

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

G.R. No. 201112. October 23, 2012

Ponente: PERALTA, J.

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PERALTA, J.:

Before the Court are the Motions for Reconsideration separately filed by movants 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 (herein referred to as Guingona, et al.) in G.R. No. 201127;[1] Solidarity for Sovereignty (S4S) represented by Ma. Linda Olaguer, Ramon Pedrosa, Benjamin Paulino Sr., Evelyn Coronel, Ma. Linda Olaguer Montayre, and Nelson T. Montayre (referred to as S4S, et al.) in G.R. No. 201121;[2] and Tanggulang Demokrasya (Tan Dem), Inc., Evelyn L. Kilayko, Teresita D. Baltazar, Pilar L. Calderon and Elita T. Montilla (Tan Dem, et al. for brevity) in G.R. No. 201413.[3] Movants implore the Court to take a second look at the June 13, 2012 Decision[4] dismissing their petitions filed against respondents Commission on Elections (Comelec), represented by its Chairman Commissioner Sixto S. Brillantes, Jr. (Chairman Brillantes), and Smartmatic-TIM Corporation (Smartmatic-TIM).

For a proper perspective, the facts as found by the Court in the assailed decision are briefly stated below:

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 (AES Contract) which is a Contract of Lease with Option to Purchase (OTP) the goods listed therein consisting of the Precinct Count Optical Scan (PCOS), both software and hardware.[5] The Comelec was given until December 31, 2010 within which to exercise the option but opted not to exercise the same except for 920 units of PCOS machines with the corresponding canvassing/consolidation system (CCS) for the special elections in certain areas in Basilan, Lanao del Sur and Bulacan.[6]

On March 6, 2012, the Comelec issued Resolution No. 9373 resolving to seriously consider exercising the OTP subject to certain conditions.[7] It issued another Resolution numbered 9376 resolving to exercise the OTP in accordance with the AES Contract.[8] On March 29, 2012, it issued Resolution No. 9377 resolving to accept Smartmatic-TIM's offer to extend the period to exercise the OTP until March 31, 2012.[9] The Agreement on the Extension of the OTP under the AES Contract (Extension Agreement) was eventually signed on March 30, 2012.[10] Finally, it issued Resolution No. 9378 resolving to approve the Deed of Sale between the Comelec and Smartmatic-TIM to purchase the latter's PCOS machines to be used in the upcoming 2013 elections.[11] The Deed of Sale was forthwith executed.[12]

Claiming that the foregoing Comelec issuances and transactions entered pursuant thereto are illegal and unconstitutional, movants filed separate petitions for certiorari, prohibition and mandamus before the Court.

Movants failed to obtain a favorable decision when the Court rendered a Decision[13] on June 13, 2012

dismissing their petitions. Hence, the motions for reconsideration based on the following grounds:

G.R. No. 201127

I. THE HONORABLE COURT, WITH ALL DUE RESPECT, ERRED IN HOLDING THAT THE PERIOD OF THE OPTION TO PURCHASE HAS NOT EXPIRED;

II. THE HONORABLE COURT, WITH ALL DUE RESPECT, ERRED IN HOLDING THAT THERE WAS NO SUBSTANTIAL AMENDMENT TO THE AES CONTRACT; [AND]

II. THE HONORABLE COURT, WITH ALL DUE RESPECT, ERRED IN HOLDING THAT THE SUBJECT AMENDMENT IS ADVANTAGEOUS TO THE PUBLIC.[14]

Movants Guingona, et al. disagree with the Court's interpretation of Article 2.2 of the AES Contract and insist that the use of the words "without prejudice" and "surviving" explicitly distinguished the "period of the option to purchase" from the "Term of this Contract." They thus conclude that the warranty provision and the OTP are covered by a totally different period and not by the term of the AES Contract.[15] They also argue that the bid bulletins relative to the AES Contract expressly stated the deadline for Comelec to exercise the OTP[16] and that the parties intended that the stated period be definite and non-extendible.[17] Movants likewise aver that the Court erred in holding that there was no substantial amendment to the AES Contract.[18] Citing *San Diego v. The Municipality of Naujan, Province of Mindoro*,[19] as discussed in Justice Arturo D. Brion's Dissenting Opinion,[20] and as allegedly reiterated in *San Buenaventura v. Municipality of San Jose, Camarines Sur, et al.*,[21] Guingona et al. points out that an extension, however short, of the period of a publicly bidden out contract is a substantial amendment that requires public bidding because the period in an OTP is a vital and essential particular to the contract.[22] Movants add that the Court erred in holding that the subject amendment is advantageous to the public as the extended option contract is void and thus can never be said to inure to the benefit of the public.[23] Lastly, movants claim that the Comelec still has the time to conduct public bidding to procure the items necessary for the 2013 elections and that the needed budget could be provided by Congress.[24]

G.R. No. 201121

Petitioners humbly submit that the Order of this Honorable Court dismissing the petition by upholding the validity of the extended option to purchase and the constitutionality of the AES Contract implementation is contrary to law and the Constitution.[25]

Movants S4S, et al. implore the Court to take a second look at the relevance of the release of the performance security to the subject expired option contract since it did not alter the fact of such expiration.[26] They explain that the Court's conclusion is a dangerous precedent, because it would encourage circumvention of the laws and rules on government contracts since the parties could enter into collusion to defer the release of the performance security for the sole purpose of prolonging the effectivity of the contract.[27] They reiterate their argument that any extension of the option period amounts to a new procurement which must comply with the requirements of bidding under Republic Act (RA) No. 9184[28] and stress that the March 31, 2012 Deed of Sale is not a special transaction which warrants any exemption from the mandatory requirements of a public bidding.[29] It is likewise their view that time constraints, budgetary consideration and other advantages in extending the option period are not plausible justifications for non-compliance with the requirements of public bidding.[30] Finally, movants assail the constitutionality of the entire AES Contract and consequently of the option contract because of its failure to provide that the mandatory minimum system capabilities be complied with; and because of the provision on shared responsibility between the Comelec and Smartmatic.[31]

G.R. No. 201413

- THE NON-RELEASE OF THE SECURITY DEPOSIT BY COMELEC INDICATES THE EXISTENCE OF

UNFULFILLED OBLIGATIONS BY THE CONTRACTOR, AND THEREFORE, IT IS ABSURD TO CITE THIS UNCURED BREACH BY THE CONTRACTOR TO JUSTIFY THE GRANT OF MORE RIGHTS TO THE SAID CONTRACTOR BY EXTENDING THE EXPIRED OPTION TO PURCHASE WHICH EFFECTIVELY CIRCUMVENTS THE GOVERNMENT PROCUREMENT LAW.

- THERE IS NO JUSTIFIABLE BASIS TO ACCEPT MERE ARGUMENTS THAT THE PCOS IS CAPABLE OF RUNNING WITH DIGITAL SIGNATURES, SECURE[D] FROM HACKING AND COMPLIANT WITH THE MINIMUM ACCURACY RATE OF 99.995%, WHEN IN ACTUAL PERFORMANCE DURING MAY 2010 [ELECTIONS,] THE PCOS OPERATED WITHOUT DIGITAL SIGNATURES, FOUND VULNERABLE TO HACKING AND FAILED BY THE ACCURACY REQUIREMENT, AS SHOWN BY THE APPLICABLE COMELEC RESOLUTIONS, TWG-RMA REPORT, AUDIT LOGS AND PRINT LOGS.[32]

Movants Tan Dem, et al. convey their view on the absurdity of the Court's decision in justifying the resurrection of the dead OTP with the continuing effectivity of the stipulation on performance security notwithstanding the presumed existence of uncured contractual breach by the contractor.[33] They also express doubt that the PCOS machines are capable of running with digital signatures compliant with the minimum accuracy rate.[34]

For their part, respondents offer the following comments:

COMELEC

The Comelec, on the other hand, argues that it validly exercised the OTP because the period for its exercise was amended and accordingly extended to March 31, 2012. It highlights the provision in the AES Contract on the right to amend the contract which the parties did during its effectivity.[35] It does not agree with movants' claim that the parties to the contract intended that the option period be definite.[36] Rather, it maintains that the parties are free to extend the option period in the same way that they can amend the other provisions of the contract.[37] Moreover, the Comelec insists that the extension of the option period is neither a material nor substantial amendment considering that after the extension, the AES Contract taken as a whole still contains substantially the same terms and conditions as the original contract and does not translate to concrete financial advantages to Smartmatic-TIM.[38] It also argues that the extension of the option period could not have affected the bid prices or financial proposals of the bidders since they understood from the RFP that it had no separate price allocation.[39] It emphasizes that a longer period was not a benefit but a burden to the bidders such that they would not have submitted a lower but in fact a higher bid because they would have to give up the opportunity to lease or sell the PCOS machines to third parties and it would also result in higher costs in warehousing and security.[40] The Comelec also opines that San Diego and San Buenaventura, cited by movants, are not applicable because they involve alterations of the essential terms and conditions of the main contract to the disadvantage of the government unlike this case where there is an alteration only with respect to the ancillary provision of the AES Contract and for the benefit of the Comelec.[41] The Comelec reiterates that the extension of the option period is advantageous to it and burdensome for Smartmatic-TIM.[42] Lastly, it posits that the exercise of the OTP was the more prudent choice for the Comelec taking into consideration the budget and time constraints.[43]

SMARTMATIC-TIM

Smartmatic-TIM contends that the OTP is only an ancillary provision in the subsisting AES Contract which has already satisfied the public bidding requirements.[44] It disagrees with petitioners that the extension of the option period was unilateral and claims instead that it was mutual as the parties in fact executed an agreement on the extension.[45] Assuming that the option period had already expired, the extension is not a substantial or material amendment since it only pertains to a residual component of the AES Contract.[46] It also echoes the Comelec's

argument that the San Diego and San Buenaventura cases are not applicable to the present case because of the difference in factual circumstances.[47] Moreover, it reiterates its claim that the extension is favorable to the Comelec and does not prejudice the other bidders.[48] Smartmatic-TIM explains that the retention of the performance security is due to its residual continuing obligations to maintain the PCOS machines and update the software in anticipation of their possible use for elections after 2010, and not due to the existence of unfulfilled obligations as provided in the AES Contract.[49] It likewise points out that the alleged flaws and deficiencies of the PCOS machines do not affect its compliance with the requirements of RA 9369.[50] It emphasizes that the use of digital signatures and their availability for use in future elections have been adequately established.[51] It also defends PCOS machines' compliance with the minimum requirements under RA 9369 as found by the Court in *Roque v. Comelec*. [52] As to the alleged glitches, Smartmatic-TIM claims that they are not attributable to any inherent defect in the PCOS machines and, in any case, enhancements have already been made.[53] Lastly, Smartmatic-TIM stresses that the arguments challenging the validity and constitutionality of the AES Contract and the performance by the Comelec of its mandate have already been rejected with finality by the Court in *Roque v. Comelec*. [54]

We find no reason to disturb our June 13, 2012 Decision.

Clearly, under the AES Contract, the Comelec was given until December 31, 2010 within which to exercise the OTP the subject goods listed therein including the PCOS machines. The option was, however, not exercised within said period. But the parties later entered into an extension agreement giving the Comelec until March 31, 2012 within which to exercise it. With the extension of the period, the Comelec validly exercised the option and eventually entered into a contract of sale of the subject goods. The extension of the option period, the subsequent exercise thereof, and the eventual execution of the Deed of Sale became the subjects of the petitions challenging their validity in light of the contractual stipulations of respondents and the provisions of RA 9184.

In our June 13, 2012 Decision, we decided in favor of respondents and placed a stamp of validity on the assailed resolutions and transactions entered into. Based on the AES Contract, we sustained the parties' right to amend the same by extending the option period. Considering that the performance security had not been released to Smartmatic-TIM, the contract was still effective which can still be amended by the mutual agreement of the parties, such amendment being reduced in writing. To be sure, the option contract is embodied in the AES Contract whereby the Comelec was given the right to decide whether or not to buy the subject goods listed therein under the terms and conditions also agreed upon by the parties. As we simply held in the assailed decision:

While the contract indeed specifically required the Comelec to notify Smartmatic-TIM of its OTP the subject goods until December 31, 2010, a reading of the other provisions of the AES contract would show that the parties are given the right to amend the contract which may include the period within which to exercise the option. There is, likewise, no prohibition on the extension of the period, provided that the contract is still effective.[55]

In interpreting Article 2.2 of the AES Contract, movants claim that the use of the word "surviving" and the phrase "without prejudice" suggests that the warranty provision and the OTP are covered by a different period and not by the term of the AES Contract.[56]

We cannot subscribe to said postulation. Article 2.2 of the AES Contract reads:

Article 2

EFFECTIVITY

x x x x

2.2. The Term of this Contract begins from the date of effectivity until the release of the Performance Security, without prejudice to the surviving provisions of this Contract including the warranty provision as prescribed in Article 8.3 and the period of the option to purchase (Emphasis supplied).

The provision means that the contract takes effect from the date of effectivity until the release of the performance security. Article 8 thereof, on the other hand, states when the performance security is released, to wit:

Article 8
Performance Security and Warranty

x x x x

Within seven (7) days from delivery by the PROVIDER to COMELEC of the Over-all Project Management Report after successful conduct of the May 10, 2010 elections, COMELEC shall release to the PROVIDER the above-mentioned Performance Security without need of demand.

The performance security may, therefore, be released before December 31, 2010, the deadline set in the AES Contract within which the Comelec could exercise the option. The moment the performance security is released, the contract would have ceased to exist. However, since it is without prejudice to the surviving provisions of the contract, the warranty provision and the period of the option to purchase survive even after the release of the performance security. While these surviving provisions may have different terms, in no way can we then consider the provision on the OTP separate from the main contract of lease such that it cannot be amended under Article 19.

In this case, the contract is still effective because the performance security has not been released. Thus, not only the option and warranty provisions survive but the entire contract as well. In light of the contractual provisions, we, therefore, sustain the amendment of the option period.

The amendment of a previously bid contract is not per se invalid. For it to be nullified, the amendment must be substantial such that the other bidders were deprived of the terms and opportunities granted to the winning bidder after it won the same and that it is prejudicial to public interest. In our assailed decision, we found the amendment not substantial because no additional right was made available to Smartmatic-TIM that was not previously available to the other bidders; except for the extension of the option period, the exercise of the option was still subject to same terms and conditions such as the purchase price and the warranty provisions; and the amendment is more advantageous to the Comelec and the public.

Movants seek the application of San Diego[57] where we nullified the extension of the lease agreement and considered said amendment substantial. We, however, find the case inapplicable. The extension made in San Diego pertained to the period of the main contract of lease while in this case, the extension referred not to the main contract of lease of goods and services but to the period within which to exercise the OTP. In extending the original period of lease of five years to another five years without public bidding, the Municipality of Naujan, Province of Mindoro acted in violation of existing law. The period of lease undoubtedly was a vital and essential particular to the contract of lease. In San Diego, the Municipality of Naujan was the lessor of its municipal waters and the petitioner, the lessee. An extension of the lease contract would mean that the lessee would be given undue advantage because it would enjoy the lease of the property under the same terms and conditions for a longer period. Moreover, prior to the extension of the lease period, the rentals were reduced upon the request of the lessee. The end result was that the municipality was deprived of income by way of rentals because of the reduced rates and longer period of lease.

In this case, the extension of the option period means that the Comelec had more time to determine the propriety

of exercising the option. With the extension, the Comelec could acquire the subject PCOS machines under the same terms and conditions as earlier agreed upon. The end result is that the Comelec acquired the subject PCOS machines with its meager budget and was able to utilize the rentals paid for the 2010 elections as part of the purchase price.

We maintain the view that the extension of the option period is an amendment to the AES Contract authorized by Article 19 thereof. As held in *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*:^[58]

While we concede that a winning bidder is not precluded from modifying or amending certain provisions of the contract bidden upon, such changes must not constitute substantial or material amendments that would alter the basic parameters of the contract and would constitute a denial to the other bidders of the opportunity to bid on the same terms. Hence, the determination of whether or not a modification or amendment of a contract bidden out constitutes a substantial amendment rests on whether the contract, when taken as a whole, would contain substantially different terms and conditions that would have the effect of altering the technical and/or financial proposals previously submitted by other bidders. The alterations and modifications in the contract executed between the government and the winning bidder must be such as to render such executed contract to be an entirely different contract from the one that was bidden upon.^[59]

It must be pointed out that public biddings are held for the best protection of the public and to give the public the best possible advantages by means of open competition between the bidders, and to change them without complying with the bidding requirement would be against public policy.^[60] What are prohibited are modifications or amendments which give the winning bidder an edge or advantage over the other bidders who took part in the bidding, or which make the signed contract unfavorable to the government.^[61] In this case, as thoroughly discussed in our June 13, 2012 Decision, the extension of the option period and the eventual purchase of the subject goods resulted in more benefits and advantages to the government and to the public in general.

While movants may have apprehensions on the effect to government contracts of allowing “advantage to the government” as justification for the absence of competitive public bidding, it must be stressed that the same reasoning could only be used under similar circumstances. The “advantage to the government,” time and budget constraints, the application of the rules on valid amendment of government contracts, and the successful conduct of the May 2010 elections are among the factors looked into in arriving at the conclusion that the assailed Resolutions issued by the Comelec and the agreement and deed entered into between the Comelec and Smartmatic-TIM, are valid.

Lastly, we need not further discuss the issues raised by movants on the alleged glitches of the subject PCOS machines, their compliance with the minimum system capabilities required by law, and the supposed abdication of the Comelec’s exclusive power in the conduct of elections as these issues have been either thoroughly discussed in the assailed decision or in the earlier case of *Roque, Jr. v. Commission on Elections*.^[62]

WHEREFORE, premises considered, the motions for reconsideration are DENIED for lack of merit.

SO ORDERED.

Sereno, C.J., Leonardo-De Castro, Peralta, Bersamin, Abad, Mendoza, Reyes, and JJ., concur. Carpio, and Perez, JJ., on official leave.

Velasco, Jr, J., please see Concurring opinion.

Brion, J., see dissenting opinion.

Del Castillo, J., on leave.

Perlas-Bernabe, and Villarama, Jr., JJ., maintain their dissent in the June 13, 2012 decision.

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- [1] Rollo (G.R. No. 201413), pp. 847-872.
- [2] Id. at 893-908.
- [3] Id. at 946-953.
- [4] Id. at 557-591.
- [5] Id. at 559.
- [6] Id. at 559-560.
- [7] Id. at 560.
- [8] Id.
- [9] Id.
- [10] Id.
- [11] Id. at 560-561.
- [12] Id. at 561.
- [13] Id. at 557-590.
- [14] Id. at 848.
- [15] Id. at 850.
- [16] Id. at 851-853.
- [17] Id. at 854-857.
- [18] Id. at 858.
- [19] 107 Phil. 118 (1960).
- [20] Rollo (G.R. No. 201413), pp. 639-672.
- [21] 121 Phil. 101 (1965).
- [22] Rollo (G.R. No. 201413) , pp. 860-863.
- [23] Id. at 864-867.
- [24] Id. at 868-869.
- [25] Id. at 895.
- [26] Id.
- [27] Id. at 896-897.
- [28] Id. at 897-898.
- [29] Id. at 899.
- [30] Id.

[31] Id. at 901-904.

[32] Id. at 946.

[33] Id. at 947-948.

[34] Id. at 948.

[35] Id. at 975-978.

[36] Id. at 980-981.

[37] Id. at 982.

[38] Id. at 982-987.

[39] Id. at 991.

[40] Id. at 993.

[41] Id. at 998.

[42] Id. at 999-1002.

[43] Id. at 1003-1008.

[44] Id. at 1018.

[45] Id. at 1025.

[46] Id. at 1026-1027.

[47] Id. at 1028.

[48] Id. at 1030.

[49] Id. at 1033.

[50] Id. at 1034.

[51] Id. at 1036.

[52] Id. at 1042.

[53] Id. at 1045-1049.

[54] Id. at 1050.

[55] Id. at 570-571.

[56] Id. at 850.

[57] Supra note 19.

[58] G.R. Nos. 155001, 155547 and 155661, May 5, 2003, 402 SCRA 612; 450 Phil. 744 (2003).

[59] Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra, at 655-656 (Emphasis in the original)

[60] San Diego v. The Municipality of Naujan, Province of Mindoro, supra note 19, at 124.

[61] Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated, G.R.

No. 183789, August 24, 2011, 656 SCRA 214, 232.

[62] G.R. No. 188456, September 10, 2009, 599 SCRA 69.

CONCURRING OPINION

VELASCO, JR., J.:

I agree with the ponencia that the Motions for Reconsideration dated October 3, 2012 should be dismissed, but for a different reason, i.e., the disputed Deed of Sale for the acquisition of the PCOS machines and CCS hardware and software can be considered as a purchase through direct contracting, a mode of acquisition not subject to the usual bidding requirements under Republic Act No. (RA) 9184 or the Government Procurement Reform Act. I am, however, of a different disposition with respect to the majority's holding that the extension of the Option to Purchase (OTP) is valid, and consequently, the assailed deed of sale is also valid.

The OTP Has Expired

The majority's position is that the OTP was still subsisting when the Deed of Sale was executed in view of the non-receipt by Smartmatic-TIM Corporation of the Performance Security, which receipt will terminate the AES Contract pursuant to Article 2 thereof. I beg to disagree. As I have discussed in my June 13, 2012 separate concurring opinion, I am of the view that a different period is given by the parties with respect to the OTP, as articulated in Article 2.2 of the AES Contract, which reads:

Article 2
EFFECTIVITY

2.2. The Term of this Contract begins from the date of effectivity until the release of the Performance Security, without prejudice to the surviving provisions of this Contract, including the warranty provision as prescribed in Article 8.3 and the period of the option to purchase. (Emphasis ours.)

Shorn of the non-essentials, the provision would read "The Term of this Contract [is] x x x until the release of the Performance Security, without prejudice to x x x the period of the option to purchase." With, this, the only interpretation that can be given to the provision is that the life of the AES Contract GENERALLY ends upon the release of the Performance Security, EXCEPT with respect to the period of the OTP, hence the use of the qualifying phrase "without prejudice to." As such, whether or not Smartmatic-TIM has already received the Performance Security is immaterial with respect to the proper determination of the date when the OTP was terminated, the OTP having its own period of existence, independent from that of the AES Contract.

The period of the OTP is specified in Par. 28.1 of Part V of the RFP, which states that "[a]n offer for an option to purchase by component shall be decided by the COMELEC before December 31, 2010." Admittedly, the COMELEC failed to exercise the OTP within the prescribed period and this failure resulted in the expiration of the OTP. This is not to say, however, that the purchase of the PCOS machines and allied components via a new contract, separate and distinct from the AES Contract, by the COMELEC is invalid for lack of a public bidding.

The purchase can be justified under the Direct Contracting mode,
an Alternative Mode of Procurement under RA 9184

Concededly, the subsequent contract in question is not an extension of the previous AES Contract, but a new one. And not being an ordinary contract but a procurement by the government, RA 9184 or the Government Procurement Reform Act applies. Section 10 of said law requires for the validity of every government

procurement that competitive bidding be conducted. As the law provides:

ARTICLE IV
COMPETITIVE BIDDING

Sec. 10. Competitive Bidding. – All Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act.

This rule, however, is not absolute. There are recognized exceptions to the bidding requirement, as can be gleaned in the above-quoted provision. The exceptions are laid out on the provisions of “Alternative Modes of Procurement” under Section 48, Article XVI of RA 9184, which reads:

Sec. 48. Alternative Methods. – Subject to the prior approval of the Head of the Procuring Entity or his duly authorized representative, and whenever justified by the conditions provided in this Act, the Procuring Entity may, in order to promote economy and efficiency, resort to any of the following alternative methods of Procurement:

- Limited Source Bidding, otherwise known as Selective Bidding - a method of Procurement that involves direct invitation to bid by the Procuring Entity from a set of pre-selected suppliers or consultants with known experience and proven capability relative to the requirements of a particular contract;
- Direct Contracting, otherwise known as Single Source Procurement - a method of Procurement that does not require elaborate Bidding Documents because the supplier is simply asked to submit a price quotation or a pro-forma voice together with the conditions of sale, which offer may be accepted immediately or after some negotiations;
- Repeat Order. - a method of Procurement that involves a direct Procurement of Goods from the previous winning bidder, whenever there is a need to replenish Goods procured under a contract previously awarded through Competitive Bidding;
- Shopping - a method of Procurement whereby the Procuring Entity simply requests for the submission of price quotations for readily available off-the-shelf Goods or ordinary/regular equipment to be procured directly from suppliers of known qualification; or
- Negotiated Procurement - a method of Procurement that may be resorted under the extraordinary circumstances provided for in Section 53 of this Act and other instances that shall be specified in the IRR, whereby the Procuring Entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant.

In all instances, the Procuring Entity shall ensure that the most advantageous price for the government is obtained.

At first glance, it is easily deduced that, being a new contract, the purchase of PCOS machines for the upcoming 2013 elections should undergo public bidding. However, in view of the uniqueness of the circumstances obtaining, I am of the view that the validity of the purchase agreement finds footing in the application of the alternative mode Direct Contracting. As such, competitive bidding is not required.

To justify resort to any of the alternative methods of procurement, the following conditions must exist:

1. There is prior approval of the Head of the Procuring Entity on the use of alternative methods of procurement, as recommended by the BAC; and
2. The conditions required by law for the use of alternative methods are present; and
3. The method chosen promotes economy and efficiency, and that the most advantageous price for the government is obtained.[1]

In this regard, I reiterate my position that all the foregoing conditions exist in the present case, thus allowing COMELEC to use an alternative method of procurement permitted under said statute. Allow me to discuss the existence of said conditions in seriatim.

Prior approval of the procuring entity

The prior approval of the procuring entity, respondent COMELEC in this case, was made through COMELEC Resolution Nos. 9376 and 9377. In said Resolutions, COMELEC manifested its resolve to purchase the AES hardware and software covered by the OTP in the AES Contract between it and Smartmatic-TIM. In its Resolution No. 9376, the COMELEC stated:

NOW, THEREFORE, the Commission on Elections, by virtue of the powers vested in it by the Constitution, the Omnibus Election Code, Republic Act No. 9369 and other election laws, and after finding the exercise of the Option to Purchase most advantageous to the government, RESOLVED, as it hereby RESOLVES, to exercise its Option to Purchase the PCOS and CCS hardware and software in accordance with Section 4.3, Article 4 of the AES contract between the Commission and SMARTMATIC-TIM in connection with the May 10, 2010 National and Local Elections x x x.

Conditions justifying a Direct Contracting

As for the second condition, I submit that the Deed of Sale executed by respondents is analogous to the “Direct Contracting” mode defined in the above-quoted Sec. 48(b), Art. XVI of RA 9184 that is exempt from the more protracted process of competitive bidding. Sec. 50, RA 9184, provides the alternative conditions before a resort to direct contracting is permitted:

Section 50. Direct Contracting. Direct Contracting may be resorted to only in any of the following conditions:

- Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, i.e., when patents, trade secrets and copyrights prohibit others from manufacturing the same items;
- When the Procurement of critical components from a specific manufacturer, supplier, or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of his contract; or
- Those sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the government. (Emphasis supplied.)

Note that while only one condition is needed to justify direct contracting, two (2) of the stated conditions actually exist in the present controversy thereby exempting the Deed of Sale from the requirement of a prior competitive bidding, namely: Sec. 50(a) on the procurement of goods of proprietary nature and Sec. 50(c) on the procurement of goods sold by an exclusive dealer that does not have sub-dealers selling at a lower price and for which a suitable substitute can be obtained at terms more advantageous to the government.

The Deed of Sale involves the procurement of proprietary goods

Under Sec. 50(a), the Deed of Sale is exempt from competitive bidding as it involves goods of “proprietary nature.” Goods are considered of “proprietary nature” when they are owned by a person who has a protectable interest in them^[2] or an interest protected by the intellectual property laws.

Our Intellectual Property Code protects, among others, original works, as provided for under Section 172, which reads in part:

Chapter II

ORIGINAL WORKS

Sec. 172. Literary and Artistic Works.-

172.1 Literary and artistic works, hereinafter referred to as “works”, are original intellectual creations in the literary and artistic domain protected from the moment of their creation and shall include in particular:

x x x x

(n) Computer programs; and

x x x x

172.2 Works are protected by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality and purpose. (Emphasis supplied.)

In the case at bar, petitioners have raised the argument that Sec. 50(a) of RA 9184 cannot apply because the EMS and the PCOS firmware are “mere component(s) of the entire Automated Election System” that also includes the PCOS hardware, canvassing system and servers listed in Annexes “E” and “E-1” of the Deed of Sale. This argument, however, fails to consider the fact that this proprietary software is a bundled software “that is sold together with hardware, other software, or services at a single price.”[3]

In Philippine contract law, one species of an indivisible object is a divisible thing which the parties treated as indivisible.[4] Article 1225 of the Civil Code provides:

Art. 1225. For the purpose of the preceding articles, obligations to give definite things x x x shall be deemed to be indivisible.

x x x x

However, even though the object or service may be physically divisible, an obligation is indivisible if so provided by law or intended by the parties.

In the present case, not only was the object of the contract a determinate thing, the parties likewise agreed that the subject Deed of Sale is for the purchase of the entire first component.[5] While the hardware and software are, by their nature, separable, the parties, however, intended to treat them as indivisible. Such being the case, the software cannot then be procured without the accompanying hardware on which they are embedded. In other words, what was purchased by the COMELEC was the whole system, that is, the entire first component of the original AES Contract, which includes the software needed for the PCOS machines consisting of the Election Management System (EMS) and the PCOS firmware[6] applications, protected by our copyright laws, together with the hardware.[7] Being inseparable by contractual stipulation, the COMELEC is thus required to procure the hardware and the proprietary software and firmware provided by Smartmatic-TIM.

To further show the importance of treating the software and hardware as indivisible, without Smartmatic-TIM’s EMS which dictates the functioning of the entire system, by directing the processes by which the PCOS and the CCS hardware and software interpret the data scanned from the cast ballots and later accumulate, tally and consolidate all the votes cast, the PCOS hardware are lifeless. The EMS is the fundamental software on which all other applications and machines in the entire Smartmatic-TIM AES depend. It serves as the brain that commands all other components in the entire AES.

The goods subjects of the assailed procurement are sold exclusively by Smartmatic-TIM which has no sub-dealer and for which no suitable substitute can be obtained at terms more advantageous to the government

In addition to the foregoing, it is important to underscore that the EMS application which has been manufactured,

configured and customized by Smartmatic-TIM[8] to fit the needs of Philippine elections cannot be obtained from any source other than Smartmatic-TIM. This satisfies the requirement under Sec. 50(c) of RA 9184, viz:

Section 50. Direct Contracting. Direct Contracting may be resorted to only in any of the following conditions:

x x x x

(c) Those sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the government.

For the condition provided under Sec. 50(c) of RA 9184 to exist, three elements must be established:

- The goods subject of the procurement are sold by an exclusive dealer or manufacturer;
- The exclusive dealer or manufacturer does not have sub-dealers selling the same goods at lower prices;
- There are no suitable substitutes for the goods offered by another supplier at terms more advantageous to the government.

In this regard, I submit that all these elements are present in the case at bar.

As discussed, the specific goods subject of the assailed Deed of Sale are goods of proprietary nature as they include the Smartmatic EMS, which is a proprietary software that cannot be used, redistributed, or modified without the permission of Smartmatic.[9] This software, together with the PCOS firmware[10] and hardware, is owned and distributed exclusively by respondent Smartmatic-TIM. Hence, the first element of the condition set forth in Sec. 50(c) is clearly present.

On the existence of the second element, it is an uncontested fact that Smartmatic-TIM has no sub-dealers[11] and that there are no other persons selling the said software and hardware,[12] much less selling them at prices lower than that offered by Smartmatic-TIM under the questioned Deed of Sale.

As to the third element, that there is no suitable substitute for the hardware and software offered by Smartmatic-TIM, it is material to recall that for the automation of the 2010 elections, only two bidders qualified, Smartmatic-TIM and the Indra Consortium (Indra), and that the terms offered by Smartmatic-TIM are far better than that of Indra on several material points, the most important of which is that Indra pegged the lease price of just 57,231 PCOS machines at PhP 11.22 billion, PhP 4 billion more than the price offered by Smartmatic-TIM for the lease of 82,000 PCOS machines.

It is, thus, reasonable to conclude that, as of the moment, no other supplier can match Smartmatic-TIM's offer, which even included the contested OTP over more than 81,000 PCOS units at only PhP 1.8 billion, or 50% of the lease price of the original 2009 AES Contract and almost PhP 7 billion less than that estimated by the COMELEC to purchase the same number of PCOS machines (without the software and accompanying hardware) based on the lowest calculated responsive bid for the 2010 elections.

With the above considerations, I respectfully submit that the terms of the procurement contract are undeniably more advantageous to the government.

The assailed Deed of Sale promotes economy and efficiency, and obtains for the most advantageous price

Anent the last requisite, I am of the opinion that it is likewise present in the instant case.

In addition to the considerations discussed above which show that the COMELEC is no longer in a position to seek other suppliers, as petitioners would have it, recall that the automation of the 2013 elections is bombarded

with numerous complications, including time and budget constraints. Note that based on the bids submitted for the 2010 automated elections, the COMELEC determined that the funds needed for the procurement of 125,000 PCOS machines to ensure a 600:1 voter-to-precinct ratio is around PhP 12.85 billion. However, it was only given a PhP 7.96 billion budget for the entire automation of the 2013 elections, which will involve not only the procurement of the equipment but also the price of the allied services. This budget is obviously insufficient for the Commission to be able to perform its mandate of automating the upcoming 2013 elections.

To further add to the government's advantage, Smartmatic-TIM also shouldered the storage price of the PCOS units and offered them for sale without considering inflation or putting a price on the enhancements and modifications demanded by COMELEC. Too, obtaining more funds from Congress and going through with competitive bidding, as insisted by petitioners, will eat up the precious time necessary to test and modify a new AES, if any, and prepare and educate the electorate and poll officers on its operation to prevent any human blunders that might lead to an erroneous declaration of the results of an election, when here is a system with which the electorate and the concerned poll officials are already familiar with. This not only reduces the attending time constraint for it abbreviates the learning curve of all the parties concerned, it also minimizes the errors attributable to the variations and differences offered by a new AES, as seen in the 2010 elections where the system was used for the first time on a national scale. Besides, to require the COMELEC to procure a new and, as demanded by petitioners, flawless AES for the 2013 elections with a budget of PhP 2.2 billion, at least PhP 5 billion short of the original amount requested, is requiring the Commission to execute a financial miracle with only a few months to pull it off.

Given the prevailing conditions and the constraints imposed on COMELEC, the course of action taken by the poll body proves to be the most efficient and economical avenue that guarantees the conduct of an automated election in 2013. Procuring the same, tested AES from the supplier who helped the conduct of a successful and peaceful election in 2010 dispenses the need for additional funding and so reserves the remaining time before the elections for the conduct of essential modifications and enhancements on the Smartmatic-TIM AES that could remove the problems complained of by petitioners. Hence, I submit that direct contracting with Smartmatic-TIM for the hardware and software subject of the Deed of Sale is justified under Sec. 50(c) of RA 9184.

ACCORDINGLY, I vote to DENY the Motions for Reconsideration.

[1] Manual of Procedures for the Procurement of Goods and Services, p. 81.

[2] Black's Law Dictionary 1339 (9th ed. for the iPhone/iPad/iPod touch, Version 2.1.0 [B112136]).

[3] Id. at 223.

[4] See *Groves v. Sentell*, 153 U.S. 465 (1894) where it was stated that indivisibility [of contract] rests upon intention.

[5] The Whereas clause of the 2009 AES Contract defines Component 1 of the AES, viz:

Component 1: Paper Based Automated Election System (AES)

1-A. Election Management System EMS)

1-B. Precinct-Count Optical Scan (PCOS) System

1-C. Consolidation/Canvassing System (CCS)

This is consistent with the items/goods listed under Annex "E" of the Deed of Sale that include:

1.1 PCOS Software

- a. EMS application
- b. PCOS application

1.2 PCOS Hardware

- a. EMS machine
- b. PCOS machines
- c. modems

1.3 Canvassing System

- a. Canvassing units
- b. Central servers

1.4 Servers

- a. KBP servers for dominant majority and minority parties, accredited citizen's arms
- b. Servers National BOC-COMELEC
- c. Servers National BOC-Congress
- d. Printers (canvassing)
- e. Modems
- f. Public Website (for publication of canvassing results)
- g. Back-up data center.

[6] Firmware means the permanent instructions and data programmed directly into circuitry of read-only memory for controlling the operation of the machines. (Article 1.10, AES Contract dated July 10, 2009)

[7] INTELLECTUAL PROPERTY CODE, Sec. 172.

[8] Final Certification Test Report, COMELEC AES 2011 Voting System prepared by Global Solutions, p. 9.

[9] Proprietary software is usually sold for profit, consists only of machine readable code, and carries a limited license that restricts copying, modification and redistribution. A user may usually backup any copy for personal use; but if the software is sold or given away, any backup copies must be passed on to the new user or destroyed. BLACK'S LAW DICTIONARY, supra note 41.

[10] Over which Smartmatic has a license from Dominion Voting System.

[11] TSN, May 8, 2012, pp. 72-73.

[12] Id.

DISSENTING OPINION

BRION, J.:

With due respect, I register my dissent to the ponencia's conclusion that the: (i) COMELEC-SMARTMATIC-TIM's Agreement on the Extension of the Option to Purchase (OTP) Under the Contract for the Provision of an Automated Election System (AES) for the May 10, 2010 synchronized National and Local Elections; (ii) the Deed of Sale of March 30, 2012; and (iii) COMELEC Resolution No. 9378

(approving the Deed of Sale) are valid and constitutional. In my June 13, 2012 Dissent, I held the view that the aforementioned contracts and COMELEC issuance are null and void, as viewed from the prism of contract law, the law on government procurement, and the constitutional set-up of the COMELEC's independence.

For a complete treatment and presentation of the issues raised, the arguments in the Resolution and the refutation are discussed below.

First, the ponencia emphasizes that although the option was not exercised within the period (i.e., December 31, 2010), the same was validly extended when the parties entered into an extension agreement giving the COMELEC until March 31, 2012 within which to exercise the option. Considering that the performance security has not been released to SMARTMATIC-TIM, the contract remained effective and could still be amended by mutual agreement of the parties.

Second, the ponencia maintains that pursuant to Section 2.2, Article 2 of the AES Contract, the entire contract, as well as the option and warranty provisions, remains effective since the performance security has not been released. It also notes that while the surviving provisions (the option and warranty) have different terms, Section 2.2 cannot be interpreted to mean that the provision on the OTP is separate from the main contract of lease such that it cannot be amended under Article 19 of the AES Contract.

Third, the ponencia asserts that the amendment, if any, to the AES Contract was not substantial because no additional right was given to SMARTMATIC-TIM that was not available to the other bidders. It emphasizes that except for the extension of the option period, the exercise of the option remained subject to the same terms and conditions; in fact, the amendment is more advantageous to the COMELEC and the public.

Fourth, the ponencia argues that the Court's ruling in *San Diego v. The Municipality of Naujan, Province of Mindoro*[1] is inapplicable for the reason that the extension made in that case pertained to the period of the main contract of lease and not to the period of an ancillary contract such as the OTP, as in the present case. It notes that in *San Diego*, the extension of the lease contract meant that the lessee would be given undue advantage because it would enjoy the lease of the property under the same terms and conditions for a longer period; here, the extension of the option period gave the COMELEC more time to determine the propriety of exercising the option. Thus, with the extension, the COMELEC could acquire the PCOS machines under the same terms and conditions as previously agreed upon.

Fifth, the ponencia submits that it is unnecessary to discuss the issues raised by the movants pertaining to the glitches of the PCOS machines, their compliance with the minimum system capabilities and the COMELEC's abdication of its exclusive power in the conduct of the elections since these issues have been discussed and passed upon in the case of *Roque, Jr. v. Commission on Elections*. [2]

These arguments are addressed in the same order they are posed under the topical headings below.

a. The OTP clearly lapsed

Contrary to the majority's conclusion, I submit that the OTP simply lapsed when the COMELEC failed to exercise the option on or before December 31, 2010. By virtue of the OTP - an option contract preparatory to a contract of sale and distinct from the main contract of lease - SMARTMATIC-TIM, as owner, agreed with the COMELEC that it shall have the right to buy the leased goods at a fixed price, to be exercised within a specific period. Failing to exercise this right within the option period, the COMELEC allowed the option to expire and thus, SMARTMATIC-TIM was released from its obligation to respect the COMELEC's right or privilege to buy. As I emphasized in my June 13, 2012 Dissent:

As authorized by the AES contract, COMELEC exercised the OTP for the 2010 special elections in the

ARMM by purchasing 920 units of Precinct-Count Optical Scan System (PCOS) machines and 36 units of Consolidated Canvassing System (CCS). No further action was taken by COMELEC on the OTP for the remainder of the goods under the option (81,280 PCOS machines and 1,684 CCS) on or before 31 December 2010. Under these developments, the option clearly lapsed. *[italics and emphasis supplied]*

Significantly, SMARTMATIC-TIM even acted under the assumption that the option has been terminated, viz.:

The COMELEC inaction is highlighted by SMARTMATIC-TIM's unilateral offers to extend the period for the COMELEC's exercise of its OTP (through its letters of December 18, 2010, March 23, 2011, April 1, 2011 and September 23, 2011), which the COMELEC clearly ignored before the lapse of the option period. With the expiration of the period, the option itself ceased to exist. There was thus no option that could be extended. Interestingly, even SMARTMATIC-TIM itself admitted that the period for the OTP already lapsed after December 31, 2010. In its several letters to the COMELEC, SMARTMATIC-TIM disowned any legal obligation to sell to the COMELEC the goods covered by the COMELEC's OTP simply because the option already expired after December 31, 2010.^[3] *[italics and emphases supplied]*

b. The terms of Section 2.2, Article 2 of the AES Contract plainly evince the parties' intention to treat the ancillary OTP contract and the period for its exercise differently from the main contract of lease

I take exception to the ponencia's conclusion that Section 2.2, Article 2 of the AES Contract cannot be interpreted to mean that the provision on the OTP is separate from the main contract of lease such that it cannot be amended under Article 19 of the AES Contract.

A basic disagreement with the ponencia relates to the interpretation of the provision on effectivity of the AES Contract, which reads:

ARTICLE 2

EFFECTIVITY

2.1 This Contract shall take effect upon the fulfillment of all of the following conditions:

- a) Submission by the Provider of the Performance Security;
- b) Signing of this Contract in seven (7) copies by the parties; and
- c) Receipt by the provider of the Notice to Proceed.

2.2. The term of this Contract begins from the date of effectivity until the release of the performance security, without prejudice to the surviving provisions of this Contract including the warranty provision as prescribed in Article 8.3 and the period of the option to purchase. *[italics and emphases supplied]*

As explained in my Dissent, while I concede that the AES Contract still technically subsists because of the COMELEC's retention of SMARTMATIC-TIM's performance security, Section 2.2, Article 2 of the AES Contract clearly mandates that its continued effectivity is without prejudice to "the period of the option to purchase." Thus, I conclude that under these terms, the COMELEC and SMARTMATIC-TIM clearly recognized that the OTP and the period for its exercise stand differently from the main contract of lease of goods and service. In other words, the effectivity of the warranty provision and of the OTP are covered by an entirely different period and not by the term of the main contract of lease of goods. Properly viewed from this perspective, this interpretation thus demolishes the ponencia's position that the OTP in this case still subsists. As emphasized in my Dissent:

In the present case, COMELEC and SMARTMATIC-TIM's intention to extend an already expired option period could not have validly gone past the negotiation stage. Specifically, SMARTMATIC-TIM formally

made an offer to the COMELEC to extend the original period and, upon its lapse, to provide for a new period to exercise the same option; these, COMELEC simply ignored. Thus, this offer is merely an imperfect promise (politation) that, by reason of lack of acceptance before the expiration of the period, did not give rise to any binding commitment. [italics and emphasis supplied]

c. The unilateral extension of the OTP amounts to a substantial amendment of the AES Contract

I cannot subscribe to the majority's view that the extension of the OTP cannot be characterized as a substantial amendment because no additional right was given to SMARTMATIC-TIM and that the option was still subject to the same terms and conditions previously agreed upon. To my mind, this view seriously ignores the fact that the period for the exercise of the option is a substantial particular in the option contract. I reached this conclusion bearing in mind that the subject of the OTP is a novel technological system in the conduct of an election and the transitory nature of the information technology employed by the AES, viz.:

It should be considered in this regard that the subject of the OTP is, collectively and broadly speaking, a technological system in the conduct of an election. To my mind, a change in technology over a short period of time through the advent of a more advanced technology is a vital reason for limiting the period within which the option must be exercised. Therefore, the fact that the original price in the AES contract is maintained is no argument, in favor of the modification of the period of the OTP. If indeed the original expiration date of the OTP is legally insignificant in view of the deemed-sold provision under Article 5.11 of the AES contract, I see no reason why SMARTMATIC-TIM would make several unilateral offers to the COMELEC before and after the expiration of the period of the OTP.

Contrary to the respondents' claim, the period is actually for the benefit of both parties and not just of the COMELEC alone. A seven-month period (reckoned from the conduct of the elections) within which the OTP may be exercised is a reasonable period to evaluate the pros and cons of the technology used in the previous 2010 elections, which may affect the COMELEC's decision to exercise the option or not. Should the COMELEC refuse to exercise the option, the parties obviously anticipated that, at least, the COMELEC would still have the remaining more than two years (prior to the conduct of the next national and local elections) to look for another technological system and make the necessary administrative, technical and legal preparations. SMARTMATIC-TIM, on the other hand, could still competitively market its PCOS machines, etc. to other countries or users. Thus, the extension or renewal of the option period on the pretext that it is beneficial to the COMELEC seriously ignores these considerations.[4] (emphases ours, italics supplied)

d. By analogy, the Court's ruling in San Diego supports the view that the extension of the OTP amounts to a substantial amendment since the period to exercise the OTP is a substantial particular in the option contract

While it is true that the case of *San Diego v. The Municipality of Naujan, Province of Mindoro*[5] involved the extension of the period of the lease contract prior to its expiration, without the benefit of a public bidding, and not an option contract as in the present case, I submit that *San Diego* is relevant to the present case for the simple reason that the period of the option is a vital and essential particular to the contract. Thus, in *San Diego*, the Court held:

Furthermore, it has been ruled that statutes requiring public bidding apply to amendments of any contract already executed in compliance with the law where such amendments alter the original contract in some vital and essential particular. Inasmuch as the period in a lease is a vital and essential particular to the contract, we believe that the extension of the lease period in this case, which was granted without the essential requisite of public bidding, is not in accordance with law. And it follows that Resolution 222, series of 1951, and the

contract authorized thereby, extending the original five-year lease to another five years are null and void as contrary to law and public policy.[6] [citations omitted, emphases and underscores ours]

Thus, I cited the case for the reason that:

The above rationale for prohibiting the extension of the period of the main contract of lease should equally apply to the period of the OTP; this period of the option is a vital and essential particular to the contract. With the short interval of three years before the next elections, the extension of the period beyond what was originally intended tends to give the winning bidder (SMARTMATIC-TIM) undue advantage in securing the contract of sale, not on the basis of having the best possible advantages for the public, but on the convenient excuse that the next election is “already a matter of urgency” and its equipment, having been previously used, needs only to be improved to replicate the 2010 election results.

If the legality of the extension of the period of the OTP prior to its expiration is already legally problematic, then a fortiori the revival of a lapsed period by mutual agreement of the parties must suffer the same fate – and even worse. It must at least be subjected to competitive bidding, or invalidated for fatal infirmity based on other grounds. I note that in *Roque, Jr. v. Commission on Elections*, filed before the 2010 elections, even the majority conceded that “the real worth of the PCOS system and the machines will of course come after they shall have been subjected to the gamut of acceptance tests.” The real test came during the actual elections where, unfortunately, serious deficiencies and issues affecting the integrity of the PCOS system surfaced, compromising some of the minimum system capabilities mandated by law.

If the present case simply involves an ordinary contract where, ordinarily, only the pertinent provisions of the Civil Code would apply, I would not perhaps have qualms with the suggestion that since the option period was a limitation imposed by SMARTMATIC-TIM on the COMELEC’s right to exercise its OTP, then nothing prevents SMARTMATIC-TIM from waiving the period it imposed. The present case, however, involves not just any government contract but one involving a constitutional office tasked with the independent enforcement and administration of all laws and regulations relating to the conduct of elections to public office to ensure a free, orderly and honest electoral exercise; it involves an ambitious step to replicate the first ever automated election held in 2010 by purchasing, out of the national coffers, the same PCOS machines and the CCS hardware and software worth billions of pesos. The respondents sorely miss this point of distinction between a government contract, on one hand, and an ordinary contract, on the other hand, by approaching the issue from the perspective of a purely private contract.[7] (emphases and italics supplied)

e. A continuing violation of the constitutional set-up of the Comelec’s independence in the present case can never be laid to rest by the majority’s ruling in *Roque, Jr. v. Commission on Elections*

I submit anew my continuing objection as I did in my dissents in *Roque, Jr. v. Commission on Elections*[8] and the present case to the COMELEC’s failure to observe Section 26 of Republic Act No. 8436 – the very law which mandated the COMELEC to undertake an automated election system. I reiterate the view that:

[Had] only the COMELEC faithfully complied with Section 26 of Republic Act No. 8436 and undertook the automation of election system in line with the law’s intent for the COMELEC itself to keep pace along with the new system, the government would not be a “captive market” of SMARTMATIC-TIM for the subsequent elections. COMELEC, unfortunately, cannot do so without SMARTMATIC-TIM by its side as it is not, up to now, technologically up to date and self-sufficient as its independence requires.

In any case, should the COMELEC choose to purchase election related hardware and software, and the accompanying system from a new provider, the same advantage that SMARTMATIC-TIM now enjoys would be enjoyed as well by this provider in a subsequent bidding, for the rendition of technical services to make the system fully functional. However, since the COMELEC does not, at any time, appear to consider Section 26 of

Republic Act No. 8436, the subsequent bidding for services (for technical support involving the operation of the items purchased from SMARTMATIC-TIM) would result in the same scheme of a shared responsibility that would put the COMELEC in continuous violation of the law and the Constitution. To my mind, this is constitutionally objectionable.[9] (*emphasis and italics supplied*)

I also take the view that this violation by the COMELEC of the law and the Constitution can never be laid to rest and remains to be a continuing violation unless and until the COMELEC complies with the terms of Section 26 of Republic Act No. 8436 and the independence that the Constitution guarantees to it.

For the foregoing reasons, I vote to grant the motions for reconsideration.

[1] 107 Phil. 118 (1960).

[2] G.R. No. 188456, September 10, 2009, 599 SCRA 69.

[3] Dissenting Opinion dated June 13, 2012.

[4] *Ibid.*

[5] *Supra* note 1.

[6] *Id.* at 123.

[7] *Supra* note 3.

[8] *Supra* note 2.

[9] *Supra* note 3.

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