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Republic of the Philippines
SUPREME COURT
Manila

EN BANC

G.R. No. 201112 June 13, 2012

ARCHBISHOP FERNANDO R. CAPALLA, OMAR SOLITARIO ALI and MARY ANNE L. SUSANO, Petitioners,
vs.
THE HONORABLE COMMISSION ON ELECTIONS, Respondent.

X ----- X

G.R. No. 201121

SOLIDARITY FOR SOVEREIGNTY (S4S), represented by Ma. Linda Olaguer; **RAMON PEDROSA, BENJAMIN PAULINO SR., EVELYN CORONEL, MA. LINDA OLAGUER MONTAYRE**, and **NELSON T. MONTAYRE**,
Petitioners,
vs.
COMMISSION ON ELECTIONS, represented by its Chairman, Commissioner **SIXTO S. BRILLANTES, JR.**,
Respondent.

X ----- X

G.R. No. 201127

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

X ----- X

G.R. No. 201413

TANGGULANG DEMOKRASYA (TAN DEM), INC., EVELYN L. KILAYKO, TERESITA D. BALTAZAR, PILAR L. CALDERON and ELITA T. MONTILLA, Petitioners,
vs.
COMMISSION ON ELECTIONS and SMARTMATIC-TIM Corporation, Respondents.

DECISION

PERALTA, J.:

Pursuant to its authority to use an Automated Election System (AES) under Republic Act (RA) No. 8436, as amended by RA No. 9369, or the Automation Law and in accordance with RA No. 9184, otherwise known as the Government Procurement Reform Act, the Commission on Elections (Comelec) posted and published an invitation to apply for eligibility and to bid for the 2010 Poll Automation Project¹ (the Project). On March 18, 2009, the Comelec approved and issued a Request for Proposal² (RFP) for the Project consisting of the following components:

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

1-A. Election Management System (EMS)

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

1-C. Consolidation/Canvassing System (CCS)

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

Component 3: Overall Project Management³

On June 9, 2009, the Comelec issued Resolution No. 8608 awarding the contract for the Project to respondent Smartmatic-TIM.⁴ 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,⁵ (AES Contract, for brevity). The contract between the Comelec and Smartmatic-TIM was one of "lease of the AES with option to purchase (OTP) the goods listed in the contract." In said contract, the Comelec was given until December 31, 2010 within which to exercise the option.

On September 23, 2010, the Comelec partially exercised its OTP 920 units of PCOS machines with corresponding canvassing/consolidation system (CCS) for the special elections in certain areas in the provinces of Basilan, Lanao del Sur and Bulacan.⁶ In a letter⁷ dated December 18, 2010, Smartmatic-TIM, through its Chairman Cesar Flores (Flores), proposed a temporary extension of the option period on the remaining 81,280 PCOS machines until March 31, 2011, waiving the storage costs and covering the maintenance costs. The Comelec did not exercise the option within the extended period. Several extensions were given for the Comelec to exercise the OTP until its final extension on March 31, 2012.

On March 6, 2012, the Comelec issued Resolution No. 9373⁸ resolving to seriously consider exercising the OTP subject to certain conditions. On March 21, 2012, the Comelec issued Resolution No. 9376⁹ resolving to exercise the OTP the PCOS and CCS hardware and software in accordance with the AES contract between the Comelec and Smartmatic-TIM in connection with the May 10, 2010 elections subject to the following conditions: (1) the warranties agreed upon in the AES contract shall be in full force and effect; (2) the original price for the hardware and software covered by the OTP as specified in the AES contract shall be maintained, excluding the cost of the 920 units of PCOS and related peripherals previously purchased for use in the 2010 special elections; and (3) all other services related to the 2013 AES shall be subject to public bidding. On March 29, 2012, the Comelec issued Resolution No. 9377¹⁰ resolving to accept Smartmatic-TIM's offer to extend the period to exercise the OTP until March 31, 2012 and to authorize Chairman Brillantes to sign for and on behalf of the Comelec the Agreement on the Extension of the OTP Under the AES Contract¹¹ (Extension Agreement, for brevity). The aforesaid Extension Agreement was signed on March 30, 2012.¹² On even date, the Comelec issued Resolution No. 9378¹³ resolving to approve the Deed of Sale between the Comelec and Smartmatic-TIM to purchase the latter's PCOS machines (hardware and software) to be used in the upcoming May 2013 elections and to authorize Chairman Brillantes to sign the Deed of Sale for and on behalf of the Comelec. The Deed of Sale¹⁴ was forthwith executed.

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

G.R. No. 201112

In G.R. No. 201112, petitioners Archbishop Fernando R. Capalla, Omar Solitario Ali and Mary Anne L. Susano pray that a Temporary Restraining Order (TRO) be issued enjoining the Comelec from purchasing the PCOS machines until after final judgment of the instant case; a writ of prohibition be issued against the Comelec for the purchase of these defective PCOS machines; a writ of mandamus be issued compelling the Comelec to conduct the necessary bidding for the equipment and facilities which shall be used for the 2013 National and Local Elections; and to declare Comelec Resolution Nos. 9376, 9377, and 9378, on the purchase of PCOS machines, null and void.

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

In G.R. No. 201121, petitioners Solidarity for Sovereignty (S4S), represented by Ma. Linda Olaguer, Ramon Pedrosa, Benjamin Paulino, Sr., Evelyn Coronel, Ma. Linda Olaguer Montayre and Nelson T. Montayre, pray that a TRO be issued directing the Comelec to desist from implementing the contract; that Resolution No. 9376 be declared unconstitutional and all acts made pursuant thereto, including the purchase of the PCOS machines unlawful and void; that an Injunction be issued prohibiting the Comelec from further pursuing any act pursuant to Resolution No. 9376.¹⁵

Petitioners argue that the Comelec's act of exercising its OTP the PCOS machines from Smartmatic-TIM after the period had already lapsed is illegal and unlawful.¹⁶ They explain that the period within which the Comelec may exercise the OTP could last only until December 31, 2010 without extension as provided in the Comelec's bid bulletin.¹⁷ They further assert that the Comelec's acceptance of Smartmatic-TIM's unilateral extension of the option period constitutes substantial amendment to the AES contract giving undue benefit to the winning bidder not available to the other bidders.¹⁸ Petitioners also contend that the Comelec's decision to purchase and use the PCOS machines is unconstitutional, as it allows the Comelec to abrogate its constitutional duty to safeguard the election process by subcontracting the same to an independent provider (Smartmatic-TIM), who controls the software that safeguards the entire election process. The purchase of the PCOS machines for use in the May 2013 elections would be tantamount to a complete surrender and abdication of the Comelec's constitutional mandate in favor of Smartmatic-TIM. The control of the software and process verification systems places the Comelec at the end of the process as it merely receives the report of Smartmatic-TIM. This, according to petitioners, amounts to a direct transgression of the exclusive mandate of the Comelec completely to take charge of the enforcement and administration of the conduct of elections.¹⁹ Lastly, petitioners aver that the Comelec's act of deliberately ignoring the palpable infirmities and defects of the PCOS machines, as duly confirmed by forensic experts, is in violation of Section 2, Article V of the Constitution, as it fails to safeguard the integrity of the votes. They went on by saying that the subject PCOS machines lack security features which can guaranty the secrecy and sanctity of our votes in direct contravention of RA 9369 which requires that the automated election system must at least possess an adequate security feature against unauthorized access. In deciding to purchase the PCOS machines despite the above-enumerated defects, the Comelec's decision are claimed to be unconstitutional.²⁰

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

Petitioners fault the Comelec in totally disregarding the recommendation of the Comelec Advisory Council (CAC) not to exercise the OTP. They point out that in its Resolution No. 2012-2003, the CAC resolved to recommend

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

G.R. No. 201418

In G.R. No. 201418, petitioners Tanggulang Demokrasya (Tan Dem), Inc., Evelyn L. Kilayko, Teresita D. Baltazar, Pilar L. Calderon and Elita T. Montilla pray that the Court annul Resolution No. 9376 and the March 30, 2012 Deed of Sale, and prohibit the Comelec and Smartmatic-TIM from implementing the same; and declare said Resolution and Deed of Sale invalid for having been issued and executed by the Comelec with grave abuse of discretion and for violating the provisions of R.A. 9184.²⁵

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

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

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

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

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

The petitions are without merit.

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

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

Stated in another way, Smartmatic-TIM insists on the validity of the subject transaction based on the following grounds: (1) there is no prohibition either in the contract or provision of law for it to extend the option period; rather, the contract itself allows the parties to amend the same; (2) the OTP is not an independent contract in itself, but is a provision contained in the valid and existing AES contract that had already satisfied the public bidding requirements of RA 9184; (3) exercising the option was the most advantageous option of the Comelec; and (4) Smartmatic-TIM has an established track record in providing effective and accurate electoral solutions and its satisfactory performance has been proven during the 2010 elections. The alleged glitches in the May 2010 elections, if at all, are not attributable to the PCOS machines.

We agree with respondents.

At the outset, we brush aside the procedural barriers (i.e., locus standi of petitioners and the non-observance of the hierarchy of courts) that supposedly prevent the Court from entertaining the consolidated petitions. As we held in *Guingona, Jr. v. Commission on Elections*:²⁸

There can be no doubt that the coming 10 May 2010 [in this case, May 2013] elections is a matter of great public concern. On election day, the country's registered voters will come out to exercise the sacred right of suffrage. Not only is it an exercise that ensures the preservation of our democracy, the coming elections also embodies our people's last ounce of hope for a better future. It is the final opportunity, patiently awaited by our people, for the peaceful transition of power to the next chosen leaders of our country. If there is anything capable of directly affecting the lives of ordinary Filipinos so as to come within the ambit of a public concern, it is the coming elections, more so with the alarming turn of events that continue to unfold. The wanton wastage of public funds brought about by one bungled contract after another, in staggering amounts, is in itself a matter of grave public concern.²⁹

Thus, in view of the compelling significance and transcending public importance of the issues raised by petitioners, the technicalities raised by respondents should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid adherence to the rules of procedure.³⁰

Now on the substantive issues. In order to achieve the modernization program of the Philippine Electoral System, which includes the automation of the counting, transmission and canvassing of votes for the May 2010 national and local elections with systems integration and over-all project management in a comprehensive and well-managed manner,³¹ the Comelec entered into an AES contract with Smartmatic-TIM for the lease of goods and purchase of services under the contract, with option to purchase the goods.

The option contract between the Comelec and Smartmatic-TIM is embodied in Article 4.3 of the AES contract to wit:

Article 4
Contract Fee and Payment

x x x x

4.3. OPTION TO PURCHASE

In the event the COMELEC exercises its option to purchase the Goods as listed in Annex "L", COMELEC shall pay the PROVIDER an additional amount of Two Billion One Hundred Thirty Million Six Hundred Thirty- Five Thousand Forty-Eight Pesos and Fifteen Centavos (Php2,130,635,048.15) as contained in the Financial Proposal of the joint venture partners – Smartmatic and TIM.

In case COMELEC should exercise its option to purchase, a warranty shall be required in order to assure that: (a) manufacturing defects shall be corrected; and/or (b) replacements shall be made by the PROVIDER, for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment, after performance of this Contract. The obligation for the warranty shall be covered by retention money of ten percent (10%) of every option to purchase payment made.

The retention money will be returned within five (5) working days after the expiration of the above warranty, provided, however, that the goods supplied are in good operating condition free from patent and latent defects, all the conditions imposed under the purchase contract have been fully met, and any defective machines, except to

those attributable to the COMELEC, have been either repaired at no additional charge or replaced or deducted from the price under the Option to Purchase.³²

Article 6.6 thereof, in turn provides for the period within which the Comelec could exercise the option, thus:

Article 6
COMELEC's Responsibilities

x x x x

6.6. COMELEC shall notify the PROVIDER on or before 31 December 2010 of its option to purchase the Goods as listed in Annex "L."³³

The Comelec did not exercise the option within the period stated in the above provision. Smartmatic, however, unilaterally extended the same until its final extension on March 31, 2012. The Comelec, thereafter, accepted the option and eventually executed a Deed of Sale involving said goods. Now, petitioners come before the Court assailing the validity of the extension, the exercise of the option and the Deed of Sale. In light of the AES contract, can Smartmatic-TIM unilaterally extend the option period? Can the Comelec accept the extension?

We answer in the affirmative.

It is a basic rule in the interpretation of contracts that an instrument must be construed so as to give effect to all the provisions of the contract.³⁴ In essence, the contract must be read and taken as a whole.³⁵ 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.

Article 2 of the AES contract lays down the effectivity of the contract, viz.:

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 (Emphasis supplied).³⁶

Obviously, the contract took effect even prior to the 2010 elections. The only question now is whether its existence already ceased. Pursuant to the above-quoted provision, it is important to determine whether or not the performance security had already been released to Smartmatic-TIM. In Article 8 of the AES contract, performance security was defined and the rules in releasing said security were laid down, to wit:

Article 8
Performance Security and Warranty

8.1. Within three (3) days from receipt by the PROVIDER of the formal Notice of Award from COMELEC, the PROVIDER shall furnish COMELEC with a Performance Security in an amount equivalent to five percent (5%) of the Contract Amount; which Performance Security as of this date has been duly received by COMELEC.

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.³⁷

Smartmatic-TIM categorically stated in its Consolidated Comment to the petitions that the Comelec still retains P50M of the amount due Smartmatic-TIM as performance security.³⁸ In short, the performance security had not yet been released to Smartmatic-TIM which indicates that the AES contract is still effective and not yet terminated. Consequently, pursuant to Article 19³⁹ of the contract, the provisions thereof may still be amended by mutual agreement of the parties provided said amendment is in writing and signed by the parties. In light of the provisions of the AES contract, there is, therefore, nothing wrong with the execution of the Extension Agreement.

Considering, however, that the AES contract is not an ordinary contract as it involves procurement by a government agency, the rights and obligations of the parties are governed not only by the Civil Code but also by RA 9184. In this jurisdiction, public bidding is the established procedure in the grant of government contracts. The award of public contracts, through public bidding, is a matter of public policy.⁴⁰ The parties are, therefore, not at full liberty to amend or modify the provisions of the contract bidden upon.

The three principles of public bidding are: (1) the offer to the public; (2) an opportunity for competition; and (3) a basis for the exact comparison of bids.⁴¹ By its very nature, public bidding aims to protect public interest by giving the public the best possible advantages through open competition.⁴² Competition requires not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, and the same undertaking, but also that it be legitimate, fair and honest and not designed to injure or defraud the government.⁴³ The essence of competition in public bidding is that the bidders are placed on equal footing which means that all qualified bidders have an equal chance of winning the auction through their bids.⁴⁴ Another self-evident purpose of public bidding is to avoid or preclude suspicion of favoritism and anomalies in the execution of public contracts.⁴⁵

A winning bidder is not precluded from modifying or amending certain provisions of the contract bidden upon. However, 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.⁴⁶ 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 the other bidders. The modifications in the contract executed between the government and the winning bidder must be such as to render the executed contract to be an entirely different contract from the one bidden upon.⁴⁷

Public bidding aims to secure for the government the lowest possible price under the most favorable terms and conditions, to curtail favoritism in the award of government contracts and avoid suspicion of anomalies, and it places all bidders in equal footing. Any government action which permits any substantial variance between the conditions under which the bids are invited and the contract executed after the award thereof is a grave abuse of discretion amounting to lack or excess of jurisdiction which warrants proper judicial action.⁴⁸ If this flawed process would be allowed, public bidding will cease to be competitive, and worse, government would not be favored with the best bid. Bidders will no longer bid on the basis of the prescribed terms and conditions in the bid documents but will formulate their bid in anticipation of the execution of a future contract containing new and better terms and conditions that were not previously available at the time of the bidding. Such a public bidding will not inure to the public good.⁴⁹

In *Power Sector Assets and Liabilities Management Corporation (PSALM) v. Pozzolanic Philippines Incorporated*,⁵⁰ the Court nullified the right of first refusal granted to respondent therein in the Batangas Contract for being contrary to public policy. The Court explained that the same violated the requirement of competitive public bidding in the government contract, because the grant of the right of first refusal did not only substantially amend the terms of the contract bidden upon so that resultantly the other bidders thereto were deprived of the terms and opportunities granted to respondent therein after it won the public auction, but also altered the bid terms by effectively barring any and all true bidding in the future.⁵¹

Also in *Agan, Jr. v. Philippine International Air Terminals Co., Inc., (PIATCO)*,⁵² this Court declared as null and void, for being contrary to public policy, the Concession Agreement entered into by the government with PIATCO, because it contained provisions that substantially departed from the Draft Concession Agreement included in the bid documents. The Court considered the subject contracts a mockery of the bidding process, because they were substantially amended after their award to the successful bidder on terms more beneficial to PIATCO and prejudicial to public interest.⁵³

The same conclusions cannot be applied in the present case.

One. Smartmatic-TIM was not granted additional right that was not previously available to the other bidders. Admittedly, the AES contract was awarded to Smartmatic-TIM after compliance with all the requirements of a competitive public bidding. The RFP, Bid Bulletins and the AES contract identified the contract as one of lease with option to purchase. The AES contract is primarily a contract of lease of goods⁵⁴ listed in the contract and purchase of services⁵⁵ also stated in the contract. Section 4.3 thereof gives the Comelec the OTP the goods agreed upon. The same provision states the conditions in exercising the option, including the additional amount that the Comelec is required to pay should it exercise such right. It is, therefore, undisputed that this grant of

option is recognized by both parties and is already a part of the principal contract of lease. Having been included in the RFP and the bid bulletins, this right given to the Comelec to exercise the option was known to all the bidders and was considered in preparing their bids. The bidders were apprised that aside from the lease of goods and purchase of services, their proposals should include an OTP the subject goods. Although the AES contract was amended after the award of the contract to Smartmatic-TIM, the amendment only pertains to the period within which the Comelec could exercise the option because of its failure to exercise the same prior to the deadline originally agreed upon by the parties. Unlike in PSALM, wherein the winning bidder was given the right of first refusal which substantially amended the terms of the contract bidden upon, thereby depriving the other bidders of the terms and opportunities granted to winning bidder after it won the public auction; and in Agan, Jr., wherein the Concession Agreement entered into by the government with PIATCO contained provisions that substantially departed from the draft Concession Agreement included in the bid documents; the option contract in this case was already a part of the original contract and not given only after Smartmatic-TIM emerged as winner. The OTP was actually a requirement by the Comelec when the contract of lease was bidden upon. To be sure, the Extension Agreement does not contain a provision favorable to Smartmatic-TIM not previously made available to the other bidders.

Two. The amendment of the AES contract is not substantial. The approved budget for the contract was P11,223,618,400.00⁵⁶ charged against the supplemental appropriations for election modernization. Bids were, therefore, accepted provided that they did not exceed said amount. After the competitive public bidding, Smartmatic-TIM emerged as winner and the AES contract was thereafter executed. As repeatedly stated above, the AES contract is a contract of lease with OTP giving the Comelec the right to purchase the goods agreed upon if it decides to do so. The AES contract not only indicated the contract price for the lease of goods and purchase of services which is P7,191,484,739.48, but also stated the additional amount that the Comelec has to pay if it decides to exercise the option which is P2,130,635,048.15. Except for the period within which the Comelec could exercise the OTP, the terms and conditions for such exercise are maintained and respected. Admittedly, the additional amount the Comelec needed to pay was maintained (less the amount already paid when it purchased 920 units of PCOS machines with corresponding CCS for the special elections in certain areas in the provinces of Basilan, Lanao del Sur and Bulacan) subject to the warranties originally agreed upon in the AES contract. The contract amount not only included that for the contract of lease but also for the OTP. Hence, the competitive public bidding conducted for the AES contract was sufficient. A new public bidding would be a superfluity.

The Solicitor General himself clarified during the oral arguments that the purchase price of the remaining PCOS machines stated in the assailed Deed of Sale was the price stated in Article 4.3 of the AES contract. Therefore, the said amount was already part of the original amount bidden upon in 2009 for the AES contract which negates the need for another competitive bidding.⁵⁷

Third. More importantly, the amendment of the AES contract is more advantageous to the Comelec and the public.

The nature of an option contract was thoroughly explained in *Eulogio v. Apeles*,⁵⁸ to wit:

An option is a contract by which the owner of the property agrees with another person that the latter shall have the right to buy the former's property at a fixed price within a certain time. It is a condition offered or contract by

which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time, or under, or in compliance with certain terms and conditions; or which gives to the owner of the property the right to sell or demand a sale. An option is not of itself a purchase, but merely secures the privilege to buy. It is not a sale of property but a sale of the right to purchase. It is simply a contract by which the owner of the property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something, *i.e.*, the right or privilege to buy at the election or option of the other party. Its distinguishing characteristic is that it imposes no binding obligation on the person holding the option, aside from the consideration for the offer.⁵⁹

Also in *Carceller v. Court of Appeals*,⁶⁰ the Court described an option in this wise:

An option is a preparatory contract in which one party grants to the other, for a fixed period and under specified conditions, the power to decide, whether or not to enter into a principal contract. It binds the party who has given the option, not to enter into the principal contract with any other person during the period designated and, within that period, to enter into such contract with the one to whom the option was granted, if the latter should decide to use the option. It is a separate agreement distinct from the contract which the parties may enter into upon the consummation of the option.⁶¹

In *Adelfa Properties, Inc. v. CA*,⁶² the Court described an option as:

An option, as used in the law on sales, is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time, or under, or in compliance with, certain terms and conditions, or which gives to the owner of the property the right to sell or demand a sale. It is sometimes called an "unaccepted offer." x x x⁶³

From the foregoing jurisprudential pronouncements, an option is only a preparatory contract and a continuing offer to enter into a principal contract. Under the set-up, the owner of the property, which is Smartmatic-TIM, gives the optionee, which is the Comelec, the right to accept the former's offer to purchase the goods listed in the contract for a specified amount, and within a specified period. Thus, the Comelec is given the right to decide whether or not it wants to purchase the subject goods. It is, therefore, uncertain whether or not the principal contract would be entered into. The owner of the property would then have to wait for the optionee to make a decision. A longer option period would mean that more time would be given to the optionee to consider circumstances affecting its decision whether to purchase the goods or not. On the part of Smartmatic-TIM, it would have to wait for a longer period to determine whether the subject goods will be sold to the Comelec or not, instead of freely selling or leasing them to other persons or governments possibly at a higher price. This is especially true in this case as the terms and conditions for the exercise of the option including the purchase price, had been included in the AES contract previously bidden upon. The parties are bound to observe the limitations embodied therein, otherwise, a new public bidding would be needed.

We agree with respondents that the exercise of the option is more advantageous to the Comelec, because the P7,191,484,739.48 rentals paid for the lease of goods and purchase of services under the AES contract was considered part of the purchase price. For the Comelec to own the subject goods, it was required to pay only P2,130,635,048.15. If the Comelec did not exercise the option, the rentals already paid would just be one of the

government expenses for the past election and would be of no use to future elections. Assuming that the exercise of the option is nullified, the Comelec would again conduct another public bidding for the AES for the 2013 elections with its available budget of P7 billion. Considering that the said amount is the available fund for the whole election process, the amount for the purchase or lease of new AES will definitely be less than P7 billion. Moreover, it is possible that Smartmatic-TIM would again participate in the public bidding and could win at a possibly higher price. The Comelec might end up acquiring the same PCOS machines but now at a higher price.

The advantage to the government of the exercise of the OTP was even recognized by petitioners, shown during the oral arguments:

ASSOCIATE JUSTICE PERALTA:

May I just ask you, do you know the total value of the subject matter of this contract?

DEAN ESPEJO:

Php1.8 billion pesos, Your Honor.

ASSOCIATE JUSTICE PERALTA:

You're referring to the Deed of Sale.

DEAN ESPEJO:

Yes, Your Honor.

ASSOCIATE JUSTICE PERALTA:

The whole, the whole equipment, subject matter of the contract.

DEAN ESPEJO:

I think roughly, the original contract something like 10 billion I am not sure, Your Honor.

ASSOCIATE JUSTICE PERALTA:

10 billion pesos.

DEAN ESPEJO:

Yes, Your Honor.

ASSOCIATE JUSTICE PERALTA:

Okay. Now, in the original contract of July 10, 2009, the contract was not actually a purchase contract but merely a lease contract.

DEAN ESPEJO:

Yes, Your Honor.

ASSOCIATE JUSTICE PERALTA:

And the lease contract is 7.1 billion.

DEAN ESPEJO:

It says 7.1 billion.

ASSOCIATE JUSTICE PERALTA:

Okay. But it is here [denominated] as a lease contract.

DEAN ESPEJO:

Yes, Your Honor.

ASSOCIATE JUSTICE PERALTA:

So the value was 10 billion pesos then you just pay the difference between ten (10) and seven (7) you get 3 billion pesos to purchase all of these equipment.

DEAN ESPEJO:

Yes, Your Honor.

ASSOCIATE JUSTICE PERALTA:

Okay. Now, you look at your Deed of Sale, this is annexed to your petition, the value of the Deed of Sale is something like two billion one hundred thirty million (Php2,130,000,000).

DEAN ESPEJO:

Around that much, Your Honor.

ASSOCIATE JUSTICE PERALTA:

You add this at two [billion] one hundred thirty million and so to seven billion one ninety-one the subject matter of your original contract; you come up with something like over 9 billion pesos.

DEAN ESPEJO:

Close to Ten, Your Honor.

ASSOCIATE JUSTICE PERALTA:

Close to Ten.

DEAN ESPEJO:

Yes, Your Honor.

ASSOCIATE JUSTICE PERALTA:

So that's practically less than the total value of the equipment, because according to you the total value would come up to 10 billion pesos, you add up the Lease Contract of 7 billion and two billion, plus under this Deed of Sale which is the subject matter of this petition, you will come up with a little more than 9 billion pesos even less than the 10 billion pesos. Do you think that is disadvantageous to the government?

DEAN ESPEJO:

May I be allowed to explain?

ASSOCIATE JUSTICE PERALTA:

Go ahead, you go ahead, you have all the time.

DEAN ESPEJO:

It may appear advantageous, Your Honor please, but on the other hand, there are certain disadvantages there. For one thing, these are not brand new machines; these are refurbished existing machines which could be suffering from hardware or software problem. For the COMELEC to accept this, Your Honor please, each machine will have to be checked as to its hardware and software. Eighty-two thousand (82,000) PCOS machines, Your Honor please, what if half of them, [turn out] to be white elephants or malfunctioning, Your Honor please, then we will be acquiring eighty-two thousand (82,000) with fifty percent (50%) malfunctioning machines. There is a danger, Your Honor please, that does not appear to the naked eye. In any event, with respect to the financial figures there appears to be some advantages, Your Honor, please.

ASSOCIATE JUSTICE PERALTA:

x x x these are merely speculative. Your're only speculating that there are dangers, the dangers might not come, in fact, it might even be void or favorable. Okay, now my other question is, do you think that if this was bidden out under R.A. 9184 for the purchase of all these equipment, do you think that a bidder will come up with a bid of less than 2 billion pesos for the whole equipment? When according to you, the equipment in 2009 is 10 billion, and elections are very near already 2013, the filing of certificates of candidacy will be on the second to the last month of this year?

DEAN ESPEJO:

May I be allowed to answer that by way of a speculation, Your Honor.

ASSOCIATE JUSTICE PERALTA:

Go ahead, please.

DEAN ESPEJO:

I think bidder will find it difficult to match that.

x x x x

ASSOCIATE JUSTICE PERALTA:

Okay. My other question is this. Okay, now you admitted that the original value is 10 billion. Are you also aware that the budget of the COMELEC when they come up with this contract is 7 billion?

DEAN ESPEJO:

Yes, Your Honor.

ASSOCIATE JUSTICE PERALTA:

And the total value of the original contract is 10 billion. Do you think that the COMELEC will have money to purchase equipment valued at 10 billion pesos with only 7 billion pesos for the elections of 2013? Because the budget of 7 billion is not for the purpose only of the purchase of the equipment, but also includes for the budget of the elections, pre, during and post elections expenses.

DEAN ESPEJO:

Well, Your Honor please, the shortfall of 3 billion pesos can be remedied if Congress will appropriate additional amounts, if the President of this Republic will convince the legislature to appropriate an additional amount, I see no problem why the shortfall of 3 billion cannot be remedied, Your Honor please.

ASSOCIATE JUSTICE PERALTA:

Oh, that's again speculative.

DEAN ESPEJO:

Again, that's unfortunate that's my speculation.

ASSOCIATE JUSTICE PERALTA:

You will have first to go to Congress, then you go to Senate, and then you go to the President discounting the possibility of filing a petition to question the allocation of additional amount for the 2013 elections, by the time that all of these exercises are finished then election is there already.

DEAN ESPEJO:

Well, I'm hopeful, Your Honor please, that our Congressmen and our Senators will rise to the occasion and move fast and appropriate the needed amount of 3 billion pesos to help the COMELEC acquire the proper Automated election System.

x x x⁶⁴

Another reason posed by petitioners for their objection to the exercise of the option and the eventual execution of the March 30, 2012 Deed of Sale is the existence of the alleged defects, glitches, and infirmities of the subject goods. The technology provided by Smartmatic-TIM was not perfect, because of some technical problems that were experienced during the 2010 elections. Petitioners herein doubt that the integrity and sanctity of the ballots are protected because of these defects.

We do not agree.

Prior to the execution of the Deed of Sale, the Comelec and Smartmatic-TIM had agreed that the latter would undertake fixes and enhancements to the hardware and software to make sure that the subject goods are in working condition to ensure a free, honest, and credible elections. As former Commissioner Augusto C. Lagman admitted⁶⁵ during the oral arguments, there are possible software solutions to the alleged problems on the PCOS machines and it is not inherently impossible to remedy the technical problems that have been identified. While there is skepticism that Smartmatic-TIM would be able to correct the supposed defects prior to the 2013 elections because of its inaction during the two years prior to the exercise of the option, we agree with the opinion of Chairman Sixto S. Brillantes, Jr. that it is absurd to expect Smartmatic-TIM to invest time, money and resources in fixing the PCOS machines to the specifications and requirements of the Comelec when prior to the exercise of the OTP, they do not have the assurance from the Comelec that the latter will exercise the option.⁶⁶

Moreover, as to the digital signature which appears to be the major concern of petitioners, it has been clarified during the oral arguments that the PCOS machines are capable of producing digitally-signed transmissions:

JUSTICE CARPIO:

I have some questions. Counsel, the law requires that the election returns that are electronically transmitted must be digitally signed, correct?

ATTY. LAZATIN:

That's right, Your Honor.

JUSTICE CARPIO:

Now, but in the 2010 elections, all election returns electronically transmitted were NOT digitally signed, correct?

ATTY. LAZATIN:

They were, Your Honors, please...

JUSTICE CARPIO:

Why? How?

ATTY. LAZATIN:

Your Honor, as we explained in our presentation, the iButtons, Your Honor, contain the digital signatures...

JUSTICE CARPIO:

Yes, I understand that

ATTY. LAZATIN:

...and the iButtons [interrupted]

JUSTICE CARPIO:

because they are there, the machine is capable of producing digitally-signed transmissions. But you just said that the BEI Chairman did not input their private keys because there was no time. It requires five (5) months.

ATTY. LAZATIN:

Your Honor, as I said, there is a digital signature that was assigned to the BEI...to the BEIs, your Honor, okay. I am saying that there is digital signature. What I also said, Your Honor, is that there is also a possibility that another digital certificate or signature can come from another certification authority xxx

JUSTICE CARPIO:

No, that's a third party...that's a third-party certifier, but that's an option. The law does not require a third-party certification. It merely says that transmission must be digitally signed.

ATTY. LAZATIN:

That's right.

JUSTICE CARPIO:

That's why Chairman Melo told Congress that it will cost one (1) billion to get a third-party certifier, but the law does not require it even now, if you said in your presentation that the BEI Chairman could not input their private key, that's generated because it takes five (5) months to do that and the list of BEI Chairman is known only one (1) month before the election, then how could there be a digital signature?

ATTY. LAZATIN:

Your Honor, as I mentioned it is a...not a customized or personal digital signature. It is a digital signature that is assigned by COMELEC.

JUSTICE CARPIO:

Assigned by COMELEC? How can...who inputs that digital signature?

ATTY. LAZATIN:

It is cranked out, Your Honor, and...

JUSTICE CARPIO:

No, your...it is trusted that the list of the BEI Chairman is known only one (1) month before, so how can the BEI Chairman input their digital signature five (5) months before?

ATTY. LAZATIN:

As I said, Your Honor, it is not a personal or customized signature. It is just like ...

JUSTICE CARPIO:

It is a machine ID, in other words?

ATTY. LAZATIN:

No, let me explain it this way, Your Honor. The best example I can give, Your Honor, is ...

JUSTICE CARPIO:

Okay, let us define first what a digital signature means.

ATTY. LAZATIN:

The Rules of Court, Your Honor, defines "digital signature" as the first one it is electronic signature consisting of a transformation of an electronic document or an electronic data message using an asymmetric or public Cryptosystem such that a person having the initial untransformed electronic document and the signer's public key can accurately determine: (i) whether the transformation was created using the private key that corresponds to the signer's public key; and (ii) whether the initial electronic document has been altered after the transformation was made.

JUSTICE CARPIO:

Therefore, digital signature requires private key and public key...

ATTY. LAZATIN:

Yes, Your Honor.

JUSTICE CARPIO:

...and this private key and public key are generated by an algorithm, correct?

ATTY. LAZATIN:

Yes, that's right, Your Honor.

JUSTICE CARPIO:

And there is another algorithm which, if you match...if you put together the private key and the message, will generate the signature.

ATTY. LAZATIN:

That's right, Your Honor.

JUSTICE CARPIO:

And the third algorithm, that if you put together the public key and the signature it will accept or reject the message, that's correct?

ATTY. LAZATIN:

That's correct, Your Honor.

JUSTICE CARPIO:

Now, was that used in the 2010 elections?

ATTY. LAZATIN:

Yes, your Honor.

JUSTICE CARPIO:

How was that private key generated?

ATTY. LAZATIN:

Again, Your Honor, as I said...

JUSTICE CARPIO:

Did the BEI Chairman know what that private key is?

ATTY. LAZATIN:

Your Honor, allow me to explain, Your Honor. The names, Your Honor, or the private keys are...were assigned to the BEIs Your Honor. In the same way, Your Honor, in the office my code name, Your Honor, or assigned to me is "00 xxx

JUSTICE CARPIO:

You mean to say the private key is embedded in the machine?

ATTY. LAZATIN:

No, Your Honor, it is embedded in the iButton and they are given a x x x

JUSTICE CARPIO:

Yes, in the machine...the iButton is in the machine.

ATTY. LAZATIN:

No, Your Honor.

JUSTICE CARPIO:

Where is it?

ATTY. LAZATIN:

It is a gadget, Your Honors, that is used...it is a separate gadget, your Honor xxx This is a sample of an iButton, your Honor, and in fact we said that we are prepared to demonstrate, Your Honor, and to show to this Court...

x x x x

JUSTICE CARPIO:

On election Day, where was the iButton placed? In the machine?

ATTY. LAZATIN:

To start the machine, Your Honor, you have to put it on top of that Button xxx

JUSTICE CARPIO:

In other words, whoever is in possession of that iButton can make a digitally-transmitted election return, correct?

ATTY. LAZATIN:

That's correct, Your Honor. Your Honor, together with the other BEIs because apart from this iButton, Your Honor, for authentication the BEIs, three of them, Your Honor, have an 8-digit PIN, Your Honor.

JUSTICE CARPIO:

How is that 8-digit PIN given to them?

ATTY. LAZATIN:

In a sealed envelope, Your Honor, these are x x x

JUSTICE CARPIO:

And then they also input that in the keyboard?

ATTY. LAZATIN:

Yes, Your Honor.

JUSTICE CARPIO:

In the display?

ATTY. LAZATIN:

Yes, Your Honor.

JUSTICE CARPIO:

So, that iButton contains the private key?

ATTY. LAZATIN:

Yes, Your Honor, that's my understanding.

JUSTICE CARPIO:

And who controls the public key? Who control[led] the public key in the last election?

ATTY. LAZATIN:

My understanding, Your honor, is COMELEC, your Honor.

JUSTICE CARPIO:

COMELEC had the public key?

ATTY. LAZATIN:

That's my understanding, Your Honor.

JUSTICE CARPIO:

And there was no certifying agency because it cost too much and the law did not require that?

ATTY. LAZATIN:

That's correct, Your Honor. But the machine, Your Honor, as I mentioned, is capable of accepting any number of digital signatures whether self-generated or by a third-party certification authority, Your Honor.

JUSTICE CARPIO:

Okay. So, whoever is in possession of that iButton and in possession of the four (4) PINS, the set of PINs, for the other BEI number, can send a transmission?

ATTY. LAZATIN:

Yes, Your Honor.

JUSTICE CARPIO:

The moment you are in possession of the iButton and the four (4) sets of PINs

ATTY. LAZATIN:

That's correct, Your Honor.

JUSTICE CARPIO:

If they can send an electronic transmission that's digitally signed and when received by the COMELEC and matched with the public key will result with an official election return, correct?

ATTY. LAZATIN:

That's correct. In the same way, Your Honor, that even if someone keeps his key or private key, Your Honor, if he is under threat he will also divulge it, Your Honor. It's the same.

JUSTICE CARPIO:

Okay, so whoever wants to send it, he will have to get the private key from the BEI Chairman and the PIN numbers from the other members...

ATTY. LAZATIN:

Yes, Your Honor.

JUSTICE CARPIO:

...before they can send the electronic transmission.

ATTY. LAZATIN:

Yes, Your Honor.

JUSTICE CARPIO:

Okay. That clarifies things. x x x⁶⁷

As the Comelec is confronted with time and budget constraints, and in view of the Comelec's mandate to ensure free, honest, and credible elections, the acceptance of the extension of the option period, the exercise of the option, and the execution of the Deed of Sale, are the more prudent choices available to the Comelec for a successful 2013 automated elections. The alleged defects in the subject goods have been determined and may be corrected as in fact fixes and enhancements had been undertaken by Smartmatic-TIM. Petitioners could not even give a plausible alternative to ensure the conduct of a successful 2013 automated elections, in the event that the Court nullifies the Deed of Sale.

WHEREFORE, premises considered, the petitions are DISMISSED. The Temporary Restraining Order issued by the Court on April 24, 2012 is LIFTED.

SO ORDERED.

DIOSDADO M. PERALTA

Associate Justice

WE CONCUR:

ANTONIO T. CARPIO
Senior Associate Justice

PRESBITERO J. VELASCO, JR.
Associate Justice

TERESITA J. LEONARDO DE-CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

ROBERTO A. ABAD
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

JOSE PORTUGAL PEREZ

Associate Justice

JOSE CATRAL MENDOZA

Associate Justice

MARIA LOURDES P. A. SERENO

Associate Justice

BIENVENIDO L. REYES

Associate Justice

ESTELA M. PERLAS-BERNABE

Associate Justice

CERTIFICATION

I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

ANTONIO T. CARPIO

Senior Associate Justice

(Per Section 12, R.A. 296

The Judiciary Act of 1948, as amended)

Footnotes

¹ Rollo (G.R. No. 201112), pp. 91-92.

² Annex "1"; Consolidated Comment (OSG); rollo (G.R. No. 201112), pp. 214-271.

³ Id. at 214.

⁴ Rollo (G.R. No. 201112), p. 95.

⁵ Annex "A"; Petition, rollo (G.R. No. 201121), pp. 26-49.

⁶ Rollo (G.R. No. 201112), p. 97.

⁷ Annex "C", Petition, rollo (G.R. No. 201127), pp. 53-55.

⁸ Annex "4", Consolidated Comment (OSG), rollo (G.R. No. 201112), pp. 277-282 .

⁹ Annex "A", Petition, rollo (G.R. No. 201112), pp. 39-42.

¹⁰ Annex "B", Petition, rollo (G.R. No. 201112), pp. 48-49.

¹¹ Annex "6", Consolidated Comment (OSG), rollo (G.R. No. 201112), pp. 315-317.

¹² Rollo (G.R. No. 201112), pp. 99-100.

¹³ Annex "C"; Petition, rollo (G.R. No. 201112), pp. 50-51

¹⁴ Annex "I"; Petition, rollo (G.R. No. 201127), pp. 81-86.

¹⁵ Petition, rollo (G.R. No. 201121), p. 21.

¹⁶ Id. at 9.

¹⁷ Id. at 9.

¹⁸ Id. at 10.

¹⁹ Id. at 11-15.

²⁰ Id. at 15-21.

²¹ Petition, rollo (G.R. No. 201127), p. 19.

²² Id. at 9-11.

²³ Id. at 11-14.

²⁴ Id. at 14-17.

²⁵ Petition, rollo (G.R. No. 201413), pp. 21-22.

²⁶ Id. at 12-19.

²⁷ Id. at 19-21.

²⁸ G.R. No. 191846, May 6, 2010, 620 SCRA 448.

²⁹ Id. at 462.

³⁰ Roque, Jr. v. Commission on Elections, G.R. No. 188456, September 10, 2009, 599 SCRA 69, 112.

³¹ Rollo (G.R. No. 201127), p. 28.

³² Rollo (G.R. No. 201121), p. 33.

³³ Id. at 37.

³⁴ Adriatico Consortium, Inc. v. Land Bank of the Philippines, G.R. No. 187838, December 23, 2009, 609 SCRA 403, 416; Domingo Realty, Inc. v. Court of Appeals, G.R. No. 126236, January 26, 2007, 513 SCRA 40, 62.

³⁵ Catungal v. Rodriguez, G.R. No. 146839, March 23, 2011, 646 SCRA 130, 155; Adriatico Consortium, Inc. v. Land Bank of the Philippines, *supra*; Domingo Realty, Inc. v. Court of Appeals, *supra*.

³⁶ Rollo (G.R. No. 201121), p. 30

³⁷ Id. at 38-39.

³⁸ Rollo (G.R. No. 201112), p. 608.

³⁹ This contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties.

⁴⁰ Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241.

⁴¹ Id. at 229; JG Summit Holdings, Inc. v. Court of Appeals, G.R. No. 124293, September 24, 2003, 412 SCRA 10, 32.

⁴² Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated, *supra* note 40, at 231; Agan, Jr. v. Philippine International Air Terminals, Co., Inc., G.R. Nos. 155001, 155547 and 155661, May 5, 2003, 402 SCRA 612, 654.

⁴³ Id.; id.

⁴⁴ JG Summit Holdings, Inc. v. Court of Appeals, *supra* note 39, at 33.

⁴⁵ Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated, *supra* note 40, at 232.

⁴⁶ *Supra* note 40, at 233; Agan, Jr. v. Philippine International Air Terminals, Co., Inc., *supra* note 42, at 655-656.

⁴⁷ Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated, *supra* note 40, at 233.

- ⁴⁸ Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra note 42, at 664.
- ⁴⁹ Agan, Jr. v. Philippine International Air Terminals Co., Inc., G.R. Nos. 155001, 155547 and 155661, January 21, 2004, 420 SCRA 575, 597.
- ⁵⁰ Supra note 40.
- ⁵¹ Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated, supra note 40, at 228-233.
- ⁵² Supra note 42.
- ⁵³ Agan, Jr. v. Philippine International Air Terminals Co., Inc., supra note 49, at 597.
- ⁵⁴ Goods refer to the precinct count optical scan (PCOS) machines and their peripherals, personal computers, servers, electronic transmission devices, printers, integrated software and other related equipment, both hardware and software, including all deliverable supplies, ballots and materials, except ballot boxes, as presented by TIM and SMARTMATIC in their Technical and Financial Proposals, all other materials necessary to carry out the Project.
- ⁵⁵ Services refer to all acts to be performed or provided by the PROVIDER to COMELEC for the operation and completion of the Project, enumerated and described in the Technical and Financial Proposals, as amended or expounded by the Bidding Documents, particularly in reference but not limited to Components 2 and 3.
- ⁵⁶ Rollo (G.R. No. 201112), p. 346.
- ⁵⁷ Transcript of Stenographic Notes (TSN), Oral Arguments, En Banc, May 8, 2012, pp.139-140.
- ⁵⁸ G.R. No. 167884, January 20, 2009, 576 SCRA 561.
- ⁵⁹ Eulogio v. Apeles, supra, at 572-573.
- ⁶⁰ 362 Phil. 332 (1999).
- ⁶¹ Carceller v. Court of Appeals, supra.
- ⁶² 310 Phil. 623 (1995).
- ⁶³ Adelfa Properties, Inc. v. CA, supra, at 640.
- ⁶⁴ TSN, Oral Arguments, En Banc, May 2, 2012, pp. 58-68.

⁶⁵ Id. at 184-185.

⁶⁶ Rollo (G.R. No. 201112), p. 47.

⁶⁷ TSN, Oral Arguments, En Banc, May 8, 2012, pp. 159-170.

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CONCURRING OPINION

LEONARDO-DE CASTRO, *J.*:

I concur fully with the ponencia of the Honorable Associate Justice Diosdado M. Peralta after a careful consideration, among others, of the stipulations in the Contract for the Provision of the Automated Election System (AES) for the May 10, 2010 synchronized National and Local Elections (AES Contract, for brevity) and the undisputed facts relevant thereto.

I deemed it necessary to explain the legal basis of my concurrence with the majority opinion in view of the points of law which I raised in the course of the oral arguments in these cases, particularly those relating to the period within which the COMELEC shall exercise the option to purchase (OTP) the goods listed in Annex "L" of the AES Contract. The latter pertinently provides:

Article 6 COMELEC's Responsibilities

X X X X

6.6. The COMELEC shall notify the PROVIDER on or before 31 December 2010 of its option to purchase the Goods as listed in Annex "L".

Questions were raised as to the validity of the extension of the OTP period agreed upon by the parties to the contract long after December 31, 2010. The Agreement on the Extension of the OTP under the AES Contract was signed only on March 30, 2012. Nonetheless, I have come to the conclusion that such an extension of the period to exercise the OTP was legal and valid.

It is important to consider that the OTP stipulation is an integral part of the AES Contract, which as of March 30, 2012 was still in effect, pursuant to Article 2 of the said 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. (Emphasis supplied.)

The assertion of Smartmatic-TIM in its Consolidated Comment that COMELEC still retains the amount of Fifty Million Pesos of the performance security posted by Smartmatic-TIM, which was noted by Justice Peralta in his ponencia was not disputed. During the oral arguments, I inquired about the release of the Performance Security precisely because I believed it was crucial in determining when the AES Contract expired.

By virtue of the above-quoted stipulation and the COMELEC's retention of the Performance Security, the AES Contract, of which the OTP is a part, was still a subsisting contract as of March 30, 2012, the date the OTP extension agreement was signed.

The next question is: Can the period to exercise OTP be validly amended after December 31, 2010? I believe so considering that stipulations of the AES Contract, including Article 19 which allowed amendments of said contract, were still effective as of March 30, 2012. Moreover, there is nothing in the AES Contract, particularly in par. 2.2, Article 2, which prohibits the extension of the period of the OTP. The said extension is the nature of an amendment to the AES Contract, which can be done while the said Contract still has life. It would have been a different matter if the AES Contract had already expired before the period of the OTP was extended by agreement of the parties. In that case, contractual stipulations, including that on the amendment of the contract will cease to have any force and effect and any contract for the purchase of goods would be an entirely different contract which should comply anew with government procurement laws and regulations.

It should likewise be stressed that the contracting parties stipulated, under par. 2.2 of Article 2, that the effectivity of the OTP cannot be prejudiced by the expiration of the AES Contract. In other words, the said parties intended that effectivity of the OTP may even outlive, or survive beyond, the term of the AES Contract, assuming that such period to exercise the OTP was agreed upon during the existence of the AES Contract.

Under the facts obtaining in these cases, the original period of the OTP expired before the termination of the AES Contract. Considering that OTP is just an adjunct of the main AES Contract, which still exists, and there being no express or implied ground in the contract to bar such extension or revival of the period, the validity of the latter must be upheld.

Moreover, I agree with the observation of Justice Peralta that the amendment of the period is not a substantial amendment of the AES Contract that would prejudice the other bidders to the said contract.

Accordingly, for the above-stated reasons and the other grounds discussed by Justice Peralta in his ponencia, I

reiterate my concurrence to the dismissal of the present petitions.

TERESITA J. LEONARDO-DE CASTRO

Associate Justice

 [BACK](#)

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CONCURRING OPINION

BERSAMIN, J.:

The consolidated petitions for certiorari, prohibition, and mandamus (with prayer for the issuance of temporary restraining order and/or writ of preliminary injunction) assail the exercise by the Commission on Elections (COMELEC) of its option to purchase under Article 4.3 of the July 10, 2009 Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (2009 Automation Contract). They claim that Resolution No. 9376 and the Deed of Sale executed on March 30, 2012 by and between the COMELEC and SMARTMATIC-TIM Corporation to concretize the COMELEC's exercise of its option to purchase under the 2009 Automation Contract were issued or done in grave abuse of discretion amounting to lack or excess of jurisdiction.

My personal persuasion is that all the petitions are inappropriate remedies against Resolution No. 9376 and the Deed of Sale executed on March 30, 2012. The Court should dismiss them for that reason.

Furthermore, I firmly urge that the Court outrightly dismiss the petitions for lack of jurisdiction over the subject matter.

But, even granting that the Court has jurisdiction over the subject matter of these actions, I respectfully submit that the COMELEC's exercise of its option to purchase beyond December 31, 2010 without a new public bidding was valid and should be upheld.

I.

Certiorari, Prohibition and Mandamus
are inappropriate remedies

I harbor serious misgivings about the propriety of the petitions for certiorari, prohibition, and mandamus as remedies to challenge Resolution No. 9376 and the March 30, 2012 Deed of Sale.

As a premise for my misgivings, I categorize the issuance of the assailed Resolution No. 9376 and the execution of the Deed of Sale on March 30, 2012 in terms of what function the COMELEC thereby discharged.

The Court has classified the functions the COMELEC exercises into the quasi-judicial, quasi-legislative, and administrative in *Bedol v. Commission on Elections*,¹ to wit:

The powers and functions of the COMELEC, conferred upon it by the 1987 Constitution and the Omnibus Election Code, may be classified into administrative, quasi-legislative, and quasi-judicial. The quasi-judicial power of the COMELEC embraces the power to resolve controversies arising from the enforcement of election laws, and to be the sole judge of all pre-proclamation controversies; and of all contests relating to the elections, returns, and qualifications. Its quasi-legislative power refers to the issuance of rules and regulations to implement the election laws and to exercise such legislative functions as may expressly be delegated to it by Congress. Its administrative function refers to the enforcement and administration of election laws. In the exercise of such power, the Constitution (Section 6, Article IX-A) and the Omnibus Election Code (Section 52 [c]) authorize the COMELEC to issue rules and regulations to implement the provisions of the 1987 Constitution and the Omnibus Election Code.

The quasi-judicial or administrative adjudicatory power is the power to hear and determine questions of fact to which the legislative policy is to apply, and to decide in accordance with the standards laid down by the law itself in enforcing and administering the same law. The Court, in *Dole Philippines Inc. v. Esteva*, described quasi-judicial power in the following manner, viz:

Quasi-judicial or administrative adjudicatory power on the other hand is the power of the administrative agency to adjudicate the rights of persons before it. It is the power to hear and determine questions of fact to which the legislative policy is to apply and to decide in accordance with the standards laid down by the law itself in enforcing and administering the same law. The administrative body exercises its quasi-judicial power when it performs in a judicial manner an act which is essentially of an executive or administrative nature, where the power to act in such manner is incidental to or reasonably necessary for the performance of the executive or administrative duty entrusted to it. In carrying out their quasi-judicial functions the administrative officers or bodies are required to investigate facts or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them as basis for their official action and exercise of discretion in a judicial nature. Since rights of specific persons are affected, it is elementary that in the proper exercise of quasi-judicial power due process must be observed in the conduct of the proceedings.

I emphasize without hesitation that in order to properly proceed against the COMELEC, an aggrieved party must choose the proper remedy. The choice depends on which function – quasi-judicial, quasi-legislative, and administrative – the COMELEC has discharged in doing the assailed

action. It is true that pursuant to Section 2,² Rule 64 of the Rules of Court,³ the remedy of an aggrieved party against a judgment or final order or resolution of the COMELEC is a special civil action of certiorari under Rule 65 brought in the Supreme Court. In *Macabago v. Commission on Elections*,⁴ however, the Court has clarified that Rule 64 applies only to the judgments or final orders or final resolutions rendered by the COMELEC in the exercise of its quasi-judicial function (that is, "the power to resolve controversies arising from the enforcement of election laws, and to be the sole judge of all pre-proclamation controversies; and of all contests relating to the elections, returns, and qualifications"). In this connection, the Court, upon noting that Rule 64 likewise extends to the judgments, final orders or final resolutions of the Commission on Audit, has said in *Dela Llana v. Commission on Audit*,⁵ viz:

Public respondents aver that a petition for certiorari is not proper in this case, as there is no indication that the writ is directed against a tribunal, a board, or an officer exercising judicial or quasi-judicial functions, as required in

certiorari proceedings. Conversely, petitioner for his part claims that certiorari is proper under Section 7, Article IX-A of the 1987 Constitution, which provides in part:

Section 7. xxx. Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof.

Petitioner is correct in that decisions and orders of the COA are reviewable by the court via a petition for certiorari. However, these refer to decisions and orders which were rendered by the COA in its quasi-judicial capacity.

While Rule 64 sets the procedure for reviewing the judgments, final orders or resolutions the COMELEC renders in its quasi-judicial capacity, Rule 65 provides another remedy to a party who is aggrieved by the act of the COMELEC in the exercise of its administrative function,⁶ but the questioned act or issuance must have been attended by grave abuse of discretion amounting to lack or excess of jurisdiction.⁷ Regardless of whether a petition is brought under Rule 64 or Rule 65, the following essential requisites must be attendant, namely: (a) the writ is directed against the COMELEC exercising its quasi-judicial functions, if the petition is for certiorari or prohibition, or exercising its ministerial function, if the petition is for prohibition or mandamus; (b) the COMELEC has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction; and (c) there is no appeal or any plain, speedy, and adequate remedy in the ordinary course of law.

Evidently, the issuance of Resolution No. 9376 did not involve the investigation of facts, the conduct of hearings, or the weighing of evidence to resolve a controversy arising from the enforcement of election laws. As such, the resolution was not issued in the exercise of COMELEC's quasi-judicial function. The resolution was not also promulgated in the exercise of the COMELEC's administrative function, because it did not relate to the enforcement of election laws. Rather, the resolution resulted from the COMELEC's exercise of its quasi-legislative function, its aim being to implement Republic Act (RA) No. 8436,⁸ as amended by RA No. 9369, through the adoption of an automated election system for the 2013 elections.

Considering that the assailed Deed of Sale entered into on March 30, 2012 pursuant to Resolution No. 9376 was clearly not the product of the COMELEC's quasi-judicial function, the Court cannot exercise its certiorari jurisdiction herein in order to review and set it aside.

Prohibition and mandamus are likewise inappropriate as remedies against Resolution No. 9376 and the Deed of Sale of March 30, 2012. In a special civil action for prohibition, the respondent tribunal, corporation, board, or person must exercise either judicial, quasi-judicial, or ministerial functions and must have acted without or in excess of jurisdiction or with grave abuse of discretion; the prohibition petitioner prays that judgment be rendered, commanding the respondent to desist from further proceeding in the action or matter specified in the petition.⁹ In a special civil action for mandamus, the petitioner seeks to compel the performance of a ministerial duty.¹⁰ The mandamus petitioner should show, on one hand, that he has a well-defined, clear and certain legal right in the performance of the act, and, on the other hand, that the respondent has the clear and imperative duty to do the act required to be done.¹¹ Without question, however, both remedies of prohibition and mandamus cannot review and correct the exercise by the COMELEC of its legislative or quasi-legislative function.¹²

I am constrained to find, therefore, that the consolidated petitions are inappropriate remedies. Upon that cause, I vote for their outright dismissal.

II.

The Court has no jurisdiction over
the subject matter of the actions

The visible objective of the consolidated petitions is to prevent the COMELEC from purchasing the PCOS machines and related election paraphernalia from SMARTMATIC-TIM. It is certain that the resolution of these cases would center on the validity and legality of the exercise by the COMELEC beyond December 31, 2010 of the option to purchase.

If that is certain, an ordinary civil action for the annulment of contract (i.e., Deed of Sale of March 30, 2012) is the appropriate and adequate remedy. Assailing the validity and legality of the exercise by the COMELEC beyond December 31, 2010 without a public bidding of the option to purchase is definitely an action whose subject matter is incapable of pecuniary estimation, considering that "the basic issue is something other than the right to recover a sum of money, or xxx the money claim is purely incidental to, or a consequence of, the principal relief sought like in suits to have the defendant perform his part of the contract (specific performance) and in actions for support, or for annulment of a judgment or to foreclose a mortgage."¹³

There is no question that the jurisdiction over an action whose subject matter is incapable of pecuniary estimation originally and exclusively pertains to the Regional Trial Court (RTC) by express provision of law.¹⁴ The Court cannot arrogate unto itself the jurisdiction that it does not have under the Constitution and the laws on jurisdiction enacted by Congress. If the Court does so, its judgment will be void and ineffectual.

I humbly posit that the RTC still has exclusive and original jurisdiction notwithstanding that the petitioners' theory is that the assailed Resolution No. 9376 was invalid and illegal for violating RA No. 9184 (The Government Procurement Reform Act). I deem it not amiss to point out that the Court's power to evaluate and pass upon the validity of an implementing rule or regulation like Resolution No. 9376 is generally only appellate in nature.¹⁵

I concede that exceptional and compelling circumstances, such as the involvement of the national interest in a controversy and the serious implications on the national life of the issue, may justify a direct resort to the Court through the extraordinary remedies for the writs of certiorari, prohibition and mandamus. Yet, the Court should still desist from giving due course to and resolving the consolidated petitions upon bare assertions of transcendental importance or the paramountcy of public interest. Verily, jurisdiction over the subject matter of any action is determined by the basic allegations of the initiating pleading, but such determinant allegations should not include conclusions of fact and law; otherwise, the laws on jurisdiction and pleadings will be easily thrown in disarray. The Court cannot arbitrarily ignore the statutory rules on jurisdiction in order to repose in itself an original authority that the Constitution and the statutes have not seen fit to repose in the Court.

III.

Petitions are bereft of merit and substance

Assuming that I am wrong about the RTC having the exclusive and original jurisdiction over the subject matter of

the consolidated petitions, as well as about the petitions not being the appropriate remedies to assail Resolution No. 9376 and the Deed of Sale of March 30, 2012, I must now submit that the petitions are really bereft of merit and substance.

The issue is whether the COMELEC acted with grave abuse of discretion amounting to lack or excess of jurisdiction in exercising the option to purchase beyond December 31, 2010. My submission is that the COMELEC did not.

The decisive query is: Was the extension of the period of the option to purchase beyond December 31, 2010 without another public bidding being first conducted pursuant to RA No. 9184 valid? In my view, it was.

I join Justice Peralta's persuasive showing that the COMELEC's exercise of the option and its entering into the purchase of the PCOS machines did not contravene the letter and spirit of RA No. 9184. I give my full concurrence to his submission that the purchase was in fact favorable to the Government and to the public interest. Accordingly, I uphold Resolution No. 9376 and the ensuing Deed of Sale.

The existence of a binding option to purchase is not in dispute. The inclusion of the option to purchase was a requirement precisely mentioned in the Bid Bulletins and Section 28, Part V or Other Specifications of the request for proposal (RFP).¹⁶ That option to purchase was irrevocable during its term because it was supported by a valuable consideration (that is, the contract price stipulated in the 2009 Automation Contract).¹⁷

The 2009 Automation Contract shows the following terms of the option to purchase, to wit:

4.3 OPTION TO PURCHASE

In the event COMELEC exercises its option to purchase the Goods as listed in Annex "L", COMELEC shall pay the PROVIDER as additional amount of Two Billion One Hundred Thirty Million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (Php 2,130,635,048.15) as contained in the Financial Proposal of the joint venture partners –SMARTMATIC and TIM.

In case COMELEC should exercise its option to purchase, a warranty shall be required in order to assure that: (a) manufacturing defects shall be corrected; and/or (b) replacements shall be made by the PROVIDER, for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment, after performance of this Contract. The obligation for the warranty shall be covered by retention money of ten percent (10%) of every option to purchase payment made.

The retention money will be returned within (5) working days after the expiration of the above warranty, provided however, that the goods supplied are in good operating condition free from patent and latent defects, all the conditions imposed under the purchase contract have been fully met, and any defective machines, except to those attributable to COMELEC, have been either repaired at no additional charge or replacement or deducted from the price under the Option to Purchase.

Explaining the nature of an option contract, the Court has declared in *Eulogio v. Spouses Apeles*,¹⁸ viz:

An option is a contract by which the owner of the property agrees with another person that the latter shall have the right to buy the former's property at a fixed price within a certain time. It is a condition offered or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time, or under, or in compliance with certain terms and conditions; or which gives to the owner of the property the right to sell or demand a sale. An option is not of itself a purchase, but merely secures the privilege to buy. It is not a sale of property but a sale of the right to purchase. It is simply a contract by which the owner of the property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something, *i.e.*, the right or privilege to buy at the election or option of the other party. Its distinguishing characteristic is that it imposes no binding obligation on the person holding the option, aside from the consideration for the offer.¹⁹

It is also sometimes called an "unaccepted offer" and is sanctioned by Article 1479 of the Civil Code:

Art. 1479. A promise to buy and sell a determinate thing for a price certain is reciprocally demandable.

An accepted unilateral promise to buy or to sell a determinate thing for a price certain is binding upon the promisor if the promise is supported by a consideration distinct from the price.

Here, the option to purchase was the unilateral undertaking of SMARTMATIC-TIM. A unilateral contract gives rise to an obligation that binds only one of the parties, which sets a unilateral contract poles apart from a bilateral contract that contemplates reciprocity of obligations. Professor Corbin, an eminent commentator on the law of contracts,²⁰ has expounded on the distinction of a unilateral contract from a bilateral one in this wise:

xxx. A unilateral contract consists of a promise or a group of promises made by one of the contracting parties only, usually assented to by the other or by someone acting on his behalf. There are many cases in which such an assent is not required. A bilateral contract consists of mutual promises, made in exchange for each other by each of the two contracting parties. In the case of a unilateral contract, there is only one promisor; and the legal result is that he is the only party who is under an enforceable legal duty. The other party to this contract is the one to whom the promise is made, and he is the only one for whom the contract creates an enforceable legal right. In a bilateral contract both parties are promisors and both parties are promisees; and the legal effect of such a contract is that there are mutual rights and there are mutual duties. The distinction between these two classes of contracts is of importance in the analysis of a contractual transaction and in determining its validity and its exact legal operation. xxx²¹

As used in the law of sales, an option, according to *Limson v. Court of Appeals*,²² "is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a time certain, or under, or in compliance with, certain terms and conditions, or which gives to the owner of the property the right to sell or demand a sale." By its juridical nature, an option contract creates a mere entitlement, right, or privilege on the part of the offeree who retains the discretionary prerogative whether to exercise it or not. Considering that the option is unilateral in essence, the offeror in an option to purchase creates a burden upon himself not to dispose of the subject matter of the option within the specified time set forth in the contract for the purpose of obtaining exclusivity of parties in a future contract conditioned upon the acceptance of

the offer.²³ It is plain, then, that a valid option contract is not a mere expression of a willingness to enter into a future contract; rather, it is already a committed offer, definite in its terms, that effectively induces the offeree-optionee to reasonably believe that the choice or preference to generate such forthcoming covenant stems from him. In *Carceller v. Court of Appeals*,²⁴ the Court has said that –

(a)n option is a preparatory contract in which one party grants to the other, for a fixed period and under specified conditions, the power to decide, whether or not to enter into a principal contract. It binds the party who has given the option, not to enter into the principal contract with any other person during the period designated, and, within that period, to enter into such contract with the one to whom the option was granted, if the latter should decide to use the option. It is a separate agreement distinct from the contract which the parties may enter into upon the consummation of the option.²⁵

Given the foregoing, all that was left to be done in order to create a bilateral promise to buy and to sell between the COMELEC and SMARTMATIC-TIM was the act of acceptance on the part of COMELEC of SMARTMATIC-TIM's committed offer.

That SMARTMATIC-TIM unilaterally made several extensions of the period to exercise the option to purchase without the corresponding agreement of the COMELEC was inconsequential to the valid and effective exercise of the option by the COMELEC. I reiterate that an offeror like SMARTMATIC-TIM retained the exclusive power to extend the option; and that nothing could prevent SMARTMATIC-TIM as the offeror from extending the offer even without the offeree's lack of consent. In point is Prof. Corbin's following discourse, to wit:

At the time that he makes his offer, the offeror has full control of its terms, of the person who shall have power to accept, of the mode of acceptance, and of the length of time during which the power of acceptance shall last. When he makes the offer he shall specify in it the time within which acceptance must occur; if he does so, the power of acceptance is limited accordingly.

The offeror's limitation of time is not operative if it is not communicated to the offeree so that he knows or should know of it; but if so communicated it operated with certainty. It makes no difference that the time specified is much less than a reasonable time. The offeror is the creator of the power; and it dies, just as it was born, by the will of its creator. He need make no offer at all; and he may so word his seeming offer that it is impossible of acceptance. x x x.²⁶

xxx The time actually taken by the offeree may properly be held to be reasonable, if the offeror intended the power to last so long, even though on the facts known to him it was not at all reasonable for the offeree to think that he was accepting in time. A reasonable time may be longer than the offeror intended, but it can never be less. The primary and perhaps the sole purpose of limiting the power of acceptance to a reasonable time, is the protection of the offeror against results that he does not expect or foresee. If those results are caused by his own action, the law will compel him to abide by them for the protection of others; hence, an offeror may sometimes be bound by an acceptance that he did not expect. But he needs no protection against an acceptance that he in fact hoped for and meant to invite, even though he did not expressly state as long a time as intended.

The power of acceptance will last much longer than it otherwise would in case the conduct of the offeror reasonably leads the offeree to believe that the offer is still open. An offer is operative as long as the offeror says that it shall be; likewise it is operative as long as his conduct leads the offeree to believe that it is. x x x.²⁷

In other words, the extension made by SMARTMATIC-TIM prior to December 31, 2010 (the expiration of the original period) as well as the extensions subsequent thereto effectively preserved the option to purchase and stretched the lifespan of the option. This signifies that the option was still subsisting when the COMELEC decided to exercise it on March 21, 2012. The COMELEC's purchase of the PCOS machines and related paraphernalia through the Deed of Sale of March 30, 2012 thus only continued the covenants embodied in the 2009 Automation Contract, contrary to the petitioners' contentions.

The usage of the words "shall notify" in Article 6.6 of the 2009 Automation Contract, which provides that "COMELEC shall notify the PROVIDER on or before 31 December 2010 of its option to purchase the Goods as listed under Annex L", simply meant that the COMELEC should communicate its acceptance of the committed offer within the term stipulated, and did not refer to the consummation of the anticipated contract of sale. In that light, the communication by the COMELEC on March 21, 2012 of its acceptance was an act within the context of the 2009 Automation Contract.

Hence, I have no alternative except to reject the petitioners' allegations of grave abuse of discretion committed by the COMELEC in issuing its Resolution No. 9376.

IV.

Extension of the period of the option
to purchase was not a material or substantial
amendment of the 2009 Automation Contract;
Hence, no new public bidding is required

RA No. 9184 requires that, subject to certain exceptions, all procurements by the Government should be through competitive bidding.²⁸ Procurement is defined as the acquisition of goods and consulting services, and the contracting for infrastructure projects, including the lease of goods and real estate.²⁹ A public bidding provides the occasion for an open and fair competition among all bidders, and is designed to secure for the Government the lowest possible price under the most favorable terms and conditions, to curtail favoritism in the award of government contracts, and to avoid suspicion of anomalies.³⁰ It is intended to minimize occasions for corruption and temptations to commit abuse of discretion in awarding contracts on the part of government authorities.³¹

All procurement contracts must undergo a public bidding before they may be awarded. A publicly-bid contract, once executed, may no longer be amended; otherwise, the policy behind the requirement of competitive bidding may be subverted. According to *Caltex (Phil.), Inc. v. Delgado Bros., Inc.*:³²

[T]he due execution of a contract after public bidding is a limitation upon the right of the contracting parties to alter or amend it without another public bidding, for otherwise what would a public bidding be good for if after the execution of a contract after public bidding, the contracting parties may alter or amend the contract, or even cancel it, at their will? Public biddings are held for the protection of the public, and to give the public the best

possible advantages by means of open competition between the bidders. He who bids or offers the best terms is awarded the contract subject of the bid, and it is obvious that such protection and best possible advantages to the public will disappear if the parties to a contract executed after public bidding may alter or amend it without another previous public bidding.

Still, the Court has recognized that a publicly-bidder contract may be amended provided that the amendment is not material or substantial.³³

When, then, is an amendment considered material or substantial as to demand another public bidding?

The leading case law on when an amendment of a publicly-bidder contract is material or substantial is *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*,³⁴ which holds that an amendment is material if it permits a substantial variance between the terms and conditions under which the bids were invited and the terms and conditions of the contract executed after the bidding. *Agan, Jr.* fittingly elucidates as follows:

An essential element of a publicly bidder contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bidder upon. Each bidder must be able to bid on the same thing. The rationale is obvious. If the winning bidder is allowed to later include or modify certain provisions in the contract awarded such that the contract is altered in any material respect, then the essence of fair competition in the public bidding is destroyed. A public bidding would indeed be a farce if after the contract is awarded, the winning bidder may modify the contract and include provisions which are favorable to it that were not previously made available to the other bidders.³⁵

x x x

While we concede that a winning bidder is not precluded from modifying or amending certain provisions of the contract bidder 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 bidder 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 bidder upon.³⁶

x x x

[A]mendments to the contract bidder upon should always conform to the general policy on public bidding if such procedure is to be faithful to its real nature and purpose. By its very nature and characteristic, competitive public bidding aims to protect the public interest by giving the public the best possible advantages through open competition. It has been held that the three principles in public bidding are (1) the offer to the public; (2) opportunity for competition; and (3) a basis for the exact comparison of bids. A regulation of the matter which excludes any of these factors destroys the distinctive character of the system and thwarts the purpose of its

adoption.³⁷

In short, the prohibition against amending a publicly-bid contract extends only to a change in vital and essential particulars of the agreement that results in a substantially new contract.³⁸

An example illustrative of a material change is seen in *Power Sector Assets and Liabilities Management Corporation v. Pozzolan Philippines Inc.*³⁹ The issue was whether the amendment made on a contract for the purchase of the fly ash produced by the Batangas Power Plant was valid or not. The contract had been amended after the bidding to include a right of first refusal to purchase the fly ash to be generated by power plants that would be put up by the National Power Corporation (NPC) in the future. The Court found that the amendment went beyond the scope of the original contract that had referred only to the Batangas Power Plant; and accordingly ruled that the amendment was material because it changed the terms of the bidding conducted; hence, the amendment was void. The Court further ruled that the amendment was especially repugnant because it also prejudiced biddings yet to be conducted as to the other power plants that NPC would be building later on, stating:

The grant of the right of first refusal in this case did not only substantially amend the terms of the contract bid upon, so that resultantly, the other bidders thereto were deprived of the terms and opportunities granted to respondent after it won the public auction, it so altered the bid terms—the very admission by all parties that the disposal of fly ash must be through public bidding—by effectively barring any and all true biddings in the future. The grant of first refusal was a grant to respondent of the right to buy fly ash in all coal-fired plants of NPC.

Here, however, the extensions of the timeline for the option to purchase did not amount to a material or substantial amendment of the 2009 Automation Contract. For sure, the bid documents specifically included the option to purchase the goods to be leased by COMELEC, as reflected in the RFP, which states:

28. The offer shall be for a one-time lease basis for Component 1-A, 1-B and 1-C.

28.1 An offer for an option to purchase by component to be decided by COMELEC before December 31, 2010 shall be included by the bidder in its proposal.

28.2 The price of the option-to-purchase shall not exceed 50% of the lease price of the equipment.

Moreover, the change related only to the period of the option to purchase. That sort of change did not go beyond the subject of the contract that had been bid out to the public because the price and other essential terms embodied in the 2009 Automation Contract remained the same; hence, the change was not material or substantial.

At any rate, extending the period of the option to purchase was entirely within the discretion of SMARTMATIC-TIM to make. There is no denying that the implementing rules and regulations of RA No. 9184 did provide that the terms stated in the bidding documents were only the minimum requirements of the procuring entity, and that the bidder was free to offer better terms.⁴⁰ In Bid Bulletin No. 13, the Special Bids and Awards Committee definitively stated that the option to purchase would not be considered in any way in determining the lowest calculated bid. Any better offer on the terms of the option to purchase would have had no bearing in determining the winning

bidder because the winner would ultimately be determined based on the lowest price submitted.⁴¹

Understandably, there may be additional factors to consider in determining if an amendment is material. Thus, in *Kenai Lumber Company, Inc. v. LeResche*,⁴² it was held that:

Not all amendments to competitively bid contracts are prohibited, only those regarded as material. The concept of materiality in this context has not been satisfactorily captured in a single phrase. One court has spoken of "an essential change of such magnitude as to be incompatible with the general scheme" of competitive bidding; another has phrased the question to be whether the amendment "so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract, that it constitutes a new undertaking." These formulations simply recognize that the materiality concept prohibits those changes which tend to be subversive of the purpose of competitive bidding. In determining whether an amendment has this tendency, courts have found the following factors to be of importance:

- (1) the legitimacy of the reasons for the change;
- (2) whether the reasons for the change were unforeseen at the time the contract was made;
- (3) the timing of the change;
- (4) whether the contract contains clauses authorizing modifications;
- (5) the extent of the change, relative to the original contract.⁴³

A consideration of these additional factors bolsters my conclusion that the extension of the period of the option to purchase was not a material amendment of the 2009 Automation Contract. I note, first of all, that the extension of the period of the option to purchase emanated from the apparent desire of SMARTMATIC-TIM to give to the COMELEC enough time to deliberate and to decide whether to avail itself of the option to purchase or not. The motivation for the extension was legitimate in view of the issues that arose even prior to the 2010 elections centering on the capability of SMARTMATIC-TIM to safeguard the votes as well as on the COMELEC's budgetary concerns, difficult issues that the COMELEC had to address first. Secondly, the need for extending the time on account of such issues and concerns was evidently not foreseen prior to the bidding and the execution of the 2009 Automation Contract. Thirdly, there was also nothing suspicious about the timing of the change because more than a year had already elapsed following the implementation of the 2009 Automation Contract. Finally, the 2009 Automation Contract permitted amendments to be mutually agreed upon by the parties, and the extent of the amendment which only refers to the period of the option to purchase is not substantial.

In summary, the extension of the period of the option to purchase did not amount to a material amendment of the 2009 Automation Contract. The extension of the period did not give rise to a new contract that would have necessitated the conduct of another public bidding.

ACCORDINGLY, I vote to dismiss all the petitions for certiorari, prohibition and mandamus.

LUCAS P. BERSAMIN

Footnotes

- ¹ G.R. 179830, December 3, 2009, 606 SCRA 554, 569-571.
- ² Section 2. *Mode of review.* — A judgment or final order or resolution of the Commission on Elections and the Commission on Audit may be brought by the aggrieved party to the Supreme Court on certiorari under Rule 65, except as hereinafter provided. (n)
- ³ Entitled Review Of Judgments And Final Orders Or Resolutions Of The Commission On Elections And The Commission On Audit.
- ⁴ G.R. No. 152163, November 18, 2002, 392 SCRA 178, 183.
- ⁵ G.R. No. 180989, February 7, 2012.
- ⁶ Macabago v. Commission on Elections, G.R. No. 152163, November 18, 2002, 392 SCRA 178, 184; citing Canicosa v. Commission on Elections, G.R. No. 120318, December 5, 1997, 282 SCRA 512; and Cabagnot v. Commission on Elections, G.R. No. 124383, August 9, 1996, 260 SCRA 503.
- ⁷ Macabago v. Commission on Elections, *supra*; citing Raymundo v. People Homesite and Housing Corp., No. L-38318, June 29, 1982, 114 SCRA 712; and Loong v. Commission on Elections, G.R. No. 133676, April 14, 1999, 305 SCRA 832.
- ⁸ An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, Providing Funds Therefor and for Other Purposes.
- ⁹ Ongsuco v. Malones, G.R. No. 182065, October 27, 2009, 604 SCRA 499, 515; Perez v. Court of Appeals, No. L-80838, November 29, 1988, 168 SCRA 236, 243.
- ¹⁰ Ongsuco v. Malones, *supra*; Heirs of Sps. Luciano and Consolacion Venturillo v. Quitain, G.R. No. 157972, 30 October 2006, 506 SCRA 102, 110; Cariño v. Capulong, G.R. No. 97203, 26 May 1993, 222 SCRA 593, 602.
- ¹¹ Ongsuco v. Malones, *supra*; Social Justice Society v. Atienza, Jr., G.R. No. 156052, 7 March 2007, 517 SCRA 657, 664.
- ¹² Holy Spirit Homeowners Association, Inc. v. Defensor, G.R. No. 163980, August 3, 2006, 479 SCRA 581.

¹³ *Lapitan v. Scandia Inc.*, G. R. No. L-24668, July 31, 1968, 24 SCRA 479, 481; cited in subsequent cases like *Singsong v. Isabela Sawmill*, No. L-27343, February 28, 1979, 88 SCRA 623, 637; *Russell v. Vestil*, G.R. No. 119347, March 17, 1999, 304 SCRA 738, 744.

¹⁴ Section 19(1), *Batas Pambansa Blg. 129* (The Judiciary Reorganization Act of 1980), which provides:

Section 19. Jurisdiction in civil cases. - Regional Trial Courts shall exercise exclusive original jurisdiction:

(1) In all civil actions in which the subject of the litigation is incapable of pecuniary estimation;

xxx

¹⁵ Section 5, Article VIII, 1987 Constitution.

¹⁶ The Bid Bulletins and Section 28, Part V, of the request for proposal (RFP) specifically required prospective bidders to include in their respective proposals an option to purchase "to be decided by COMELEC before December 31, 2010."

¹⁷ In *National Development Corporation v. Firestone Ceramics, Inc.*, G.R. No. 143590 (November 14, 2001), one of the issues pertains to the existence of a consideration in so far as it concerns the 'right of first option to purchase' provision incorporated in the lease contract. In determining whether it is a "paid-up option", this Court held that: "xxx the right of first refusal is an integral and indivisible part of a contract of lease and is inseparable from the whole contract. The consideration for the right is built into the reciprocal obligations of the parties. Thus, it is not correct for the petitioners to insist that there was no consideration paid by FIRESTONE to entitle it to the exercise of the right, inasmuch as the stipulation is part and parcel of the lease making the consideration for the lease the same as that of the option."

¹⁸ G.R. No. 167884, January 20, 2009, 576 SCRA 561, 572-573.

¹⁹ Bold underscoring supplied for emphasis.

²⁰ Professor Arthur Linton Corbin (1874–1967) was a professor of law in Yale Law School and a scholar of contract law. He helped to develop the philosophy of law known as legal realism, and his work on contracts is one of the most celebrated legal treatises of the Twentieth Century.

²¹ *Corbin on Contracts*, One Volume Edition, West Publishing Co., 1952:156-7. Ch. 1 § 21, p. 31.

²² G.R. No. 135929, April 20, 2001, 357 SCRA 209, 215.

²³ To the same effect is *Uniq Computer Corp. v. United States*, 20 Cl. Ct. 222, 231 (Cl. Ct. 1990), where the US Supreme Court said:

Stated differently, a noted text writer explains that an **option** contract is an agreement to keep an offer open for a prescribed period of time during which that offer is irrevocable. 1 S. Williston, *A Treatise on the Law of Contracts* § 61A (3d ed. 1957). An **option** is "a unilateral contract whereby the optionor for valuable consideration grants the optionee a right to make a contract of purchase but does not bind the optionee to do so; the optionor is bound during the life of the **option**, but the optionee is not." *Id.* The power conferred on the **option** holder is called the power of acceptance, who therefore has the legal authority to consummate the contemplated transaction by merely exercising that contractual right. The **option** giver, on the other hand, is bound to execute the exchange for the duration of the agreement. 1A A. Corbin, *Corbin on Contracts, A Comprehensive Treatise on the Working Rules of Contract Law* § 259 (1963).

²⁴ G.R. No. 124791, February 10, 1999, 302 SCRA 718.

²⁵ *Carceller v. Court of Appeals and State Investment House*, G.R. No. 124791, February 10, 1999, 302 SCRA 718, 724.

²⁶ Corbin on Contracts, Ch. 2, §35, p. 55.

²⁷ *Id.*, pp. 56-58.

²⁸ RA No. 9184, Section 10.

²⁹ RA No. 9184, Section 5(n).

³⁰ *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, G.R. No. 155001, May 5, 2003, 402 SCRA 612, 664.

³¹ *Manila International Airport Authority v. Olongapo Maintenance Services, Inc.*, G.R. Nos. 146184-85, January 31, 2008, 543 SCRA 269.

³² *Caltex (Phil.), Inc. v. Delgado Bros., Inc., et.al.*, 96 Phil. 368, 375 (1954).

³³ *Supra*, note 30; reiterated in *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*, G.R. No. 183789, August 24, 2011, 656 SCRA 214.

³⁴ *Supra*, note 30.

³⁵ *Id.*, pp. 654-655.

³⁶ *Id.*, pp. 655-656 (bold underscoring supplied for emphasis).

³⁷ *Id.*, pp. 663-664.

³⁸ Mata v. San Diego, No. L-30447, March 21, 1975, 63 SCRA 170, 178 (Emphasis supplied).

³⁹ G.R. No. 183789, August 24, 2011, 656 SCRA 214.

⁴⁰ 17.4. The specifications and other terms in the bidding documents shall reflect minimum requirements or specifications required to meet the needs of the procuring entity in clear and unambiguous terms. The bidder may submit an offer which provides for superior specifications and/or better terms and conditions to the Government at no extra cost. However, these shall not be given any bonus, credit or premium in the bid evaluation.

⁴¹ 32.1. For the procurement of goods and infrastructure projects, the purpose of bid evaluation is to determine the Lowest Calculated Bid. This bid shall be subject to post-qualification in accordance with Rule X of this IRR-A to determine its responsiveness to the eligibility and bid requirements. If after post-qualification the Lowest Calculated Bid is determined to be post-qualified it shall be considered the Lowest Calculated Responsive Bid and the contract shall be awarded to the bidder.

32.2. For the procurement of goods and infrastructure projects, the Lowest Calculated Bid shall be determined in two steps:

a) The detailed evaluation of the financial component of the bids, to establish the correct calculated prices of the bids; and

b) The ranking of the total bid prices as so calculated from the lowest to the highest. The bid with the lowest price shall be identified as the Lowest Calculated Bid.

⁴² 646 P.2d 215, 220 (1982 Alas).

⁴³ Kenai Lumber Company, Inc. v. LeResche, 646 P.2d 215, 220 (1982 Alas).

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SEPARATE CONCURRING OPINION

VELASCO, JR., J.:

I agree with the ponencia that the Deed of Sale dated March 30, 2012 is legal and valid, but for another reason, i.e., it can be considered as a purchase via the direct contracting mode under Section 50 of Republic Act No. 9184 or the Government Procurement Reform Act. However, I take exception to the majority's holding that the option to purchase (OTP) was legally extended or revived by the parties, and the option extension agreement can be the legal basis for the validity of the assailed deed of sale.

Before the Court are these consolidated petitions under Rule 65¹ assailing and seeking to nullify the Deed of Sale entered into on March 30, 2012 by and between the Commission on Elections (COMELEC) and Smartmatic-TIM Corporation (Smartmatic-TIM) for the acquisition of the Precinct Count Optical Scan (PCOS) machines with the corresponding Consolidated Canvassing System (CCS) hardware and software pursuant to the OTP clause, stipulated under the 2009 Contract for the Provision of an Automated Election System (AES) for the 2010 elections (AES Contract, hereinafter). Sought to be nullified too are COMELEC Resolution Nos. 9373 and 9376 dated March 6 and 21, 2012, respectively, and the March 30, 2012 agreement on the extension of the OTP under the AES Contract.

As prayed for, the Court issued on April 24, 2012 a temporary restraining order (TRO) enjoining the implementation of the deed in question. Forthwith, the Court heard the parties on oral arguments.

The antecedent facts, as culled from the records and as gathered from the Decision of the Court in the related case of Roque, Jr. v. Commission on Elections,² are as follows:

For the automation of the 2010 national and local elections, the COMELEC designed and eventually released a public bidding system embodied in the Request for Proposal (RFP), also known as Terms of Reference (TOR), for the procurement of automation machines with the necessary technical components. The RFP/TOR described the prospective bids as one "for lease, with an option to purchase, of an automated election system (AES)." The terms of the OTP are more particularly described in Part V of the RFP on "Other Specifications":

28. The offer shall be for a one-time lease basis for Component 1-A, 1-B and 1-C.

28.1. An offer for an option to purchase by component to be decided by COMELEC before December 31, 2010, shall be included by the bidder in its proposal.

28.2. The price of the option-to-purchase shall not exceed 50% of the lease price of the equipment. (Emphasis added.)

After public bidding, the COMELEC and Smartmatic-TIM, the winning responding consortium, executed on July 10, 2009 the AES Contract for the lease of goods and services specified under the contract. The contract award came after Smartmatic-TIM has passed, among other things, the post-qualification eligibility requirements and the end-to-end PCOS machine demonstration tests COMELEC conducted pursuant to Republic Act No. (RA) 8436, as amended by RA 9369.³ While stating in Roque, Jr. that the real worth of the PCOS machine units and software will come when actually deployed and operated on election day, the Court nonetheless declared that hurdling the demo-testing reflects the capability of the PCOS machines and is an indication of their having met the minimum capabilities standards required by RA 8436.

Article 6 of the AES Contract contained the following parallel option-to-purchase provision: "COMELEC shall notify [Smartmatic-Tim, as] PROVIDER on or before 31 December 2010 of its option to purchase the Goods as listed in Annex 'L.'"

On May 10, 2010, the Philippines held its first fully-automated nationwide elections using Smartmatic-TIM's AES, the PCOS technology. Numerous obstacles reportedly attended the implementation of the automation project,

among the more significant of which involved the Compact Flash (CF) Card configuration. Complaints about long queues at polling precincts, alleged defective PCOS machines or CF Cards and electoral fraud were also reported.⁴ These aberrations were discussed in some detail in the "Post-Election Report on the Use of the Automated Election System (AES) in the 2010 National and Local Elections" submitted by the COMELEC Advisory Council (CAC)⁵ in June 2010 to the Joint Congressional Oversight Committee on AES. In said report, the CAC stated the observation that despite time constraints and mistakes COMELEC and Smartmatic-TIM committed, "the AES ultimately did work" and eliminated the pernicious "dagdag-bawas" practice. And while it found the basic technology "a good fit for the Philippines," and strongly advised against a return to manual elections or a manual/automated mix, CAC nonetheless urged COMELEC not to exercise the option to purchase the PCOS machines,⁶ noting:

x x x The AES encountered too many problems that need to be resolved before this particular system can be used again. Also, the savings of approximately 2 billion pesos versus leasing the machines again is negated by the costs of storage, breakage and obsolescence.

For its part, the COMELEC's Technical Working Group (TWG) submitted its July 20, 2010 Report on the Manual Audit (RMA) of the AES in the 2010 elections.⁷ The manual audit basically serves to check the fairness and accuracy of the AES. The RMA, thus, highlighted the transparency and credibility of the 2010 elections. The report reflected a 99.60% accuracy rate of the AES for all national level positions. The TWG added that, in most cases of large variances, errors were due to human factors, such as the inability of the RMA Team (RMAT) to distinguish "over votes" and "ambiguous markings." The TWG concluded the Report in this wise:

If the Random Manual Audit is to make sure of the accuracy of election results and preserve electoral integrity, then it must be clearly pointed out from the beginning that the margin of variance is a computation of the difference between the manual count and the machine count. Hence, it is a test between man and machine. While the tolerance level set for the accuracy of the machine is a test that involves only the machine [sic]. The margin of variance indicated by the NSO as equivalent to 1% is based on the accuracy rate of 99% (the allowable rate used in statistical analysis) cannot thus be used as the basis of comparison to the 99.995% accuracy rate of the PCOS machine set by the Request for Proposals (RFP) as a requirement for the Bidding Process of the AES technology.

In September 2010, the COMELEC, vis-à-vis the upcoming special elections in three provinces, partially exercised the OTP and bought 920, out of the leased 82,000 plus, units of PCOS machines.

On December 16, 2010, or two weeks before the OTP was to expire, Smartmatic-TIM sent COMELEC what turned out to be the first of several letters offering extensions of the period to exercise the OTP. The first offer came with a couple of sweeteners, such as waiving the storage and maintenance costs related to keeping the machines in the country. This was followed by another letter of March 23, 2011, but this time with a reminder that the option had already expired but which Smartmatic-TIM was willing to extend up to April 1, 2011. Just as in the first instance, this second letter-offer went unanswered.

On April 1, 2011, Smartmatic-TIM again wrote COMELEC proposing a "Revised Extended Option to Purchase" effective December 31, 2011, and stating new conditions for its availment. The letter stressed that Smartmatic-TIM no longer had the obligation to sell the equipment covered by the OTP. In another letter of December 28,

2011, Smartmatic-TIM again offered to extend the option period until March 31, 2012.

In the meantime, or on April 8, 2011, COMELEC sent its budget proposal to the Department of Budget and Management (DBM) for the automated 2013 national and local elections. So as to enable it to fully automate in that year's electoral exercise, with a target ratio of 600 voters per precinct and the lease of some 125,000 new voting machines, COMELEC requested for the purpose a budgetary allocation of PhP 12.854 billion. As later events would show, however, the General Appropriations Act for FY 2012 allocated a budget of PhP 7,962,221,000 to COMELEC for the upcoming elections, way below the requested amount of PhP 12.854 billion. According to the COMELEC, out of the approved outlay for 2012, only PhP 2.2 billion is available to secure an AES for the 2013 elections, as the balance would need to be allocated for other equally essential services.

On January 12, 2012, the CAC issued Resolution No. 2012-001, recommending the use of the Optical Mark Reader technology for the 2013 Elections.⁸

On February 6, 2012, the COMELEC Law Department issued a Memorandum, opining that the COMELEC can legally exercise the OTP, provided that the extension period has not yet expired and provided further that the offer is identical to that contained in the AES Contract.

The CAC, obviously having been apprised of the COMELEC's bent to exercise the OTP, issued on February 8, 2012 Resolution No. 2012-003, which in part reads:

2. that the [OTP] under the 2010 national and local elections contract should not be exercised, if as a consequence, the rest of the system must come from the same vendor as this:

- a. may not afford the COMELEC the best possible total solution, as the hardware is just one component of the entire automated election system;
- b. prevents the COMELEC from taking advantage of the best possible technology currently available considering technological advances and/or obsolescence;
- c. will prevent other prospective vendors from competitively participating in the bidding process x x x.⁹

On March 6, 2012, the COMELEC issued its first response to Smartmatic-TIM's queries through Resolution No. 9373.¹⁰ In it, the COMELEC manifested its resolve to "seriously consider" exercising the OTP, subject to certain conditions, and provided Smartmatic-TIM introduces desired "fixes and enhancements on the AES." The next day, the CAC issued Resolution No. 2012-005, virtually endorsing the exercise by COMELEC of the OTP subject to certain conditions. The pertinent portion of the Resolution provides:

Wherefore, the Advisory Council x x x resolves as it hereby resolved to recommend that COMELEC ensure the following:

- 1. Should the COMELEC be able to overcome the legal uncertainty and decide to exercise the option to purchase, such exercise be limited to what was included in the original contract for the 2010 National and Local Elections x x x.¹¹

On March 21, 2012, the COMELEC, apprehensive about the possibility that all its preparations for the 2013 automation would be for naught should it proceed with a public bidding on several essential services given its limited FY 2012 budget allocation, among other reasons, decided to exercise its OTP, subject to defined conditions, and issued Resolution No. 9376 for the purpose.

Resolution No. 9376 reads:

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, subject to the conditions that:

1. The warranties agreed upon under Articles 4 and 8 of the 2010 AES Contract shall be in full force and effect;
2. The original price for the hardware and software covered by the Option to Purchase as specified under Annex "L" of the 2010 AES contract shall be maintained, excluding the cost of the nine hundred twenty (920) units of PCOS and related peripherals previously purchased for use in the 2010 special elections; and
3. All other services related to the 2013 Automated Election System shall be subject to public bidding.¹² (Emphasis supplied.)

On March 29, 2012, COMELEC issued Resolution No. 9377 accepting the offered extension of up to March 30, 2012 within which to exercise the OTP.

On March 30, 2012, the COMELEC and Smartmatic-TIM inked an "Agreement on the Extension of the Option to Purchase under the Contract for the Provision of the Automated Election System for the May 10, 2010 Synchronized National and Local Elections" (Extension Agreement), pursuant to Art. 19 of the AES Contract on "Amendments."¹³ Some highlights of this agreement: (1) The period within which COMELEC can exercise its OTP is extended to March 31, 2012; and (2) the original price of the hardware and software covered by and specified in the underlying AES Contract shall be maintained, without prejudice to price adjustment brought about by reasonable system modifications of the software.

On the same day, March 30, 2012, COMELEC and Smartmatic-TIM executed a Deed of Sale for the purchase, at the total cost of PhP 1,833,274,457 of the PCOS and CCS hardware and software pursuant to the OTP, subject, among other things, to the conduct of the Hardware Acceptance Test and compliance with the final scope of work for additional system modification, or the so-called fixes and enhancements COMELEC requested in the Extension Agreement. By Resolution No. 9378, COMELEC approved the Deed of Sale aforementioned.

It is against the backdrop of these material facts and events that the petitioners have interposed their separate petitions anchored on several grounds. While the formulation of the various grounds differs, the petitions in G.R. Nos. 201112 and 201127 capture the issues which are determinative of this case, as follows:

1. Whether or not the COMELEC may purchase these PCOS machines without following R.A. No. 9184 or the Government Procurement Law. As a corollary, whether or not COMELEC may still exercise the option after December 31, 2010;
2. Whether or not the PCOS machines used by Smartmatic-TIM are qualified to be used in the AES as provided under R.A. 9369. The use of the PCOS machines that fail to meet the minimum standards required to safeguard the votes and the voters' rights is unlawful; and
3. Whether COMELEC committed grave abuse of discretion in opting to buy PCOS machines and allied paraphernalia of SMARTMATIC-TIM for use in the approaching 2013 election, despite the incontrovertible findings of the glitches, malfunctions, bugs and defects of the same.

Petitioners seek, as their main plea, the nullification of the Deed of Sale in question, it being their common submission that the deed springs from and finds context in the exercise by COMELEC of the OTP under the aforementioned Art. 4.3 of the AES Contract, an option no longer existing when availed of. Grave abuse of discretion attended that exercise, so petitioners chorus, thus infecting it too with the vice of invalidity and, ergo, COMELEC Resolution Nos. 9373 and 9376 and the resulting Extension Agreement should also be stricken down as void.

Pushing their point, petitioners would argue that since the December 31, 2010 option deadline fixed under the AES Contract had come to pass without the COMELEC exercising the OTP, Smartmatic-TIM cannot unilaterally extend, as it did in fact, the option to buy the leased PCOS machines. Accordingly, they add, the deed of sale of the PCOS machines cannot be considered as the end-product of the OTP clause of the AES Contract. In fine, the purchase constitutes a new procurement, one not entered into pursuant to or contemplated in the OTP clause written in the AES Contract. As a new procurement, therefore, a new public bidding is required for the new procurement by Section 10 of RA 9184,¹⁴ as shall be discussed shortly.

To petitioners, the unilateral extension of the option period effected after its lapse is without legal consequence, implying that if effected and accepted prior to the expiration of the original option period, there could have plausibly been a valid amendment of the stipulation on the option. As argued, the extension, when finally accepted on March 30, 2012, not only brought about a substantial or material amendment to the bid AES Contract, which is not allowed; worse still, it resulted also in the COMELEC concluding, under the guise of exercising a purported extended OTP, a purchase agreement in breach of the law and policy on public bidding.

On top of the foregoing arguments, petitioners invite attention to the alleged deficiencies, lapses and glitches that, as observed by IT experts in and out of government, surfaced during the May 10, 2010 electoral exercise. The litany includes, but is not limited to: (1) the disabling of security features, like the ultra violet (UV) mark sensors; (2) the absence of digital signatures; (3) faulty CF cards; (4) lack of or ineffective source code review; and (5) insufficient random manual audit. They argue further that COMELEC, oblivious of its mandate to ensure clean elections, still pushed through with the purchase of defective machines, jeopardizing in the process the sanctity of the 2013 electoral process. And training their sight at Smartmatic-TIM, petitioners rue that the former's equipment had performed miserably in the last elections and even failed to meet the automated election law's minimum requirements.

Public and private respondents, in their separate comments, urge the dismissal of the consolidated petitions on

substantive and procedural grounds. They also pray for the immediate lifting of the TRO thus issued.

The gravamen of respondents' case may be formulated, thusly: the OTP forms an integral part of the larger AES Contract concluded after public bidding, and the COMELEC was not precluded from agreeing to and accepting an extension of the OTP, even after the lapse of the original option date. The assailed deed of sale, so respondents claim, is but an implementation of a residual surviving provision of the AES Contract, a procurement contract awarded after public bidding. Be that as it may, the award of the purchase contract need not go through another public bidding process. To COMELEC, the purchase of the PCOS machines and the use of its AES technology under the same terms agreed upon are advantageous to the government and, when viewed against the backdrop of inadequate budgetary support and time for preparation, constitute its best viable option.

Procedural Issues

The procedural issues raised pivot on three concerns: the question of legal standing, the propriety of the recourses availed of by the petitioners, and the non-observance of the hierarchy of courts.

Petitioners have legal standing

Respondents' posture as to petitioners' lack of the necessary personality or standing (*locus standi*) to file the cases at bar is not difficult to deflect. *Locus standi* may be defined as:

x x x a personal and substantial interest in the case such that the party has sustained or will sustain a direct injury as a result of the governmental act that is being challenged. The term "interest" means a material interest, an interest in issue affected by the decree, as distinguished from mere interest in the question involved, or a mere incidental interest. The gist of the question of standing is whether a party alleges 'such personal stake in the outcome of the controversy as to assure the concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions.'¹⁵

To have legal standing, therefore, a suitor must show that he or she has sustained or will sustain a direct injury as a result of a government action, or has a material interest in the issue affected by the challenged official act.¹⁶ However, the Court has, time and again, acted liberally on the *locus standi* requirements and has accorded certain individuals, not otherwise directly injured, or with material interest affected, by a Government act, standing to sue, provided a legal issue of critical significance is at stake.¹⁷ The rule on *locus standi* is, after all, a mere procedural technicality in relation to which the Court, in a slew of cases involving a subject of transcendental import, has waived, or relaxed, thus allowing non-traditional plaintiffs, such as concerned citizens or taxpayers, as here, to sue in the public interest, albeit they may not have been personally injured by the operation of a law or any other government act.¹⁸ In *David v. Macapagal-Arroyo*,¹⁹ the Court laid out the bare minimum norm before the so-called "non-traditional suitors" may be extended standing, thusly:

- 1.) For taxpayers, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
- 2.) For voters, there must be a showing of obvious interest in the validity of the election law in question;

3.) For concerned citizens, there must be a showing that the issues raised are of transcendental importance which must be settled early; and

4.) For legislators, there must be a claim that the official action complained of infringes their prerogatives as legislators.

The case before the Court is of critical importance to the nation, ultimately involving the efficiency of computerized hardware and software intended to achieve clean, or at least credible, elections. Assuming a liberal stance is, therefore, in order. In allowing petitioner to institute the instant petition, it is apropos to recall what the Court wrote in Roque, Jr.:

There is no doubt in our mind, however, about the compelling significance and the transcending public importance of the one issue underpinning this petition: the success—and the far-reaching grim implications of the failure—of the nationwide automation project that will be implemented via the challenged automation contract.

The doctrinal formulation may vary, but the bottom line is that the Court may except a particular case from the operations of its rules when the demands of justice so require. x x x Accordingly, technicalities and procedural barriers should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid adherence to the rules of procedure. This postulate on procedural technicalities applies to matters of locus standi and the presently invoked principle of hierarchy courts, which discourages direct resort to the Court if the desired redress is within the competence of lower courts to grant x x x. For indeed the Court has full discretionary power to take cognizance and assume jurisdiction of special civil actions for certiorari and mandamus filed directly with it for exceptionally compelling reasons or if warranted by the nature of the issues clearly and specifically raised in the petition.²⁰

Special civil action for certiorari under Rule 65 is the proper remedy

The COMELEC would have the Court dismiss the petitions on the postulate that the petitioners availed themselves of the wrong remedy. A special civil action for certiorari, prohibition and mandamus, as urged, is improper as the object of the recourse is the nullification of an agreement, the Deed of Sale; hence, the proper action is one for annulment of contract under the jurisdiction of the Regional Trial Court (RTC).

It must be remembered that the assailed March 30, 2012 Deed of Sale is a contract between respondents COMELEC and Smartmatic-TIM. Hence, the proper party to file an ordinary civil action for the annulment of said agreement before the RTC is the aggrieved party. The fact, however, is neither of the contracting parties plans to impugn the agreement. On the other hand, the petitioners, not being parties to the contract, are not real parties-in-interest to file the ordinary civil action, and their legal standing may be seriously challenged.

On the other hand, petitioners are one in saying that grave abuse of discretion was committed by COMELEC in entering into the assailed purchase because it violates the Government Procurement Reform Act (RA 9184). Grave abuse of discretion has been defined as a "capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."²¹

In *Francisco, Jr. v. Toll Regulatory Board*,²² the Court ruled that grave abuse of discretion was committed by TRB "for its act of entering into these same contracts or agreements without the required public bidding mandated by law, specifically the BOT Law (R.A. 6957, as amended) and the Government Procurement Reform Act (R.A. 9184)."

Clearly, the averment that the act of respondent COMELEC in entering into the challenged Deed of Sale constitutes a breach of RA 9184 sufficiently brings it within the ambit of the remedy of special civil action under Rule 65. Plainly, petitioners availed of the proper legal remedy.

The rule on hierarchy of courts was not breached

The judicial system follows a ladderized scheme which, in essence, requires that lower courts initially decide on a case before it is considered by a higher court. Specifically, under a judicial policy recognizing the hierarchy of courts, a higher court will not entertain direct resort to it unless the redress cannot be obtained in the appropriate courts.²³

The Supreme Court is a court of last resort, and must so remain if it is to satisfactorily perform the functions assigned to it by the fundamental charter and immemorial tradition. It cannot and should not be burdened with the task of dealing with causes in the first instance.²⁴

A disregard of the doctrine of hierarchy of courts warrants, as a rule, the outright dismissal of the petition.²⁵ Direct invocation of the Court's jurisdiction is allowed only when there are special and important reasons clearly and especially set forth in the petition. Recourse must first be made to a lower-ranked court exercising concurrent jurisdiction with a higher court.²⁶

Primarily, although this Court, the Court of Appeals (CA) and the RTCs have concurrent jurisdiction to issue writs of certiorari, prohibition, mandamus, and quo warranto, among other processes, such concurrence does not give the petitioner unrestricted freedom of choice of court forum. In *Heirs of Bertuldo Hinog v. Melicor*, citing *People v. Cuaresma*, this Court made the following pronouncements:

This Court's original jurisdiction to issue writs of certiorari is not exclusive. It is shared by this Court with Regional Trial Courts and with the Court of Appeals. **This concurrence of jurisdiction is not, however, to be taken as according to parties seeking any of the writs an absolute, unrestrained freedom of choice of the court to which application therefor will be directed.** There is after all a hierarchy of courts. That hierarchy is determinative of the venue of appeals, and also serves as a general determinant of the appropriate forum for petitions for the extraordinary writs. **A becoming regard for that judicial hierarchy most certainly indicates that petitions for the issuance of extraordinary writs against first level ("inferior") courts should be filed with the Regional Trial Court, and those against the latter, with the Court of Appeals. A direct invocation of the Supreme Court's original jurisdiction to issue these writs should be allowed only when there are special and important reasons therefor, clearly and specifically set out in the petition.** This is [an] established policy. It is a policy necessary to prevent inordinate demands upon the Court's time and attention

which are better devoted to those matters within its exclusive jurisdiction, and to prevent further over-crowding of the Court's docket.²⁷ (Emphasis added.)

But the Court, while granted original jurisdiction over petitions for certiorari, prohibition, mandamus, quo warranto and habeas corpus under the Constitution, is not precluded to entertain such petitions and, in effect, may forego application of the rule on hierarchy of courts, provided there are special and compelling reasons that serve as exceptions to this rule. Here, the urgency and importance of the issues presented call for this Court's constitutional, yet primary, duty to resolve these petitions.

While the RTCs under Sec. 21 of the Judiciary Reorganization Act of 1980 or Batas Pambansa Blg. 129, as amended, are also given original jurisdiction over "the issuance of writs of certiorari, prohibition, mandamus, quo warranto, habeas corpus and injunction which may be enforced in any part of their respective regions," in these recourses, there are critical and important legal issues with far-reaching political implications that necessitate the immediate, expeditious and final resolution of the matter. The Constitutional grant of authority over the said petitions to this Court of course prevails over the statutory grant of judicial authority to the RTCs or the CA. Hence, it is proper for the Court to take cognizance of the instant petitions sans the application of the hierarchy of courts.

Substantive Issues

The substantive issues, in the main, boil down to the following: (1) whether or not the execution of the assailed deed of sale without public bidding can legally be justified under the OTP clause or as an alternative mode of procurement not requiring a bidding under RA 9184; and (2) whether the COMELEC gravely abused its discretion when it opted to buy the same PCOS machines and software despite, as petitioners assert, the deficiencies and glitches experienced in their deployment and actual operation in the 2010 elections.

Before disposing of these core issues, some basic premises need to be stated or restated for perspective:

1. The OTP is a stipulation in the AES Contract and is also found in the adverted RFP/TOR issued vis-à-vis the bidding for the automated 2010 elections project. The option belongs to COMELEC to be exercised on or before a fixed date. In mandatory language, the AES Contract requires the exercise of the OTP to be made not later than December 31, 2010.

Both the AES Contract and the RFP/TOR contain no provision on option extension, albeit the AES Contract provides under its Art. 19 that: "This Contract and its Annexes may be amended by mutual agreement by the parties. All such amendments shall be in writing and signed by the duly authorized representatives of the parties."

2. COMELEC knew of the expiration of the option period, as it in fact received several letters of Smartmatic-TIM about the fact of expiration, with the latter offering at every conceivable turn to extend the option period.

3. The assailed deed of sale partakes of a government procurement of goods, hence covered, as earlier indicated, by RA 9184. This Court, in *MIAA and Gana v. Olongapo Maintenance Services, Inc. and Triple*

Crown Services, Inc.,²⁸ stated that "[t]he rationale behind the requirement of a public bidding, as a mode of awarding government contracts, is to ensure that the people get maximum benefits and quality services from the contracts."

Government contracts shall be void, as against the law and public policy, where a statutory requirement of open competitive bidding has been ignored.²⁹ As a corollary, agreements directly tending to prevent bidding for covered government contracts may violate public policy.³⁰

The Deed of Sale cannot be justified under the OTP clause, but can be justified under the Alternative Mode of Procurement

Petitioners contend that the Deed of Sale is illegal as it violates Sec. 10 of RA 9184 that generally requires procurement of goods via competitive bidding. Petitioners are correct, but only to a point. The pertinent OTP provision reads:

ARTICLE 4 CONTRACT FEE AND PAYMENT

x x x x

4.3 OPTION TO PURCHASE

In the event COMELEC exercises its option to purchase the Goods as listed in Annex "L", COMELEC shall pay the PROVIDER an additional amount of Two Billion One Hundred Thirty Million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (Php2,130,635,048.15) as contained in the Financial Proposal of the joint venture partners – SMARTMATIC and TIM.

In case COMELEC should exercise its option to purchase, a warranty shall be required in order to assure that: (a) manufacturing defects shall be corrected; and/or replacements shall be made by the PROVIDER x x x The obligation for the warranty shall be covered by retention money of ten percent (10%) of every option to purchase payment made.

x x x x

ARTICLE 6 COMELEC'S RESPONSIBILITIES

x x x x

6.6 COMELEC shall notify the PROVIDER on or before 31 December 2010 of its options to purchase the Goods as listed in Annex "L".³¹

The term "option," as a civil law concept, has been defined in Carceller v. CA:³²

An option is a preparatory contract in which one party grants to the other, for a fixed period and under specified

conditions, the power to decide whether or not to enter into a principal contract. It binds the party who has given the option, not to enter into the principal contract with any other person, during the period designated, and, within that period, to enter into such contract with the one to whom the option was granted, if the latter should decide to use the option. It is a separate agreement distinct from the contract which the parties may enter into upon consummation of the option.

On the other hand, an option to purchase may be described as a "contract by which the owner of the property agrees with another person that the latter shall have the right to buy the former's property at a fixed price within a certain time."³³ The option is not of itself a purchase, but merely secures the privilege to buy or the right to buy; its distinguishing feature is that it imposes no binding obligation to buy on the person holding the option.³⁴

Clearly then, an option is considered alive and, hence, binding only during the period designated in the document or contract, as the case may be, where it is stipulated, unless an amendment extending the option is duly agreed upon during the existence of the contract. After all, the minds that agree may validly agree to novate, subject of course to the fundamental tenet that the resulting agreement or its terms are not contrary to law, morals, good customs or public policy.³⁵

In the case at bar, since the designated end of the option period, December 31, 2010, came and went without COMELEC exercising the OTP, this stipulated option clause had since effectively ceased to exist. Put a bit differently, COMELEC's right to purchase accorded under the AES Contract is deemed waived or, to be more precise, lost when it failed to exercise the right in accordance with the terms of the granting instrument. American case law holds that where the lease specifies an option to purchase, but the lessee did not attempt to exercise the option until several months after the expiration of the term, the option was not exercised in due time and the lessee lost rights thereunder.³⁶ In the exercise of an option for which time is specified, time is of the essence, unless the agreement of the parties evidences an intent to the contrary; the court is without discretion to grant additional time.³⁷

The revised OTP Smartmatic-TIM offered to COMELEC cannot plausibly work to extend let alone revive the option which had meanwhile been rendered *functus officio* by reason of non-availing. Even assuming hypothetically the feasibility of amending the OTP clause by extending its period in the AES Contract on or before December 31, 2010, such extension must be done via a mutual agreement, a unilateral amendment not being recognized under the AES Contract. The written mutual agreement for such extension executed by and between COMELEC and Smartmatic-TIM was of no legal moment, since it was done only in March 2012, or over a year after the deadline spelled out in the AES Contract.

The option having expired, the March 30, 2012 Deed of Sale between COMELEC and private respondent Smartmatic-TIM cannot be legally moored to said lapsed option. The subsequent contract in question is a NEW CONTRACT and not an "extension agreement" of the AES Contract dated July 10, 2009 nor of the stipulation covered by Article 19 of said contract on the option to purchase the goods described in Annex "L" of said agreement. Since it is a new contract, then it cannot derive any benefit from the competitive bidding conducted by COMELEC which gave life to the AES Contract. The Deed of Sale in question has to conform to Art. 1306 of the Civil Code which provides:

Art. 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

Since the stipulations, clauses, terms and conditions in a contract should not deviate nor conflict with any law, the March 30, 2012 Deed of Sale on its face is legally flawed and patently illegal, since it violated Sec. 10 of RA 9184 on the requisite competitive bidding. Paragraph 2 of said contract stipulated the direct purchase by COMELEC of the hardware and software subject of Annexes E and E-1 thereof from respondent Smartmatic-TIM for the price of PhP 1,833,274,457.09, without respondent COMELEC having conducted the public competitive bidding prescribed by RA 9184. Hence, petitioners are correct in saying that the purchase is in contravention of the Procurement Act. Nonetheless, the Court, I submit, is unprepared to impugn the bona fides of the transaction, given the trying circumstances under which it was made and the benefits inuring to the government. Indeed, the COMELEC can hardly be faulted for believing that the extension of the OTP and the execution of the resulting Deed of Sale did not constitute what *Agan v. Philippine International Air Terminals Co., Inc.*³⁸ considered as substantial or material amendments that alter the parameters of the mother contract. Accordingly, it would be inappropriate to impute grave abuse of discretion on COMELEC for assuming that the extension of the OTP was a permissible amendment to the AES Contract.

The Deed of Sale is an alternative procurement that does not require a competitive public bidding

COMELEC parlays the notion that the purchase in question is analogous to direct contracting, which, under RA 9184, is an alternative mode of procurement excepted from public bidding rules.

I am inclined to agree.

Conformity with RA 9184 does not necessarily require competitive bidding. As with all rules, the rule requiring competitive bidding on government procurements comes with several exceptions. RA 9184 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.

x x x x

ARTICLE XVI ALTERNATIVE METHODS OF PROCUREMENT

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:

a. Limited Source Bidding, otherwise known as Selective Bidding. - xxx

b. Direct Contracting, otherwise known as Single Source Procurement – a method of Procurement that

does not require elaborate Bidding Documents because the supplier is simply tasked to submit a price quotation or a pro-forma (in)voice together with the conditions of sale, which offer may be accepted immediately or after some negotiations.

c. Repeat Order. – x x x

d. Shopping. – x x x

e. Negotiated Procurement. – x x x

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

Admittedly, an alternative method of procurement is justified only in highly exceptional cases³⁹ and when the following conditions 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.⁴⁰

Contrary to the position taken by Justice Brion, however, all the foregoing conditions exist allowing COMELEC to use an alternative method of procurement permitted under RA 9184.

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, which manifested respondent COMELEC's resolve to purchase the AES hardware and software covered by the OTP in the 2009 AES Contract between respondents COMELEC and Smartmatic-TIM. As implied in the resolutions, the purpose of entering into the Deed of Sale is to avert the despondent possibility that no suitable AES will be procured in time for the 2013 elections and the nation will be compelled to conduct a manual election given the inadequate budget allocated by Congress and the limited time remaining before the elections. Hence, 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, petitioners' assertion that the subject Deed of Sale does not meet any of the conditions allowing the use of an alternative method of procurement is without merit. A review of the facts and the requirements set under the law will verify 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:

- a. 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;
- b. 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
- 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. (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) of RA 9184, the Deed of Sale is exempt from competitive bidding as it involves goods of "proprietary nature." Goods are considered to be of "proprietary nature" when they are owned by a person who has a protectable interest in them⁴¹ or an interest protected by the intellectual property laws. The subject of the assailed Deed of Sale is the entire first component⁴² of the original AES Contract, which includes the software or the "non-physical portion of the computer; the part that exists only as data or the programs"⁴³ needed for the PCOS machines consisting of the Election Management System (EMS) and the PCOS firmware⁴⁴ applications. These applications are computer programs, defined as "set[s] of instructions expressed in words, codes, schemes or in any other form, which is capable when incorporated in a medium that the computer can read, of causing the computer to perform or achieve a particular task or result,"⁴⁵ that are protected by our laws on copyright from the moment of their creation.⁴⁶

The original works protected by the law on copyright are listed in Sec. 172 of RA 8293 otherwise known as The Intellectual Property Code of the Philippines, to wit:

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.)

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"⁴⁷ that also includes the PCOS hardware, canvassing system and servers listed in Annexes "E" and "E-1" of the Deed of Sale neglects the fact that this proprietary software is a bundled software "that is sold together with hardware, other software, or services at a single price."⁴⁸ Hence, these proprietary software cannot be procured without the accompanying hardware on which they are embedded requiring the COMELEC to procure the PCOS hardware, canvassing system and servers along with the proprietary EMS and the PCOS firmware provided by respondent Smartmatic-TIM.

Consider that more than the PCOS machines and the other hardware, it is these software—the EMS and the PCOS firmware applications—that form the core and integral parts of the Deed of Sale between respondents. Without these applications, the PCOS hardware, the canvassing system and the servers, which petitioners assert can be sourced elsewhere, are but mere scraps of metals.⁴⁹

Explaining the function of the EMS, SLI Global Solutions explained, as follows:

The Smartmatic EMS is used to create all the base components of an election definition.⁵⁰ The application has the ability to either create election components singularly using manual labor interface or in a more automated way, in which files containing many individual components can be imported by the system and laid out into the system's database structure. The application makes the needed associations of offices, candidates, parties and contests to create the election. The EMS outputs data files that are used to customize each CCS within the voting system. The EMS also creates output files containing the data needed by the Dominion EED⁵¹ to create the election's ballot styles, compact flash cards that are customized for each PCOS used in the election, as well as iButton⁵² that are needed by poll workers to access the PCOS.⁵³

In other words, the EMS dictates 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. Plainly, 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.

Thus, the EMS application which has been manufactured, configured and customized by Smartmatic-TIM⁵⁴ to fit the needs of Philippine elections—and more importantly, tested and tried in a successful Philippine elections—is protected by our intellectual property laws and recognized as the intellectual and proprietary product of Smartmatic-TIM. Since this particular program cannot be obtained from any source other than Smartmatic-TIM, any agreement that involves the purchase of this EMS application from Smartmatic-TIM is a procurement that does not require the conduct of a competitive bidding under Sec. 50(a) of RA 9184.

With time and budgetary constraints, the requirements of the technology-neutral principle of our government and the more supreme endeavor to protect the sanctity of our ballots must be balanced. Relying on an already tested system is better than taking a chance on a supplier offering a new untested AES, with different software and hardware components, that could possibly turn out to be of lower standard in light of the limited budget available and the short period remaining before the 2013 elections.

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 existence of the condition under Sec. 50(a) of RA 9184 justifying the exemption of the Deed of Sale from competitive bidding, the Deed of Sale is likewise exempt under Sec. 50(c) of RA 9184. For the condition provided under Sec. 50(c) of RA 9184 to exist, three elements must be established:

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

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 proprietary software that cannot be used, redistributed, or modified without the permission of Smartmatic.⁵⁵ This software, as bundled with the PCOS firmware⁵⁶ and the PCOS hardware, is owned and distributed exclusively by respondent Smartmatic-TIM. The distribution and sale of this Smartmatic-TIM bundled software have not been licensed to any other persons or entities but exclusively retained 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, petitioners do not deny the statements made by respondent Smartmatic-TIM during the oral arguments that it has no sub-dealers⁵⁷ and there are no other persons selling the subject Smartmatic software and hardware,⁵⁸ much less selling them at prices lower than that offered by Smartmatic-TIM under the Deed of Sale questioned in the case, viz:

JUSTICE VELASCO:

x x x Is SMARTMATIC TIM the exclusive manufacturer or distributor or you can call dealer of the hard and software that we used in the May 2010 elections and which are now subject of this litigation?

SOLICITOR GENERAL JARDELEZA:

Yes, your Honor.

JUSTICE VELASCO:

Is there any other company that can lay claim to the right to use the hardware and software that was used in these elections?

SOLICITOR GENERAL JARDELEZA:

The SMARTMATIC machines used are own[ed] by the company SMARTMATIC. But you are right, Your Honor, there are other PCOS machines under different branch, owned by different providers that are in the market x x x.

JUSTICE VELASCO:

How about the software, does any other company make use of the same software that was used by SMARTMATIC in the last May 2010 elections?

SOLICITOR GENERAL JARDELEZA:

My understanding, Your Honor, is each vendor will have their own hardware and their own software.

JUSTICE VELASCO:

Does SMARTMATIC have subdealers here in the Philippines?

SOLICITOR GENERAL JARDELEZA:

I do not believe so, Your Honor.

JUSTICE VELASCO:

And do you believe that this purchase would be most advantageous to the government?

SOLICITOR GENERAL JARDELEZA:

Under all the circumstances, Your Honor, we submit so.⁵⁹ (Emphasis supplied.)

The existence of the third element—the want of any other supplier of a suitable substitute who can offer more advantageous terms to the government needs—is best understood in light of the following discussion.

It is plain from the Deed of Sale itself that the remaining 81,280 PCOS units, the EMS, the CCS servers, and their

corresponding software are offered by Smartmatic-TIM at PhP 1.8 billion in accordance with the original 2009 AES Contract, which set 50% of the lease price of Component I as the price ceiling.⁶⁰ This price is 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.

It is relevant to recall that for the bidding conducted for the automation of the 2010 elections, there was only one other bidder who passed the evaluation of the technical proposals, Indra Consortium. And for the lease of just 57,231 PCOS machines, as opposed to the 82,000 offered by Smartmatic-TIM, the Indra Consortium proposed the price of PhP 11.22 billion, or PhP 4 billion more than what was offered by Smartmatic-TIM. Needless to state, no other supplier can match the offer of Smartmatic-TIM which is bound to sell, not just lease, more than 81,000 PCOS units at only PhP 1.8 billion. It is, thus, fair to conclude that no other supplier offering a suitable substitute to the Smartmatic-TIM system at more advantageous terms to the government can match this price. Hence, 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.

Petitioners' argument that the insufficient budget allocated to the COMELEC by Congress and the limited time remaining before the conduct of the 2013 elections do not justify the exploitation of this alternative method of procurement allowed by law is inconsistent with the actual processes involved in the appropriation of an additional budget for the procurement and the entire competitive bidding process set by law. This misperception of the practical reasons considered by COMELEC may well cause a reversion to a manual election with all its evils that have been significantly, if not completely, removed by the technology supplied by Smartmatic-TIM.

Based on the bids submitted for the 2010 elections, the COMELEC is sure 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. Hence, the budget of PhP 7.96 billion allocated 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, is obviously not sufficient.

So let us assume that this Court favors the arguments advanced by petitioners and nullifies the procurement made under the Deed of Sale for not complying with the rule on the conduct of competitive bidding. This Court's Decision would be promulgated in June 2012, and probably received by the COMELEC and all concerned parties in early July 2012. Let us suppose that no motion for reconsideration will be interposed and COMELEC decides to conduct a competitive bidding pursuant to the general rule provided under Sec. 10 of RA 9184. For practical reasons, the COMELEC must, therefore, request for the additional budget needed for the procurement of a technically superior AES from a different supplier.

Hence, it is argued that the COMELEC should be able to convince Congress to grant its budget proposal for the 2013 automated elections,⁶¹ i.e., make an additional allocation for the 2013 elections through a special appropriations act, since, as will be revealed by a review of the facts, the budget for the 2013 automation has in fact already been approved via RA 10155, otherwise known as the General Appropriations Act of 2012,⁶² albeit not in the amount requested by COMELEC but at an amount lower than that suggested by the DBM. Parenthetically, the COMELEC must first be able to impress on the executive department the need for additional funds, considering that "Congress may not increase the appropriations recommended by the President (through the DBM) for the operation of the Government as specified in the budget."⁶³

Yet, let us assume that the DBM will be convinced of the need of additional funding for the automation of the 2013 elections and will actually endorse the allocation of additional funds; the allocation must then undergo the same legislative process required of all bills.

Like all appropriations, the special appropriation to augment the budget for the automation of the 2013 elections must originate from the House of Representatives.⁶⁴ Assuming, yet again, that there is a member of the House who will sponsor the bill for the special appropriation, the bill might be prepared, at the earliest, around mid-August 2012.⁶⁵ The bill is then filed for numbering and reproduction. Three days thereafter, the bill will be included in the Lower House's Order of Business for first reading.⁶⁶ After the first reading, it will be referred to the Appropriations Committee for discussion, evaluation, and even possibly, a public hearing.⁶⁷ The Committee may then propose an amendment to the bill and generate a report on it.⁶⁸ Upon the approval of the Committee Report, the bill will be transmitted to the Plenary Affairs Bureau and scheduled for second reading.⁶⁹ During the second reading, the bill is subjected to debates and amendments. The bill, as amended, will be reproduced and scheduled for a third reading for its approval. Considering all these steps, the preparation of, and the deliberations on, the bill could very well take up a good part of September 2012.

Yet, on top of our other assumptions, let us further assume that upon transmittal to the Senate, the process will be abbreviated by a certification from the President to dispense with the requirements of the reading of the bill in separate days⁷⁰ so that the bill is approved by the Upper House in the same month of September 2012. Assuming that no bicameral committee is created, the approved bill is then transmitted for the President's signature. Hence, the bill may become law at the end of the month. After the required publication,⁷¹ the special appropriations act increasing the budget for the automation of the 2013 elections could be effective October 2012.⁷²

By then, the Certificate of Availability of Funds required under the Administrative Code of 1987⁷³ may be issued and the COMELEC can finalize the bidding documents⁷⁴ which should include the technical specification for (an improved) technology required for the automation of the 2013 elections. Thereafter, a pre-procurement conference will be conducted to review, among others, the criteria for eligibility and the readiness for the procurement.⁷⁵ Next, the invitation to bid is prepared and advertised to inform prospective bidders of the procurement. The invitation must, hence, be posted in the COMELEC office and its website for seven calendar days and published in a newspaper of general circulation.⁷⁶ This can take up some weeks in November 2012.

Subsequently, a pre-bid conference will be called at least 12 days before the deadline of submission and receipt of bid to discuss with the prospective bidders the technical and financial component of the contract to be bid, as well as the eligibility requirement that must be complied with. The maximum allowable period from the first day of advertisement and the opening of the bids in case of the procurement of goods is 30 days.⁷⁷ It is, thus, reasonable to assume that the opening of possible bids for the technology needed for the 2013 elections will fall on December 2012.

From the opening of the submitted bids, the COMELEC⁷⁸ is given 15 calendar days⁷⁹ to evaluate the proposals and determine the lowest calculated bid or the highest rated bid.⁸⁰ Seven days after the determination of the

lowest calculated bid, a post-qualification evaluation is conducted to verify, validate and ascertain all statements made and documents submitted by the bidder with the Lowest Calculated Bid.⁸¹ The bidder that successfully hurdles this step will be declared the "Lowest Calculated Responsive Bid."⁸² Note that the post-qualification evaluation can last up to 30 calendar days.⁸³ Hence, it can be reasonably inferred that the completion of the post-qualification evaluation and the determination of the winning bidder, if any, who will be awarded the contract will fall in January 2013 or barely four months before the 2013 elections.⁸⁴

Assuming that the winning bidder eventually awarded the contract for the automation of the 2013 elections is a supplier different from respondent Smartmatic-TIM, it is just practical to customize and tailor-fit this new system to the distinctive nuances of Philippine elections and, more importantly, educate the electorate and the concerned poll officers on the process that will be observed during election day. Note that Smartmatic-TIM and the COMELEC had ten months to do just that before the 2010 elections. Yet various problems, both caused by human errors and the shortcomings of the system, are still ventilated before this Court. Will the shorter period of 4 months be better than the clearly insufficient ten-month period at anticipating and remedying such problems? To answer in the affirmative is naiveté in the extreme that could usher in confusion and, ultimately, failure of our exercise of the right of suffrage. In fact, all the foregoing presents a perfect scenario where bidders actually submit proposals to contract with the COMELEC and one of them is eventually declared to have successfully passed the technical, financial and post-qualification tests. What will happen if this ideal scenario does not transpire? Are we to go back to manual elections?

As a matter of practical convenience, courts of law have applied laws in a manner that would avoid consequential mischief.⁸⁵ The failure of our elections or a reversion to the snail-paced and problem-laden manual method of election will not only be a mischievous, but a disastrous, consequence, if this Court shall refuse to recognize that, given the time and the budget for the 2013 elections, no supplier can provide a suitable substitute for the Smartmatic-TIM AES at more advantageous terms to the government so that the COMELEC's application of the allowed alternative method of procurement is justified.

The assailed Deed of Sale promotes economy and efficiency,

and obtains for the most advantageous price

In light of the foregoing discussions that explain the conditions that allow respondent COMELEC to enter into a contract analogous to Direct Contracting as an alternative method of procurement under RA 9184, the economy and efficiency of the avenue chosen by respondent COMELEC are readily apparent, especially as it cannot be denied that the Deed of Sale offers the most advantageous price obtainable for the government.

As stated, Smartmatic-TIM offered, and still offers, the least expensive AES for the automation of Philippine elections. It is selling more than 80,000 units of PCOS hardware and software at less than 50% of the original lease price for the same number of units, which was the lowest responsive bid for the automation of the 2010 elections. The only other bid that passed the technical evaluation, the Indra Consortium, offered to the government the lease of an AES consisting of only 57,231 PCOS units at a price PhP 4 billion more expensive than that offered by Smartmatic-TIM. Added to this, Smartmatic-TIM 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.

If, as argued by petitioners, the government can do better than settle on the Smartmatic-TIM AES and pursue the assailed Deed of Sale, COMELEC requires more money than what it has been provided by the Congress for the entire election process slated in 2013 to ensure that the competitive bidding sought by petitioners will not turn out to be a futile and empty exercise. Yet, as previously illustrated, obtaining more funds from Congress and going through with competitive bidding 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.

Certainly, COMELEC cannot produce the components of an AES out of thin air, which is what the COMELEC is wont to do given the budget earmarked by Congress that falls at least PhP 5 billion short of the original amount requested, leaving only PhP 2.2 billion for the procurement of a new and, as demanded by petitioners, flawless AES for the 2013 elections. Even if the COMELEC has the capacity to execute such a financial miracle, it has but a few months to pull it off.

On one hand, the COMELEC has the awesome responsibility to conduct and ensure an orderly and peaceful election. On the other hand, Sec. 1 of RA 9369 provides that "[t]he State recognizes the mandate and authority of the [COMELEC] to prescribe the adoption and use of the most suitable technology of demonstrated capacity taking into account the situation prevailing in the area and the funds available for the purpose." Given these twin postulates, it is, at once, understandable why COMELEC decided on an alternative method allowed under the law that warrants "the most advantageous price for the government" in the most efficient manner, within the least of time. Sticking it out with Smartmatic-TIM may be far from ideal. But grave abuse of discretion cannot surely be laid on the doorsteps of the COMELEC for choosing an already tested AES rather than gamble the nation's fate on a new, untested AES, if any, which its available money can buy from a different supplier, just a few short months before the elections. Grave abuse of discretion denotes a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. Any suggestion that COMELEC acted under the premises out of whim is too simplistic and sweeping for acceptance.

As pointed out by petitioners, the elections occasion the exercise by our citizens of their fundamental right to choose the persons who will hold the reins of our government and lead its charge for a better future. It is, therefore, much safer, if not better, to err in the conservative than wager our nation's future on a new and experimental AES each time glitches occur in the system used in an election—glitches that are actually attributable to poll officers—which have never been proved to cause an erroneous proclamation of an un-elected candidate, nor cause cheating, terrorism and other fraudulent election activities. The glitches have in fact already been remedied.

Parenthetically, there is no such thing as a perfect system and to search for one is a futile exercise. The best that can be hoped for is a system that reflects the choice of our electorate and that was what the Smartmatic-TIM system did. As resolved by the COMELEC, it is, therefore, not prudent to switch to another AES in the hopes of improving on the Smartmatic-TIM system in, again, just a few months before the elections with such limited funds.

The Court, in my view, cannot just set aside the familiarity of the electorate and the concerned poll officials with the Smartmatic-TIM system that abbreviates the learning curve of all the parties concerned and so minimizes the

errors attributable to the variations and differences offered by a new AES. If the aim is, in fact, the approximation of a perfect election system, sufficient time must be allocated for the education of the voters, the election officials and the candidates in the workings and processes of the system. Needless to state, a few months is not enough to gain familiarity, let alone a thorough knowledge of another AES whose true worth is yet to be tested on the ground.

Indeed, the method of procurement chosen by COMELEC, given the prevailing conditions and the constraints imposed on COMELEC, provides the most efficient and economical manner 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.

I submit that all the conditions that allow respondent COMELEC's resort to an alternative method of procurement under RA 9184 exist, and COMELEC's execution of the assailed Deed of Sale pursuant to its recognized authority to "use the most suitable technology of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose" is justified by a number of reasons. The respondents themselves found it fit to incorporate these reasons in the deed in question:

WHEREAS, after public bidding, the [COMELEC] and [SMARTMATIC-TIM] had executed on 10 July 2009 a Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections ("AES Contract") x x x;

WHEREAS, [COMELEC] had already used the automated election system ("AES") supplied by [SMARTMATIC-TIM] for the May 10, 2010 elections, and [COMELEC] had already invested approximately 2/3 of the cost of the hardware and software comprising the AES under the AES Contract which was on a "lease with an option to purchase" basis;

WHEREAS, Congress has allotted a limited budget of P7,000,000.00 for the use of [COMELEC] for the conduct of the next elections on May 13, 2013, which is **insufficient to purchase and/or lease a new set of voting machines and other hardware and software different from the AES supplied by (SMARTMATIC-TIM);**

WHEREAS, [COMELEC], **including the Board of Election Inspectors and Board of Canvassers, the Filipino voting population and other election stakeholders have a familiarity, working experience and general acceptance of the AES used during the May 10, 2010 elections;**

WHEREAS, the resolutions in electoral protest cases confirm or validate the accuracy of the results and the reliability of the AES used during the May 10, 2010 elections x x x.

The advantages and benefits from the purchase of the hardware and software in question are further amply elucidated and satisfactorily demonstrated in COMELEC Resolution No. 9376:

WHEREAS, in preparation for the public bidding of the AES for the 2013 elections, the Commission submitted its proposed budget to the Department of Budget and Management in the total amount of Php 10,436,300,399.00 for

the procurement of the 2013 AES through lease;

WHEREAS, for fiscal year 2012, the Congress approved the amount of Php 7,000,000,000.00 for the procurement of the 2013 AES;

WHEREAS, since there are several essential services that have to be subjected to public bidding in the year 2012 to ensure that the same are in place either by December 2012, or by the start of 2013, the Commission is constrained to utilize its 2012 budget for the public bidding of, and award of contracts for, said essential services in order to avoid delays that will adversely affect the preparations and implementation of the AES project;

WHEREAS, due to the limited budget approved by the Congress for fiscal year 2012, there is a need to determine all available means of acquisition that the Commission may take to ensure the successful implementation of the AES in 2013;

x x x x

WHEREAS, the COMELEC Advisory Council, in its Resolution No. 2012-001 dated January 12, 2012, recommended, among other things, that for any purchase of the AES, consideration must be given by COMELEC to the cost of storage, facility for storage, reliability of hardware over time, and cost of money;

WHEREAS, to determine the available means of acquisition in relation to the 2012 budget approved by the Congress, the Commission took into consideration the above CAC recommendations, including the number of voters in a clustered precinct, the total number of precinct-level counting machines to be deployed, the services needed, and the required budget for the purpose;

WHEREAS, on the basis of the lowest calculated responsive bid obtained during the public bidding conducted in connection with the May 10, 2010 automated national and local elections, the following modes were ascertained:

No. of voters per precinct	No. of machines	Total cost
600	125,000	12,854,731,547.00
700	117,000	12,138,033,856.00
800	102,000	10,816,666,036.00
1,000	82,200	9,062,460,242.00

WHEREAS, said amount of Php7,000,000,000.00 as approved by the Congress is insufficient to procure the AES through public bidding under any of the above modes;

WHEREAS, only the amount of approximately Php4,802,870,000 is necessary should the Commission proceed with the exercise of the Option to Purchase, and with the conduct of public biddings for other services;

WHEREAS, the cost for the deployment of hardware, official ballots and ballot boxes, an activity that shall be

undertaken by the Commission, is estimated, based on the expenses incurred during the 2010 elections, at P2,080,000,000;

WHEREAS, the estimated over-all total cost for technology (hardware and software), all services, and deployment is Php6,882,870,000, which amount is within the Php7,000,000,000.00 budget approved by the Congress;

WHEREAS, although Systest Labs, Inc. (now SLI Global Solutions), the established International Certification Entity that reviewed the AES for the 2010 elections, has determined that the critical and major issues on the Voluntary Voting System Guidelines (VVSG) of the 2010 AES have already been resolved, there are fixes and enhancements being requested by the Commission on the AES to be used in the 2013 elections;

WHEREAS, the final Scope of Work for the enhancements being requested by the Commission on the AES to be used in the 2013 elections has already been completed;

WHEREAS, the Commission's Project Management Office for the May 13, 2013 National and Local Elections has submitted an Inspection Report showing that the PCOS used in the May 10, 2010 elections are properly stored at the Cabuyao Warehouse where said PCOS are currently stocked.

In view of the foregoing, I find that respondents have convincingly shown that said acquisition would definitely be most advantageous to the government.

Compliance with Minimum System

Capabilities under RA 9369

Petitioners contend that the deficiencies observed during the actual operation of the PCOS machines in the 2010 elections would suffice to nullify the Deed of Sale over the remaining PCOS machines. I disagree.

The issue on the system's qualification based on Sec. 6 of RA 8436, as amended,⁸⁶ has earlier been raised in Roque, Jr., in which petitioners maintained that "[t]he PCOS machines [thus] offered by private respondents x x x do not satisfy the minimum system capabilities set by [RA] 8436 (as amended by [RA] 9369)."⁸⁷ Disposing of that contention in Roque, Jr., the Court held:

From the records before us, the Court is fairly satisfied that the Comelec has adopted a rigid technical evaluation mechanism, a set of 26-item/check list criteria, x x x to ensure compliance with the above minimum system capabilities.

The SBAC Memorandum of June 03, 2009, as approved by Comelec Res. 8608, categorically stated that the SBAC-TWG submitted its report that the TIM/Smartmatic's proposed systems and machines PASSED all the end-to-end demo tests using the abovementioned 26-item criteria, inclusive of the accuracy rating test of at least 99.955%.

x x x x

Given the foregoing and absent any empirical evidence to the contrary, the Court, presuming regularity in the

performance of regular duties, takes the demo-testing thus conducted by SBAC-TWG as a reflection of the capability of the PCOS machines x x x.

Apropos the issue immediately above, the Court's disposition thereon has the force of res judicata.

Res judicata comprehends two distinct concepts: (1) bar by a former judgment; and (2) conclusiveness of judgment.⁸⁸ It is the latter, conclusiveness of judgment, which is relevant to the case at bar.

Conclusiveness of judgment states that "a fact or question which was in issue in a former suit and was there judicially passed upon and determined by a court of competent jurisdiction, is conclusively settled by the judgment therein as far as the parties to that action and persons in privity with them are concerned. The fact or question cannot be again litigated in any future action between such parties or their privies, in the same court or any other court of concurrent jurisdiction on either the same or different cause of action, while the judgment remains unreversed by proper authority."⁸⁹ The ruling in Roque, Jr. has yet to be overturned. Accordingly, this Court's pronouncement thereat as to the compliance of the offered PCOS machines with the minimum system requirements⁹⁰ set forth by law operates as a judgment that is conclusive upon that particular matter.

A view, however, has been advanced that the AES had yet to be subjected to various acceptance tests. Petitioners now come before Us presenting a number of reported 2010 problems or glitches which cropped up after the Decision in Roque, Jr. had been promulgated.

To support their posture about COMELEC gravely abusing its discretion when it decided to purchase the PCOS machines and allied paraphernalia, petitioners present quite a number of issues which, at first glance, tend to make a plausible case of grave abuse of discretion on the part of COMELEC. The Court, I believe, should no longer delve into and belabor these purely factual issues, relating as they do to the manner the 2010 elections were conducted. Also, supporting this particular call is the assurance by the Solicitor General, representing the COMELEC during the oral arguments, that major glitches and shortcomings adverted to by the petitioners have been identified and corrected⁹¹ as part of the COMELEC's preparations for the 2013 electoral exercise. Absent compelling proof to the contrary, the Court must accord positive credence to the assurances of COMELEC. Members of the Commission are accountable officers, if not to the law, then to history. They have in their favor the presumption of regularity and good faith.⁹² If only for these factors, the Court would be extending to COMELEC the benefit of the doubt.

Lest it be overlooked, the COMELEC and Smartmatic-TIM ably explained the reasons for the occurrence of the lapses and glitches complained of. The Post-Election Report of CAC corroborates the explanation. Moreover, even the findings of the CAC, the TWG and the SLI Global Solutions,⁹³ an international certification body, support a conclusion that the problems thus encountered in the 2010 elections are not entirely attributable to the system itself. And to recall the CAC's final verdict, "the AES [offered by Smartmatic-TIM] ultimately did work."⁹⁴

Security Features of the AES

Among the security features, the absence of which petitioners advert to in their bid to nullify the subject deed of sale, are:

1. Disabled UV mark detection function;
2. CF Card configuration problem;
3. Restrictive source code review environment;
4. Random Manual Audit result variance;
5. Open console port found in the PCOS machine;
6. Non-demonstration of the re-zero function;
7. Lack of a voter-verified paper audit trail; and
8. Absence of a digital signature.

To petitioners, the foregoing alleged problems and glitches evince a grave disregard of the minimum requirements set forth in Sec. 6 of RA 8436, as amended, which pose a threat to the integrity and veracity of the results of the 2010 elections.

For their part, respondents insist that these problems were identified prior to the conduct of the 2010 elections and, in fact, had already been addressed through the implementation of corrective measures, e.g., the purchase of hand-held UV lamps to replace the use of the UV detection capability of the PCOS, among others, which will be discussed below. Petitioners, however, would have the Court believe that the remedial measures implemented by the COMELEC during the 2010 elections are not sufficient to remedy the reported deficiencies. They also point out that these alleged flaws are inherent in the hardware and software which prove that the AES lacks the demonstrated capability required by law, thus warranting the invalidation of the sale.

Again, I do not agree. The aspects of the AES to which respondents applied remedial measures during the conduct of the 2010 elections, to me, do not affect the integrity and reliability of the system used and will be used. I shall explain.

Disabled UV mark detection function

Petitioners ascribe fault upon the AES because of the non-use of the UV verification function of the PCOS machines. Had this function been used, the PCOS machines would have automatically detected the authenticity of the ballots upon being fed into the machine by the voter. This function, however, was disabled by Smartmatic-TIM upon the order of the COMELEC.

To explain the reason behind disabling the UV, respondents say that, contrary to petitioners' position, the PCOS machines have UV-reading functionality so that the machine itself would automatically confirm the authenticity of a ballot. However, in the 2010 elections, tight deadlines brought about by legal impediments (a TRO, for instance was issued in the Roque, Jr. case) necessitated fast-tracking of the UV-mark printing with less UV-ink concentration, resulting in unreliable UV detection. As aptly explained in the Oral Arguments,⁹⁵ the printing had to be rushed. To expedite the printing process, they had to reduce the amount of UV ink, because if less ink would

be injected by the printer, then the time it would take for the printer to complete the printing process would be shorter.⁹⁶ This reduction of the amount of ink to be injected caused insufficient ink concentration on the ballots. Thus, during the Fast Testing and Sealing (FTS), the PCOS machines were unable to read the UV mark due to this inadequate amount of ink concentration, causing the PCOS machines to reject authentic ballots. This rejection of authentic ballots due to the insufficiency of the UV ink concentration, plus the fact that printing had already begun and they were working under tight deadlines, prompted the COMELEC to decide to deactivate the UV mark detection feature of the PCOS machines, and, as a remedy, the COMELEC procured handheld UV lamps for each polling precinct's Board of Election Inspectors (BEI) to use on election day to verify each ballot's authenticity before handing it to a voter.⁹⁷ Respondents add that if printing was done properly and in a timely manner, nothing can prevent the COMELEC from utilizing the UV scanning capability in future elections. In any event, there are other means implemented by COMELEC to verify the authenticity of the ballots, such as the unique barcodes which made sure that the PCOS machines will recognize and accept each ballot only once. This feature, together with the UV marking, prevented the acceptance of fake ballots.

It is also well to note that this problem with the UV mark detection is not attributable to the machine. It was sufficiently established by respondent Smartmatic-TIM that the PCOS machines have a UV detection capability, only that it was not utilized. Also, the UV mark detection is not a statutorily mandated requirement, it merely being an additional AES security feature exacted by the COMELEC.

CF Card issues

With regard to the data storage and encryption procedures, an allegation has been made that the CF Card, upon which the data collected from the ballots are stored, is not a "Write-Once, Read-Many" (WORM) device. Thus, there is a possibility that different files may be stored in the CF card other than those scanned by the PCOS after the ballots were fed by the voters.

This appears to be a serious matter which can affect the integrity of the results of the elections, for, if the results generated were not based on the actual files scanned by the PCOS from the ballots, the machines will fail to transmit the authentic results. I, however, give credence to the explanation offered by respondents, which is also supported by the Final Report of the Carter Center. Respondents explain that the main CF Card cannot be a WORM device, because there are several operations in the election process where the procedure and data must be written and recorded several times, and this will not be possible if the main CF Card is a WORM device. The second CF Card, however, is a WORM device, the function of which is to store a backup of the results in the particular PCOS machine. As stated in the Carter Center's report, "After voting closed and results were transmitted to the canvassing server from the PCOS, the machine was programmed to automatically back up the results to the blank compact flash (CF) card in the administrator slot (the 'second' or alternate card). This card is a blank 'write-once/read-many' device that ensures that only one set of results can be stored on the card."⁹⁸

On the issue of the alleged misconfiguration of the CF card, petitioners insist that the CF Cards were defective because during the FTS, the PCOS improperly read the side of the ballot where the local races were reflected. This problem was caused by COMELEC's decision to change the layout of the ballot's local side from single to double space and further exacerbated by the fact that this change was belatedly communicated to Smartmatic-TIM. Hence, a week before the elections when the FTS was being conducted, the local side of the ballot was not

properly read by the machine because the CF card was configured to read a single-spaced ballot style. To address the problem, Smartmatic-TIM retrieved the CF cards deployed as well as ordered additional ones, because not all of the CF cards from each precinct could be retrieved on time. The CF cards were then re-configured and re-deployed. There were no reported problems afterwards.

This, to me, is a clear case of lack of coordination between the two entities—Smartmatic-TIM and COMELEC; it has nothing to do with the efficiency of the PCOS machine. As it were, it was not a case of misconfiguration of the CF Card, but a reconfiguration necessitated by the spacing change in ballot style.⁹⁹

Restrictive environment for the source code review

RA 9369 provides that "[o]nce an AES technology is selected for implementation, the [COMELEC] shall promptly make the source code¹⁰⁰ of that technology available and open to any interested political party or groups which may conduct their own review thereof."¹⁰¹ In compliance with this, the COMELEC had invited interested political parties and groups to a meeting to discuss the manner of the source code review.¹⁰² The CAC and COMELEC's Technical Evaluation Committee (TEC) issued a joint resolution, recommending a set of guidelines for the conduct of the review, upon request of the COMELEC, including a rule that the source code cannot be taken out of the COMELEC's premises. The latter subsequently prepared a room with two (2) computer terminals in its Project Management Office for the conduct of such review. The Center for People Empowerment and Governance, as well as other groups, found the guidelines to be too stringent and the time for review too short or too near to the coming elections such that if there were any findings, there would not be enough time to modify the source code.¹⁰³ For petitioners, this is a blatant violation of RA 9369. I, however, have a different opinion.

Here, what the law required of the COMELEC was to make the source code open to review, which it did. Only that, and rightly so, stringent restrictions were imposed. In its Post-Election Report, the CAC gave the following reasons why the source code was to be kept only within COMELEC's premises: (1) it would violate the intellectual property rights of Smartmatic-TIM; and (2) it would make it easier for computer hackers to exploit vulnerabilities in the system, if any.¹⁰⁴ The reason behind the restriction is valid; thus, the COMELEC cannot be faulted for having employed such measures to minimize, if not totally prevent, the source code from being accessed by unauthorized persons. Unauthorized access to the source code can open the entire AES to tampering, cheating and other unpredictable danger that hackers or computer programmers can do in order to destroy the reliability of the system, or worse, prevent the use of the AES itself. Thus, protection and preservation of the source code are paramount considerations in the automation of the elections. Whether the political parties or interested groups would avail themselves of that opportunity, albeit in a controlled environment, is discretionary upon them. I cannot favor petitioners' implied plea for a relaxation of the procedure for examining the source code just to indulge the desire of these groups for leniency in the source code review. To do so would open the very brain of the AES to the possibility of being infected, which may ultimately cause a defect in the system, or worse, its death. The COMELEC is not under any obligation to ensure that these groups will conduct a review. Its only mandate, as clearly set forth in the law, is to "promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review thereof."¹⁰⁵

In addition to the foregoing, this is an issue not attributable to the AES itself as this pertains to the procedure and restrictions imposed by the COMELEC, CAC and TEC on the system for the source code review. The restrictive

environment created for the review of the source code by the COMELEC has nothing to do with the PCOS machines or the AES, but more with the desire of the COMELEC to preserve the integrity of the code through the implementation of strict security measures. The role of the source code in the AES is too important to be put at risk just to give in to the desires of these groups that refuse to conduct the review merely because of tight security.

Random Manual Audit result variance

Petitioners argue that based on the Report of the TWG-RMA, the system count resulted in an accuracy rate of only 99.6%, or 80 votes erroneously counted for every 20,000 votes, when the TOR¹⁰⁶ and other bid documents stipulated an accuracy rate of 99.995%.

For their part, to which I agree, the COMELEC and Smartmatic-TIM explained that what the TWG-RMA meant in its conclusion referred to above was that the electronic and manual counts coincided 99.6% of the time.¹⁰⁷ The PCOS machines were tested four (4) times by the Special Bids and Awards Committee (SBAC) and TWG, and in all those times, the accuracy rating of reading the ballots was 100%.¹⁰⁸ Even SLI Global Solutions reported that the PCOS had a 100% accuracy rate.¹⁰⁹ Also, the validation teams discovered that:

In most cases of large variances, errors were due to human factors such as the inability of the [Random Manual Audit Team] (RMAT) to distinguish "over votes" and "ambiguous markings." There were also instances when the transposition errors were due to miscopying the numbers from the ARs to the Minutes/Reports, miscopying the Taras, as well as when the numbers are mixed up or zeroes are dropped. Some RMATs even resorted to using "liquid paper" or ["]snowpake" in trying to undo errors, rendering the ARs and Minutes/Reports almost unreadable. Another case, x x x only one RMAT conducted the RMA in several precincts so that the ARs and Minutes/Reports were mixed up resulting in the wrong computation of the manual counts.¹¹⁰ x x x

This only goes to show that the machine count is superior to the manual count because the machine will only count the way it is programmed to, while manual counts are subject to a number of factors which ultimately lead to the commission of errors, as what happened during the RMA. This inference is reflected in the conclusion presented by the TWG, viz:

If the Random Manual Audit is to make sure of the accuracy of election results and preserve electoral integrity, then it must be clearly pointed out from the beginning that the margin of variance is a computation of the difference between the manual count and the machine count. Hence, it is a test between man and machine. While the tolerance level set for the accuracy of the machine is a test that involves only the machine. The margin of variance indicated by the NSO as equivalent to 1% is based on the accuracy rate of 99% (the allowable rate used in statistical analysis) cannot thus be used as the basis of comparison to the 99.995% accuracy rate of the PCOS machine set by the Request for Proposals (RFP) as a requirement for the Bidding Process of the AES technology.¹¹¹ (Emphasis supplied.)

Additionally, the Carter Center, in its Final Report, stated that:

Despite delays, once completed, the RMA did not show significant discrepancies in results. As reported on May

29 by the Parish Pastoral Council on Responsible Voting (PPCRV), which was responsible for reporting on the RMA to COMELEC, with 1,063 audits completed, "minimal variance" had been determined. There was 100 percent accuracy in 80 percent of RMA tallies on a candidate-by-candidate basis, while 6 percent of precincts recorded single digit variances. The largest discrepancy reported between digital and manual results was 99:352 on the printed [ER] as compared with 253 on the audit report. Because of the similarity in numbers, however, it seems likely that this was due to a transcription error made by the BEI.¹¹² (Emphasis supplied.)

The Final Report also stated that according to the COMELEC, discrepancies were generally attributable to errors in manual transcription by the RMA team when recording the totals to the AES and RMA tallies.¹¹³

This, in my view, is an issue not innate in the machines, but inherent in a system where what are to be compared are machine results and results from a manual count performed by the RMATs. Ergo, there can be no other conclusion than that the AES meets the required accuracy rate, and there are these foregoing reports¹¹⁴ and tests¹¹⁵ upon which this conclusion is based.

Existence of a Console Port

Petitioners strongly question the existence of a console port in the PCOS machines which allowed ordinary laptop computers to be attached and, even without a username or password, access the machine's operating system. This, according to them, made each PCOS machine susceptible to unauthorized access. In fact, the Senate Joint Forensic Team (SJFT), in its Final Report to the Senate, said that it was able to access the PCOS using an ordinary laptop.

Respondents concede that there exists a console port in the machine through which a device may be attached in order to gain access to the machine. Respondents explain, however, that these ports were mechanically sealed or disabled¹¹⁶ during the 2010 elections. Also, in the Oral Arguments, respondents manifested that, to address the complaints regarding the existence of these ports, even though there were no recorded incidents that indeed PCOS machines were accessed through such, the port shall be both mechanically and electronically disabled as well so that the software will no longer allow access to the PCOS through the port. The console port will no longer be functional so to speak.¹¹⁷

To me, the measures that respondents commit themselves to employ this coming 2013 elections are sufficient to address the complaints of petitioners as regards this matter. It must also be noted that there were no reported incidents of unauthorized access of the machines through these ports and that the poll watchers and BEIs are there to see and ensure that no such access is done.

Voter-Verified Paper Audit Trail

Petitioners insist that the AES lacks a voter-verified paper-audit trail which is expressly required by law. A voter-verified paper-audit trail consists of physical paper records of voter ballots as voters have cast them on an electronic voting system.¹¹⁸ This is used as a record of each set of votes cast by the voters so that, after the elections, the electronically generated results can be audited through a comparison with these paper records.

Anent this issue, it is important to note that the AES in question is still paper-based, unlike a Direct Recording Electronic¹¹⁹ election where the vote is cast directly on a machine by the use of a touchscreen, touchpad, keypad or other device, and the machine records the individual votes and calculates the vote totals electronically;¹²⁰ thus, without a printed receipt, it leaves no paper-trail which can be utilized for audit purposes.¹²¹ In the 2010 elections, what were automated were only the counting, tallying, canvassing and consolidation of results, excluding the casting of votes by the voters. Thus, even without a form of "receipt" which reflects the choices made by the voter, still, the availability of the ballots themselves is sufficient to allow an audit of the election results generated by the AES. The PCOS also has an available screen-display feature that allows voters to verify how the PCOS had read and interpreted their ballot, a capability that also provides for notification of null votes. At the request of COMELEC, however, this feature was disabled in the 2010 elections,¹²² because to have the voters view their votes cast on the LCD screen would further aggravate the already lengthy queues in each polling precincts. Plus this is a mere additional feature which is not required by law.

During the 2010 elections, there were not only electronic records generated by the PCOS machines. As mentioned above, there also existed ballots actually filled in by the voters, which were securely stored in ballot boxes. Thus, the alleged lack of voter-verified paper-audit trail is not a glitch in the PCOS machines. In fact, this matter does not pose a problem, since the system adequately provides for materials, i.e., the ballot themselves, with which the electronically generated results can be compared.

Re-Zero Function

Petitioners fault the system for such instances during the 2010 elections where the COMELEC noticed that some PCOS machines transmitted only ten (10) results. This means that the machines transmitted results different from those actually obtained from the ballots fed into the PCOS machines.

Without knowing the procedure for transmission and the source from which the 10 results originated, it may appear that the AES does have a glitch that affects the integrity and accuracy of the election results. However, respondents COMELEC and Smartmatic-TIM were able to enlighten the Court as to the cause of this problem.

A week before the 2010 elections, the COMELEC and Smartmatic-TIM used ten (10) test votes to conduct the FTS of each PCOS machine. These results were stored in the CF cards of the PCOS machines. Thereafter, the BEIs were required to use the transmit function of the PCOS machines to erase the files obtained during the FTS. Some BEIs, however, failed to activate this transmit function; hence, on election day, when the results were transmitted to the CCS, COMELEC noticed that some of the transmitted results were only ten (10), reflecting the votes counted during the FTS.¹²³ Respondents then identified that the re-zero function was not activated causing the ballot images stored in the CF cards during the FTS to be retained, instead of being deleted, and consequently, transmitted to the CCS.

As can be readily seen, this re-zero issue was caused by the BEIs' failing to activate the transmit function. Also, petitioners did not present any objection to the explanation made by respondents as well as to their conclusion that this was due to the BEIs' error. Nor did petitioners present a different explanation for the non-activation of the re-zero function. As such, this problem is clearly not a bug in the software or a glitch in the system but a failure on the part of some BEIs to execute their task of re-zeroing the CF cards. Clearly, this is a case of human error, not

a defect inherent in the AES. To remedy this, respondents manifested that they intend to automatically re-zero the machines upon closure of the FTS.

Digital Signatures

Lastly, as regards the digital signatures, Sec. 25 of RA 9369 reads:

Sec. 25. A new Section 30 is hereby provided to read as follows:

Sec. 30. Authentication of Electronically Transmitted Election Results. – The manner of determining the authenticity and due execution of the certificates shall conform with the provisions of [RA 7166] as may be supplemented or modified by the provisions of this Act, where applicable, by appropriate authentication and certification procedures for electronic data, electronic documents and electronic signatures as provided in [RA 8792] as well as the rules promulgated by the Supreme Court pursuant thereto.

Thus, Sec. 25 of RA 9369 requires a form of authentication which is concretized in the form of a digital signature.

A digital signature¹²⁴ is an electronic signature¹²⁵ consisting of a transformation of an electronic document or an electronic data message using an asymmetric or public cryptosystem,¹²⁶ such that a person having the initial untransformed electronic document and the signer's public key can accurately determine: (1) whether the transformation was created using the private key¹²⁷ that corresponds to the signer's public key;¹²⁸ and (2) whether the initial electronic document had been altered after the transformation was made.¹²⁹

An electronic signature may come in two forms: a distinctive mark, characteristic or sound in electronic form; or a method or procedure employed by a person with the intention of approving or authenticating an electronic document.

COMELEC Resolution No. 8786¹³⁰ shows the process by which the BEI Chairperson and the BEIs utilize the machine's digital signature through the use of a proprietary token known as the iButton, which contains a unique PIN or password (private key) assigned to the specific voting precinct, and any data that would not comply with the digital signatures are simply not canvassed.¹³¹ This procedure was followed in the 2010 elections.

For the 2010 elections, each PCOS machine contained a built-in certificate that was used to encrypt and digitally sign the election returns (ERs) upon transmission to the CCS. The digital signatures for the 2010 elections are generated by the RSA algorithm, a 1,024-bit private key. These digital signatures are used through the concurrence of the following: the digital certificates encrypted or programmed in the iButtons, the signature embedded in the CCS servers, the encryption of the signature in the internal memory of the PCOS machines, and 8-digit PINs used to activate the PCOS. The PCOS can only be started with the use of the CF card, the iButton and the PINs which should be specifically matched with each other and assigned to a particular precinct. When the polls are closed through the use of the same iButtons and PINs, the ERs will be generated and the PCOS will also generate a hash code,¹³² which will be encrypted using the RSA asymmetric encryption algorithm and the digital certificate in the iButton which will be appended to the ER file. Thereafter, the file is encrypted using a 256-bit symmetric key previously loaded to each machine by Smartmatic-TIM. With this procedure, the ERs are

digitally signed and encrypted giving them the integrity, confidentiality and non-repudiation properties and are, thus, secure for transmission. Once completed, the ERs are transmitted to the CCS, the Central server and the KBP server. The CCS, to which a digital certificate verification program was previously loaded by Smartmatic-TIM, together with the encryption key and the digital certificates, will now verify the ERs transmitted through decryption. If the transmitted ERs pass this rigid verification procedure, the results will be imported to the databases and it is only then that the results will be canvassed.¹³³ The Chairperson of the BEI or the person authorized by the COMELEC, in effect, digitally signs¹³⁴ the ER with the PCOS machine's unique digital signature automatically upon transmission,¹³⁵ and the CCS verifies the authenticity of the digital signature borne by each ER transmitted.

With the foregoing discussion on the use of the digital signatures for the 2010 elections, it is certain that there was compliance with the mandate of the law. The digital certificates¹³⁶ placed in the iButtons and 8-digit PINs, as well as the procedure employed with the intention of providing a way of digitally signing the document implemented through the use by the BEI Chairperson of the iButton and the BEIs entering the PIN issued by COMELEC in order to convert the ER generated into a digitally signed document, a pre-requisite for transmission and canvassing, all in accordance with COMELEC Resolution No. 8786, sufficiently comply with the requirements of the law.

Under the RFP for the 2010 automation project, it was expressly required that the system shall transmit digitally signed and encrypted ERs and reports enabled by public/private key cryptography to provide authenticity, integrity, and non-repudiation utilizing at least a 128-bit encryption scheme.¹³⁷ During the oral arguments, private respondent explained that there were digital signatures although it used the RSA asymmetric encryption algorithm and the file is encrypted using a 256-bit symmetric key loaded earlier in the machine.¹³⁸ I believe that this slight deviation from the protocol requested by COMELEC is a minor error which did not affect the integrity and accuracy of the kind of digital signature used in the 2010 elections. The use of an encryption scheme algorithm different from that required by the COMELEC is insignificant in such a way that it is not sufficient to invalidate the sale on the basis that the AES is utterly defective. Moreover, petitioners failed to prove that this variance affected the results of the elections and that there were results or proclamations which were invalidated because of this. In addition, the 128-bit requirement was stated in the RFP; however, the law itself, i.e., RA 9369 and the pertinent laws and rules referred to therein, did not specify what kind of system will be used to generate these signatures. Ultimately, there was no violation of the law. What merely transpired was a failure to comply with a specification made by the COMELEC. Even so, the functional equivalent of that specification is, to my mind, sufficient compliance with what RA 9369 requires.

As regards the demand for the use of a third-party generated digital signature, it must be noted that this is not specifically required by law. The COMELEC only decided to resort to this as an additional security measure; however, it was discontinued. This alteration was due in part to COMELEC's concern that providing each BEI member with his or her own digital signature would leave the success of transmission reliant on the attendance of all BEI members.¹³⁹ As shown in the report of the Carter Center, the production of public and private keys (or digital certificates) was completed by the technology vendor, Smartmatic.¹⁴⁰ The public and private keys were ultimately generated by Smartmatic itself rather than a third-party certification authority hired to generate the public key infrastructure. This report shows that there were digital signatures used, only that they were generated not by a third-party certification authority but by Smartmatic-TIM.

Petitioners point out that the SJFT, during the investigation it conducted, was not able to find any digital signature in the PCOS machines. The reason for this was shown in the report of the SLI Global Solutions which explained that proving the existence of the digital certificates could not have been accomplished without the source code examples of how the certificates were generated and used. Smartmatic-TIM's representatives and the SJFT were not able to view the digital certificates during the forensic analysis, because they did not have access to said source code examples.¹⁴¹ Again, the fact that they were unable to view the digital signature is merely because they did not have a source code sample on how these are generated. The existence of the source code sample is a prerequisite to the finding of the digital signatures sought. To reiterate, if the SJFT and SLI Global Solutions had the necessary source code during their analysis of the PCOS machine, the digital signatures would have been detected. This is not a defect in the AES system, nor is it correct to say that there were definitely no digital signatures used. This is a simple case of not having the equipment or information necessary to find what was being sought. Definitely, it is incorrect to attribute this problem to the AES and, worse, to nullify the sale on this ground.

The complaints regarding the AES notwithstanding, it can be reasonably said that the 2010 elections were fairly successful. The speed by which COMELEC announced the results and proclaimed the winning candidates, juxtaposed with the minimal laments about "dagdag-bawas," is an indication of this success. The problems encountered during the implementation of this pilot system are but natural incidents extant in every new scheme, as in this case. Shortcomings have been identified, problems have been addressed, and lessons are learned. It is but proper to give the AES another chance, especially when the COMELEC and Smartmatic-TIM have been continuously identifying and correcting problems in the system. To invalidate the sale with problems and glitches would not only put to naught the efforts made by these two entities who have been exerting so much efforts in improving the system for the upcoming 2013 elections, but would also put the coming elections at risk of not being automated. This is not to say, however, that we should stop all efforts to seek better technologies if the circumstances so warrant. Owing to the time pressure and the budgetary constraint, COMELEC did not have the luxury of choice. The situation compelled COMELEC to ultimately procure the PCOS machines and allied paraphernalia for it to be able to execute its mandate under the law to have automated elections for the coming years. We cannot fault the COMELEC for doing that. With a positive general feedback in the 2010 automated elections, the elimination of the "dagdag-bawas" scheme which used to haunt the electoral process in our country, the increased number of youth voters during the 2010 elections, among others, the AES truly deserves another chance at the 2013 elections. In the words of the CAC itself, "We should use the valuable experience we have gained from this milestone exercise to move the country forward instead of backward."

ACCORDINGLY, I vote to DISMISS the separate petitions insofar as each seeks to declare the assailed deed of sale as null and void. I also vote to lift the TRO dated April 24, 2012.

PRESBITERO J. VELASCO, JR.

Associate Justice

Footnotes

¹ G.R. Nos. 201112, 201127 and 201413 are petitions for certiorari, prohibition and mandamus, while G.R. No. 201121 is a petition for certiorari and prohibition.

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

³ An Act Amending RA 8436, entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, to Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pambansa Blg. 881, as Amended, [RA] 7166 and Other Related Election Laws, Providing Funds therefor and for Other Purposes."

⁴ CAC Post-Election Report on the Use of the AES in the 2010 National and Local Elections, p. 1.

⁵ CAC is a creation of RA 9369 tasked, inter alia, to recommend the most appropriate, applicable and cost-effective technology to be applied to the AES. It is composed of the Chairperson of the Commission on Information and Communications Technology and one member each from the Department of Education, Department of Science and Technology and three members representing ICT professional organizations.

⁶ Rollo (G.R. No. 201112), p. 481.

⁷ Id. at 507-530.

⁸ Id. at 272-273.

⁹ Annex "3," Consolidated Comment of respondent COMELEC.

¹⁰ Then Commissioner Augusto Lagman and Commissioner Christian Lim dissented.

¹¹ Annex "5," Consolidated Comment of respondent COMELEC.

¹² Annex "14," Consolidated Comment of respondent Smartmatic-TIM.

¹³ Said provision reads: "This Contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties."

¹⁴ An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes.

¹⁵ Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, August 15, 2000, 338 SCRA 81; citing Baker v. Carr, 369 U.S. 186.

¹⁶ Id.

- ¹⁷ See *David v. Macapagal-Arroyo*, G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 & 171424, May 3, 2006, 489 SCRA 161.
- ¹⁸ *Abaya v. Ebdane*, G.R. No. 167919, February 14, 2007, 515 SCRA 720.
- ¹⁹ *Supra* note 17.
- ²⁰ *Supra* note 2.
- ²¹ *Chua Huat v. CA*, G.R. Nos. 53851 & 63863, July 9, 1991, 199 SCRA 1.
- ²² G.R. Nos. 166910, 169917, 173630 & 183599, October 19, 2010, 633 SCRA 470, 494.
- ²³ *Riano*, Civil Procedure 36-37 (2009).
- ²⁴ *Quesada v. DOJ*, G.R. No. 150325, August 31, 2006, 500 SCRA 454.
- ²⁵ *Flaminiano v. Adriano*, G.R. No. 165258, February 4, 2008, 543 SCRA 605.
- ²⁶ *Bagabuyo v. COMELEC*, G.R. No. 176970, December 8, 2008, 573 SCRA 290.
- ²⁷ Cited in *Chamber of Real Estate and Builders Associations, Inc. (CREBA) v. Secretary of Agrarian Reform*, G.R. No. 183409, June 18, 2010, 621 SCRA 295, 309-310.
- ²⁸ G.R. Nos. 146184-85, January 31, 2008, 543 SCRA 269.
- ²⁹ *Agan v. Philippine International Air Terminals Co., Inc.*, G.R. No. 155001, May 5, 2003, 402 SCRA 2003.
- ³⁰ 17 C.J. S. p. 1042, Sec. 15, Contracts.
- ³¹ *Rollo* (G.R. No. 201112), pp. 721-722, 725-726.
- ³² G.R. No. 124791, February 10, 1999, 302 SCRA 718.
- ³³ *Eulogio v. Apeles*, G.R. No. 167884, January 20, 2009, 576 SCRA 561.
- ³⁴ *Id.*
- ³⁵ Art. 1306 of the Civil Code provides that "[T]he contracting parties may establish such stipulations, clauses, terms and conditions as they deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy."

³⁶ Good v. Evans, 178 S.W. 2d 600, 296 Ky. 756, 51C C.J.S. 257, Landlord & Tenant, Sec. 84.

³⁷ Id. at 258; citing Smith v. Carter, 214 S. W.2d 64, 66 213 Ark. 937.

³⁸ Supra note 29.

³⁹ Sec. 48.2, Rule XVI of the IRR of RA 9184: In accordance with Section 10 of this IRR-A, as a general rule, the procuring entity shall adopt public bidding as the general mode of procurement and shall see to it that the procurement program allows sufficient lead time for such public bidding. Alternative methods shall be resorted to only in the highly exceptional cases provide for in this Rule.

⁴⁰ Manual of Procedures for the Procurement of Goods and Services, p. 81.

⁴¹ Black's Law Dictionary 1339 (9th ed. for the iPhone/iPad/iPod touch, Version 2.1.0 [B112136]).

⁴² 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.

⁴³ Computer Terminology Glossary, Publish This for iBooks.

⁴⁴ 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)

⁴⁵ Intellectual Property Code, Sec. 171.4.

⁴⁶ Id., Sec. 172.

⁴⁷ Justice Brion's Concurring Opinion, p. 24.

⁴⁸ Black's Law Dictionary, 9th Ed., for the iPhone/iPad/iPOd touch. Version: 2.1.0(B12136), p. 223.

⁴⁹ See Center for People Empowerment in Governance v. Commission on Elections, G.R. No. 189546, September 21, 2010, 631 SCRA 41.

⁵⁰ An established value that persists through the entire application or program. (Glossary of Programming Technology, Publish this for iBook, p. 11.) In this case, the election definition pertains to the definition of the contests and questions that will appear on the ballot for a specific election (Voting System Performance Guidelines Volume 1, Appendix A: Glossary, p. A-9).

⁵¹ Meaning the "Election Event Designer" whose primary functions include the creation of all ballot styles used in the elections, creation of the data that will be used by each individual PCOS in each voting jurisdiction, and creation of the accompanying iButtons for the PCOS. (Final Certification Test Report, COMELEC AES 2011 Voting System prepared by Global Solutions, p. 21)

⁵² The iButton is a gadget separate from the PCOS machine, which serves the following functions: (a) starts the PCOS machine (together with a CF card and 8-digit PIN); (b) digitally transmit ERs; (c) close the machines (together with the 8-digit PIN). It also contains the digital certificates (a 1,024-bit key RSA algorithm) necessary to generate digital signatures (private key). TSN, May 8, 2012 Oral Arguments, pp. 149-150, 165-166.

⁵³ Final Certification Test Report, COMELEC AES 2011 Voting System prepared by Global Solutions, p. 20.

⁵⁴ *Id.* at 9.

⁵⁵ 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.

⁵⁶ Over which Smartmatic has a license from Dominion Voting System.

⁵⁷ TSN, May 8, 2012, pp. 72-73.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Under the AES, the lease price of Component I of the AES (which is the subject of the OTP) is PhP 6.8 billion. Since the RFP provided that the purchase price cannot exceed 50% of the lease price, the price ceiling for the purchase of the goods subject of the OTP from Smartmatic-TIM is set at PhP 3 billion. This price was further lowered to PhP 2.1 billion in the OTP between respondents. The price is further reduced by PhP 24 million (the amount paid for the PCOS units purchased for the ARMM elections) and another PhP 272 million for lost, missing, and unserviceable goods and equipment. See Annex "E-1" of the Deed of Sale.

⁶¹ Justice Villarama's Opinion, p. 36.

⁶² COMELEC's Consolidated Comment, pp. 1-12.

⁶³ Constitution, Art. VI, Sec. 25.

⁶⁴ *Id.*, Sec. 24.

⁶⁵ Taking into consideration that the Resumption of the Second Regular Session of the 15th Congress is on July 23, 2012 <<http://www.congress.gov.ph/legisinfo/index.php?l=calendar ®ses=second>>.

⁶⁶ Constitution, Art. VI, Sec. 26(2).

⁶⁷ House Rules of the House of Representatives, Sec. 44.

⁶⁸ Id., Sec. 44.

⁶⁹ Id., Sec. 48.

⁷⁰ Constitution, Art. VI, Sec. 26(2).

⁷¹ Civil Code, Art. 2.—Laws shall take effect after fifteen days following the completion of their publication in the Official Gazette, unless it is otherwise provided x x x.

⁷² Notably, this mirrors the time spent in the preparation of the supplemental budget for the 2010 automated elections which covered the first quarter of 2009, or from January to March 2009. (HBN 5715, which was the precursor of RA 9252 which gave a supplemental budget of P11.3 B for the automation of the 2010 elections, was First Read in the House of Representatives on January 19, 2009, transmitted to the Senate on March 5, 2009 and finally signed into law on March 23, 2009. (House of Representatives Journal No. 42, January 19, 2009, p. 10 <http://www.senate.gov.ph/lis/bill_res.aspx?congress=14&q=HBN-5715> (visited June 6, 2012).

⁷³ SECTION 46. Appropriation Before Entering into Contract. —

1. No contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure; and

2. Notwithstanding this provision, contracts for the procurement of supplies and materials to be carried in stock may be entered into under regulations of the Commission provided that when issued, the supplies and materials shall be charged to the proper appropriations account.

SECTION 47. Certificate Showing Appropriation to Meet Contract. — Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three (3) months, or banking transactions of government-owned or controlled banks, no contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current calendar year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract, and the sum so certified shall not thereafter be available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished.

SECTION 48. Void Contract and Liability of Officer. — Any contract entered into contrary to the

requirements of the two (2) immediately preceding sections shall be void, and the officer or officers entering into the contract shall be liable to the Government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties.

⁷⁴ RA 9184, Implementing Rules and Regulations Part A, Rule VI, Sec. 17.

⁷⁵ Id., Rule VII, Sec. 20.

⁷⁶ Id., Sec. 21.2.1.

⁷⁷ Id., Sec. 21.2.2(i).

⁷⁸ Through its Bids and Awards Committee.

⁷⁹ Annex "C" to the Implementing Rules and Regulations Part A of RA 9184, as amended, entitled "Period of Action on Procurement Activities."

⁸⁰ RA 9184, Implementing Rules and Regulations Part A, Rule IX, Sec. 30.4: "The [COMELEC] BAC shall x x x evaluate the technical merits of the proposals received from eligible bidders vis-à-vis the required performance standards. A meeting/discussion shall then be held by the BAC with those eligible bidders whose technical tenders meet the minimum required standards stipulated in the bidding documents for purposes of drawing up the final revised technical specifications/requirements of the contract. Once the final revised technical specifications are completed and duly approved by the [COMELEC] BAC, copies of the same shall be issued to all the bidders identified in the first stage who shall then be required to submit their revised technical tenders, including their price proposals in two (2) separate sealed envelopes."

⁸¹ RA 9184, Implementing Rules and Regulations Part A, Rule X, Sec. 34.2.

⁸² Id., Sec. 34.3.

⁸³ Id., Sec. 34.1.

⁸⁴ The 3 to 4-month period of competitive bidding is similar to the bidding made for the 2010 elections which started on March 18, 2009, when the COMELEC approved the RFP/TOR, and culminated on July 10, 2009, when the AES Contract was signed between respondents.

⁸⁵ Marcelino v. Cruz, Jr., No. L-42428, March 18, 1983, 121 SCRA 51.

⁸⁶ RA 8436, as amended, Sec. 6. Minimum System Capabilities. – The automated elections system must at least have the following functional capabilities:

(a) Adequate security against unauthorized access;

- (b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;
- (c) Error recovery in case of non-catastrophic failure of device;
- (d) System integrity which ensures physical stability and functioning of the vote recording and counting process;
- (e) Provision for voter verified paper audit trail;
- (f) System auditability which provides supporting documentation for verifying the correctness of reported election results;
- (g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election result in the shortest time possible;
- (h) Accessibility to illiterates and disabled voters;
- (i) Vote tabulating program for election, referendum or plebiscite;
- (j) Accurate ballot counters;
- (k) Data retention provision;
- (l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;
- (m) Utilize or generate official ballots as herein defined;
- (n) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and
- (o) Configure access control for sensitive system data and function.

⁸⁷ Supra note 2.

⁸⁸ Heirs of Tabia v. Court of Appeals, G.R. Nos. 129377 & 129399, February 22, 2007, 516 SCRA 431; cited in Riano, Civil Procedure 316 (2009).

⁸⁹ Moraga v. Spouses Somo, G.R. No. 166781, September 5, 2006, 501 SCRA 118; cited in Riano, supra.

⁹⁰ In the TWG Consolidated report on the evaluation of Smartmatic-TIM's proposed systems for the 2010 elections, it was stated that the actual systems evaluation test, which Smartmatic-TIM's system passed, covered the following:

1. Manual feeding of ballot into the PCOS machine;
2. PCOS scanning speed;
3. Fully-integrated single device;
4. Scanning resolution;
5. User authentication with multi-user access levels;
6. Electronic display;
7. Error handling procedures;
8. Detection and rejection of fake and spurious ballots;
9. 2-side scanning in one pass in different orientations;
10. Authenticity of the ballot;
11. Pre-printed names on the ballot;
12. 300-name accommodation on each side of the ballot with minimum font size of 10;
13. Full shade mark recognition;
14. Partial shade mark recognition;
15. Check mark recognition;
16. X mark recognition;
17. Pencil and ink marks recognition;
18. Error recovery features in a system shutdown simulation;
19. Report-generation capability.

⁹¹ TSN, May 8, 2012, pp. 48-49.

⁹² Roque, Jr., *supra* note 2.

⁹³ SLI Global Solution, formerly Systest Lab, is a Denver Colorado Voting System Test Laboratory accredited by the US Federal National Institute of Standards and Technology; see TSN, May 8, 2012, pp. 13-14.

⁹⁴ CAC Post-Election Report, p. 34.

⁹⁵ TSN, May 8, 2012, p. 148.

⁹⁶ "For everyday printing (not photos), draft mode, which is quicker and uses less ink, will give you what you need. *This **Draft** setting lets you print faster and use less ink. The print color will be lighter, but this mode is perfect for drafts and everyday printing.*" From <http://www.hp.com/united-states/consumer/digital_photography/print_better_photos/tips/10-tips.html>.

⁹⁷ Final Report, The Carter Center, pp. 17-18.

⁹⁸ Id. at 18.

⁹⁹ All primary CF cards that had already been distributed were recalled to the configuration facility in Laguna. By using 18,000 spare CF cards that were already on hand at the configuration facility, purchasing 30,000 new cards in Hong Kong and Taiwan, and reconfiguring thousands of cards recalled from the provinces, Smartmatic managed to distribute a sufficient number of properly configured CF cards. (Final Report, The Carter Center, p. 27)

¹⁰⁰ RA 9369, Sec. 2(12). *Source code*—Human readable instructions that define what the computer equipment will do.

¹⁰¹ Id., Sec. 12.

¹⁰² Commissioner Augusto Lagman's Dissenting Opinion to COMELEC Resolution No. 9373, p. 13.

¹⁰³ CAC Post-Election Report, p. 22.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Request for Proposal (also known as Terms of Reference or TOR) for Solutions, Terms & Conditions for the Automation of the May 10, 2010 Synchronized National and Local Elections, p. 41.

¹⁰⁷ Id.

¹⁰⁸ SBAC System Evaluation Consolidated Report and Status Report on the Post-Qualification Evaluation Procedures dated June 1, 2009, Item 10.

¹⁰⁹ SLI Global Solutions, Final Certification Test Report, p. 29.

¹¹⁰ Report of the TWG-RMA, p. 20.

¹¹¹ Id. at 20-21.

¹¹² Final Report, The Carter Center, p. 40

¹¹³ Id. (Emphasis supplied.)

¹¹⁴ Final Report, The Carter Center; Final Certification Report, SLI Global Solutions.

¹¹⁵ Final Certification Report, SLI Global Solutions; SBAC-TWG Post-Qualification Tests Report.

¹¹⁶ Also reflected in the Final Report of the Carter Center, p. 16.

¹¹⁷ TSN, May 8, 2012, p. 159.

¹¹⁸ See <<http://votingmachines.procon.org/>>.

¹¹⁹ Audit trail for direct-recording equipment: paper printout of votes cast, produced by direct-recording electronic (DRE) voting machines, which election officials may use to crosscheck electronically tabulated totals. (Voting System Performance Guidelines Volume 1, Appendix A: Glossary, p. A-4)

¹²⁰ CAC Post-Election Report, p. 6.

¹²¹ TSN, May 8, 2012, p. 158.

¹²² Final Report, The Carter Center, p. 32.

¹²³ TSN, May 8, 2012, p. 146.

¹²⁴ Digital signature: An asymmetric key operation where the private key is used to digitally sign an electronic document and the public key is used to verify the signature. Digital signatures provide data authentication and integrity protection. (Voting System Performance Guidelines Volume 1, Appendix A: Glossary, p. A-8)

¹²⁵ "Electronic signature" refers to any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or electronic document or any methodology or procedures employed or adopted by a person and executed or adopted by such person with the intention of authenticating or approving an electronic data message or electronic document. E-Commerce Act (RA 8792), Implementing Rules and Regulations, Sec. 6(g).

¹²⁶ A.M. No. 01-7-01-SC, Re: Rules on Electronic Evidence, Rule 2, Sec. 1(a) "Asymmetric or public cryptosystem" means a system capable of generating a secure key pair, consisting of a private key for

creating a digital signature, and a public key for verifying the digital signature; Cryptography: Discipline that embodies the principles, means, and methods for the transformation of data in order to hide their semantic content, prevent their unauthorized use, prevent their undetected modification and establish their authenticity. (Voting System Performance Guidelines Volume 1, Appendix A: Glossary, p. A-8)

127 Private key: The secret part of an asymmetric key pair that is typically used to digitally sign or decrypt data. (Voting System Performance Guidelines Volume 1, Appendix A: Glossary, p. A-15)

128 Public key: Public part of an asymmetric key pair that is typically used to verify digital signatures or encrypt data (Voting System Performance Guidelines Volume 1, Appendix A: Glossary, p. A-15)

129 Rules on Electronic Evidence, Rule 2, Sec. 1(e).

130 ARTICLE V - PROCEDURES OF VOTING, COUNTING OF VOTES AND TRANSMISSION OF PRECINCT RESULTS

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Section 40. *Counting of ballots and transmission of results; Procedure. (Renumbered) (As Revised)*

a) At the end of voting and before the start of counting of votes, the Chairman shall place the iButton security key on top of the iButton security key receptacle and apply slight pressure thereon. Remove the iButton security key from its receptacle, after which the PCOS will display the Main Menu;

b) Press the "CLOSE VOTING" option in the Main Menu;

c) The screen will display a message "ARE YOU SURE YOU WANT TO CLOSE VOTING? NO MORE BALLOTS WILL BE ACCEPTED AFTER THIS." Select "YES" option;

d) The PCOS will request for the PIN of the poll clerk who will then enter his PIN and press "ENTER". The PCOS will validate the PIN and displays a message "PIN ACCEPTED". The PCOS will request for the second PIN from the third member who will then enter his PIN and press "ENTER". The PCOS will validate the PIN and displays a message "PIN ACCEPTED".

e) The screen will display a message "POLL IS BEING CLOSED PLEASE WAIT" followed by another message "VOTING HAS BEEN CLOSED NO MORE BALLOTS WILL BE ACCEPTED BY THIS PCOS";

f) Thereafter, the PCOS shall automatically count the votes and immediately display a message "WOULD YOU LIKE TO DIGITALLY SIGN THE TRANSMISSION FILES WITH

¹³¹ Smartmatic-TIM's Consolidated Comment, p. 54.

¹³² Hash values are indices that match data sets in an array (such as filled-in oval marks to indicate candidate names).

¹³³ TSN, May 8, 2012, pp. 150-151.

¹³⁴ Rules on Electronic Evidence, Rule 2, Sec. 1(f) "Digitally signed" refers to an electronic document or electronic data message bearing a digital signature verified by the public key listed in a certificate.

¹³⁵ COMELEC's Consolidated Comment, p. 115.

¹³⁶ Rules on Electronic Evidence, Rule 2, Sec. 1(c) "Certificate" means an electronic document issued to support a digital signature which purports to confirm the identity or other significant characteristics of the person who holds a particular key pair.

¹³⁷ Request for Proposal for Solutions, Terms and Conditions for the Automation of the May 10, 2010 Synchronized National and Local Elections, p. 17.

¹³⁸ TSN, May 8, 2012, p. 150.

¹³⁹ Final Report, The Carter Center, p. 20

¹⁴⁰ Id. at 44.

¹⁴¹ COMELEC's Consolidated Comment, p. 116.

SEPARATE CONCURRING OPINION

SERENO, J.:

The present Rule 65 Petitions challenge the proposed purchase of 80,916 Precinct Count Optical Scan (PCOS) machines by the Commission on Elections (COMELEC) from Smartmatic-TIM. They claim that the failure of the latter to timely and completely exercise the option to purchase the said units, prior to the expiration of the original given period, removed the legal basis for the COMELEC to make the purchase without conducting a separate public bidding. The proposed purchase is embodied in a Deed of Sale executed by the parties on 30 March 2012 (Deed of Sale). Under its original 2009 contract with Smartmatic-TIM,¹ COMELEC had until 31 December 2010 to

exercise the option to purchase 82,200 PCOS machines, which it was going to lease, and did lease, for use in the 2010 national and local elections. On 23 September 2010, it partially exercised this option by purchasing 920 of the machines for the 13 November 2010 Special Elections.² Four letters extending the option were sent by Smartmatic-TIM to COMELEC, and an extension agreement over the option was entered into by respondents. We will discuss the legal effects of these letters and agreement subsequently. The issue in these Petitions thus ultimately boil down to whether the COMELEC committed grave abuse of discretion in purchasing 80,916³ PCOS machines from Smartmatic-TIM without subjecting the purchase to a separate public bidding, considering that under the terms of the 2009 Contract, the original period within which the purchase should have been made, already expired?

As will be clearly demonstrated, the COMELEC has ample authority under the Constitution and the Civil Code to execute the Deed of Sale, and this Deed of Sale does not violate any provision of the Government Procurement Reform Act (GPRA), its implementing rules and regulations (IRR), or any public policy on government contracts; and, thus, the COMELEC did not commit any grave abuse of discretion to warrant the grant of the Petitions.

Setting Aside the Technical Issues

Petitioners have raised five technical issues regarding the following:

- (a) Absence of a digital signature;
- (b) Absence of a voter verified paper trail;
- (c) Existence of an open port console;
- (d) Deactivation of the ultraviolet marks verification capability; and
- (e) Last-minute reconfiguration of the compact flash disks in 2010.

A decision on whether the COMELEC can proceed to implement the Deed of Sale need not hinge on the resolution of these issues for the following reasons:

One, a legal defect in the proposed sale of the machines can only exist with respect to these technical issues, if there is a showing that the machines are not "fit for the purpose" of their intended use.⁴ Absent a showing that the machines cannot presently perform and cannot be made to perform in a way that satisfies the requirements of an Automated Election System (AES) as defined by Republic Act No. 8436, as amended — otherwise known as the Automated Election System Law (AES Law) — then the sale cannot be struck down on that legal point.

Petitioners are not assailing the results of the 2010 elections. They are not parties to any electoral protest involving the same. Allegations regarding the failure of the machines to conform to the requirements of an acceptable AES are intrinsically relevant only to the various electoral protests currently lodged with the Presidential Electoral Tribunal⁵ and the House of Representatives Electoral Tribunal. The performance of the machines during the 2010 Elections will have an impact on this case only if petitioners can demonstrate that these defects (1) fail the technical requirements of an AES; and (2) were not and cannot be remedied. We will avoid

ruling on the first point so as not to prejudice the outcome of the electoral protests. On the second point, however, we can already rule, and hereby rule, that petitioners have failed to prove it. We will discuss this point in a later portion of this opinion.

Two, assuming that the burden of proof to demonstrate the fitness of the machines has shifted to the COMELEC and Smartmatic-TIM, this burden has been adequately met by respondents. We will discuss this in a later portion together with our discussion on the first point. For now, let it suffice that the debate among the Members of the Court focused on the legal issues surrounding the option to purchase the PCOS machines; they did not consider the technical issues sufficiently determinative of the disposition of the various Petitions for reasons that will be evident in a later discussion.

Preliminary Discussion on the Context: The Interface Between Contract Law and Government Procurement Regulations in This Case

A. The Treatment of Options, Extensions of Time for their Exercise, and their Revival Under Contract Law

Had the parties been both private entities, then there would have been either no legal dispute on the validity of the exercise of an option that was renewed after its expiry, or, the legal dispute would have been quite easy to resolve. This is because our law on contracts is quite straightforward on this matter. It is our government procurement laws and regulations that have complicated the legal issues we need to resolve.

First, the Civil Code is quite emphatic about respecting the autonomy of the wills of the parties:

Art. 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

Among the stipulations that the parties can agree on is an "option" granted by one party in favor of the other (Art. 1324, Civil Code). Samples of such contractually created options can be found in some articles of the Civil Code, such as: (a) an option to buy, which is embedded in a lease of personal property (Art. 1485) and (b) sales on consignment in which the buyer has the option to return the goods or pay the price thereof (Art. 1502).

Second. A contract when validly executed has the legal effect of binding the party who has undertaken to give something or to render some service (Art. 1305). By "binding," we mean that a legally enforceable right is created in favor of the person who is to receive the "thing" or the service. This right has the force of law between the contracting parties (Art. 1159, Civil Code).

Conversely, if the person who possesses the right to demand the performance of the undertaking to give or to render a service, can demand the performance thereof, he or she can also waive the same. This waiver has the effect of extinguishing the obligation. A waiver is the abandonment or voluntary forfeiture of a right. It operates in the same manner as a condonation or remission of a debt under Articles 1231(3), and 1270-1274 of the Civil Code.

Examples of valid waivers can be found in the following articles of the Civil Code: (a) a waiver evidenced by the delivery of a document evidencing a credit (Art. 1271); (b) the waiver of a right to assail a voidable contract through an act ratifying the contract (Art. 1393); (c) the waiver of a condition in a sales contract (Art. 1545).

Third, if an option is conditioned on its exercise within a period, then this condition that consists in a "period" or a deadline for its exercise can itself be waived. In a contract of sale, for example, "where the obligation of either party . . . is subject to any condition which is not performed, such party may refuse to proceed with the contract or he may waive performance of the condition. (Art. 1545, Civil Code)"

Fourth, this waiver of a condition that consists in a deadline can be made by the party in whose favor the deadline was constituted. Under Article 1196 of the Civil Code, "[w]henever in an obligation a period is designated, it is presumed to have been established for the benefit of both the creditor and the debtor, unless from the tenor of the same or other circumstances, it should appear that the period has been established in favor of one or of the other." An option that expires on a fixed date is an obligation with a resolutive period that "take[s] effect at once, but terminate[s] upon arrival of the day certain." An offeror can also always withdraw an option under Article 1324 of the Civil Code, with the converse implication that he or she can always extend the period for the acceptance of the offer.

Thus, an option to purchase exercisable within a fixed period, embedded in a lease contract, expires after that fixed period, because the lapse thereof is a resolutive condition that extinguishes the option to purchase. Both parties can agree to waive the resolutive condition, however, in the form of an extension of the period for performance, under the very clear provisions of the Civil Code. This accounts for the commonness of renewed or revived options in private commercial agreements, such as leases, sales, joint ventures, intellectual property rights contracts, etc.

The legal disputes that will arise in these situations would be easy to resolve. Because both parties agreed to revive or renew an expired option, their agreement binds both of them; and neither can assail the agreement simply on the ground that the original option period has expired, and this extension agreement has the force of law between them.

That the parties have the ability to revive dead or terminated contracts is so basic a rule that it has consistently and implicitly been understood to be so by this Court. In two injunction cases, the Court restated its understanding that a dead or terminated contract can always be revived or renewed by mutual agreement of the parties.⁶

The termination of a contract is not like the death of a natural being. It is the will and the mutual understanding of the parties, rather than the form and solemnities, that prevail in contract interpretation. Thus, a contract that on its face expires can, by the mutual contracting action of the parties, even be pronounced by the court to be continuing simply because the parties consider it to be so continuing. As the eminent scholar on contracts put it:

"In the construction of an instrument, the intention of the parties is to be pursued. The true agreement of the parties may be proved, as against the terms and stipulations appearing in a written contract where a mistake or imperfection of the writing, or its failure to express the true intent and agreement of the parties, is put in issue by the pleadings, or there is an intrinsic ambiguity in the writing. When the true intent and agreement of the parties is established, it must be given effect and prevail over the bare words of the written contract."⁷

B. The Treatment of Options, Extensions of Time for their Exercise, and their Revival Under Government Procurement Laws

Having laid down the premises for the intrinsic validity of the revival of expired options upon mutual agreement of the parties, we shall now need to examine whether such mutual agreement entered into by the government as vendee contravenes "law, morals, good customs, public order, or public policy."

It has been alleged by petitioners that the Deed of Sale contravenes the law, because it violates the mandatory public bidding provisions of the Government Procurement Reform Act (GPRA).⁸

To begin with, we will immediately dispose of an isolated claim made in one of the Petitions that the option to purchase in the 2009 Contract is a void arrangement in a contract for public procurement.

We have already clarified that an option to purchase leased equipment is a recognized stipulation by the Civil Code itself. This legal situation is no different when the purchaser is a government entity.

Lease contracts with the government are covered by the GPRA.⁹ Although there is no express provision on options to purchase in a lease contract in the GPRA, its implementing rules specifically point to other permissible variations of leases, including lease-purchase, lease-to-own and other similar arrangements. Section 46 of the GPRA/IRR holds thus:

The lease of construction and office equipment, including computers, communication and information technology equipment, are subject to the same public bidding and to the processes prescribed under the Act and this IRR. Lease may also cover lease purchases or lease-to-own and similar variations.¹⁰ (Emphasis supplied.)

Options to purchase in leases are implicitly recognized as valid by the GPRA. In response to a query from the Armed Forces of the Philippines, it has been opined by the Government Procurement Policy Board — an agency created under the GPRA — that a lease-to-own arrangement over military motor vehicles is valid and subject to the rule on competitive bidding:

Whether Section 46 of the IRR-A of R.A. 9184 is applicable to the purchase of motor vehicles under lease-to-own arrangement.

While lease-to-own of motor vehicles is not contemplated under Section 46 of the IRR-A which specifically relates to construction and office equipment, Section 5 (k) of the IRR-A expressly defines goods as including "related" or "analogous services," such as, lease or purchase of office space, media advertisements, health maintenance services, and other services essential to the operation of the procuring entity. Undoubtedly, motor vehicles are essential in the operations of the procuring entity. In addition, a lease-to-own arrangement is a variant of lease which involves procurement as defined under Sections 4 and 5 (p) of the IRR-A.

Based on the foregoing, the procurement of motor vehicles under lease-to-own arrangement is subject to the general rule of competitive bidding under Section 5 (k) in relation to Section 4 of the IRR-A.¹¹

In the same manner, an option to purchase is a recognized alternative for any government lease of goods in the international market under the World Trade Organization Agreement on Government Procurement:

This Agreement applies to procurement by any contractual means, including through such methods as purchase

or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.¹² (Emphasis supplied.)

An option to purchase is even advised in one jurisdiction as a preferable condition for any lease of equipment. In the United States, the Federal Acquisition Regulation System provides that "[i]f a lease is justified, a lease with option to purchase is preferable."¹³

Next, as in any other ordinary private contract, the procuring entity is permitted to allow an extension in the performance of a government contract, which includes the option to purchase.

The GPRA IRR recognizes allowable delay, or extension of time, for the delivery of purchased goods:

Subject to the conditions set forth below, amendments to order may be issued at any time by the procuring entity concerned. If any such order increases or decreases the cost of, or the time required for executing any part of the work under the original contract, an equitable adjustment in contract price and/or delivery schedule shall be mutually agreed upon between the parties concerned, and the contract modified in writing.¹⁴ (Emphasis supplied.)

Parties to a government contract are also free to amend the government contract even after the award and during the performance of the contract. In the procurement of goods, supplies or materials, the government can issue amendments to its order at any time, subject to the consent of the awarded supplier and to the agreement being reduced into writing. Of course, as jurisprudence would explain, such amendment must not be material as to affect or alter the terms of the original competitive bidding.

The same implementing rules of the GPRA also recognize instances, especially in infrastructure projects, in which there is a justification for allowing the contracting private party some extension of time to perform its contractual obligations:

Should the amount of additional work of any kind or other special circumstances of any kind whatsoever occur such as to fairly entitle the contractor to an extension of contract time, the procuring entity shall determine the amount of such extension; xxx Upon receipt of full and detailed particulars, the procuring entity shall examine the facts and extent of the delay and shall extend the contract time completing the contract work when, in the procuring entity's opinion, the findings of facts justify an extension.¹⁵

It is then left to the other contracting party whether to accept the explanations for the delay and allow an extension or to refuse the explanation.¹⁶

In *Cities Service Helix, Inc., v. US*,¹⁷ the U.S. government was pronounced by the Court as possessing the right to waive the expiry of contracts. Although the government earlier terminated a contract for the supply of helium due to an alleged material breach, it continued to accept and pay for the helium given by the complaining corporations. The United States Court of Claims therein ruled that a material breach of the contract only gave the injured party a right to terminate the agreement, but would not prevent the latter, meaning the government, from waiving the right to act on the breach and thus continue with the contract performance, if accepted by the other

party:

A material breach does not automatically and ipso facto end a contract. It merely gives the injured party the right to end the agreement; the injured party can choose between canceling the contract and continuing it. If he decides to close the contract and so conducts himself, both parties are relieved of their further obligations and the injured party is entitled to damages to the end of the contract term (to put him in the position he would have occupied if the contract had been completed). If he elects instead to continue the contract, the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach.¹⁸

In other words, pursuant to the dominance of the will of the parties in Philippine contract law, and as illustrated in the U.S. procurement case above, the life of a government procurement contract depends on the will of the parties, and the terms on the face of the contract can be superseded by the contrary exercise of that will.

In a United States case that will be discussed subsequently, even unexercised options can be availed of after the lapse of the original period, and a losing bidder cannot assail the belated exercise of that option.

FACTUAL ANTECEDENTS

Respondent COMELEC conducted a competitive bidding for the automated election system for the 2010 national and local elections pursuant to its authority to implement an automated election system under Republic Act No. 8436, as amended, otherwise known as the Automated Election System Law (AES Law),¹⁹ which states:

SEC. 5. *Authority to Use an Automated Election System.* - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises...**In succeeding regular national or local elections, the AES shall be implemented nationwide.**

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SEC. 12. *Procurement of Equipment and Materials.* - To achieve the purpose of this Act, **the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources** free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness...

On 18 March 2009, the COMELEC issued a Request for Proposal (RFP)²⁰ for the 2010 Poll Automation Project which consisted of the following:

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)

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

Component 3: Overall Project Management

The prospective bids were described in Part II of the RFP on "Intent" as bids for a lease with option to purchase:

The Commission on Elections (COMELEC), through its Bids and Awards Committee (BAC), is currently accepting bids for the lease, with an option to purchase, of an automated election system (AES) xxx. (Emphasis supplied)

The terms of the option to purchase (OTP) were specified in Part V of the RFP on "Other Specifications" as follows:

28. The offer shall be for a one-time lease basis for Component 1-A, 1-B and 1-C.

28.1 An offer for an option to purchase by component to be decided by COMELEC before December 31, 2010 shall be included by the bidder in its proposal.

28.2 The price of the option-to-purchase shall not exceed 50% of the lease price of the equipment. (Emphasis supplied.)

Only seven bidders submitted bid proposals, of whom only two were able to satisfy the eligibility requirements and thus qualified for further evaluation of their technical and financial proposals. The technical proposals of the two remaining complying bidders — namely, Indra Sistemas/Strategic Alliance Holdings/Hart InterCivic (Indra) and Smartmatic-TIM — were declared qualified. However, upon opening of the financial proposals, only Smartmatic-TIM's bid for the required 82,200 PCOS machines was qualified. Indra's bid was disqualified, because it was only for 57,231 PCOS machines.²¹ A comparison of the two bids is shown below:²²

Item	Budget Estimate	Smartmatic-TIM's Bid (for 82,200 units)	Indra's bid (for 57,231 units)
Component 1	P 10,923,618,400.00	P 6,891,484,742.96	P 10,923,307,793.00
· 1-A (EMS) and 1-B (PCOS)	P 8,220,000,000.00	P 4,187,876,280.00	P 8,220,000,000.00
· 1-C (CCS)	P 140,000,000.00	P 139,999,999.86	P 140,000,000.00
· Services and Others	P 1,563,618,400.00	P 1,563,618,399.00	P 1,563,618,400.00

· Ballots	P 1,000,000,000.00	P 999,999,064.10	P 999,689,393.00
Component 2	P 200,000,000.00	P 199,999,997.51	P 200,000,000.00
Component 3	P 100,000,000.00	P 99,999,999.00	P 100,000,000.00
Total Amount of Bid	P 11,223,618,400.00	P 7,191,484,739.48	P 11,223,307,793.00

On May 26, 2009, the COMELEC's Special Bids and Awards Committee (SBAC) issued Omnibus SBAC Resolution No. 09-007 declaring Smartmatic-TIM "as the bidder that has submitted the single complying calculated bid."

After Smartmatic-TIM complied with post-qualification proceedings, COMELEC thereafter entered into a lease agreement (the 2009 AES Contract)²³ with the former. Under the 2009 Contract, Smartmatic-TIM would lease its PCOS machines to public respondent and render services in connection with their operation. One of the features of this agreement relevant to the instant Petitions was the grant to respondent COMELEC of an OTP vis-à-vis the machines leased by Smartmatic-TIM,²⁴ was an option to be exercised on or before 31 December 2010:

ARTICLE 4

CONTRACT FEE AND PAYMENT

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4.3 OPTION TO PURCHASE

In the event COMELEC exercises its option to purchase the Goods as listed in Annex "L", COMELEC shall pay the PROVIDER an additional amount of Two Billion One Hundred Thirty Million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (Php2, 130,635,048.15) as contained in the Financial Proposal of the joint venture partners- SMARTMATIC and TIM.

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ARTICLE 6

COMELEC'S RESPONSIBILITIES

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6.6 COMELEC shall notify the PROVIDER on or before 31 December 20 10 of its option to purchase the Goods as listed in Annex "L."

Aside from the option to purchase, there are other major prestations in the 2009 Contract. These include the purchase of ballots; the provision of allied support services; the requirement that Smartmatic-TIM furnish a performance security as well as the warranties of Smartmatic-TIM that all the goods covered would comply with

COMELEC's specifications and that the former will provide all software/firmware upgrades or replacements of any defective components or entire units. There is also a provision reserving the right of the COMELEC to purchase goods on repeat order basis whenever the need arises; and to issue variation orders to cover any increase in quantities, including the introduction of new work items as a result of a mutually agreed change of plans of the parties.

On 10 May 2010, the synchronized national and local elections were held using the automated election system of Smartmatic-TIM, including its 82,200 PCOS machines.

After the 2010 elections and prior to the expiration of the period, respondent COMELEC on 23 September 2010 partially exercised its option under the 2009 Contract and purchased 920 PCOS machines for the 13 November 2010 special elections to be conducted in Basilan, Lanao del Sur and Bulacan.²⁵

In November 2010, COMELEC Chairperson Jose Melo tendered his resignation effective 31 January 2011, or four years ahead of his scheduled retirement. Not long after, in February 2011, *Commissioners Nicodemo Ferrer and Gregorio Larrazabal would also retire.*

On 18 December 2010, respondent Smartmatic-TIM reminded public respondent COMELEC of the imminent expiration of the option period, but nevertheless granted the latter its first three-month extension from 31 December 2010 to 31 March 2011.²⁶ However, private respondent received no response from COMELEC regarding its extension.

In the early part of 2011, Atty. Sixto S. Brillantes, Jr., Atty. Christian Robert S. Lim and Mr. Augusto Lagman were appointed as Chairperson and Members, respectively, of the COMELEC, following the retirement of its previous members.

On 23 March 2011, Smartmatic-TIM again reminded the COMELEC of the option period and the impending expiration of the extension. It also informed the COMELEC that there would be a 10% price increase from the 2009 Contract price that was to be maintained until 30 September 2011.²⁷

On 23 September 2011, Smartmatic-TIM wrote a follow-up letter to inquire about the status of the COMELEC's decision on the OTP and reiterated the former's commitment to extend the period to exercise the OTP until 31 December 2011, but with a 20% price increase.²⁸

On 28 December 2011, a few days before the end of 2011, Smartmatic-TIM again followed up COMELEC's decision on the OTP.²⁹ Aside from extending the period for another three months or until 31 March 2012, Smartmatic-TIM dropped the price increase it had imposed in previous extensions,³⁰ and outlined the advantages and benefits to be obtained by COMELEC from exercising the OTP.

The extensions made by Smartmatic-TIM are summarized as follows:

Extension	Start of the	Expiry of the Period	Date of Smartmatic-	Price Escalation
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	Period		TIM Letter Extending the Period	
(Original Option Period)		(31 December 2010)		
First Extension Letter	01 January 2011	31 March 2011	18 December 2010	No
Second Extension Letter	01 April 2011	30 September 2011	23 March 2011	Yes (10% price increase from the original 2009 price for 75,000 PCOS units. The price per unit is therefore increased from ₱ 20,049.58 to ₱ 22,054.54)
Third Extension Letter	01 October 2011	31 December 2011	23 September 2011	Yes (20% price increase from the original 2009 price. The price per unit is therefore increased from ₱ 20,049.58 to ₱ 24,059.50)
Fourth Extension Letter	01 January 2012	31 March 2012	28 December 2011	No

Meanwhile, the General Appropriations Act of 2012 was signed into law.³¹ Although the COMELEC initially proposed a budget of ₱ 10,436,300,399 for the procurement of the 2013 AES through a lease, it received an approved budget of only ₱ 7 billion for this particular item. According to the COMELEC, out of this approved budget for 2012, only ₱ 2.2 billion is available for purposes of securing an AES for the 2013 national and local elections, because the balance would need to be allocated to fixed expenses to run the 2013 elections.³²

Citing the budgetary constraints, the COMELEC En Banc promulgated assailed Resolution No. 9376 dated 21 March 2012 and exercised the OTP under its 2009 Contract with Smartmatic-TIM, subject to three conditions:

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, subject to the conditions that:

1. The warranties agreed upon under Articles 4 and 8 of the 2010 AES Contract shall be in full force and effect;
2. The original price for the hardware and software covered by the Option to Purchase as specified under Annex "L" of the 2010 AES contract shall be maintained, excluding the cost of the nine hundred twenty (920) units of PCOS and related peripherals previously purchased for use in the 2010 special elections; and
3. All other services related to the 2013 Automated Election System shall be subject to public bidding. (Emphasis supplied.)

Commissioners Lim and Lagman dissented from the above-quoted Resolution. In his Additional Arguments for Dissent, Commissioner Lagman cited the failure of Smartmatic-TIM to complete the fixes and improvements required from it and alleged that the critical issues with the PCOS hardware and software had not yet been completely resolved, contrary to the claims of the majority of the Commissioners.³³ In response, Chairperson Brillantes argued that the alleged bugs in the software relied upon by Commissioner Lagman were "easily identifiable and definitely correctible."³⁴

On 30 March 2012, both respondents mutually agreed to extend the period for the exercise of the OTP by the COMELEC to 31 March 2012.³⁵ On even date, COMELEC duly exercised the extended option and entered into a Deed of Sale for the purchase of the PCOS machines and CCS hardware and software for a total amount of ₱ 1,833,274,457.09, which was within the COMELEC's approved budget of ₱ 2.2 billion.³⁶ The extension of the period for the OTP³⁷ and the exercise of the option³⁸ were both duly approved by the COMELEC En Banc.

Several days thereafter, petitioners questioned the validity of the exercise by the COMELEC of its OTP under the 2009 Contract with respondent Smartmatic-TIM by filing the instant consolidated Rule 65 Petitions³⁹ with this Court.

In essence, petitioners seek the nullification of the Deed of Sale executed by the COMELEC and Smartmatic-TIM for the acquisition of the PCOS machines and CCS hardware and software on the ground that the option period expired way back on 31 December 2010 without COMELEC timely exercising the OTP. Thus, the purchase of the PCOS machines after the expired period should supposedly be deemed as a new public procurement, which would require competitive bidding in compliance with public procurement laws. According to petitioners, the absence of a bidding process for the purchase of the PCOS machines from Smartmatic-TIM constituted grave abuse of discretion on the part of COMELEC. Petitioners likewise assailed the technical capabilities of the purchased PCOS machines, since these purportedly failed to comply with the minimum requirements of an automated election system under the AES Law.

DISCUSSION OF THIS WRITER ON THE SUBSTANTIVE ISSUES

Legal Cover for the Deed of Sale as to Exempt It from the Requirement of a Separate Public Bidding?

Several observations are in order. There are at least eight (8) distinct prestations in the 2009 Contract: (1) lease of goods, (2) purchase of ballots, (3) provision of allied support services, (4) payment of contract fee, (5) option to purchase, (6) provision of performance security, (7) observance of warranties, and (8) provisions on repeat orders and variation orders.

It would be the height of absurdity to posit that the conduct of eight public biddings is required for each of these eight prestations to be valid under the GPRA. Instead, the only sensible position is that the 2009 Contract is a unitary contract, and that all of its provisions have the benefit of legal cover provided by the successful and unassailed public bidding conducted on 04 May 2009 and the consequent award of contract in favor of Smartmatic-TIM.

It has been posited, however, that the OTP, which is the fifth prestation identified above, expired; thus, there is absolutely no option that can be exercised anymore. In other words, once an option to purchase expires in any government contract, it allegedly cannot be revived anymore without violating the GPRA. To understand the legal impact of this proposition, we need to analyze the prestations involved in the 2009 Contract. Below is a table showing the major prestations and their respective expiry dates or conditions:

Table of Expiry of Prestations of the 2009 Contract

A. By Express Contract Prestation Provisions		Expiration
1. Lease of Goods	1-A: Election Management System	
	1-B: Precinct Count Optical Scan	Delivery, Testing and Acceptance of the PCOS machines
	1-C: Consolidation/Canvassing System	Delivery, Testing and Acceptance of the PCOS machines
	2: Electronic Transmission	
	3: Over-all Project Management	Delivery of Over-All Project Management Report
2. Purchase of Ballots		Print and delivery of ballots
3. Allied Support Services		Expiration of the Contract
4. Contract Fee (Schedule and Mode of Payment)		Within 30 days from receipt of Final Report

5. Option to Purchase	On or before 31 December 2010
6. Performance Security	To be released within 7 days from delivery of the Over-All Project Management Report after successful conduct of the 2010 Elections
7. Warranties	If PCOS machines are purchased, 10 years; if CCS hardware and software are purchased, 3 years.
8. Repeat Order and Variation Orders	Expiration of the Contract
B. By the Provisions of the Civil Code on Sales	
1. Warranty of fitness for purpose (Art. 1562, Civil Code)	Intended lifespan of machines
2. Warranty against hidden defects (Art. 1547(2), Civil Code)	10 years from delivery (Art. 1144, Civil Code)
C. By the Provisions of the GPRA IRR (2009)	
1. Performance security (Secs. 39.4 & 39.5)	Issuance of final Certificate of Acceptance
2. Warranty for non-expandable supplies (Sec. 62.1) (GPRA IRR (2009))	Minimum of 1 year

It would appear that the prestation on the contract fee has yet to be performed, as Smartmatic-TIM still has an outstanding claim.⁴⁰ Moreover, the performance security has not been released.⁴¹ In other words, the 2009 Contract, as a totality, is still very much alive.

An American case, *C.M.P., Inc. d/b/a/ C.M.P. Corporation v. The United States*,⁴² illustrates why options should be considered as an intrinsic part of the mother contract, and why an original procurement contract with an option should be considered as unitary:

On February 8, 1985, the procurement division of the Department of Commerce issued an Invitation for Bids (IFB) No. 50–SOL–61665 to procure maintenance services for the Bureau of the Census for Government-owned IBM data processing equipment located in Suitland, Maryland. The IFB was prepared from the automated document

preparation system of the Department of Commerce, and embodied the standard clauses utilized for the various procurements of that Department.

Prices for maintenance services for 14 listed items of equipment were solicited, to be provided during an initial period, with options to the Government to extend for additional periods. The IFB specified that the initial term of contract for services of a continuing nature such as maintenance would extend to September 30 of the award year, and that additional term periods were to be at the Government's option. Special contract provision H.1 provided, in part:

As used in this contract, the phrase "Term of the Contract" refers to that period of time for which this contract is valid for the purpose of the Government exercising certain unilateral rights, such as exercising options for increased quantity. If this contract results in services of a continuing nature, as opposed to one time services, such as but not limited to transportation or installation, then the term of contract shall be from the date of contract award through September 30 of the Government's fiscal year in which award is made, subject to the Government's unilateral option to extend the term of contract. Services of a continuing nature may include, but are not necessarily limited to lease/rent of equipment, license or lease of software, maintenance, or on-going system support.

The combination of initial and extended terms was limited to 42 months. Special contract provision H.2 provided:

a. This contract is renewable at the prices stated elsewhere in the contract, at the option of the Government, by the Contracting Officer giving written notice of renewal to the Contractor by the first day of each fiscal year, or funded portion thereof, of the Government, or within 30 days after funds for that fiscal year become available, whichever date is the later; provided that the Contracting Officer shall have given preliminary notice of the Government's intention to renewal at least 30 days before this contract is to expire. Such a preliminary notice of intent to renew shall not be deemed to commit the Government to renewals. If the Government exercises this option for renewal, the contract as renewed shall be deemed to include this option provision. However, the total duration of this contract, including the exercise of any options under this clause shall not exceed 42 months from the first day of service(s) covered hereunder.

Provisions in the IFB relative to evaluation of bids explained the policy reasons for use of the option method of contracting and gave notice that award would be based on the price for all option periods. Section M(a) stated, in part:

This solicitation is being conducted on the basis that the known requirements extend beyond the initial contract period to be awarded, but, due to the unavailability of funds including statutory limitations on obligation of funds, the option(s) cannot be exercised at the time of award of the initial contract. There is a reasonable certainty that funds will be available thereafter to permit exercise of the options. Because realistic competition for the option periods is impracticable once the initial contract is awarded, it is in the best interest of the Government to evaluate options in order to eliminate the possibility of a "buy-in."

Section M(c)(2) provided, in part:

Evaluation of Prices. Offers will be evaluated for purpose of award by adding the total price of all optional periods

to the total price for the initial contract period covering the initial systems or items. These prices will be adjusted by the appropriate discount factors shown in this Section M. Evaluation of option prices will not obligate the Government to exercise the options.

Section M(f) contained the following notice:

failure to exercise an option(s) shall not obligate the Government to any charges other than the contract price including exercised options.

The IFB required price information to be supplied by means of completed unit price tables and by completion of a pricing questionnaire. There were two tables: (1) pricing tables for equipment to be maintained and (2) a table for optional extended maintenance service and per-call monthly rates for service outside the designated principal period of maintenance (PPM). PPM was a defined term:

Any nine consecutive hours per day, including an official meal period not to exceed one hour per day, between the hours of 7:00 AM and 6:00 PM, Monday through Friday, excluding holidays observed at the installation.

The unit pricing tables listed and described each item of equipment, designated the number of units and contained space for insertion of a price for each item in columns. One column was headed: "Monthly Unit Price PPM" and the other column was headed: "Monthly Unit Prices Extended PPM."

A synopsis of the solicitation was published in Commerce Business Daily on December 21, 1984, and 14 companies requested copies of the IFB; eight companies, including plaintiff, submitted bids. At bid opening, on March 11, 1985, preliminary comparison of the pricing tables indicated that Sorbus, Inc., with a bid of \$3,076.23 per month, was the low bidder. Sorbus, Inc. was announced as the low bidder at that time. Plaintiff's representatives at the bid opening complained that its bid had been erroneously interpreted and that its bid was \$2,975 per month, which made it the actual low bidder. Plaintiff was told to make a written complaint.

On March 22, 1985, plaintiff's president, by letter, explained the computations on plaintiff's unit pricing tables and confirmed its contention that its bid when properly analyzed was for \$2,975 per month for the equipment listed. Thereafter there were discussions between representatives of plaintiff and defendant, and plaintiff's contentions were considered in the Commerce Department's general counsel's office.

Plaintiff had completed the pricing tables in a manner that was not clear on the face of the tables as submitted, and in a manner which was unexpected by defendant. None of the other bidders had submitted price information that was calculated on the same basis that plaintiff had used.

During July 1985, the contracting officer reviewed the IFB and the bids that had been submitted by plaintiff and Sorbus, Inc. The contracting officer concluded that it would be inappropriate and unfair to accept plaintiff's explanation of the manner in which its bid had been calculated or to permit plaintiff to correct the bid it had submitted.

At argument, defendant conceded that the agency had recomputed column 2 (Monthly Unit Prices Extended PPM) for all bids, for the reason that the IFB possibly was ambiguous as to that column. Plaintiff does not challenge defendant's authority to make such recomputations. In this recalculation, the contracting officer found

that, on the basis of the information in column 1 of plaintiff's table, the total monthly on-call maintenance cost submitted by plaintiff was \$6,425 per month. The recalculation of the bid of Sorbus, Inc. confirmed the \$3,076.23 per month that company had submitted, and that Sorbus, Inc. had submitted the low bid.

On July 31, 1985, contract No. 50-YABC-5-66031 was awarded to Sorbus, Inc.

DISPOSITION

Plaintiff does not challenge the award to Sorbus, Inc. of a contract under the IFB for the initial period, April 1—September 30, 1985. Plaintiff seeks to invoke the equitable jurisdiction of this court to enjoin the exercise of the option to procure maintenance services from Sorbus, Inc., during the forthcoming fiscal year, October 1, 1985, through September 30, 1986. Plaintiff's premise is that, as to the period commencing October 1, 1985, until the option is exercised, no contract is in being between defendant and Sorbus, Inc., and, accordingly, that a contract had not been awarded on September 6, 1985, when plaintiff filed its complaint.

Plaintiff argues that an option is a contract in which one of the contracting parties holds an inchoate power to bring into being a second contract through acceptance of an offer that contractually has been rendered irrevocable under certain conditions.

The option that the Government may exercise for the period commencing October 1, 1985, according to plaintiff, would give rise to a new contractual relationship between the parties during the later performance period. Plaintiff argues that, since no contractual relationship presently exists between Sorbus, Inc. and the Government for that later period, plaintiff's claim qualifies as a contract claim brought before the contract is awarded within the meaning of 28 U.S.C. § 1491(a)(3).

Plaintiff misconceives the nature of the contractual relationship that was created between defendant and Sorbus, Inc. on July 31, 1985. That contract includes an initial term of computer maintenance that is to expire on September 30, 1985, and it includes provision for renewals of 1 year, with a maximum of 42 months from July 31, 1985. The options are essential parts of the total contractual relationship and are in no sense severable from the initial term as far as the obligations of the parties are concerned. Sorbus, Inc. is subject to an obligation to provide maintenance services at the contract rates for a maximum of 42 months. Concurrently, the defendant has a vehicle which assures it of those services at those prices if it is in its best interest.

The contract that was awarded was the contract that was intended to result from the IFB on which plaintiff submitted its bid. The exercise of an option in an existing contract is not equivalent to the award of a new and different contract; it is an element in the continuation of a unitary contract package. The decision to exercise an option is a matter of contract administration, when done in compliance with the requirements of the federal acquisition regulation. 48 C.F.R. § 17.207. (Emphasis supplied)

x x x x x x x x x

In this case, the contract that controls the exercise of this court's equitable jurisdiction was awarded on July 31, 1985, well before the complaint was filed on September 6, 1985. For purposes of section 1491(a)(3), the exercise of an option in an existing contract is not the equivalent of the award of a new contract.

The use of option clauses in IFB's and contracts accords with Government policies and procedures. The use of options is authorized in recognition of the Government's need in certain service contracts for continuity of operation where there is an anticipated need for similar services beyond a first contract period. 48 C.F.R. § 17.202(d). The use of options is particularly apt and is frequently used in Government contracts to obtain maintenance services. x x x

If such contracts as the above U.S. government contract is unitary with all its various parts, and the exercise of an option therein is not to be considered as a new contract – especially to benefit government during periods when it may not have a budget to immediately procure the intended service – then there is absolutely no reason why the OTP herein should be denied the legal cover provided by the successful public competitive bidding conducted in 2009. It is false, artificial and too shrill an argument to say that an expired clause in the 2009 Contract will immediately deny government a procurement advantage it might otherwise have.

There are two other related arguments that seek to contradict our position that the OTP is part of a unitary contract that need not be subjected to a new public bidding, neither of which is correct.

One, according to petitioners, the Deed of Sale is a new contract requiring a new public bidding.

Petitioners argue that the Deed of Sale between COMELEC and Smartmatic-TIM is a new contract with a new object and must therefore undergo another bidding in compliance with the GPRA.⁴³ But the Deed of Sale does not contain a new object, as it is in fact pursuant to the option under the 2009 Contract clearly contemplated by the parties and included as an integral part thereof, precisely in accordance with the doctrine in the C.M.P. case.

In claiming that a new contract is being entered into – as opposed to considering the transaction as merely giving effect to a mere subpart of the old contract or as a "matter of contract administration" – petitioners are in effect saying that the aforesaid 2009 Contract has been novated, and that a new contract has replaced it. This argument is plainly wrong.

There are two kinds of novation. There is express novation when it is so declared in unequivocal terms⁴⁴ while there is implied novation when there is complete or substantial incompatibility between two agreements.

In the present case, there is no express novation, since the Deed of Sale does not state in clear terms that the obligations under the 2009 Contract are extinguished and in lieu thereof the Deed of Sale will be substituted. On the contrary, the Deed of Sale expressly states that it is being entered into pursuant to the OTP under the 2009 Contract:

WHEREAS, after public bidding, the BUYER and the SELLER had executed on 10 July 2009 a Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections ("AES Contract), a copy of which is hereto attached by way of reference as Annex "A" hereof; ...

WHEREAS, Article 4.3, among others, of the AES Contract granted the BUYER the option to purchase the hardware and software listed in Annex 'L' of the AES Contract, including one (1) lot of EMS Machine, for the total option price of Two Billion One Hundred Thirty Million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (Php 2,130,635,048.15); ...

In fact, the Deed of Sale even incorporates, by way of reference, Articles 4 and 8 of the 2009 Contract; and the warranties thereunder continue to remain in full force and effect:

The warranties agreed upon by the parties under Articles 4 and 8 of the AES Contract, including the limitations on warranties under Article 8.5, shall continue to remain in full force and effect. Articles 4 and 8 of the AES Contract are incorporated by way of reference. ...⁴⁵

Neither is there an implied novation, since the Deed of Sale is not incompatible with the 2009 Contract. Changes that breed incompatibility must be essential in nature and not merely accidental. The incompatibility must take place in any of the essential elements of the obligation, such as its object, cause or principal conditions.⁴⁶

Neither is there substantial change in the principal conditions resulting in a novation. Jurisprudence has consistently held that a mere extension or renewal of a period does not novate a contract.⁴⁷ What is sought to be performed is still the old contract or, more specifically, a part of it. In other words, the option herein is merely being allowed to be given effect vis-à-vis the mother contract or the 2009 AES Contract, which has not been novated and still subsists. Therefore, there is no new contract. Consequently, there is no need for a new bidding.

In some cases, the Court deemed changes that were considerably more substantial than a mere extension of time as insufficient to create incompatibility that would result in an implied novation. For instance, additional interest was not deemed sufficiently substantial to create incompatibility.⁴⁸

Two, petitioners allege that the Deed of Sale is a substantial amendment of the 2009 Contract that requires a new public bidding.

Amendments of government contracts, per se, are not prohibited. It is when an amendment is so substantial as to effectively alter the terms of the bid that the amendment can be struck down if it is not covered by a separate public competitive bidding. Public biddings would not be competitive if a bidder, after winning the contract, can abruptly and substantially change the original parameters of its obligations under the government contract, to the prejudice of the losing bidders. Otherwise, nothing would prevent unscrupulous bidders from lowballing their bids and promising the world, only to attempt to change the terms of the contract midstream after the government has awarded them the contract.

The logic of this principle was well-discussed in the seminal case *Agan, Jr., v. PIATCO*.⁴⁹ The Court struck down the 1997 Concession Agreement between the government and the Philippine International Airport Terminals, Co. (PIATCO), because the amendments made to the government contract for the construction of the Ninoy Aquino International Airport International Passenger Terminal III were substantial. These changes included new terms and conditions that provided financial benefit to PIATCO, which could have altered the technical and financial offer of the other bidders had they known that such terms were available. The amendments to the originally bid contract proposal included modification of the public and non-public utility revenues that may be collected by PIATCO and the inclusion of a direct guarantee by the Republic of the liabilities of PIATCO in case the latter defaulted on them. The Court, through then Justice Reynato S. Puno, succinctly ruled that any substantial amendment to a government contract would contravene the very rationale for open and competitive bidding and would result in turning the exercise into a farce:

An essential element of a publicly bidden contract is that all bidders must be on equal footing. Not simply in terms of application of the procedural rules and regulations imposed by the relevant government agency, but more importantly, on the contract bidden upon. Each bidder must be able to bid on the same thing. The rationale is obvious. If the winning bidder is allowed to later include or modify certain provisions in the contract awarded such that the contract is altered in any material respect, then the essence of fair competition in the public bidding is destroyed. A public bidding would indeed be a farce if after the contract is awarded, the winning bidder may modify the contract and include provisions which are favorable to it that were not previously made available to the other bidders.⁵⁰ (Emphasis supplied.)

In *Information Technology Foundation of the Philippines v. COMELEC*,⁵¹ the Court was confronted with a petition to cancel a billion-peso contract entered into by COMELEC with Mega-Pacific for, oddly enough, the automation of the counting and canvassing of the ballots in the 2004 elections. The Court found that COMELEC awarded the contract to Mega-Pacific with inexplicable haste despite the latter's non-participation in the public bidding process, and that it had even failed to adequately qualify under COMELEC's own financial, technical and legal requirements. In striking down the contract with Mega-Pacific, the Court ruled that COMELEC violated the policy on public biddings, especially when the latter allowed the winning bidder to alter the contract:

At the very outset, the Court has explained that Comelec flagrantly violated the public policy on public biddings (1) by allowing MPC/MPEI to participate in the bidding even though it was not qualified to do so; and (2) by eventually awarding the Contract to MPC/MPEI. Now, with the latest explanation given by Comelec, it is clear that the Commission further desecrated the law on public bidding by permitting the winning bidder to change and alter the subject of the Contract (the software), in effect allowing a substantive amendment without public bidding.

This stance is contrary to settled jurisprudence requiring the strict application of pertinent rules, regulations and guidelines for public bidding for the purpose of placing each bidder, actual or potential, on the same footing. The essence of public bidding is, after all, an opportunity for fair competition, and a fair basis for the precise comparison of bids. In common parlance, public bidding aims to "level the playing field." That means each bidder must bid under the same conditions; and be subject to the same guidelines, requirements and limitations, so that the best offer or lowest bid may be determined, all other things being equal.

Thus, it is contrary to the very concept of public bidding to permit a variance between the conditions under which bids are invited and those under which proposals are submitted and approved; or, as in this case, the conditions under which the bid is won and those under which the awarded Contract will be complied with. The substantive amendment of the contract bidden out, without any public bidding — after the bidding process had been concluded — is violative of the public policy on public biddings, as well as the spirit and intent of RA 8436. The whole point in going through the public bidding exercise was completely lost. The very rationale of public bidding was totally subverted by the Commission.⁵²

In sharp contrast, the extension of time for the exercise of the purchase option under the 2009 Contract is not a substantial amendment that would render the other qualifying bidders disadvantaged. The issue of substantial amendment of the awarded contract for the AES can be framed in this wise: would stretching the period for the COMELEC to exercise the OTP from 31 December 2010 to 31 March 2012 have given an unfair advantage in favor of Smarmatic-TIM and unduly prejudiced the other qualifying bidders? The answer is no.

In this particular case, the period for exercising the purchase option in the lease arrangement is insignificant, as it does not materially promote the position of the winning bidder vis-à-vis that of the other bidders. In fact, petitioners conceded that, had the alteration of the period been mutually agreed upon before the original deadline set in the 2009 AES Contract, no legal issue would have arisen:

JUSTICE ABAD

Since that option to purchase is part of the lease agreement awarded as a result of competitive bidding, why should the exercise of that option still require competitive bidding?

ATTY. ESPEJO

Because the option has expired, Your Honor.

JUSTICE ABAD

But supposing it was extended, the option is validly extended, it would be alright?

ATTY. ESPEJO

The extension must be in accordance with the procurement law. In other words, it must refer to the same subject matter.

JUSTICE ABAD

Well yes, assuming that it is done properly, would the agreement to lease with option to purchase be valid?

ATTY. ESPEJO

It will be valid, Your Honor.⁵³ (Emphasis supplied)

The above exchange only emphasizes the nature of the extension of the period as one that is not an intrinsically prohibited amendment as would amount to a substantially modified contract. Despite the lapse of the original OTP period and the delay in the exercise of the purchase option by the COMELEC, Smartmatic-TIM not only allowed the extensions but maintained the same purchase price the latter had originally bid out. Hence, Indra, the other qualifying bidder, cannot claim unfair treatment, since it could not have offered superior price terms based on its submitted bid in 2009. Smartmatic-TIM did not insist on a higher purchase price from what was originally set in the 2009 Contract, which was pegged at ₱ 2,130,635,048.15.⁵⁴ Under the Deed of Sale,⁵⁵ COMELEC would only be paying for ₱ 1,833,274,457.09 for the remaining units (minus the 920 units earlier purchased and those that have been lost or have become unserviceable), subject to a hardware acceptance test.⁵⁶

If any disadvantage resulted from the extension of the OTP period, it was against the interest of the winning bidder, Smartmatic-TIM. Allowing the COMELEC to vacillate in its decision on whether to exercise the OTP was not without financial cost to Smartmatic-TIM. From 01 January 2011 to 30 March 2012, the latter shouldered the costs of storing and maintaining the PCOS machine units. It did not pass on these costs during the period of

COMELEC's indecision.

We have demonstrated that the OTP is an intrinsic part of the 2009 Contract and should thus be covered by the legal protection of the public bidding conducted in 2009.

The next question that should be asked is whether that legal protection can extend to the purchase under an option that has previously expired. To answer this question would require examining the exchanges of communication between the parties on the extension of the option period.

The exchange of letters between the COMELEC and Smartmatic-TIM outlined below strongly evinces the indubitable mutual intention of the parties to continually negotiate the former's exercise of the OTP granted to it, including their intention to continually extend the option period to allow the negotiation. Thus, the option period never expired. Significantly, in none of the letters did COMELEC show any intention to repudiate the extensions granted to it by Smartmatic-TIM; much less, to repudiate the former's right to exercise the option itself.

The first of four extension letters was sent to COMELEC by Smartmatic-TIM on 18 December 2010. In the letter, the company reminded the COMELEC of the impending expiration of the option period on 31 December 2010 and assured the latter that it understood that "COMELEC is still finalizing its evaluation of the automated election system, in order [for the Commission] to make a decision on the Option to Purchase." Smartmatic-TIM then informed COMELEC that it was granting the latter its first three-month extension from 31 December 2010 to 31 March 2011 "in order to allow the Commission to meet [sic] its decision regarding the option to purchase on the PCOS machines."⁵⁷ As an added concession, the company said that it was waiving the storage cost, as well as the maintenance cost related to keeping the machines in the Philippines.

On 23 March 2011, Smartmatic-TIM sent a second letter of extension to the COMELEC informing the latter of the impending expiration of the first extended option period on 31 March 2011. It also informed COMELEC of a 10 percent increase in the price of the PCOS machines to be maintained until 30 September 2011.⁵⁸ Alternatively, it was offering COMELEC a right of first refusal effective until 31 December 2011, for which there would be no price escalation for the PCOS machines. However, COMELEC was to pay for the warehouse and security costs for the machines until 31 December 2011. The COMELEC was reminded that if it did not purchase the PCOS machines, it would be sacrificing significant financial savings.

On 30 March 2011, within a week of receiving the second extension letter from Smartmatic-TIM, the COMELEC, through Commissioner Rene Sarmiento, wrote a formal clarification letter on the aforesaid options outlined in the second letter. The latter sought a clarification of whether the company would still absorb the warehousing costs if the Commission exercised the option by 30 September 2011, among other things. It then requested Smartmatic-TIM to "set a date to continue our discussions and negotiations on or before 31 March 2011 xxx."

In response to the clarifications sought by COMELEC, Smartmatic-TIM wrote a letter dated 1 April 2011 explaining the offers it made to COMELEC in the company's second letter of extension dated 23 March 2011. Smartmatic-TIM reiterated that, beginning 1 April 2011, there would be a price increase of 10 percent to be maintained until 30 September 2011. It also said that the warehousing costs would be paid separately by COMELEC. It assured the COMELEC that the former was "still very interested in COMELEC exercising the option to purchase..." and would be willing to maintain the original 2009 prices until December 2011 in a right of first

refusal arrangement. It also outlined the benefits of exercising the OTP.

On 23 September 2011, Smartmatic-TIM sent COMELEC the third letter extending the option period to 31 December 2011. However, there would be a 20 percent price increase. It also said that after the new extended period, it would "update COMELEC if we are willing to further extend the option, and if any price increases were to be decided on by our corporate headquarters." It then outlined again the benefits of exercising the option.⁵⁹

On 28 December 2011, Smartmatic-TIM sent its fourth letter of extension to COMELEC.⁶⁰ Aside from "again granting an extension on the option to purchase for another three (3) months" or until 31 March 2012, the company also dropped the price increase it had imposed in previous extensions.⁶¹ Furthermore, Smartmatic-TIM also outlined the advantages and benefits to be obtained by COMELEC from exercising the OTP. Additionally, it offered to provide the additional PCOS machines that it heard COMELEC would need if the latter would increase the number of poll precincts.

The exchange of letters above clearly shows the intention of the parties to extend the option period to allow them to continue their negotiations for COMELEC's exercise of the OTP. Thus, the option period never expired.

In fact, the intention of the parties to extend the period for the exercise of the OTP by the COMELEC to 31 March 2012 was finally formalized and embodied in an extension agreement signed on 30 March 2012. In the said agreement, the parties noted that "while such extension normally leads to an increase in the price of the hardware and the software, subject of the option to purchase, due to warehousing and maintenance costs, the PROVIDED [Smartmatic-TIM] offered to sell them at the same price [2009 AES Contract] without such increase."⁶²

If we were to use the analysis in *Helex*, and go by the principles continually stated in Philippine cases, a government procuring entity need not treat the expiry of the period, or even a material breach of the contract, as a bar to waiving the right to continue the contract, provided that the other party agrees. In *Helex*, the continued supply of helium by the private corporation and the continued ordering of supplies by the government, despite the notice of termination earlier sent by the latter, was considered as evidence that the contract continued to be alive.

So also, the exchange of communication by the parties indicates (1) that Smartmatic-TIM did not want the option to expire and was in fact unilaterally extending it several times; and (2) that COMELEC was contemplating making use of the option but, for different reasons, was not in a position to immediately and definitively arrive at a decision on the manner. In other words, neither of the parties wanted to demand the termination of the option, and both of them eventually waived the expiry of the original option period.

In the face of this evidence, the Court cannot conclude that the option period, given the contrary intervention of the parties, has already expired.

Even assuming *arguendo* that the option period has expired, this Court, under the circumstances, cannot deny the revived option the benefit of the successful bidding conducted in 2009. This matter will be discussed in the immediately succeeding portion.

We have already ruled that the period to exercise the option to purchase, under the principles of contract law, was extended by the mutual agreement of the parties.

We have also posited that, even assuming that the period to exercise the option has expired, the parties have agreed to revive the option, and this revived option is valid. While this principle finds ready application to private parties, it is also applicable to a government contract, provided that other relevant laws are not violated, and government is not placed at a disadvantage. We hold this to be so, and because of the circumstances surrounding the revival of the option in this case, the revival herein is valid.

We now also rule that the COMELEC did not commit grave abuse of discretion in executing the Deed of Sale, and that the successful bidding in 2009 satisfies the requirement of the GPRA; again, only because of the unique circumstances of this case.

COMELEC Could Not Have Been Legally Required to Commit to Availing or Not Availing Themselves of the Option Before the Original Expiry Thereof on 31 December 2010.

A test of grave abuse of discretion here could be propounded thus: Were then COMELEC Chairperson Jose A. Melo and Commissioners Rene V. Sarmiento, Nicodemo T. Ferrer, Lucenito N. Tagle, Gregorio Y. Larrazabal, Armand C. Velasco and Elias R. Yusoph remiss in their lawful duties if they failed to exercise the option to purchase before it expired on 31 December 2010? Another way of putting it is: could they be justified in failing to immediately act on the option if as these COMELEC members claim, the exercise of the option is after all advantageous to the Republic?

While procurement laws seek to prevent abusive exercise of discretion, they do not unreasonably require government agencies to abandon their duty to exercise care and good judgment.⁶³ In this case, the decision to purchase the PCOS machines under the OTP was actually an exercise of sound discretion afforded to the COMELEC to implement our electoral laws, given the limited circumstances and the viable options open to it at that time.

For petitioners to singularly target the fact that the OTP had already lapsed without COMELEC exercising the option or accepting the offer to extend the period is to ignore the factual context in which it was at that time. It is an overly strict construction of a government contract that would only prejudice the voting public. At the time that the initial OTP period was to expire on 31 December 2010, the COMELEC had just finished conducting the first nationwide automated national elections and was facing the myriad consequences of such electoral exercise. Aside from deciding and ruling on various local electoral protests, it had to reschedule and conduct special elections in affected areas. Prior to the Court's Decision in *Kida v. Senate*,⁶⁴ the Commission was also faced with preparations for the elections in the Autonomous Region of Muslim Mindanao previously scheduled on 08 August 2011, but since been reset and synchronized with the 2013 national and local elections. Of course, it did not help that the COMELEC at the beginning of 2011 was also undergoing changes in its composition with the retirement of COMELEC Chairperson Melo and Commissioners Ferrer and Larrazabal, as well as the consequent appointment of present COMELEC Chairperson Sixto Brillantes and Commissioners Christian Robert S. Lim and Augusto C. Lagman.

More compelling than these daily operational constraints is the budgetary limitation imposed by Congress itself on the financial capabilities of COMELEC. It must be remembered that from the latter's initial request for a P 10,436,300,399 budget for the procurement of an AES for the 2013 elections, the budget was significantly reduced to only P 7 billion. Out of that amount, it could only use P 2.2 billion for sourcing the AES, whether through purchase or lease. If we were to reckon the lowest calculated responsive bid from its experience in 2009, the COMELEC will have to spend a minimum of P 9 billion in order to secure a viable AES through public bidding. This fact only highlights the limitations imposed by its reduced budget grant of P 7 billion. The Court cannot summarily ignore these financial constraints imposed upon the COMELEC.

It has been posited, in response to these financial considerations, that COMELEC could still request an additional budget for the lease or purchase of an AES in time for the 2013 elections and still undergo a new public bidding process. This proposition asks the Court to make several leaps of faith which is simply untenable and too fraught with peril to warrant any proper consideration, especially since we are dealing here with something that directly impacts elections, which are at the heart of our representative democracy.

First, the proposed alternative route of going to Congress for additional budget presupposes that there are available funds for re-allocation to answer the needs of COMELEC. In addition, the alternative likewise assumes that the process of approving additional funding requirements would immediately and swiftly pass through Congress and the Senate and achieve Presidential approval, all in time for COMELEC to receive the needed appropriation, request proposals, and conduct another public bidding. The alternative route already assumes that no opposition to an increase in funding would be raised and thus prolong discussion and delay eventual approval. Of course, all of this should be achieved in sufficient time before the conduct of the 2013 elections which is less than a year from now.⁶⁵

Second, the proposition heavily relies on the existence of other qualified bidders who would be willing to submit offers within the limited budget provided under the 2012 General Appropriations Act. Lest it be forgotten, during the public bidding for the 2009 AES, the next best bid after Smartmatic-TIM's offer of P 4,327,876,279.86 for 82,200 PCOS machine units was Indra's bid of P 8,360,000,000 for only 57,231 units. The Court has been given no assurance that the market for these machines has improved since 2009 such that greater interest and participation from qualified suppliers would be generated.

The final leap of faith required by the Court under this alternative route would be to assume that a new bidding would result in the procurement of an AES that is perfect and free from technical glitches of the kind complained of here. In fact, even Commission Lagman admits that there is no guarantee that the new machines to be procured by the COMELEC would be problem-free.⁶⁶

Rather than make these three giant leaps of faith, the more defensible and reasonable position is to dismiss the convoluted argument of petitioners that the exercise of the OTP cannot be mutually extended and affirm that the purchase option was validly extended and consensually agreed upon by the contracting parties.

The GPRA recognizes exceptional circumstances that would dispense with the requirement of public bidding, considering the overarching need to promote economy and operational efficiency. These alternative methods of procurement, which would allow for dispensing with the requirement of open, public and competitive bidding,

include limited source bidding, direct contracting, repeat order, shopping and negotiated procurement.⁶⁷ The limitation is that in resorting to these modes of procurement, the "Procuring Entity shall ensure that the most advantageous price for the government is obtained." The underlying consideration in these alternative modes is that requiring strict compliance with the statutory processes of bidding under the GPRA would burden the procuring entity with needless technicalities, even if there are adequate safeguards to prevent corruption and ensure transparency in the procurement of goods and services.

Of particular significance to the present case is the repeat order method under the GPRA, whereby the procuring entity obtains goods from a winning bidder previously awarded through competitive bidding, whenever there is a need to replenish those goods.⁶⁸ Specific conditions are outlined

under the GPRA⁶⁹ and its implementing rules and regulations⁷⁰ before repeat orders can be resorted to by a government agency.⁷¹

- a. Previous Award - Existence of a supply contract awarded through full competitive or public bidding;
- b. Unforeseen Need - Need of procuring entity for additional quantity of goods supplied under the contract due to unforeseen cause;
- c. Non-splitting of Contracts - The procurement must not result in the splitting of contracts, requisitions, or purchase orders under Section 54.1 of the IRR-A;
- d. Time Requirement - Must be availed within six (6) months from the date of the Notice to Proceed arising from the original contract except in cases approved by the Government Procurement Policy Board;
- e. Same or Lower Price - Unit prices must be the same as, or lower than those in the original contract, and still the most advantageous to the procuring entity based on price verification;
- f. Quantity Limitations - The procurement shall not exceed twenty-five percent (25%) of the quantity of each item in the original contract.

Similar to direct contracting,⁷² repeat orders are made by the procuring entity directly to a specific and winning bidder for the purchase of specific goods. The policy rationale for this alternative mode is that these goods have already been prescreened under a previously conducted competitive bidding. It would be redundant for the procuring entity to go through another round of bidding in this instance, because the goods have been qualified under the GPRA.

To some reasonable extent, there is enough room for this Court to apply the rationale for repeat orders to the questioned OTP, in order to justify the exemption from the requirement of public bidding, even if we cannot strictly categorize the purchase as a repeat order.

First, the PCOS machines sought to be purchased have previously gone through competitive bidding and qualified under the technical requirements of the COMELEC as a procuring entity. The goods to be purchased by it under the OTP are the same machines that were used under the 2009 AES Contract for the 2010 national and

local elections. Subject only to the Hardware Acceptance Test under the Deed of Sale, these PCOS machines have presumably passed the technical requirements for the AES in 2009. None of the petitioners have put into question the regularity in the conduct of the public bidding that gave rise to the 2009 AES Contract. To conduct another round of public bidding for the PCOS machines, when they have been previously proven to have satisfied the COMELEC requirements, would be superfluous.

Second, the purchase price for these PCOS machines has not increased and continues to be the superior bid as opposed to the proposal of the other bidder, Indra. None of the petitioners claims that the 2009 AES Contract should have been awarded to any other supplier. In fact, the bid of Smartmatic-TIM was found to be the "single complying calculated bid" after an evaluation of its technical and financial proposal.⁷³ These strongly indicate that both its product and the purchase price are superior to those of the others and more advantageous to the government.

In the final analysis, not only is the extension of the OTP and the exercise thereof compliant with the objectives of competitiveness and transparency under the GPRA, but these are also the most advantageous options available to the COMELEC considering the present factual circumstances, the urgency of the upcoming mid-term elections, and limited financial resources.

There is no overwhelming necessity for the Court in the instant Petition to make definitive findings on the alleged technical defects of the PCOS machines at this time.

Petitioners have highlighted the technical defects of the PCOS machines to demonstrate their failure to comply with the requirements under the AES Law. On the other hand, respondents COMELEC and Smartmatic-TIM argue that the claimed deficiencies of the PCOS machines are either attributable to human intervention and not to the machines themselves or alternatively, are not critical to render the units unacceptable for purposes of conducting the 2013 elections.

We understand the concerns of petitioners. Any doubt as to the functionality of the PCOS machines would put the integrity of the electoral process under serious suspicion and hence, cast disconcerting shadows on the legitimacy of their results. Elections are "indispensable in a true democracy,"⁷⁴ so that, "without it, democracy would not flourish and would be a sham."⁷⁵

Nevertheless, petitioners have not sufficiently demonstrated to this Court that the PCOS machines have technical insufficiencies of such magnitude as would support our exercise of judicial review over the exclusive mandate of the COMELEC to administer the election process.

The Constitution empowered the COMELEC to "[e]nforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall."⁷⁶ No other body is granted such plenary powers with regard to elections under the Constitution. In recognition of this Constitutional mandate, the Court has, in a long line of cases,⁷⁷ given the COMELEC wide latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created – "free, orderly, honest, peaceful, and credible elections."⁷⁸

The "**COMELEC deserves to be accorded by the Court the greatest measure of presumption of regularity in its course of action and choice of means in performing its duties**, to the end that it may achieve its designed place in the democratic fabric of our government."⁷⁹ Sumulong v. COMELEC,⁸⁰ underlined the distinct role of the COMELEC and highlighted the Court's policy of non-interference, even if the Court may not fully agree with the Commission's choice of means:

The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created - free, orderly and honest elections. We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere. Politics is a practical matter, and political questions must be dealt with realistically — not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions.

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There are no ready-made formulas for solving public problems. Time and experience are necessary to evolve patterns that will serve the ends of good government. In the matter of the administration of the laws relative to the conduct of elections xxx we must not by any excessive zeal take away from the Commission on Elections the initiative which by constitutional and legal mandates properly belongs to it. Due regard to the independent character of the Commission, as ordained in the Constitution, requires that the power of this court to review the acts of that body should, as a general proposition, be used sparingly, but firmly in appropriate cases. We are not satisfied that the present suit is one of such cases. (Emphasis supplied.)

In Roque v. COMELEC,⁸¹ this Court upheld the very same 2009 Contract between the COMELEC and Smartmatic-TIM containing the OTP exercised by the Commission. Reiterating its pronouncement in Sumulong, the Court explained:

The COMELEC is an independent constitutional body with a distinct and pivotal role in our scheme of government. In the discharge of its awesome functions as overseer of fair elections, administrator and lead implementor of laws relative to the conduct of elections, it should not be stymied with restrictions that would perhaps be justified in the case of an organization of lesser responsibility. It should be afforded ample elbow room and enough wherewithal in devising means and initiatives that would enable it to accomplish the great objective for which it was created — to promote free, orderly, honest and peaceful elections. This is as it should be for, too often, COMELEC has to make decisions under difficult conditions to address unforeseen events to preserve the integrity of the election and in the process the voice of the people. Thus, in the past, the Court has steered away from interfering with the COMELEC's exercise of its power which, by law and by the nature of its office properly pertain to it. Absent, therefore, a clear showing of grave abuse of discretion on COMELEC's part, as here, the Court should refrain from utilizing the corrective hand of *certiorari* to review, let alone nullify, the acts of that body. xxx. (Emphasis supplied.)

Rather than employ excessive judicial zeal, this Court has generally deferred to the discretion of the COMELEC in the performance of the latter's constitutional mandate. Oftentimes, we have steered away from unduly interfering with the administration of electoral exercises by COMELEC and refrained from substituting our own wisdom. This judicial policy of guarded review holds especially true in administrative matters, such as the determination of which voting machines to use for purposes of the automated elections.

Hence, restraint in ruling on the discretion regularly exercised by the COMELEC is the better part of prudence, especially in administrative matters; otherwise, excessive meddling may create adverse critical consequences. In questioning the decision of the constitutional body, petitioners bear a heavy burden of proving that it acted with grave abuse of discretion.

The defects of the PCOS machines have not been sufficiently demonstrated to support a judicial finding that they failed to comply with the technical requirements under the AES Law.

The issue raised by petitioners is whether the modern voting machines used and purchased by the COMELEC will accurately reflect the will of the people in a manner that also complies with the AES Law.

In praying for the nullification of the Deed of Sale of the PCOS machines, petitioners cite five areas of special concern in which the integrity, security and auditability of the AES, as required by the AES Law, may be particularly vulnerable: (a) absence of a digital signature; (b) lack of verified paper trail; (c) lack of ultraviolet marks on the ballots; and (d) last-minute configuration of the compact flash disks in 2010.

Although petitioners cited the presence of the open console port as another technical defect of the PCOS machines which, according to them, allowed unauthorized access to the operating system thereof,⁸² this purported defect is not expressly required under the AES Law and need not be discussed at length. Suffice it to say that Smartmatic-TIM easily remedied the defect by physically closing the port with tamper-proof mechanical seals⁸³ and installing new firmware to prevent unauthorized access to the system.⁸⁴ That this defect was remediable was even candidly admitted by Commissioner Lagman during the oral arguments.⁸⁵

On the other hand, respondents have presented arguments to refute these claims of alleged defects. They argue that the cited technical insufficiencies of the purchased PCOS machines will not pose substantial and critical threats to the integrity of these machines. Respondents likewise insist that most of the errors are not attributable to the PCOS machines themselves, but more to human intervention.

A summary of the opposing arguments of both sides are presented below:

A. Digital Signature

The AES Law, as amended, provides for the manner in which the electronically transmitted election results are authenticated:

The manner of determining the authenticity and due execution of the certificates shall conform with the provisions of Republic Act No. 7166 as may be supplemented or modified by the provisions of this Act, where applicable, by appropriate authentication and certification procedures for electronic data, electronic documents and electronic

signatures as provided in Republic Act No. 8792 as well as the rules promulgated by the Supreme Court pursuant thereto.⁸⁶

Hence, the digital signature is the primary means of ensuring the authenticity of electronically transmitted election returns. In fact, only a digitally signed election return is considered as containing official election results.⁸⁷

Petitioners point to the failure of the PCOS machine to ensure the security of the election results because of the lack of a digital signature. According to them, the machines are incapable of embedding digital signatures as required by the AES Law.⁸⁸

In response, Smartmatic-TIM explained that the PCOS machines can be programmed to have several types of digital signature including self-generated ones or even those generated by a third-party certifying authority.⁸⁹ However, COMELEC allegedly disabled the feature that would have enabled the Board of Election Inspectors (BEI) to put additional personal digital signatures generated by a third-party certifying authority, because a certifying authority had not been established by law, among other reasons.⁹⁰ Despite these instructions by the COMELEC to disable the said feature, Smartmatic-TIM argues that the separate i-Button gadget could be considered as sufficient compliance with the digital signature provision of the AES Law.⁹¹

B. Voter Verified Paper Audit Trail

One of the other minimum capabilities required by the AES Law was that the voting machine should have a provision for voter verified paper audit trail⁹² and allow the voter a system of verification to find out whether or not the machine has registered his or her choice.⁹³ The objective of this requirement is to allow voters to confirm that their choices as marked in their ballots have been properly read and counted.

Petitioners claim that no such voter verified paper audit trail was provided to the voters during the 2010 elections.⁹⁴ They allege that even COMELEC admitted to disabling this feature for logistical reasons, specifically the lack of ink for printing the paper audit trail.⁹⁵

Again, Smartmatic-TIM argues that this capability was actually present in the PCOS machines except that it was also disabled by the COMELEC.⁹⁶ No adequate explanation has been offered by the COMELEC why this feature was rendered inoperative, even if the PCOS machines were capable of performing them.

C. Deactivation of the UV Mark Detectors

Another of the cited problems is the disabling of the UV marks detection capability of the PCOS machines, which compromises the security of the ballots.⁹⁷

Respondent COMELEC admits that it intentionally disabled the detectors because of printing problems and the belated decision to change the UV marks design from that of the COMELEC to that of the National Printing Office.⁹⁸ According to Smartmatic-TIM, the delay in its printing schedule necessitated fast-tracking of the UV-mark printing using less UV-ink concentration. The reduced concentration resulted in unreliable UV detection.

Thus, COMELEC deactivated the UV detectors and decided to use handheld UV lamp detectors instead.⁹⁹ The PCOS machines, however, have the capability to read UV marks.

D. Reconfiguration of the Compact Flash Cards

Finally, petitioners cite the much publicized recall and reconfiguration of the compact flash cards a week before the conduct of the 2010 elections.¹⁰⁰ This controversy fuelled speculations of attempts to abandon the AES, resort to the vulnerable manual voting, perpetrate massive fraud, and reduce voter confidence in the process.¹⁰¹

COMELEC admits that during the Final Testing and Sealing (FTS) a week before the 2010 elections, it was discovered that the PCOS machines did not properly read the local side of the ballot.¹⁰² It explains that this was because the CF cards were configured to read a ballot design that used single-spacing for the local side of the ballot, while COMELEC belatedly decided to use double-spacing, because the local side was relatively empty in comparison with the national side which was full due to the lengthy list of party-list candidates. The decision to use double-spacing was not timely communicated to Smartmatic-TIM. This omission led to the nationwide recall of the CF cards to correct their configuration, so that the PCOS machines would read the local side of the ballot as double-spaced, instead of single-spaced.¹⁰³ The recall of the CF cards did not impact the technical fitness of the PCOS machines.

The purported technical defects of the PCOS machines are factual issues that are not proper and ripe for the present Rule 65 Petitions.

After evaluating the above factual allegations of both petitioners and respondents, we find that we are unable to make a conclusion of grave abuse of discretion based on these allegations. To every allegation of material defect, respondents are able to give an answer. The Court would need to conduct a hearing on the facts to make a conclusion on which claim is correct.

Had there been adequate time and resources, a third-party review by a proven and competent authority would have been valuable in helping the Court to resolve the supposed technical deficiencies of the PCOS machines. It would be legally improper for the Court to entertain these highly technical disputes in the instant Rule 65 Petition, when the basic legal issue sought to be resolved is limited only to whether the OTP was properly exercised by the COMELEC, and whether the consequent Deed of Sale covering the PCOS machines is legally valid.

In any event, the PCOS machines have been subject to review by SLI Global Solutions (SLI).¹⁰⁴ SLI twice evaluated Smartmatic-TIM's AES to examine compliance with COMELEC's technical requirements under the AES Law as well as the request for proposal. SLI likewise used the 2005 Voluntary Voting System Guidelines of the United States Election Assistance Commission to gauge the proposed electoral system. Prior to the May 2010 elections, SLI issued its Final Certification Test Report,¹⁰⁵ in which it concluded as follows:

xxx. While the system conforms to key requirements and is operationally suitable for use, findings remain in areas such as documentation, process and setup. **All issues are considered however to be minor in nature or reconcilable using appropriate manual processes and/ or compensating controls.** Assuming the above mentioned controls are put into practice and that the AES is properly configured, operated and supported,

SysTest Labs finds Smartmatic Automated Election System to be capable **of operating properly, securely and accurately** and therefore recommends the system for certification and use in the May 10, 2010 election. (Emphasis supplied)

SLI performed another review after the elections to determine the viability of the AES for future elections. On 07 November 2011, SLI issued a Final Certification Test Report, which affirmed its earlier findings and recommended the certification of the system as conformant with the operations requirements:

xxx. Assuming that the AES environment setup is successfully completed, and the, system is properly configured, operated and supported, and that the compensating controls are implemented, SLI Global Solutions finds that the Automated Election System is functionally capable of operating properly, securely and accurately, although there will continue to be dependence on the vendor for assistance. **SLI recommends the system for certification, as it is conformant with the operational requirements and is suitable for use in applicable future elections.** (Emphasis supplied.)

The above certification of the SLI, as to the functional viability and suitability of Smartmatic-TIM's AES for both the 2010 and 2013 elections, deserves sufficient weight. There has been absolutely no claim that the methods used by SLI are doubtful, or that its qualifications are questionable. Petitioners, as well as the Court, cannot simply disregard the approval given by an independent and objective evaluator of the AES.

Fuelling the trepidation to rule on the technical sufficiency of the PCOS machines is the general sense obtained during the course of the oral arguments that these defects do not appear to be critical or intrinsic to the machines. Strangely, many of the complaints focus on the wisdom of the administrative decisions made by COMELEC in the performance of its discretionary authority, i.e., disabling some of the features of the PCOS machines. Although it is not discounted that the PCOS machines may leave room for improvement, it seems that another aspect of the problem may have something to do with the conduct of COMELEC personnel using the PCOS machines, which is already beyond the scope of the issue with respect to the technical compliance of the units with the minimum functional capabilities set by law for an AES.

Without making set judgment as to the gravity of the defects, it is to be noted that these defects are remediable, as admitted by former COMELEC Commissioner Lagman in his testimony during the oral arguments:

JUSTICE SERENO:

xxx. So, you are basically saying here that these technical proposals are not inherently irremediable. That is the conclusion that we are coming to. There are access devices or accessories that you can attach to machines and it will do what you want it to do. The software can be configured. In other words, in the world of technologies the possibilities are there. Okay?

FORMER COMMISSIONER LAGMAN:

That is correct, Your Honor. I just don't know whether they can do it in time. ¹⁰⁶

Based on the foregoing exchange, Commissioner Lagman's concern was whether the defects could be remedied

in time. This illustrates the speculative character of some of the concerns raised in these Petitions.

Considering the wide latitude given to the COMELEC in the exercise of its constitutional mandate, the lack of competence of the Court to decide on technical matters, and the apparently adequate explanations given by respondents for the non-intrinsic defects, the Court finds it extremely difficult to declare that grave abuse of discretion attended the decision of the COMELEC to purchase the PCOS machines based on supposed technical insufficiencies.

This Case Is Unique: The Interests of the Government Are Adequately Safeguarded in This Particular Circumstance.

This Court's Decision is not intended to be a new, wide-open valve that would violate the requirements of the GPRA. The conditions herein compel us to rule in favor of COMELEC or, rather, to avoid stymieing its exercise of discretion of COMELEC in its planned conduct of future elections. Government procurement officials are still required to give adequate written notice of their intention to make use of options to purchase in validly executed contracts and to put in writing mutual agreements to extend option periods which must ultimately be justified in the context of the original contract in which the option inheres.

For the guidance of government procurement officials, we enumerate conditions that, at a minimum, must exist in order that expired OTPs can still be availed of. More conditions may be required if provided for by law, regulation or contract, as follows:

One, there can be no revival of an expired option if the revival is not made within a reasonable time after its expiry.

Two, the delay in the exercise of the option or the failure to exercise it within the original period must be fully justified under the circumstances.

Three, the exercise of the option must be advantageous to government.

We clarify, however, that the option period in this case has not, under the circumstances, truly expired as to deny the parties the ability to make use of them.

Accordingly, I vote to DISMISS the instant Petitions. Consequently, the Commission on Elections Resolution Nos. 9373 and 9376 dated 06 March 2012 and 21 March 2012, respectively — on the "Agreement on the Extension of the Option to Purchase under the Contract for the Provision of the Automated Election System for the May 10, 2010 Synchronized National and Local Elections" dated 30 March 2012 and the Deed of Sale dated 30 March 2012 by and between COMELEC and Smartmatic-TIM Corporation — are declared VALID.

The Temporary Restraining Order issued by this Court on 24 April 2012 enjoining respondents COMELEC and Smartmatic-TIM Corporation from implementing COMELEC Resolution No. 9376 should likewise be LIFTED.

MARIA LOURDES P. A. SERENO
Associate Justice

Footnotes

¹ Contract for the Provision of an Automated Election System for the 10 May 2010 Synchronized National and Local Elections, Annex "3" of Smartmatic-TIM's Comment dated 30 April 201, hereafter "the 2009 Contract."

² In Basilan, First District of Bulacan and some areas of Lanao del Sur.

³ The original quantity of PCOS machines subject of the option to purchase was 82,200 units. After COMELEC partially exercised the option for 920 units for the special elections, the remaining number of units available for purchase should have been 81,280 units. However, the assailed proposed purchase covers only 80,916 units instead of 81,280, because it appears that some of the remaining PCOS machines have been lost, missing or unserviceable. (Annexes "E" and "E-1" of the Deed of Sale dated 30 March 2012, Annex "16" of Smartmatic-TIM's Comment dated 30 April 2012.)

⁴ "ARTICLE 1562. In a sale of goods, there is an implied warranty or condition as to the quality or fitness of the goods, as follows:

(1)Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are acquired, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose;

(2)Where the goods are brought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality. (n)" (Civil Code)

⁵ Roxas v. Binay, docketed as PET Case No. 004, is a Protest filed under Rule 15 of the 2010 Rules of the Presidential Electoral Tribunal. Protestant Manuel A. Roxas seeks the annulment of the proclamation of protestee Jejomar C. Binay as the duly elected Vice-President of the Republic of the Philippines after the 10 May 2010 synchronized elections due to "fraud, anomalies, irregularities and statistical improbabilities in certain clustered precincts," among other grounds. The fraud, anomalies and irregularities were alleged to be due to the "complete and utter disregard by COMELEC and Smartmatic-TIM of the mandated minimum system capabilities for an automated election system under the AES Law." It is alleged that the two were "complicit in disabling or entirely removing crucial safeguards that should have prevented the occurrence of system-wide electoral fraud in the Vice-Presidential Contest."Among the mandatory requirements and security safeguards allegedly disregarded or deactivated were the voter verified paper trail, the digital signatures, the ultraviolet (UV) verification capability, the source code review and the configuration of the compact flash (CF) cards in a way that made them unable to read votes for the protestant.

⁶ "A contract can be renewed, revived or extended only by mutual consent of the parties." (*Light Rail*

Transit Authority v. CA, 486 Phil. 315,329 (2004); *Thunder Security and Investigation Agency v. NFA (Region I)*, G.R. No. 182042, 27 July 2011, 654 SCRA 714, 725).

⁷ Arturo M. Tolentino, Commentaries and jurisprudence on the Civil Code of the Philippines, Volume Four, 559-560 (1987).

⁸ ARTICLE IV, Sec. 10. Competitive Bidding. – All Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act.

⁹ "Lease of construction and office equipment, including computers, communication and information technology equipment are subject to the same public bidding and to the processes prescribed under this Act." (GPRA, Sec. 46)

¹⁰ Part A, Rule XIV, Sec. 46.

¹¹ GPPB NFM No. 065-2007 dated 03 December 2007 available at http://www.gppb.gov.ph/opinions/view_opinion.asp?o_id=447 (last visited on 05 June 2012).

¹² WTO Agreement on Government Procurement, Art. 1 (2).

¹³ 48 C.F.R. 7.402 (b) (2).

¹⁴ IRR-A of the GPRA, Annex "D," Sec. 1.1.

¹⁵ IRR-A of the GPRA, Annex "E," Contract Implementation Guidelines for the Procurement of Infrastructure Projects, Sec. 10.

¹⁶ If the government agrees to extend the period, however, the winning bidder of the infrastructure project is obliged to increase or extend its performance security to cover the approved contract time extension:

"For the procurement of infrastructure projects, the winning bidder shall post an additional performance security following the schedule above to cover any cumulative increase of more than ten percent (10%) over the original value of the contract as a result of amendments to order or change orders, extra work orders and supplemental agreements, as the case may be. The winning bidder shall cause the extension of the validity of the Performance Security to cover approved contract time extensions." (IRR-A of the GPRA, Sec. 39.5.)

¹⁷ 21 Ct.Cl. 222, 543 F.2d 1306, 20 UCC Rep. Serv. 923 (20 October 1976).

¹⁸ *Id.* at 1313.

¹⁹ AES Law, Sec. 5, as amended by Republic Act No. 9369.

- ²⁰ Annex "1," Consolidated Comment of COMELEC dated 30 April 2012.
- ²¹ COMELEC's Consolidated Memorandum dated 18 May 2012, p. 7.
- ²² Consolidated Comment of COMELEC dated 30 April 2012, pp. 60-61.
- ²³ Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections dated 09 July 2009.
- ²⁴ 2009 AES Contract, Art. 4.3, p. 8.
- ²⁵ Contract of Sale dated 23 September 2010.
- ²⁶ "6. Partial Temporary Extension - In order to allow the Commission to meet its decision regarding the option to purchase on the PCOS machines, Smartmatic-TIM is amenable to extend the option to purchase, solely on the remaining 81,280 PCOS machines, until March 31st 2011, waiving the storage costs, and covering the maintenance costs. Would COMELEC exercise the option to purchase before March 31st, the additional 1 years [sic] warrant would begin to count again." (Smartmatic-TIC Letter dated 18 December 2010, p. 3)
- ²⁷ Smartmatic-TIM letter dated 23 March 2011.
- ²⁸ Smartmatic-TIM letter dated 23 September 2011.
- ²⁹ Smartmatic-TIM letter dated 28 December 2011.
- ³⁰ "Considering it is now end of December 2011, and the Commission is still finalizing its evaluation of the AES in order to make a decision on the purchase of the equipment, we are again granting an extension of the option to purchase for another three (3) months." (Id.)
- ³¹ Republic Act No. 10155.
- ³² Based on COMELEC's computation, ₱ 4.8 billion out of the ₱ 7 billion budget will be used for essential services (₱ 2.8 billion) and to defray the costs of deployment (₱ 2 billion). (COMELEC Memorandum dated 18 May 2012, p. 22)
- ³³ "Thus, the phrase 'has determined that the critical and major issues on, the Voluntary Voting System Guidelines (VVSG) of the 2010 AES have already been resolved' (though wrongly phrased as there are no issues on the VVSG-standard used for the review of the software source code) is wrong. SMTT, in fact, is still in the process of presenting the fixes to the Comelec. While fixes on some issues have already been presented, none of [the] said fixes have actually and officially been accepted." (Additional Arguments for Dissent dated 21 March 2012)

³⁴ Comment dated 21 March 2012, p. 2.

³⁵ "The period in which the COMELEC can exercise its option to purchase is extended to 31 March 2012." (Agreement on the Extension of the Option to Purchase under the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections dated 30 March 2012)

³⁶ "2. For and in consideration of the amount of One Billion Eight Hundred Thirty Three Million Two Hundred Seventy Four Thousand Four Hundred Fifty Seven Pesos and Nine Centavos (Php1,833,274,457.09) ("Purchase Price"), the BUYER [COMELEC] hereby purchases the hardware and software listed in Annex 'E' and Annex 'E-1' from the SELLER [Smartmatic-TIM] subject to the terms and conditions set forth in Annex 'D'. The Purchase Price shall be paid by the BUYER in accordance with the payment schedule attached as Annex 'F'. The BUYER shall pay the Purchase Price to the SELLER via irrevocable letter of credit issued by the Land Bank of the Philippines." (Deed of Sale dated 30 March 2012)

³⁷ "To formally ACCEPT the offer of SMARTMATIC-TIM to extend the period to exercise the Option to Purchase until March 31, 2012." (COMELEC Resolution No. 9377 dated 29 March 2012)

³⁸ "To APPROVE the Deed of Sale between the COMELEC and the SMARTMATIC-TIM attached as Annex 'A' hereof to purchase the latter's PCOS Machines (hardware and software) to be used in the upcoming May 13, 2013 National and Local Elections; xxx." (COMELEC Resolution No. 9378 dated 30 March 2012)

³⁹ Petition for Review on Certiorari, Prohibition and Mandamus dated 10 April 2012 (G.R. No. 201112); Certiorari and Prohibition dated 03 April 2012 (G.R. No. 201121); Petition for Certiorari, Prohibition and Mandamus dated 10 April 2012 (G.R. No. 201127); and Petition dated 26 April 2012 (G.R. No. 201413).

⁴⁰ Smartmatic-TIM claims that in addition to the substantial part of the Performance Security, which the COMELEC still retains, the company also has a remaining outstanding claim of ₱ 23,000,000 for the Command Center that it built at the Philippine International Convention Center upon the instruction of the COMELEC. (Smartmatic-TIM's Consolidated Memorandum dated 18 May 2012, p. 39)

⁴¹ The performance security was furnished through an irrevocable domestic standby letter of credit, which Smartmatic-TIM opened on 15 June 2009 in favor of the COMELEC. The standby letter of credit remained in effect until its expiration on 10 July 2010. However, in COMELEC Resolution No. 9293 dated 6 October 2011, the COMELEC retained an amount approximately equal to ₱ 50,000,000 to cover the remaining unfulfilled obligations of Smartmatic-TIM under the 2009 AES Contract. (COMELEC's Consolidated Memorandum dated 18 May 2012, pp. 54-55.)

⁴² 8 Cl.Ct. 743, 33 Cont.Cas.Fed., 26 Sept. 1985.

⁴³ TSN, 02 May 2012, p.12.

⁴⁴ Article 1292, Civil Code. See also Evadel Realty and Development Corporation v. Spouses Antero, 409

Phil. 450 (2001) and Transpacific Battery Corporation v. Security Bank & Trust Co., G.R. No. 173565, 08 May 2009, 587 SCRA 536.

⁴⁵ Deed of Sale dated 30 March 2012, Art. 9, p. 4.

⁴⁶ Cresencio C. Milla v. People of the Philippines, G.R. No. 188726, 25 January 2012 citing *Quinto v. People*, 365 Phil. 259 (1999).

⁴⁷ Inchausti & Co. v. Yulo, 34 Phil. 978 (1914); Pascual v. Lacsamana, 100 Phil. 381 (1956); Tible v. Aquino, 160 Phil. 214 (1975); California Bus Lines v. State Investment House, 463 Phil. 689 (2003).

⁴⁸ BPI v. Gooch, 45 Phil 514 (1923).

⁴⁹ 450 Phil. 744 (2003).

⁵⁰ *Id.* at 814-815.

⁵¹ 464 Phil. 173 (2004).

⁵² *Id.* at 248.

⁵³ TSN, 02 May 2012, p. 91.

⁵⁴ 2009 AES Contract, Art. 4.3, p. 8.

⁵⁵ Deed of Sale dated 30 March 2012, Art. 2, p. 2.

⁵⁶ "4. The SELLER [Smartmatic-TIM] shall retain administrative control and ownership of the hardware and software prior to the conduct of the Hardware Acceptance Test ("HAT"). The control and ownership of the hardware and software shall be transferred to the BUYER [COMELEC] upon acceptance per batch of 20,000 units during the HAT process. For said purpose, the SELLER shall issue a Delivery Receipt of accepted hardware upon acceptance of every 20,000 units. The SELLER shall submit the Inventory List (including the serial numbers) of the hardware and software listed in Annex "E" and Annex "E-1" to the BUYER within three (3) business days after the execution of this Deed of Sale." (Deed of Sale dated 30 March 2012, Art. 4, p. 2)

⁵⁷ "6. Partial Temporary Extension - In order to allow the Commission to meet its decision regarding the option to purchase on the PCOS machines, Smartmatic-TIM is amenable to extend the option to purchase, solely on the remaining 81,280 PCOS machines, until March 31st 2011, waiving the storage costs, and covering the maintenance costs. Would COMELEC exercise the option to purchase before March 31st, the additional 1 years [sic] warrant would begin to count again." (Smartmatic-TIM letter dated 18 December 2010, p. 3)

- ⁵⁸ Smartmatic-TIM letter dated 23 March 2011.
- ⁵⁹ Smartmatic-TIM letter dated 23 September 2011.
- ⁶⁰ Smartmatic-TIM letter dated 28 December 2011.
- ⁶¹ "Considering it is now end of December 2011, and the Commission is still finalizing its evaluation of the AES in order to make a decision on the purchase of the equipment, we are again granting an extension of the option to purchase for another three (3) months." (Id.)
- ⁶² "The period in which the COMELEC can exercise its option to purchase is extended to 31 March 2012." (Agreement on the Extension of the Option to Purchase under the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections dated 30 March 2012)
- ⁶³ Data Recognition Corporation v. State of Minnesota, 2003 WL 23335317 (Minn.Dist.Ct.).
- ⁶⁴ G.R. Nos. 196271, 196305, 197221, 197280, 197282, 197392 & 197454, 18 October 2011.
- ⁶⁵ TSN, 02 May 2012, pp. 66-67, 296-297.
- ⁶⁶ Id. at 192.
- ⁶⁷ GPRA, Sec. 48.
- ⁶⁸ GPRA, Sec. 48 (c).
- ⁶⁹ GPRA, Sec. 51.
- ⁷⁰ IRR-A of the GPRA, Sec. 51.
- ⁷¹ Florante b. nacor, The Philippine Government Procurement Reform Act (R.A. No. 9184) and the Revised IRR, Annotated: A Handbook on Public Bidding, Central Book Supply, 541 (2011).
- ⁷² Direct contracting is a method of procurement that does not require elaborate bidding documents because the supplier is simply asked to submit a price quotation or a proforma invoice, together with the conditions of sale, which is an offer that may be accepted immediately or after some negotiations. (GPRA, Sec. 48 [b]; Sec. 50)
- ⁷³ Roque v. COMELEC, G.R. No. 188456, 10 September 2009, 599 SCRA 69.
- ⁷⁴ Bato Ali v. Court of First Instance of Lanao, 80 Phil. 506 (1948).

⁷⁵ COMELEC v. Tagle, 445 Phil. 667 (2003).

⁷⁶ Constitution, Art. IX, Sec. 2.

⁷⁷ Tolentino v. COMELEC, G.R. Nos. 187958, 187961, 187962, 187966, 187967, 187968, 07 April 2010, 617 SCRA 575; Province of Agusan del Norte v. COMELEC, G.R. No. 165080, 24 April 2007, 522 SCRA 94; Pamatong v. COMELEC, G.R. No. 161872, 13 April 2004, 427 SCRA 96; Laban ng Demokratikong Pilipino v. COMELEC, 468 Phil. 70 (2004); Buac v. COMELEC, 465 Phil. 800 (2004); Akbayan Youth v. COMELEC, 407 Phil. 618 (2001); Pelayo v. COMELEC, 132 Phil. 822 (1968).

⁷⁸ 1987 Constitution, Art. IX, Section 4.

⁷⁹ Id., citing *Aratuc v. COMELEC*, 177 Phil. 205 (1979).

⁸⁰ 73 Phil. 288, 294-296 (1941).

⁸¹ Supra note 73, at 152-153.

⁸² Annex "A," S4S Memorandum dated 18 May 2012; TSN, 02 May 2012, pp. 139, 164-168.

⁸³ Smartmatic-TIM's Consolidated Memorandum dated 18 May 2012, p. 82; COMELEC Consolidated Memorandum dated 18 May 2012, p.103.

⁸⁴ JUSTICE SERENO: These machines are configurable by the necessary software commands, correct Commissioner?

COMMISSIONER LAGMAN: Yes, Your Honor.

JUSTICE SERENO: Except for the accessible port but even the accessible port cannot be actually disabled.

COMMISSIONER LAGMAN: It can be disabled, Your Honor. (TSN dated 02 May 2012, p. 178; emphasis supplied)

⁸⁵ TSN, 02 May 2012, p. 178.

⁸⁶ AES Law, as amended by Republic Act No. 9369, Sec. 30.

⁸⁷ "The election returns transmitted electronically and digitally signed shall be considered as official election results and shall be used as the basis for the canvassing of votes and the proclamation of a candidate." (AES Law, as amended, Sec. 22; emphasis supplied)

⁸⁸ Petitioners Capalla et al.'s Memorandum dated 18 May 2012, p. 22; Petitioners Guingona et al.'s

Memorandum dated 18 May 2012, pp. 19-26; Petitioners Solidarity for Sovereignty (S4S) et al.'s Memorandum dated 18 May 2012, pp. 35-36; Tanggulang Demokrasya (Tan Dem) et al.'s Memorandum dated 18 May 2012, pp.11-13.

⁸⁹ "...The PCOS machine itself has provisions for, and can be programmed to have, several types of digital signatures. SMARTMATIC-TIM will only program the PCOS machines in accordance with the instructions of COMELEC." (Consolidated Comment of Smartmatic-TIM dated 30 April 2012, p.53). See also TSN dated 08 May 2010, pp. 159-170.

⁹⁰ "3.87 For the 2010 elections, COMELEC evaluated different options to implement additional signatures to the PCOS machines, but there were basically three constraints. First, during the preparations for the 2010 elections, a Certification Authority for the use of Public Key Infrastructure had not been established. xxx.

"3.88 Second, the members of the Board of Advisers are selected a couple of months before the elections, while the final data configuration of voting machines and canvassing servers need to be finished by January 2010, making it therefore impossible to add the specific individual certificates and keys in the PCOS machines.

"3.89. Third, there was concern that providing each BEI member with his or her own digital signature would leave success of transmission reliant on the attendance of all tile BEI members. The drop-out rate of BEIs is typically too high to justify essentially giving any one person the "key" to the PCOS. Also, the use of personal digital signatures exposes BEIs to higher probabilities of coercion, violence, and bribery.

"3.90. To reiterate, the PCOS machine has security features as it allows for the addition of multiple keys, on top of the one supplied to the BEI chairman. However, COMELEC discarded this option for the reasons described above. xxx." (Consolidated Comment of Smartmatic-TIM dated 30 April 2012, pp. 54-55; See also TSN, dated 08 May 2010, p. 161)

⁹¹ "xxx [I]t is not correct to state that the COMELEC 'did not require' or use a digital signature in the 2010 elections. COMELEC Resolution No. 8786 defines the processes for the generation of the PCOS machine's digital signature through the use of a proprietary token known as the i-Button, which contains a unique PIN or password (private key) assigned to the specific voting precinct, and which is under the control and custody of the BEI Chairman assigned to that voting precinct. Inside every PCOS machines a digital certificate is implanted, from the moment the machines are configured in COMELEC central. Together with the i-Button provided to the chairman of the BEI and a password, the results are digitally signed and encrypted, thus giving the ER its integrity, confidentiality and non-repudiation properties, and enabling the encryption of the ER data as needed for secure transmission." (Consolidated Comment of Smartmatic-TIM dated 30 April 2012, pp. 53-54; see also COMELEC Resolution No. 8739, otherwise known as the General Instructions for the Board of Election Inspectors; and TSN, 08 May 2010, pp. 159-170)

⁹² AES Law, as amended, Sec. 6 (e).

⁹³ AES Law, as amended, Sec. 6 (n).

⁹⁴ Petitioners Guingona et al.'s Memorandum dated 18 May 2012, pp.15-19; Petitioners Capalla et al.'s Memorandum dated 18 May 2012 , pp. 24-25.

⁹⁵ Petitioners Capalla et al.'s Memorandum dated 18 May 2012, p. 25.

⁹⁶ "xxx. Sec 6(3) of RA 9369 requires that the AES must at least have the functional capability to provide for voter verified paper audit trail. The law asks that the system has the capability, which it has. It is up to COMELEC to activate it, and not SMARTMATIC-TIM. Thus, it cannot be said that the system lacks the capability." (Consolidated Comment of Smartmatic-TIM dated 30 April 2012, pp. 55-56)

⁹⁷ Petitioners Guingona et al.'s Petition dated 10 April 2012, p. 13.

⁹⁸ "177. Third. The PCOS machines are perfectly capable of detecting UV marks. It just so happened that the COMELEC intentionally disabled the UV mark verification feature for reasons extraneous to the PCOS machines- printing problems and the belated decision to use the change the UV mark's design from the COMELEC's to the National Printing Office's ("NPO's")." (COMELEC's Consolidated Comment dated 30 April 2012, pp. 107; see also COMELEC's Memorandum dated 18 May 2012, pp. 103-104)

⁹⁹ "3.94. The PCOS machines have UV-reading functionality so that the PCOS machine itself would automatically confirm the authenticity of a ballot. However, in the 2010 elections, tight deadlines brought about by legal impediments necessitated fast-tracking of the UV-mark printing with less UV-ink concentration resulting in unreliable UV detection. Since the printing had to proceed given the time constraints, COMELEC decided to disable the UV verification feature on the PCOS. Instead COMELEC procured handheld UV lamps for each polling precinct's BEI to use on election day to verify each ballot's authenticity before handing it to a voter." (Smartmatic-TIM's Consolidated Comment dated 30 April 2012, p. 57.)

¹⁰⁰ Petitioners Guingona et al.'s Petition dated 10 April 2012 p. 13; Petitioners Guingona et al.'s Memorandum dated 18 May 2012, p. 12; Petitioners S4S et al.'s Memorandum dated 18 May 2012, p. 34.

¹⁰¹ Was "malicious software" placed in recalled CF cards?, <http://www.abs-cbnnews.com/nation/05/27/10/was-malicious-software-placed-recalled-cf-cards>; Defective data cards for poll machines recalled, <http://newsinfo.inquirer.net/topstories/topstories/view/20100504-268027/Defective-data-cards-for-poll-machines-recalled> (last visited on 08 June 2012); Erap camp gathering proof of electronic fraud, <http://www.philstar.com/Article.aspx?articleId=575062&publicationSubCategoryId=63> (last visited on 08 June 2012).

¹⁰² "146.1. During the Final Testing and Sealing (FTS), it was discovered that the PCOS machines did not properly read the local side of the ballot. This was because the CF cards were configured to read a ballot design that used single-spacing for the local side of the ballot.

"146.2. The COMELEC made the belated decision to use double-spacing for the local side of the ballot because the local side was relatively empty in comparison to the national side which was full due to the lengthy list of party-list candidates.

"146.3. The decision to use double-spacing was not timely communicated leading to the recall of the CF cards to correct their configuration so the PCOS machines would read the local side of the ballot as double-spaced, instead of single-spaced." (COMELEC's Consolidated Comment dated 30 April 2012, pp. 76-7.)

¹⁰³ Id. at 77.

¹⁰⁴ Formerly known as SysTest Labs Incorporated.

¹⁰⁵ Annex "16," Consolidated Comment of COMELEC dated 30 April 2012.

¹⁰⁶ TSN, 02 May 2012, pp. 186-191.

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SEPARATE CONCURRING

REYES, J.:

Barely a year left before May 2013, past the supposed initial stage in the timeline for choosing suppliers for goods and services for the elections and when preparations for the orderly conduct of this constitutional exercise is expected to have started, the Commission on Elections (COMELEC) is now before this Court with a serious undertaking of justifying its resolve to proceed with the purchase of Precinct Count Optical Scan (PCOS) Machines from Smartmatic International Corporation and Total Information Management Corporation (Smartmatic-TIM). Justices of this Court are called upon to decide whether the transaction should be annulled for supposedly having violated the procurement law or to recognize the same as a valid exercise of the option to purchase incorporated in the Automated Election System Contract (AES Contract) between the COMELEC and Smartmatic-TIM. With all the legal reservations and technical objections some of my esteemed colleagues may have against the action of the COMELEC, I would like to place the intent and spirit of the law at the heart of this reflection.

Requirement for a public bidding satisfied

Republic Act No. 9184 (R.A. No. 9184) otherwise known as the Government Procurement Reform Act was signed into law on January 10, 2003. The crux of the legislation is the promotion of good governance in all branches of the government, its departments, agencies, subdivisions and instrumentalities, including government-owned and controlled corporations and local government units.¹ Section 3 of the law states the overriding principles on

government procurements, to wit:

Section 3. *Governing Principles on Government Procurement.*

All procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or-controlled corporations, government financial institutions and local government units, shall, in all cases, be governed by these principles:

- (a) Transparency in the procurement process and in the implementation of procurement contracts.
- (b) Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in public bidding.
- (c) Streamlined procurement process that will uniformly apply to all government procurement. The procurement process shall be simple and made adaptable to advances in modern technology in order to ensure an effective and efficient method.
- (d) System of accountability where both the public officials directly or indirectly involved in the procurement process as well as in the implementation of procurement contracts and the private parties that deal with government are, when warranted by circumstances, investigated and held liable for their actions relative thereto.
- (e) Public monitoring of the procurement process and the implementation of awarded contracts with the end in view of guaranteeing that these contracts are awarded pursuant to the provisions of this Act and its implementing rules and regulations, and that all these contracts are performed strictly according to specifications.

Essentially, R.A. No. 9184 seeks to foster good governance by implementing transparency in government transactions, specifically by making mandatory the conduct of a public bidding in all procurements of any government agency, branch or instrumentality. By requiring a public bidding, the government is expected to maximize its resources because the competition will prompt potential bidders to put forward their best possible offer in order that they will be awarded with the contract. It will also curtail indecent efforts of some prospective bidders who, in the hope of securing a deal, employ extraneous means to earn the grantor's favor.

In *Manila International Airport Authority v. Olongapo Maintenance Services, Inc.*,² we emphasized that a public bidding secures the government of the optimum benefits and services out of a contract which ultimately redound to the benefit of the public which stands as the final recipient of the object of the contract, viz:

The rationale behind the requirement of a public bidding, as a mode of awarding government contracts, is to ensure that the people get maximum benefits and quality services from the contracts. More significantly, the strict compliance with the requirements of a public bidding echoes the call for transparency in government transactions and accountability of public officers. Public biddings are intended to minimize occasions for corruption and temptations to abuse of discretion on the part of government authorities in awarding contracts.³

Further, in Gov. Garcia v. Hon. Burgos,⁴ we ratiocinated:

In the award of government contracts, the law requires a competitive public bidding. This is reasonable because "[a] competitive public bidding aims to protect the public interest by giving the public the best possible advantages thru open competition. It is a mechanism that enables the government agency to avoid or preclude anomalies in the execution of public contracts." x x x⁵ (Citation omitted)

Pursuant to the mandate of R.A. No. 9184, the COMELEC published an invitation to apply for eligibility and to bid for the 2010 Poll Automation Project in March 2009. The COMELEC described the prospective bid as one for lease, with an option to purchase, of an automated election system. Specifically stated in Section 28, Part V of the Request for Proposal (RPF) are the following:

28. The offer shall be for a one-time lease basis for Component 1-A, I-B and 1-C.

28.1 An offer for an option to purchase by component to be decided by COMELEC before December 31, 2010 shall be included by the bidder in its proposal.

28.2 The price of the option-to-purchase shall not exceed 50% of the lease price of the equipment.

Out of the seven (7) prospective bidders who submitted their proposal, only two (2) passed the eligibility requirements and qualified for further evaluation of their technical and financial proposals – Indra Sistemas/Strategic Alliance Holdings/Hart InterCivic (Indra) and Smartmatic-TIM. Upon evaluating the financial proposals of the two (2) remaining bidders, however, Indra failed to qualify.

The Technical Working Group (TWG) of the COMELEC's Special Bids and Awards Committee (SBAC) subjected the Precinct Count Optical Scan (PCOS) Machines of Smartmatic-TIM to several tests and was satisfied with the functionalities of the equipment. The process culminated to the COMELEC's issuance of Resolution No. 8608, awarding the contract for the Poll Automation Project to Smartmatic-TIM.

It is beyond question that Smartmatic-TIM underwent the tedious bidding process and satisfied all the eligibility requirements imposed by COMELEC as, in fact, it was awarded with the AES Contract. It is also undisputed that the AES contract contained an option to purchase the object of the contract which the COMELEC may exercise until December 31, 2010. Said contract was unilaterally extended by Smartmatic-TIM to which COMELEC signified its acceptance through Resolution No. 9377 issued on March 29, 2012. On the following day, March 30, 2012, COMELEC and Smartmatic-TIM executed an Agreement on the Extension of the Option to Purchase under the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (Extension Agreement) and the corresponding Deed of Sale was signed. Considering the antecedent circumstances, the COMELEC could not have violated R.A. No. 9184 when it proceeded with the purchase of the PCOS machines without conducting another competitive bidding. The option to purchase the PCOS machines was an integral part of the AES Contract awarded to Smartmatic-TIM. As a public bidding was already conducted before the main contract of lease was awarded to Smartmatic-TIM, there is no need to conduct another bidding for the exercise of an option which forms part of the principal contract. To require anew the conduct of a public bidding, for the same purpose and requirements already covered by the bidding in 2009, is a superfluity not intended under R.A. No. 9184. Certainly, the law could not have contemplated an interpretation

which is inconsistent to what is reasonable and logical.

The extension of the option to purchase is valid

It is the considered opinion of those who voted against the majority decision that upon the expiration of the period to exercise the option to purchase, the same is automatically extinguished. It is however my humble belief that the extension of the period within which COMELEC could exercise its option to purchase was validly made. The Extension Agreement entered into by COMELEC and Smartmatic-TIM on March 30, 2012 qualified as an amendment of the AES Contract, allowed under Article 19 thereof which reads:

ARTICLE 19 AMENDMENTS

This Contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties.

The COMELEC's retention of the Performance Security under the AES Contract has prevented the contract's termination. Article 2 on Effectivity of the AES Contract provides, "[t]he 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." In view of this clause, the parties were not yet precluded from entering into the Extension Agreement in March 2012, especially as it did not involve substantial or material amendments that would require a separate bidding. The determination of whether or not a modification or amendment of a contract bidden out constitutes substantial amendment rests on whether the contract, when taken as 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 entirely different contract from the one that was bidden upon.⁶ Here, the option to purchase and its conditions were already required in the bid documents submitted during the public bidding held in 2009. All that the Extension Agreement of March 30, 2012 changed was the period within which the option can be exercised, without varying the technical specifications required for the bids in 2009. No modification or alteration as ever made on the essential terms and conditions of the main contract which can qualify as a substantial or material amendment.

The exercise of the option to purchase is the only workable option for the COMELEC considering time and financial constraints

I believe that if COMELEC only had the complete freedom to decide, it could have opted for the purchase of brand new machines, at a number sufficient to address its ambition of a voter-to-precinct ratio of 600:1. It could have effortlessly elected for the easier path, that is, to buy new machines and other necessities of the elections and then just simply wait for the big day. Unfortunately, it does not have the luxury to do so.

First. The COMELEC does not have sufficient budget to acquire new machines, or even to lease a new set of machines. In its budget proposal submitted to the Department of Budget and Management (DBM), the COMELEC requested for a budget of P12,854,731,547.00 for the 2013 elections, with the amount of P10,436,300,399.00

thereof allotted for the lease of PCOS machines. However, when the DBM released its National Expenditure Program (NEP) for the Fiscal Year 2012, the COMELEC was given only a measly budget of P7,962,220,229.00.

In 2009, the winning lowest calculated responsive bid was at P7,191,484,739.48 by Smartmatic-TIM. Out of this amount, P4,327,876,279.86 was spent on the lease of approximately 82,200 PCOS machines, 1,684 Consolidation/Canvassing System (CCS) machines and the necessary software for these machines, while the remaining P2,863,608,459.62 went to the costs of allied goods and services under the AES Contract. On top of the mentioned costs, the COMELEC spent another P5,000,000,000.00 for fixed costs. Deducting these fixed costs from the allotted budget of the COMELEC of P7,962,220,229.00 for 2012, will leave only the amount of P2,962,220,229.00 for the lease of the necessary hardware and software for the 2013 elections, which is substantially lesser than the amount of P4,327,876,279.86 actually spent on the same components for the May 2010 elections.

Second. With only eleven (11) months left before the 2013 elections, it is hardly conceivable how the COMELEC will manage to make the necessary preparations when it has to slip back to square one and begin the entire process anew. The nullification of the assailed COMELEC Resolutions and Deed of Sale between COMELEC and Smartmatic-TIM will require another public bidding, preparations and establishment of an entire system, which process will require several months, even more than a year, to complete. For this reason, it is more likely that an automated election system will not be completed in time for the 2013 national and local elections. There is merit to COMELEC's claim of logistical impossibility, when it pointed out:

165. For the 2010 Poll Automation Project, the bidding process took four (4) months. The Invitation to Bid was published as early as March 13, 2009. The AES Contract was signed only on July 10, 2009. Thereafter, Smartmatic-TIM delivered the first twenty (20) units for customization. The fully customized hardware and software were not delivered until January 15, 2010 or more than six (6) months after the AES Contract was signed. Because of the length of time necessary to source the raw materials and to manufacture the machines, the actual delivery of the bulk of the machines did not begin until December 11, 2009. The last of the machines finally arrived on February 21, 2010. Consequently, the testing of the machines in their actual configuration with the ballots did not begin until January 25, 2010 and only finished on April 25, 2010.

166. The COMELEC is deeply concerned with the limited time left to bid out the supply of the AES for the 2013 Elections. Even if the COMELEC published the invitation to bid on May 15, 2012, and based on the experience with the 2010 Elections, the notice to proceed will likely be issued only on September 15, 2012. In the preparations for the 2010 Elections, by the middle of September 2009, the customization of the software was already well underway. With the schedule in 2009 as yardstick, this means that all the tests designed to ensure that the AES will be ready in time for the 2013 Elections will all be delayed and maybe even condensed.⁷

It bears emphasizing that in the event that the Deed of Sale dated March 30, 2012 is nullified, the COMELEC will not simply resume from where it has gone before the sale was consummated. The nullification of the sale does not entail a mere resumption of business for the COMELEC by easily taking one step back and carrying on from that point onwards. Quite the contrary, the COMELEC will have to abandon what has been done, revert to the earliest stage of the undertaking and redo the entire process. It will have to start with the difficult task of lobbying for additional funds in order that it can set the ceiling in formulating the acceptable bid prices which investors should find profitable and reasonable considering the complexity of the undertaking involved. Without sufficient

funding, the chance for a successful conclusion of a public bidding is nil since no investor will participate in a business venture without expectation of a reasonable return.

Surely, the prospect of an adequate and orderly preparation of the elections could not simply be charged on the fact that the COMELEC is composed of brilliant minds, as the petitioners supposed, who will take care of the shambles should this Court finally decide to nullify the Deed of Sale dated March 30, 2012. There are factors, far more compelling than the breed of individuals composing the COMELEC, which should draw the attention of the Court, like time and financial considerations which will take a toll on the conduct of the second automated elections in this country if we shrug them off as secondary. In the face of limitations in time and budget, the COMELEC made a bold but well-calculated step of opting for the most feasible choice at the moment – the exercise of the option to purchase.

The COMELEC acted in obedience to its mandate and in observance of the intent of R.A. No. 9184

Under Section 2, Article IX-C of the Constitution, the COMELEC is specifically tasked to enforce and administer all laws relating to the conduct of elections to public office and to ensure free, orderly and honest, peaceful and credible elections. In the discharge of this responsibility, COMELEC has been afforded enough latitude in devising means and methods that would enable it to accomplish the great objective for which it was created.⁸

Consistent with its constitutional mandate, the COMELEC gathered all its resources and made a calculated measure of electing the course of action most viable to pursue and completely dismissed the temptation to yield to time and financial restrictions. The COMELEC made a good judgment of exercising the option to purchase under the AES Contract, instead of pursuing the ambitious path of buying brand new machines which is hardly within its capacity to acquire. For the COMELEC, it is not a simple task of ascertaining the best option from a predetermined enumeration, rather, it involves a gruelling effort of determining the only workable option available.

The exercise of the option to purchase conforms to the spirit of R.A. No. 9184, which aims to secure the government the best possible advantages out of a contract. The option to purchase benefits the government as it allows the purchase of the object of the lease contract, which has undergone a competitive bidding, at a conscionable price. The rental fees paid for the lease of the goods and the services provided under the AES Contract was considered a part of the purchase price, hence, the government is required only to shell out a manageable sum of P2,130,635,048.15 to own the leased equipment. This squarely addresses time and financial difficulties of the COMELEC and permits it to carry on with the necessary preparations for the elections without further delay.

On the other hand, if we agree to invalidate the COMELEC's exercise of the option to purchase and annul the Deed of Sale dated March 30, 2012, what good will it bring the government and the public? Surely, in the event that this Court finds for the petitioners, the government will have to assume the burden of heavier costs for the lease of another set of PCOS machines. A contract with another supplier, or even with Smartmatic-TIM should it again prevail in the new bidding, will require a higher expense even for merely a lease of the PCOS machines needed for the automated elections. Further, if we disapprove of the only workable option left for the COMELEC, which is already in the midst of a struggle with time and financial constraints, how soon can they revive themselves and come up with a better solution than the best they had? Clearly, the proposed action of the petitioners is not too promising. It puts the electoral process even closer to jeopardy.

If we succumb to petitioners' contention and invalidate the exercise of the option to purchase for supposedly having violated R.A. No. 9184, without considering the repercussions of the same on the very purpose of the existence of said law, then we commit a deplorable mistake of sacrificing the spirit of R.A. No. 9184 for the sake of blind adherence to its letter. If the aim in this quagmire is relegated to a mere desire to annul an official undertaking of the COMELEC because an act was performed, not exactly as defined by the law but nevertheless within its contemplation, then we become ordinary evaluators who lean purely on the objective, rather than judges who reconcile the letter of the law with its spirit, from which the former derived its life.

In *Obosa v. CA*,⁹ we underscored:

Truly, law must be understood not by "the letter that killeth but by the spirit that giveth life." Law should not be read and interpreted in isolated academic abstraction nor even for the sake of logical symmetry but always in [the] context of pulsating social realities and specific environmental facts.¹⁰

At this juncture, I would like to lay emphasis on the fact that a law is not a mere concoction of the visionary. Neither is it a measly futuristic creation of the ingenious lawmaker. Rather, it is a response to a social reality or a present demand of the community; a panacea to a social ill or difficulty. Thus, a law must be construed always within the context of its creation.

IN VIEW OF THE FOREGOING DISQUISITIONS, I respectfully vote for the dismissal of the petitions on the grounds that (1) the requirement for public bidding under Republic Act No. 9184 was satisfied; (2) the extension of the option to purchase constitutes a valid amendment to the contract, and; (3) the exercise of the option to purchase is consistent with the constitutional mandate of the COMELEC and the intent of Republic Act No. 9184.

BIENVENIDO L. REYES

Associate Justice

Footnotes

¹ Section 2, Article I, R.A. No. 9184.

² G.R. No. 146184-85, January 31, 2008, 543 SCRA 269.

³ *Id.* at 275.

⁴ 353 Phil. 740 (1998).

⁵ *Id.* at 767-768.

⁶ *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, 450 Phil 744, 816 (2003).

⁷ Consolidated Memorandum of the COMELEC, pp. 71-72.

⁸ Roque, Jr. v. Commission on Elections, G.R. No. 188456, February 10, 2010, 612 SCRA 178, 186.

⁹ 334 Phil. 253 (1997).

¹⁰ Id. at 275.

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DISSENTING OPINION

BRION, J.:

I dissent and thereby join the Dissenting Opinion of my esteemed colleague, Justice Martin S. Villarama, Jr. In this Dissent, I further stress the grounds cited by J. Villarama on why: (i) the COMELEC-SMARTMATIC-TIM's Agreement on the Extension of the Option to Purchase Under the Contract for the Provision of an Automated Election System for the May 10, 2010 synchronized National and Local Elections; (ii) the Deed of Sale of March 30, 2012; and (iii) the COMELEC Resolution No. 9378 (approving the Deed of Sale) are null and void from the strict point of contract law, the law on government procurement, and the constitutional set-up of COMELEC independence.

A. Government contracts are generally governed by the same principles applicable to ordinary contracts

A contract is a "meeting of the minds" between the contracting parties with respect to an object certain and with respect to the cause which shall constitute the contract.¹ As part of the liberties of the people in a democracy, the contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient. Except insofar as they may be contrary to law, morals, good customs, public order, or public policy, the contract validly entered into is the law itself for the contracting parties.²

A **government or public contract**, such as the 2009 Contract for an Automated Election System (AES contract), is defined as a contract entered into by officers (the COMELEC) acting on behalf of the State, and in which the entire people of the State are directly interested. It relates wholly to matters of public concern (the conduct of an election process), and affects private rights only insofar as the statute confers such rights when its provisions are carried out by the implementing officer undertaking his tasks.³

"A government contract is essentially similar to a private contract contemplated under the Civil Code. The legal requisites of consent of the contracting parties, an object certain which is the subject matter, and cause or consideration of the obligation must likewise concur. Otherwise, there is no government contract to speak of."⁴ The pertinent provisions of the Civil Code on the particular kind of contract involved generally apply as well to a government contract.

However, since a government contract would generally involve the disbursement of public funds, several laws and regulations, otherwise not applicable in an ordinary contract, would have to be observed.⁵ These laws are aimed not only to ensure the correct expenditure of these funds, but, most importantly, the protection of public interest in ensuring transparency and the most advantage to the government.

The AES contract is basically a contract for the lease of goods and specified services⁶ for the amount of Seven Billion One Hundred Ninety-One Million Four Hundred Eighty-Four Thousand Seven Hundred Thirty-Nine Pesos and Forty-Eight Centavos (P7,191,484,739.48).⁷ Side by side with the contract of lease is an option in favor of the COMELEC to purchase the goods as listed in Annex "L" of the AES contract upon payment of an additional amount of Two Billion One Hundred Thirty Million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (P2,130,635,048.15).⁸

Article 6.6 of the AES contract provides that the option to purchase (OTP) shall be exercised by COMELEC on or before December 31, 2010. The Request for Proposal for the Automation Contract and various Bid Bulletins⁹ issued by the Special Bids and Awards Committee of the COMELEC state that COMELEC's OTP is exercisable only until December 31, 2010.

B. The COMELEC's OTP under the AES contract is partly an option contract

As characterized above, the AES contract is partly an option contract. *Carceller v. Court of Appeals*¹⁰ explains the nature of an option¹¹ contract:

An option [contract] is a preparatory contract in which one party grants to the other, for a fixed period and under specified conditions, the power to decide, whether or not to enter into a principal contract. It binds the party who has given the option, not to enter into the principal contract with any other person during the period designated, and, within that period, to enter into such contract with the one to whom the option was granted, if the latter should decide to use the option. It is a separate agreement distinct from the contract [to] which the parties may enter upon the consummation of the option. [citations omitted, emphases ours]

The option aspect of the contract, in contemplation of or preparatory to the principal contract of sale, is distinct from the contract of lease already perfected and consummated by the parties.¹² By virtue of the option, SMARTMATIC-TIM, as owner, agreed with COMELEC that it shall have the right or privilege to buy the leased goods at a fixed price, to be exercised within a specified period. If the right is not exercised within this period, the option terminates and the owner is released from any obligation to respect the other's right or privilege to buy.¹³

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 2010.¹⁴ Under these developments, the option clearly lapsed.

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, 2010.¹⁵

Significantly, the Government Procurement Policy Board Technical Support Office joins me in this view. In its issued opinion, it clearly said:¹⁶

The contractual relation between COMELEC and SMARTMATIC-TIM, specifically on the exercise by the former of the OTP, is deemed automatically terminated upon the expiration of the option on 31 December 2010. When the option to purchase expired on December 31, 2010, there is nothing more to extend thereafter because the existing "offer" that served as basis of the option to purchase had already ceased to exist, particularly, when COMELEC did not accept the unilateral and voluntary extension made by SMARTMATIC-TIM on 18 December 2011. Consequently, the subsequent extensions have no leg to stand on, so to speak, as the original "offer," that is, the offer for COMELEC to exercise the option to purchase, was already non-existent. Concomitantly, the succeeding offers made by SMARTMATIC-TIM proposing to extend the option to purchase until 31 December 2011 are regarded as new offers that need to comply with existing laws, rules, and regulations on government contracting before it may be accepted legally. [emphasis and italics supplied]

For a better understanding of this conclusion, it must be appreciated that contracts undergo three distinct stages, to wit: negotiation, perfection or birth, and consummation. "**Negotiation** begins from the time the prospective contracting parties manifest their interest in the contract and ends at the moment of their agreement. **Perfection** or birth of the contract takes place when the parties agree upon the essential elements of the contract, *i.e.*, consent, object and price. **Consummation** occurs when the parties fulfill or perform the terms agreed upon in the contract, culminating in its extinguishment[.]"¹⁷

The parties were very much aware of this crucial contract stages by providing an effectivity provision in the AES contract, as follows:

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]

While it may be true that the AES contract still technically subsists by reason of the COMELEC's retention of SMARTMATIC-TIM's performance security worth P50 million, its continued effectivity is "without prejudice to x x x the period of the option to purchase." Under these terms, the parties themselves clearly therefore recognized that the OTP and the period for its exercise stand differently from the main contract of lease of goods and services. This legal reality directly refutes the ponencia's position.

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 (politacion) that, by reason of lack of acceptance before the expiration of the period, did not give rise to any binding commitment.¹⁸

The Government Procurement Policy Board Technical Support Office's Opinion (on the Purchase of Goods for the Automated Election System [AES] Under an Expired Option to Purchase and Institutional Development of a Canvassing and Consolidation System [CCS]) is partly instructive in characterizing SMARTMATIC-TIM's offer.¹⁹

Absent any mutual agreement, which must be reduced in writing and signed by the authorized representatives of both parties, the Extended or Revised OTP did not serve as a valid amendment to the OTP provisions of the Contract. Accordingly, Article 19 of the Contract renders the unilateral extension of the period and amendment of the terms of the OTP ineffectual. As such, the proposals may be treated as new offers, which are separate and distinct from the original contract. [italics and emphasis supplied]

C. The period of the OTP is not covered by Article 19 of the AES contract

Since the revised and extended OTP is nothing but a new offer, could the COMELEC have validly accepted it after the expiration of the period under the AES contract?

On the assumption that the original period under the OTP may be extended prior to its expiration, the AES contract itself requires that the amendment of its provisions requires the mutual agreement of the parties.²⁰ In fact, this is even a debatable assumption considering that the period for the exercise of the option is a substantial particular in the option contract.

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,²¹ 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.

In *San Diego v. Municipality of Naujan, Province of Mindoro*,²² involving the extension of the period of the lease contract before its expiration without public bidding, the Court ruled:

There is no doubt that the original lease contract in this case was awarded to the highest bidder, but the reduction of the rental and the extension of the term of the lease appear to have been granted without previous public bidding. In the case of *Caltex (Phil.), Inc., et al. vs. Delgado Bros., Inc., et al.*, x x x the amendment to an arrastre contract was declared null and void on the ground that it was made without previous public bidding. In so declaring, this Court has adopted the following opinion:

x x x x

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 the 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.²³ [citations omitted, emphases and underscoring ours]

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"²⁴ 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*,²⁵ 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.²⁶

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.

D. COMELEC gravely abused its discretion when it entered into the March 30, 2012 Deed of Sale with SMARTMATIC-TIM without competitive bidding, as mandated by Republic Act No. 9184

1. The 2009 AES contract and the March 30, 2012 Deed of Sale are different contracts

In my view, the PCOS hardware and software for the 2013 elections under the March 30, 2012 Deed of Sale between COMELEC and SMARTMATIC-TIM amounts to a "new procurement"²⁷ that is distinct and separate from the AES contract with OTP, and thus necessitates the conduct of another competitive bidding.²⁸

It must be emphasized at this point that the original AES contract was only for the lease (with OTP) of the goods, as stated in Annex "L" of the said contract. Clearly, this original contract is entirely different from the "new" contract generated by COMELEC's acceptance of SMARTMATIC-TIM's revised and extended OTP and as evidenced by the March 30, 2012 Deed of Absolute Sale that called for the purchase of remaining hardware and software, as listed in Annex "E" and Annex "E-1." This is plainly evident from Section 2 of the Deed of Absolute Sale which states:

2. For and in consideration of the amount of One Billion Eight Hundred Thirty Three Million Two Hundred Seventy Four Thousand Four Hundred Fifty Seven Pesos and Nine Centavos (Php 1,833,274,457.09) ("Purchase Price"), the BUYER hereby purchases the hardware and software listed in Annex "E" and Annex "E-1" from the SELLER subject to the terms and conditions set forth in Annex "D." The Purchase Price shall be paid by the BUYER in accordance with the payment schedule attached as Annex "F." The BUYER shall pay the Purchase Price to the SELLER via irrevocable letter of credit issued by Land Bank of the Philippines.

From another point of view, considering that the COMELEC allowed the original OTP under the AES contract to expire (thus, the juridical relation between COMELEC and SMARTMATIC-TIM concerning the OTP has already been severed), the exercise of the option became the road not taken on the part of the COMELEC; it can no longer pursue the OTP route in order to purchase the remaining hardware and software under the AES contract for the purpose of the 2013 National and Local Elections. To illustrate, Justice Teresita J. Leonardo-de Castro

astutely raised during the oral arguments the legal absurdity of an extension of a contract - in this case, the option contract - that has already expired, viz.:

JUSTICE DE CASTRO: I think you go back to the question of when is there an extension. You have to explain to us whether this is an extension or a revival or a resurrection of an expired contract because you cannot extend something, which is already expired. So it is important for you to explain, to justify to the Court why you still consider this as an extension covered by the Procurement Act when this does not come within the general concept of extension, which is extending something, which is still alive; that is the essence of an extension. You do not extend something, which is already dead. And why is this very material for the Procurement Act? If the contract has already expired, then the provisions of that contract are no longer applicable. So the provisions of the contract, which has already expired, can be subject to renegotiation. And did COMELEC renegotiate the terms of the contract after it has allowed this extension that you referred to?

SOLICITOR GENERAL JARDELEZA: In our view, Your Honor, it was not a renegotiation except for the term because in fact under the Deed of Sale they have the same terms, the same price, the same object, which is the PCOS machines. If there was ever renegotiation, it was the insistence of the COMELEC that, "Please give or you must give additional fixes and enhancements at no additional cost." I concede that there was (sic) some negotiations on that, Your Honor. But again I go back to the spirit of the Procurement Law; if the extensions, if the enhancements, are for the benefit of the government agency, we respectfully submit, given if it is a resurrected contract, the resurrection is at the forbearance of the vendor. If the vendor agrees to resurrect, again our humble submission is, this to the advantage of the government.

X X X X

JUSTICE DE CASTRO: There is a very technical legal problem here because if the contract has already expired, then that opens up all the stipulations in the contract. And so I am wondering if we can just assume that this is to the benefit of the government because there was already bidding before. But as we know we're dealing with technology and technology changes in just a few months and this technology was developed in 2009, used in 2010 and... (interrupted)

SOLICITOR GENERAL JARDELEZA: I couldn't agree more, Your Honor, in fact that's why I started, what was the initial wish of the COMELEC? They wish to have more machines, brand new machines but it comes with a price; that's why [COMELEC] asked for 12 billion. But if that was not going to be, as this cannot be, the options of the COMELEC are so constricted that they are settling for the PCOS machines is the only viable commercial technical available, Your Honor. As I said, if they have to go bidding, I go to my question, how much, how many can 2.2 billion buy or lease? That is the problem confronting the COMELEC, Your Honor. They wish they had more; they wish they had more money; they wish they had more machines; they wish six hundred (600) hundred voters per precinct so that if there are no long queues, they will not be castigated in public but that wish was not going to be, Your Honor.

JUSTICE DE CASTRO: But the problem is, if the contract has already expired, then the government is not bound by the terms and conditions stated in the original contract. And so it will not be sufficient to say that SMARTMATIC made some changes without cause because you open up, if this is a new contract then you open up all the provisions there; all the stipulations can be subject to renegotiation more so, if the offer came from SMARTMATIC

and not from the government. That's how I look at it. That's why I am very concerned in distinguishing between an extension of the contract and a revival of an old contract because it would seem that if you revive an old contract then you are bound by the substantive provisions of that contract; you cannot get away from it, if you consider this as an extension. But if you consider it as a new contract, because the original has already expired then the government will have more leeway in negotiating new terms and conditions. If it will be more beneficial for the government to purchase this because it was already leased before and therefore, this can be acquired at lower costs, now the question is, "How much should the government pay for it and what should be the terms and conditions of that new contract?" I just hope... I am not asking you to answer this now; but this is something that you should explain in your memorandum.²⁹ [italics and emphases supplied]

Unfortunately, no sufficient nor convincing explanation was ever given in the respondent COMELEC's Memorandum.

2. Deed of Sale circumvented the competitive bidding law

Justice Antonio T. Carpio, for his part, emphasized the "great repercussions" on government procurement, in particular, on the circumvention of the law on competitive bidding should the Court accept COMELEC's incongruous theory that an expired contract can be "resurrected" without need for competitive bidding by mutual agreement of the parties, or in this case, a unilateral offer on the part of SMARTMATIC-TIM, viz.:

JUSTICE CARPIO: You said that even if the contract is already dead, it can still be resurrected by mutual agreement of the parties or by unilateral offer of SMARTMATIC in this case, unilaterally extended the option to purchase.

SOLICITOR GENERAL JARDELEZA: Yes, Your Honor.

JUSTICE CARPIO: Now, again, my problem is that, if you allow this then government agencies will follow that. They will say to the contractor, the contract is already terminated, why don't you offer an extension or make an offer of an option to purchase so that we don't have to go to bidding. Then we have a problem again because all agencies will follow this, then instead of the requirement of public bidding the existing contractor after his contract has expired will just make an offer again of an extension. So, how do you prevent that?

SOLICITOR GENERAL JARDELEZA: My answer Your Honor, is we go back to the rules established by this Court in *Agan v. PIATCO*. If there is a change whether the change is period, whether the change is profit, whether the change is can you operate the MIAA it always goes back to... whether at the end of the day, the change is substantial, alters the basis parameters as to at the end is an advantage to the government.

JUSTICE CARPIO: That element of whether it is advantageous to the government or not. If you use that as a reason then everybody will say this offer is advantageous to the government, there is no need for a bidding because we are offering a very low price. So the moment, you use that as a valid argument everybody will use it, that is why a bidding is required whether you assert that you are offering the lowest possible price already, it still has to go through a bidding. It's not enough that SMARTMATIC will say this is the best price that the government can ever get. Because the law still requires a public bidding. Because if you accept that argument, this is already the best price then all agencies will do that, then the bidding will be, then there will be no more bidding.

SOLICITOR GENERAL JARDELEZA: Our answer to that respectfully, Your Honor, is that all our arguments today, are founded on the basis that there must be, there should be a public bidding. All we're saying in this particular case is, there was already a public bidding and the lesson of *Agan v. PIATCO* is of course, there must be a bidding but after the bidding, can you change, can you tweak the contract and the guidelines are there, established by this Court. Yes, you may, provided you do not violate 1, 2, 3. But just for avoidance of doubt, Your Honor, no way are we suggesting that public bidding be dispense with.

JUSTICE CARPIO: Well, yes, we agree with that but what you are saying here now is despite the lapse, expiration of the contract, we should accept the extension and extend the option to purchase, in other words, if we are extending the contract, if we do that then other agencies will follow that and that's the problem. We are not deciding this for this particular case so if you can find another reason why there should be an exemption to the bidding, maybe that would be better. But to say that a dead contract can be resurrected is something else because that will have great repercussions on procurement of government goods for the government.³⁰

As previously emphasized, this case involves not only an ordinary commercial contract but a government contract that is primarily governed by our procurement laws. Section 12 of Republic Act No. 9369,³¹ or the Automation Law, reinforces this principle when it authorized the COMELEC to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, the supplies, equipment, software, etc., for the Automated Election System. Thus, in view of the expired OTP, COMELEC could not have legally accepted SMARTMATIC-TIM's offer of a revised and extended OTP nor could it have legally entered into a contract of sale with SMARTMATIC-TIM for the purchase of the remaining goods without having to go through a competitive bidding as required by law. The law, in this case, is Section 10 of Republic Act No. 9184 which states:

Section 10. *Competitive Bidding*. - All Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act. [emphasis supplied]

Significantly, the pervasive state policy on public or competitive bidding for government procurement has been the prevailing policy since 1900 when the United States Philippine Commission introduced the American practice of public bidding through Act No. 22. It required the "Chief Engineer, United States Army for the Division of the Philippine Islands, acting as [a] purchasing agent under the control of the then Military Governor, to advertise and call for a competitive bidding for the purchase of the necessary materials and lands to be used for the construction of highways and bridges in the Philippine Islands."³²

More than a century later and touted as a world-class piece of legislation,³³ Republic Act No. 9184 (otherwise known as the Government Procurement Act of 2003) was passed, upholding the enduring policy that competitive bidding is the primary mode of procurement; as a rule, government acquisition shall be done through competitive bidding except for the alternative methods of procurement explicitly provided by law. The Court, in *Manila International Airport Authority v. Olongapo Maintenance Services, Inc.*,³⁴ echoed this rule when it held that "competitive bidding may not be dispensed with nor circumvented, and alternative modes of procurement for public service contracts and for supplies, materials, and equipment may only be resorted to in the instances provided for by law."³⁵

The rationale behind the requirement of public bidding, as a mode of awarding contracts, is to ensure that the people get maximum benefits and quality services from the contracts. More significantly, the strict compliance with the requirements of a public bidding echoes the call for transparency in government transactions and accountability of public officers. Public biddings are intended to minimize occasions for corruption and temptations to abuse of discretion on the part of government authorities in awarding contracts.³⁶

3. Reasonableness of SMARTMATIC-TIM bid price

In the course of the oral argument, Justice Carpio also raised the lack of evaluation by COMELEC on whether the bid price of SMARTMATIC-TIM for the OTP was reasonable. This, to my mind, is a significant observation that even more underpins the requirement of a competitive bidding with respect to the COMELEC's exercise of the OTP under the AES contract since competitive bidding is regarded as the only the accepted method for arriving at a fair and reasonable price for the government and it ensures that overpricing and favoritism, and other anomalous practices are eliminated or minimized.³⁷ The following oral arguments exchanges are instructive on this point:

JUSTICE CARPIO: But with respect to the option to purchase, it look[s] like the COMELEC merely said that the purchase price in the option to purchase must not be, must not exceed 50% of the lease.

SOLICITOR GENERAL JARDELEZA: Yes, Your Honor.

JUSTICE CARPIO: So, it looks like there was no evaluation whether the bid price of SMARTMATIC for the option to purchase was reasonable. The COMELEC just said the bid price for the option to purchase must not be more than 50% of the lease, correct?

SOLICITOR GENERAL JARDELEZA: If your Honor please, may I explain. The bid terms said the maximum price for this contract is 11.2 billion.

And then it told the bidders, you also will be subject to an option to purchase and the term is, on the option to purchase should not be more than 50% of the base price and to be exercised within a year but the bid bulletin, I recall no. 13, said that however, this is what the COMELEC said, however when we decide on the best bid for the government, while you bidders will have to tell us how much is your option price, at the end of the day, the COMELEC will look only at your top price which is a maximum of 11 billion. That is why SMARTMATIC won at 7.1. Our understanding then under the circumstances is, the option price was something that will bind the vendor if and when COMELEC chooses to exercise the option.

X X X X

JUSTICE CARPIO: Because they did not make a detailed evaluation whether the 1.8 billion option price for the machine was reasonable or not. They looked at the other side, whether the rental rate was reasonable or not, correct?

SOLICITOR GENERAL JARDELEZA: I would characterize it this way. Your Honor, with your permission. Yes, they were primarily and principally concerned with the top line lease the 7 billion, based on a budget of 2011. But they

told all bidders but I want an option and tell me what is your option price and Bid Bulletin 13 said, having told me what your option price is, I will still decide based on the top price but if I decide to exercise the option then you are bound but what you declare to me is 50% of your base price.

JUSTICE CARPIO: Yes, because if the purpose of the procurement law is there must be a bidding whether it is a lease or a purchase, if you combine both under a lease with option to purchase there must be a competitive bidding in both and a competitive evaluation in both, the rental rate and the option rate. Because there may be a situation where a bidder will bring down his rental rate and jack up his option to purchase price rate and there will be connivance. Of course, he will win, in the lease rate competition, he will be very low. But once a contract is signed the agency will now exercise the option to purchase and that will be grossly disadvantageous to the government. How will you prevent this? Because if we are saying that, incidentally you agree with me that this is the first time that a case like this is being decided by the Court under government procurement where a lease contract has an option to purchase and you are asking us for the validity, correct?

SOLICITOR GENERAL JARDELEZA: Yes, Your Honor.

JUSTICE CARPIO: So, if we say that a government agency can do this, bid out the lease with an option to purchase and we say that's okay then a lot of agencies will follow this. But how do you prevent a situation where a bidder will drive down his rental rate and jack up his option to purchase rate, how do you prevent that?

SOLICITOR GENERAL JARDELEZA: Then my answer will be twofold, Your Honor. No. 1, if you assume honesty and the bidder lowers the top price but jacks up the option price, if you assume honesty, the agency will not exercise his option because the option price is going less...

JUSTICE CARPIO: But....

SOLICITOR GENERAL JARDELEZA: If you... may I proceed, Your Honor. If we assume dishonesty, I am afraid it is going to be difficult, there's no answer to that, Your Honor.

JUSTICE CARPIO: That's why the law requires bidding because the law cannot assume honesty. That's the reason for the bidding because if we assume that all government officials will act honestly, then we don't need a public bidding that is required.

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JUSTICE CARPIO: So, how do you now prevent that situation? Because you are asking us to legitimize this bid for lease with purchase and how do you prevent the situation, where the bidder will drive down his rental rate and jack up his purchase rate?

SOLICITOR GENERAL JARDELEZA: The answer, Your Honor is that if the bidder brings down his lease price and the government leases it at a very low price then the government will be advantaged so much because all the government has to do is not to exercise the very high option price. So my answer is, the commercial, the way an option to purchase operates is the answer to the question on how to police it, Your Honor.

JUSTICE CARPIO: Yes, but that will open the door to connivance where both the procuring agency and the

bidder, will agree that the bid price for their lease rate will go down while the option price for the purchase of the equipment will go up. So, how do you prevent that? Could you not prevent that by requiring an evaluation of both, the rental rate and the option rate. Both must be evaluated.

SOLICITOR GENERAL JARDELEZA: That could be conceivable yes, Your Honor.

JUSTICE CARPIO: Yes, that is why my question is, was this done in this case? Was there an evaluation of the rental rate? Yes there was but was there an evaluation of the purchase rate? Because it merely says not more than 50% of the rental rate. Why 50, why not 30, why not 20, what is the basis for 50?

SOLICITOR GENERAL JARDELEZA: I would not know the basis, Your Honor.

JUSTICE CARPIO: Yes, that is why I am asking why 50, why not 30, why not 40? There has to be a basis. It looks very arbitrary to me and I have not come across any evaluation of the purchase rate.

SOLICITOR GENERAL JARDELEZA: You're right, Your Honor.³⁸ [italics and emphases supplied]

4. COMELEC is not excused from competitive bidding

Given the requirement of strict adherence to the requirements of competitive bidding and the overarching public policy that mandates competitive bidding except for specific alternative modes of government procurement, COMELEC comes to Court with a heavy and unenviable burden of justifying its non-compliance with the competitive bidding requirement of Republic Act No. 9184. Stated differently, in the event any of the alternative procurement modality is available for use by a procuring entity, it is necessary to show why an alternative mode of procurement was resorted to³⁹ considering that the law mandates that alternative methods shall only be resorted to in the highly exceptional cases, as provided for by law.⁴⁰

In these highly exceptional cases, the law recognizes that certain unique circumstances require the use of the alternative methods of procurement.⁴¹ However, the selection of the method of procurement is dependent on the presence or absence of specific conditions that justify the use of a particular method. Specifically, the Implementing Rules and Regulations of Republic Act No. 9184 mandates the use of alternative methods of procurement in some exceptional cases, provided that:⁴²

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;
2. The conditions required by law for the use of alternative methods are present; and
3. In resorting to any of the alternative methods of procurement, the Procuring Entity must ensure that the method chosen promotes economy and efficiency, and that the most advantageous price for the government is obtained. [italics and emphases supplied]

In this regard, COMELEC contends that the exercise of the OTP can be justified and is analogous to the following alternative modes of procurement, namely: direct contracting, negotiated procurement and ordering agreement. I

fully concur with Justice Villarama that the COMELEC failed to substantiate that the conditions specifically required by law for the use of alternative methods of procurement are present. With respect to direct contracting,⁴³ the COMELEC must show that it resorted to the same under the following conditions:

- a. Procurement of Goods of proprietary nature, which can be obtained only from the propriety source, i.e. when patents, trade secrets and copyrights prohibit others from manufacturing the same items;
- b. 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 his contract; or,
- 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.

I cannot agree with the COMELEC's argument that the purchase of the remaining goods under the OTP for the 2013 elections may be justified on conditions (a) and (c).

On the one hand, condition (a) is applicable only when the goods or services being procured are covered by a patent, trade secret or copyright duly acquired under the law. Under the Intellectual Property Code of the Philippines (Republic Act No. 8293), the registered owner of a patent, a copyright or any other form of intellectual property has exclusive rights over the product, design or process covered by such patent, copyright or registration. Such exclusive right includes the right to use, manufacture, sell, or otherwise to derive economic benefit from the item, design or process.⁴⁴

On the other hand, in condition (c), exclusive dealership does not per se give rise to the use of direct contracting as an alternative mode. The supplier/contractor/manufacturer must prove through proper documentation that it is the sole source of the said goods, equipment, or services required. This condition anticipates a situation where the goods are sold by an exclusive dealer or distributor, or directly sold by the manufacturer. In this instance, it is highly unlikely that sub-dealers can sell the same at lower prices. Further, the procuring entity has not identified a suitable substitute for the product that can be procured at terms more advantageous to the government.⁴⁵

In the present case, the COMELEC cannot use the justification that the software is proprietarily owned by Dominion considering that the same is a mere component of the entire Automated Election System. It must be emphasized that under the March 30, 2012 Deed of Sale, the COMELEC obligated itself to purchase not only the PCOS software but also the PCOS hardware, canvassing system and servers as listed in Annexes "E" and "E-1" of the same deed.⁴⁶ The COMELEC also failed to substantiate that SMARTMATIC-TIM is the sole manufacturer of the PCOS machines which again remain to be a mere component of the Automated Election System under the AES contract. Finally, I agree with the ponencia that the COMELEC also failed to prove that no suitable substitute to the PCOS is available or can be obtained at terms more advantageous to the government.

In its memorandum, the COMELEC also contends that its exercise of the OTP is also analogous to a negotiated procurement⁴⁷ considering that time is of the essence and immediate action is necessary to restore vital public

service because the acquisition of a new Automated Election System is a near commercial, as well as a logistical, impossibility.⁴⁸ This claim is utterly preposterous as it does not even approximate the extraordinary and unique circumstances which justify the use of negotiated procurement instead of a competitive bidding. Section 53(b) of Republic Act No. 9184 provides that negotiated procurement shall be allowed only in the following circumstances:

b. In case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities. [italics and emphasis supplied]

To my mind, the above provision speaks for itself; it requires immediate action through a negotiated procurement instead of the lengthy process of competitive bidding because of a calamity, whether natural or man-made, or to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public services.

The COMELEC's insistence that the exercise of the OTP is analogous to an ordering agreement is also similarly absurd.⁴⁹ GPPB Resolution No. 06-2005 entitled "Guidelines on the Use of an Ordering Agreement under the Government Procurement Act" mandates that items covered by ordering agreements are limited only to those, although identified, becomes necessary only upon the happening of a fortuitous event where the exact time of the need of such parts cannot be accurately pre-determined; and it is inadvisable for procuring entities to carry it on stock or commit to purchase a certain quantity within a given period. Under this resolution, an ordering agreement is defined as –

Ordering Agreement. Refers to a written instrument of understanding, negotiated between the procuring entity and the Lowest Calculated and Responsive Bidder and used to expedite the procurement process when anticipated needs for specific items are not known. It grants the procuring entity the option to either place an order or not buy at all, within a given period of time. The Ordering Agreement shall contain (1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) a description, as specific as practicable, of supplies to be delivered including lead time for the receipt thereof, and (3) methods for issuing and delivering future orders under the ordering agreement. [emphases supplied]

The peculiar situations that call for an ordering agreement clearly do not obtain in the present case considering that the COMELEC is fully aware that the items to be purchased under the March 30, 2012 Deed of Sale shall be for the purposes of the May 2013 elections. This fact alone obviates the need to resort to an ordering agreement. Worse, had COMELEC even bothered to read in full GPPB Resolution No. 06-2005, it would have discovered that an ordering agreement must still undergo competitive bidding, viz.:

5. COMPETITIVE BIDDING

5.1. The procuring entity shall package the contract for Ordering Agreements in the most practicable manner and conduct the bidding using the single stage, three-envelope procedure as prescribed in Sections 23 and 25 of R.A. 9184 and its IRR-A, whereby bidders are to bid on a per item basis as presented in the Ordering Agreement List. For this purpose, the procuring entity, through its BAC, shall prepare separate Technical Specifications and/or Terms of Reference for every line item to be bid out and indicate, among others; (1) an estimate of the budgetary

allocation for each item, (2) the estimated quantity it may procure when needed, and (3) the requested delivery lead time from execution of Delivery Order Contract or from any date determined by the procuring entity.

In sum, it is apparent that the COMELEC - by accepting SMARTMATIC-TIM's offer of a revised and extended OTP despite a lapsed/or expired OTP and by entering into a Contract of the Sale with the latter - has circumvented the mandatory requirement of a competitive public bidding. This clearly amounts to a grave abuse of discretion on the part of the COMELEC.⁵⁰

E. Independence of the COMELEC under the Deed of Sale: Subject of continuing Dissent in Roque v. COMELEC

If a contract is constitutionally infirm, chances are, the subsequent act rooted from the same contract would, in one way or another, inherit the same or similar infirmity under the same legal consideration.⁵¹ This is one such case.

In Roque, Jr. v. Commission on Elections,⁵² I registered my dissent based primarily on 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. Section 26 of Republic Act No. 8436 reads:

Section 26. Supervision and control. – The System shall be under the exclusive supervision and control of the Commission. For this purpose, there is hereby created an information technology department in the Commission to carry out the full administration and implementation of the System.

The Commission shall take immediate steps as may be necessary for the acquisition, installation, administration, storage and maintenance of equipment and devices, and to promulgate the necessary rules and regulations for the effective implementation of this Act. [emphases and underscoring supplied]

Based on this provision vis-à-vis the pertinent provisions of the AES contract,⁵³ I considered the COMELEC's role in the election process under an automated system of elections as an abdication of its exclusive role in the conduct of elections under the Constitution and the law. Section 26 of Republic Act No. 8436 obviously envisioned that the COMELEC would empower itself in the field of information technology as a necessary prerequisite for embarking in a historic first step to automate our elections riddled with fraud and violence. Additionally, the Congress required the COMELEC to create or establish (i) an Advisory Council and (ii) a Technical Evaluation Committee to help the COMELEC keep up with an entirely new system.

While the COMELEC complied with the law's mandate to automate our election system, which in its judgment is the "most suitable technology," it cannot choose not to fully comply with the minimum system requirements required by law by the hollow interpretation of its duty of "exclusive control and supervision of the system."

True, Article 6.7 of the AES contract provides that "the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials"; but this is an empty provision when cast against the actual conduct of the election process vis-à-vis the COMELEC's constitutional and statutory role. I already noted in my Dissent in Roque that the blurry roles of both the COMELEC's Project Management Office and its Information Technology Department under the automated election compromised the independence of the COMELEC since the very Request for Proposal issued long ago

by the COMELEC calls for a "complete systems provider" with whom the COMELEC would have a "shared responsibility."

In the present case, Sections 10 and 11 of the very Deed of Sale between COMELEC and SMARTMATIC-TIM acknowledge that there are remaining issues to be dealt with by the parties such as "the need to improve the preparations, training and the conduct for the 2013 elections" that are not covered by the Deed; and hence the need for a "continuing review of this Agreement." Notwithstanding, the sale of the PCOS machines, etc. to COMELEC, SMARTMATIC-TIM's role in the election process, as noted in my Dissent in Roque, has not been reduced to a significant degree simply because the COMELEC continues to refuse to abide by the terms of Section 26 of Republic Act No. 8436. Sections 10 and 11 of the Deed of Sale state:

10. The parties acknowledge that there is a need to improve the preparations, training and the conduct for the 2013 elections. Towards such end, the parties undertake to comply with their respective obligations to be agreed upon by the parties not later than seven working (7) days from the date of this Agreement. As a commitment of the SELLER to the BUYER, the SELLER has also agreed to the new additional modifications requested by the BUYER set forth in Annex "D" hereof.

11. In order to ensure the successful implementation of the 2013 elections, there shall be a continuing review of this Agreement and the procedures by the parties.

The parties are aware that every situation cannot be provided for in this Agreement, and upon the occurrence of such situation for which there is no specific provision in this Agreement or there is no agreement in the application thereof, the parties shall forthwith meet and attempt to resolve the matter immediately, amicably and in good faith with the successful implementation of the 2013 Elections in mind.

Finally, Section 13 of the Deed of Sale ensures the continuity of the AES contract by providing that –

13. All the provisions in the AES Contract consistent with this Agreement shall be in full force and effect. In case of conflict between the terms of this Agreement and the terms of the AES Contract, the terms of this Agreement prevail. *[italics and emphasis supplied]*

The following exchanges with the Solicitor General provide us with illuminating clarification of the present situation:

JUSTICE BRION: But the PCOS machine is.... would need service, the machine itself would need services in the course of its operation when and if there would be a purchase, who would provide the services?

SOLICITOR GENERAL JARDELEZA: My understanding, Your Honor, is that the COMELEC as it will become the new owner of the PCOS, will essentially supply the manpower. But I understand that, at no cost, SMARTMATIC will still field its people. Just to make sure that there is a safety net for the use of the machines, Your Honor.

JUSTICE BRION: Would the two services that would not be provided by SMARTMATIC, would this be dependent somehow on the PCOS machine?

SOLICITOR GENERAL JARDELEZA: I don't think so, Your Honor. The other services as I said will be bidded out.

And in fact SMARTMATIC can bid and it will depend on whether they win or not....

JUSTICE BRION: When and if the sale pushes through you would have a system whereby PCOS machines would be used and the management of the system using PCOS machines would be provided by a third party, not the SMARTMATIC and COMELEC?

SOLICITOR GENERAL JARDELEZA: Yes, Your Honor, not necessarily SMARTMATIC. But if they win in the bidding then they will be part of the...

JUSTICE BRION: No, let's not go to the... you are referring to the bidding for services?

SOLICITOR GENERAL JARDELEZA: Yes, Your Honor.

JUSTICE BRION: Okay. So, we'll have a system where management will be provided by a third party and then we have a system where the PCOS would be owned by COMELEC together with the software but there are attendant services still that would be provided by SMARTMATIC, right?

SOLICITOR GENERAL JARDELEZA: Yes, Your Honor. Now on the management, the management will be no different from the management in 2009. This is a management contracted out with a third party under the direction and control of the COMELEC.

JUSTICE BRION: Supposedly, under the direction and control of the COMELEC. Now, what about the third component, the canvassing and consolidation, canvassing and transmission? Would this not be dependent on the PCOS machine?

SOLICITOR GENERAL JARDELEZA: In a sense, Your Honor, because the... what will be canvassed will be the results or the printouts from the PCOS machines. In that sense... but the canvassing itself now will be under the COMELEC and if they contract out what used to be done by SMARTMATIC in 2009, then there could be a provider for that. Again, our caveat, under the supervision and control of the COMELEC.

JUSTICE BRION: Under the supervision and control.... so, the role of SMARTMATIC would stop when the results are out. And then there would be consolidation, canvassing and transmission. Using the same PCOS machine, where there has been a guarantee by SMARTMATIC that they would service these machines insofar as hardware and software are concerned. But there would still be a third party involved. Another service provider insofar as consolidation, canvassing and transmission would be concerned, right?

SOLICITOR GENERAL JARDELEZA: That's my understanding, Your Honor.

JUSTICE BRION: So what would come out is a very mixed-up system where you have the COMELEC depending on a third party service provider for management, the COMELEC owning supposedly the PCOS machine and the software but depending on its... on SMARTMATIC for the servicing out the technical aspects of these machines now owned by the COMELEC then comes the consolidation, canvassing and transmission which are dependent on the PCOS machine that will now be serviced by still another third party but SMARTMATIC would still have a role because of the warranties that they have stated in the contract of sale. I'm quite confused by the resulting situation. Can you explain to me, can you clarify that?

SOLICITOR GENERAL JARDELEZA: Our explanation, Your Honor, is that in effect as compared to 2009 and assuming SMARTMATIC doesn't win the bid for services, what will be new will be possibly a new provider for any or all of the essential services... And to your concerns, Your Honor, we respectfully submit what we have is the experience of the COMELEC in the 2010 election. So our humble submission is that, all of these activities are still under the direct supervision and control of the COMELEC. Yes, they do have providers yes, there will be a new provider. But the experience of the COMELEC, the guarantee of new independent providers, independent for (sic) SMARTMATIC in our view is the informed judgment of the COMELEC on how to improve the election system for 2013.

JUSTICE BRION: Would not the result be down the road after the sale pushes through when the bidding for the services come there would be the position of the COMELEC, ["]then perhaps we should give the services again to SMARTMATIC because they are in the best position, they have been with us in the 2009 contract in the 2010 elections.["] And now they own... they used to own the PCOS and are in the best position to service these machines, to provide management because they had been there before, to provide services for consolidation, canvassing and transmission because they had been there before; it is then to the best interest of this government to stick with SMARTMATIC, would this not be the result?

SOLICITOR GENERAL JARDELEZA: No, Your Honor. The COMELEC cannot do that. And they will not do that under the terms of the resolution.

JUSTICE BRION: But I thought that the SMARTMATIC can still bid for the other services that are not included in the deed of sale?

SOLICITOR GENERAL JARDELEZA: Yes, Your Honor. Because under the procurement law as we speak there is nothing that will legally disqualify them. I'm trying to explain, when the COMELEC decided that only the machines will [be] bought from SMARTMATIC, all other services will be bidded out. There is no legal impediment for SMARTMATIC to bid, to participate to bid.

JUSTICE BRION: Yes. Precisely. That's what I am saying.⁵⁴ [italics and emphases supplied]

In other words, 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.

It is in light of the foregoing that I dissent from the majority's conclusions.

ARTURO D. BRION

Associate Justice

Footnotes

¹ NEW CIVIL CODE, Articles 1305 and 1319.

² NEW CIVIL CODE, Article 1308.

³ Sargasso Construction & Development Corporation/Pick & Shovel, Inc./Atlantic Erectors, Inc. (Joint Venture) v. Philippine Ports Authority, G.R. No. 170530, July 5, 2010, 623 SCRA 260, 274.

⁴ Id. at 274-275.

⁵ For example: Republic Act No. 6957, as amended by Republic Act No. 7718 (AN ACT AUTHORIZING THE FINANCING, CONSTRUCTION, OPERATION AND MAINTENANCE OF INFRASTRUCTURE PROJECTS BY THE PRIVATE SECTOR, AND FOR OTHER PURPOSES); Presidential Decree No. 1445 (GOVERNMENT AUDITING CODE OF THE PHILIPPINES); Republic Act No. 9184 (AN ACT PROVIDING FOR THE MODERNIZATION, STANDARDIZATION AND REGULATION OF THE PROCUREMENT ACTIVITIES OF THE GOVERNMENT AND FOR OTHER PURPOSES) which expressly repealed Presidential Decree No. 1594 (PRESCRIBING POLICIES, GUIDELINES, RULES AND REGULATIONS FOR GOVERNMENT INFRASTRUCTURE CONTRACTS).

⁶ Article 3, Scope of the Project, AES Contract.

⁷ Ibid.

⁸ Id., Article 4.3.

⁹ Bid Bulletin No. 10 dated April 15, 2009, Bid Bulletin No. 19 dated April 19, 2009 and Bid Bulletin No. 21 dated April 20, 2009.

¹⁰ 362 Phil. 332, 338-339 (1999).

¹¹ Articles 1324 and 1479 of the Civil Code read:

Art. 1324. When the offerer has allowed the offeree a certain period to accept, the offer may be withdrawn at any time before acceptance by communicating such withdrawal, except when the option

is founded upon a consideration, as something paid or promised.

Art. 1479. A promise to buy and sell a determinate thing for a price certain is reciprocally demandable.

An accepted unilateral promise to buy or to sell a determinate thing for a price certain is binding upon the promisor if the promise is supported by a consideration distinct from the price.

¹² Carceller v. Court of Appeals, supra note 10.

¹³ Manila International Airport Authority v. Olongapo Maintenance Services, Inc., G.R. Nos. 146184-85, 161117, and 167827, January 31, 2008, 543 SCRA 269; and Adelfa Properties, Inc. v. CA, 310 Phil. 623 (1995).

¹⁴ Dennis S. Santiago, Executive Director III, Government Procurement Policy Board, Technical Office, Legal Opinion Re: Purchase of Goods for the Automated Election System Under an Expired Option to Purchase and Institutional Development of a Canvassing and Consolidation System (CCS) dated March 28, 2012, p. 2.

¹⁵ In its letter dated March 23, 2011 (not attached to any of the petitions), SMARTMATIC-TIM acknowledged that the "OTP expired last 31 December 2010" without the COMELEC formally responding to its offer to extend the OTP. SMARTMATIC-TIM further stated that "no legal basis exists for an option to purchase beyond the original contract." (Memorandum, Re: Expiration of the Option to Purchase Under the 2009 AES contract with SMARTMATIC-TIM of Commissioner Augusto C. Lagman [Member, 2013 Steering Committee] to the 2013 Steering Committee dated February 6, 2012, p. 5). In its April 1, 2011 letter, SMARTMATIC-TIM stressed that it "has no obligation to sell the equipment to COMELEC anymore, and will only decide to do so, if COMELEC's request is convenient for the company, and if the equipment, in total or partiality, is still available." (Dennis S. Santiago, supra note 14) SMARTMATIC-TIM also stated that it "will immediately start marketing these PCOS to other countries, and thus, "don't have any need of keeping them further in the Philippines." (Article 3, Scope of the Project, 2009 AES contract, supra note 6, at 5) SMARTMATIC-TIM reiterated the same stance in its September 23, 2011 letter when it insisted that "SMARTMATIC will decide on any request for purchase, if said request is convenient for the company, and if the equipment, in total or partiality, is still available." (supra note 14)

¹⁶ Id. at 2-3.

¹⁷ Sargasso Construction & Development Corporation/Pick & Shovel, Inc./Atlantic Erectors, Inc. (Joint Venture) v. Philippine Ports Authority, supra note 3.

¹⁸ Diamante v. Court of Appeals, G.R. No. 51824, February 7, 1992, 206 SCRA 52.

¹⁹ Dennis S. Santiago, supra note 14.

²⁰ See NFA v. CA, 323 Phil. 558 (1996). Article 19 of the AES contract reads:

ARTICLE 19 AMENDMENTS

This Contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties.

²¹ The provision states:

5.11. All Goods or Equipment in the possession of COMELEC because of any election contest or audit requirement after December 31, 2010 shall be considered sold to COMELEC pursuant to its purchase option under this Contract, and COMELEC shall pay the corresponding price within the first five (5) business days of January 2011. In the case the election protest was due to any defect in the machines or the system or that the audit will show the same, COMELEC shall return the machines to the PROVIDER for full refund.

²² 107 Phil. 118 (1960).

²³ Id. at 122-123.

²⁴ Memorandum of SMARTMATIC-TIM, p. 47.

²⁵ G.R. No. 188456, September 10, 2009, 599 SCRA 69, 138.

²⁶ REPUBLIC ACT No. 9369, Section 6.

²⁷ Section 5 (n) of Republic Act No. 9184 defines procurement as the acquisition of Goods, Consulting Services, and the contracting for Infrastructure Projects by the Procuring Entity. Procurement shall also include the lease of goods and real estate. The lease coverage under the law refers to lease contracts pertaining to "[l]ease of construction and office equipment, including computers, communication and information technology equipment" (Article XIV, Section 46, RA 9184) and "lease purchases or lease to own and similar variations" (Section 46, Rule XIV, Revised IRR). See Atty. F. B. Nacor, The Philippine Government Procurement Reform Act (Republic Act No. 9184) and the Revised IRR, Annotated, A Handbook on Public Bidding, 2011 ed., p. 9.

²⁸ See J. Villarama's Dissent.

²⁹ TSN, May 8, 2012, pp. 56-60.

³⁰ Id. at 93-96.

³¹ SEC. 10. Section 8 of Republic Act No. 8436 is hereby amended to read as follow[s]:

"SEC. 12. *Procurement of Equipment and Materials.* - To achieve the purpose of this Act, the Commission [is] authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or [abroad]. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.

"In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid."

³² Abaya v. Ebdane, Jr., G.R. No. 167919, February 14, 2007, 515 SCRA 720, 759.

³³ Plugging the Loopholes of the Philippine Procurement System, PB-0805, Senate Economic Planning Office Policy Brief, citing Former World Bank Philippines Country Director Joachim von Amsberg who recognized the GPRA as a legislation with "world class" quality during a press conference in 2007.

³⁴ Supra note 13.

³⁵ Id. at 294.

³⁶ Id. at 275.

³⁷ National Power Corporation v. Civil Service Commission and Rodrigo A. Tanfelix, G.R. No. 152093, January 24, 2012. See also Dennis S. Santiago, supra note 14.

³⁸ TSN, May 8, 2012, pp. 87-93.

³⁹ Dennis S. Santiago, supra note 14, at 4, citing Cabrera v. Hon. Marcelo, 487 Phil. 427 (2004).

⁴⁰ See Handbook on Philippine Government Procurement, Fourth Ed., Government Procurement Policy Board and Technical Support Office, September 2007, p. 93.

⁴¹ The IRR provision states:

1.1 In accordance with Section 10 of this IRR-A, as a general rule, the Procuring Entities shall adopt public bidding as the general mode of procurement and shall see to it that the procurement program allows sufficient lead time for such public bidding. Alternative methods shall be resorted to only in the highly exceptional cases provided for in this Rule. (Id.)

⁴² See Manual of Procedures for the Procurement of Goods and Services, p. 81.

⁴³ Section 48(b) of Republic Act No. 9184 defines Direct Contracting, otherwise known as Single Source Procurement as a method of procurement of Goods that does not require elaborate bidding documents. The supplier is simply asked to submit a price quotation or a pro-forma invoice together with the conditions of sale. The offer may be accepted immediately or after some negotiations.

⁴⁴ Manual of Procedures for the Procurement of Goods and Services, *supra* note 42, at 84.

⁴⁵ *Ibid.*

⁴⁶ Section 2 of the March 30, 2012 Deed of Sale provides:

2. For and in consideration of the amount of One Billion Eight Hundred Thirty Three Million Two Hundred Seventy Four Thousand Four Hundred Fifty Seven Pesos and Nine Centavos (Php 1,833,274,457.09) ('Purchase Price'), the BUYER hereby purchases the hardware and software listed in Annex "E" and Annex "E-1" from the SELLER subject to the terms and conditions set in accordance with the payment schedule attached as Annex "F." The BUYER shall pay the Purchase Price to the SELLER via irrevocable letter of credit issued by the Land Bank of the Philippines.

⁴⁷ Section 53 of Republic Act No. 9184 states that negotiated procurement is a method of procurement of goods, infrastructure projects and consulting services, whereby the procuring entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant.

⁴⁸ COMELEC's Memorandum, pp. 71-73.

⁴⁹ *Id.* at 73-76.

⁵⁰ There is grave abuse of discretion (1) when an act is done contrary to the Constitution, the law or jurisprudence; (2) when it is executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias. *Information Technology Foundation of the Phils. v. COMELEC*, 464 Phil. 173 (2004).

⁵¹ Murphy's law.

⁵² *Supra* note 25.

⁵³ Articles 3.3, 6.7 and 7.4 which read:

3.3. The PROVIDER shall be liable for all its obligations under this Project, and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall

be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

The PROVIDER must provide to SMARTMATIC at all times the support required to perform the above responsibilities.

6.7. Subject to the provisions of the General Instructions to be issued by the Commission En Banc, the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials, and their performance, completion and final results according to specifications and within the specified periods shall be the shared responsibility of COMELEC and the PROVIDER.

7.4. Upon delivery of the Goods, in whole or in part, to the warehouses as approved by COMELEC, the Equipment shall be under the custody, responsibility and control of the PROVIDER.

⁵⁴ TSN, May 8, 2012, pp. 121-127.

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DISSENTING OPINION

VILLARAMA, JR., J.:

Existing laws are read into and form part of every government contract. The terms of such contract may not contravene mandatory provisions of general or special laws, or public policy. An option to purchase provided in a contract of lease of equipment cannot be enforced if it is used to circumvent the law on procurement requiring a competitive bidding, or where the equipment and services failed to comply with the essential conditions or standards set by the law or regulation authorizing the original bidded contract.

Factual Antecedents

On July 10, 2009, respondents Commission on Elections (COMELEC) and the joint venture of Smartmatic International Corporation and Total Information Management Corporation (Smartmatic-TIM) entered into a contract for the provision of an automated election system (2009 AES Contract) for the May 10, 2010 synchronized national and local elections. The contract was awarded to the winning bidder Smartmatic-TIM after it passed the eligibility requirements, evaluation of financial and technical proposals, and demonstration tests conducted by the COMELEC pursuant to the provisions of Republic Act (R.A.) No. 9369.¹

The 2009 AES Contract contained an option to purchase Smartmatic-TIM's Precinct Count Optical Scan (PCOS) machines being leased to COMELEC, under the following terms:

ARTICLE 4 CONTRACT FEE AND PAYMENT

X X X X

4.3 OPTION TO PURCHASE

In the event COMELEC exercises its option to purchase the Goods as listed in Annex "L", COMELEC shall pay the PROVIDER [Smartmatic-TIM] an additional amount of Two Billion One Hundred Thirty Million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (Php2,130,635,048.15) as contained in the Financial Proposal of the joint venture partners – SMARTMATIC and TIM.

In case COMELEC should exercise its option to purchase, a warranty shall be required in order to assure that: (a) manufacturing defects shall be corrected; and/or (b) replacements shall be made by the PROVIDER, for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment, after performance of this Contract. The obligation for the warranty shall be covered by retention money of ten percent (10%) of every option to purchase payment made.

The retention money will be returned within five (5) working days after the expiration of the above warranty, provided, however, that the goods supplied are in good operating condition free from patent and latent defects, all the conditions imposed under the purchase contract have been fully met, and any defective machines, except to those attributable to COMELEC, have been either repaired at no additional charge or replaced or deducted from the price under the Option to Purchase.

X X X X

ARTICLE 6 COMELEC'S RESPONSIBILITIES

X X X X

6.6 COMELEC shall notify the PROVIDER on or before 31 December 2010 of its option to purchase the Goods as listed in Annex "L".

X X X X²

The above stipulation was based on Section 28, Part V of the Other Specifications of the Request for Proposal (RFP) or the Terms of Reference (TOR), which states:

28. The offer shall be for a one-time lease basis for Component 1-A, 1-B and 1-C.

28.1 An offer for an option to purchase by component to be decided by COMELEC before December 31, 2010 shall be included by the bidder in its proposal.

28.2 The price of the option-to-purchase shall not exceed 50% of the lease price of the equipment.³

Smartmatic-TIM's PCOS machines were used in the first fully-automated national and local elections held on May 10, 2010.

In June 2010, the COMELEC Advisory Council (CAC) submitted its "Post- Election Report on the Use of the Automated Election System (AES) in the 2010 National and Local Elections"⁴ to the Joint Congressional Oversight Committee on Automated Election System. The CAC concluded that despite the time constraints, several questionable decisions made by COMELEC that placed the integrity of the AES in jeopardy and the mistakes committed by Smartmatic-TIM, the AES ultimately did work. While it noted the numerous claims of electronic fraud, none have been substantiated and while the new system did not eradicate all forms of electoral fraud, it was able to remove the most damaging type – the "dagdag-bawas". For the May 2013 elections, the CAC opined that COMELEC need not use the same PCOS machines, but the basic technology appears to be a good fit for the Philippines. It further recommended that the COMELEC would be better off not exercising the option to purchase the PCOS machines so it can look for an even better solution for the May 2013 elections. On the whole, the CAC found the May 2010 automated elections as a success despite criticisms and its shortcomings which should never be used to justify a return to manual election or even hybrid manual/automated elections.⁵

On July 20, 2010, the Technical Working Group submitted its Report⁶ on the Random Manual Audit of the AES in the May 2010 elections, which highlighted the difficulties encountered by the TWG-RMA and gave recommendations to improve and standardize the conduct of Random Manual Audit in future elections using the AES system.

On September 23, 2010, COMELEC partially exercised the option to purchase when it entered into a Contract of Sale with Smartmatic-TIM for the acquisition of 920 units of PCOS machines with the corresponding Consolidated Canvassing System (CCS), which were used during the special elections held on November 13, 2010 in certain areas in the provinces of Basilan, Lanao del Sur and Bulacan.

On December 20, 2010, COMELEC received a letter from Smartmatic-TIM reminding it of the imminent expiration of the option to purchase the remaining 81,280 PCOS units and extending the period of the option to purchase until March 31, 2011. As no response was received from COMELEC, Smartmatic-TIM sent another letter dated March 23, 2011 addressed to the new Chairman, Hon. Sixto S. Brillantes, Jr., offering a "Revised Extended Option to Purchase," in consideration of the forthcoming ARMM elections, until September 30, 2011.⁷

In a letter dated March 30, 2011, Commissioner Rene V. Sarmiento sought clarification on the terms of Smartmatic-TIM's revised extended offer. In its letter-reply dated April 1, 2011, Smartmatic-TIM answered the queries and detailed the conditions for its revised extended option to purchase effective until December 31, 2011.⁸

On September 23, 2011, Smartmatic-TIM again sent a communication to COMELEC following-up on the extended option to purchase and stating new conditions for its availment. This was followed by the letter dated December 28, 2011 reiterating the benefits of the PCOS technology offered to COMELEC under the revised option to purchase.⁹

On January 12, 2012, the CAC issued Resolution No. 2012-001¹⁰ recommending the use of the Optical Mark

Reader (OMR) technology for the 2013 national and local elections, and that in any purchase COMELEC consider the cost of storage, facility for storage, reliability of hardware over time and cost of money.

On February 8, 2012, the CAC issued Resolution No. 2012-003¹¹ with the following recommendations:

1. that for the sake of transparency and for the COMELEC to have the best option possible, COMELEC should exert all efforts to procure the necessary AES only through a competitive public bidding process;
2. that the option to purchase under the 2010 national and local elections contract should not be exercised, if as a consequence, the rest of the system must come from the same vendor, as this:
 - a. may not afford the COMELEC the best possible total solution, as the hardware is just one component of the entire automated election system;
 - b. prevents the COMELEC from taking advantage of the best possible technology currently available considering technological advances and/or obsolescence;
 - c. will prevent other prospective vendors from competitively participating in the bidding process; and
 - d. may severely erode the public trust and confidence in the electoral process;

x x x x¹² (Emphasis supplied.)

Subsequently, the CAC having been apprised that COMELEC was seriously considering to exercise the option to purchase, issued Resolution No. 2012-005¹³ dated March 7, 2012 setting forth its recommendations to ensure that COMELEC will have full control of the election process. Among these recommendations were: that the AES hardware be compliant to the technical specifications recommended in the 2012 CAC resolutions, delivered with appurtenances such as system specifications and user/training manuals, and be certified that they have all been upgraded and checked to comply with the established requirements and are in good working condition; that there be ample time for COMELEC to test the equipment; provisions for a minimum one year warranty and replacement/repair of malfunctioning units, and spare parts; and separate biddings for transmission and ballot printing services, as well as for the services of a Systems Integrator to take advantage of the best possible technology currently available considering advances and/or obsolescence.

Meanwhile, Congress approved the amount of P7,000,000,000.00 for the procurement of AES for the 2013 elections, which was way below the proposed budget for lease of AES submitted by COMELEC in the amount of P10,436,300,399.00. Per COMELEC's computation based on the lowest calculated responsive bid obtained during the bidding for the May 10, 2010 elections, P12,854,731,547 would be needed for the lease of 125,000 PCOS machines to achieve the target of 600 voters per precinct. On the other hand, only P4,728,912,086.00 is necessary should COMELEC exercise the option to purchase, and the over-all cost of technology and all services and deployment would only amount to P6,757,382,285.00, which is well within the budget allocated by Congress.¹⁴

Faced with budgetary and time limitations, COMELEC issued Resolution No. 9373¹⁵ dated March 6, 2012,

seriously considering the exercise of its option to purchase under the 2009 AES Contract, subject to compliance with the following conditions:

- 1) Smartmatic-TIM shall submit to the Commission not later than noon of **March 12, 2012** a formal written proposal indicating the total cost of the technology (PCOS and CCS hardware and software) which amount, as reflected in Annex "L" of the 2010 AES Contract, shall not be increased. Such proposal may also include its offer for technology related services mentioned above which it may provide for the 2013 automated elections, preferably at the same price as in the 2010 AES contract;
- 2) Smartmatic-TIM shall undertake that the PCOS and CCS hardware to be procured are properly stored and in good working condition until their turn-over to the Commission, subject to inspection by the Commission. To determine whether the PCOS and CCS hardware are properly stored, the Project Management Office shall create an Inspection Team who will submit a report thereon to the Commission not later than March 12, 2012;
- 3) The warranties agreed upon under Articles 4 and 8 of the 2010 AES Contract shall be in full force and effect; and
- 4) Fixes and enhancements on the AES as requested by the Commission must be addressed by Smartmatic-TIM. For this purpose, the Project Management shall submit a report to the Commission on the final Scope of Work and timelines to address said fixes and enhancements not later than March 12, 2012.¹⁶ (Italics supplied.)

In his Dissenting Opinion,¹⁷ Commissioner Augusto C. Lagman pointed out that: (1) even Smartmatic-TIM acknowledged the fact that the option to purchase period had already expired and hence any offer to extend it communicated to COMELEC was unilateral; (2) the extension of the option period was a substantial amendment and had the other bidders known that the option period could be extended beyond the time provided, they could have varied the amount of their respective bids; (3) COMELEC's acceptance of Smartmatic-TIM's unilateral offer may be deemed a manifest partiality to Smartmatic-TIM to the detriment of other bidders; (4) the exercise by COMELEC of the option to purchase in this case may not be justified under the alternative modes of procurement allowed by R.A. No. 9184, i.e., direct contracting, because Smartmatic-TIM is not the only supplier of OMR machines, the technology recommended by the CAC; and (5) on the technical aspect, the requirements of functional capability under R.A. No. 9369 were not met by Smartmatic-TIM as shown by the deficiencies uncovered in the AES used in the 2010 elections.

On March 21, 2012, COMELEC issued Resolution No. 9376¹⁸ stating that the COMELEC decided to exercise the option to purchase the PCOS machines for the 2013 elections. The COMELEC deemed it most advantageous for the government to exercise the option citing primarily the time and budgetary constraints, and the fact that Smartmatic-TIM has extended the option to purchase until March 31, 2012 without COMELEC rejecting the same. The resolution reads in part:

x x x x

WHEREAS, although Systest Labs, Inc. (now SLI Global Solutions), the established International Certification

Entity that reviewed the AES for the 2010 elections, has determined that the critical and major issues on the Voluntary Voting System Guidelines (VVSG) of the 2010 AES have already been resolved, there are fixes and enhancements being requested by the Commission on the AES to be used in the 2013 elections;

WHEREAS, the final Scope of Work for the enhancements being requested by the Commission to the AES to be used in the 2013 elections has already been completed;

WHEREAS, the Commission's Project Management Office for the May 13, 2013 National and Local Elections has submitted an Inspection Report showing that the PCOS used in the May 10, 2010 elections are properly stored at the Cabuyao Warehouse where said PCOS are currently stocked;

WHEREAS, the Commission previously purchased from Smartmatic-TIM nine hundred twenty (920) units of PCOS and related peripherals for use in the special elections in 2010;

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, subject to the conditions that:

1. The warranties agreed upon under Articles 4 and 8 of the 2010 AES Contract shall be in full force and effect;
2. The original price for the hardware and software covered by the Option to Purchase as specified under Annex "L" of the 2010 AES contract shall be maintained, excluding the cost of the nine hundred twenty (920) units of PCOS and related peripherals previously purchased for use in the 2010 special elections; and
3. All other services related to the 2013 Automated Election System shall be subject to public bidding.

SO ORDERED.¹⁹

On March 30, 2012, COMELEC and Smartmatic-TIM entered into an "Agreement on the Extension of the Option to Purchase Under the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections,"²⁰ citing as basis Article 19 of the 2009 AES Contract which allows amendments to its provisions upon mutual agreement. It was thus agreed that the last date of the exercise of the option to purchase is extended to March 31, 2012.

On March 30, 2012, COMELEC and Smartmatic-TIM executed the Deed of Sale²¹ covering the PCOS and CCS hardware and software pursuant to the option to purchase in the 2009 AES Contract, for the total consideration of P1,833,274,457.09 subject to the conduct of the Hardware Acceptance Test (HAT) and compliance with the Final Scope of Work for "additional system modifications" or the fixes and enhancements earlier requested by the COMELEC.

On the same date, COMELEC issued Resolution No. 9378²² approving the aforesaid Deed of Sale between COMELEC and Smartmatic-TIM.

On April 10, 2012, the first two petitions -- for certiorari, prohibition and mandamus with prayer for temporary restraining order (TRO) and writ of preliminary injunction -- were filed before this Court by Archbishop Fernando R. Capalla, Omar Solitario Ali and Mary Anne L. Susano (G.R. No. 201112), and former Vice-President Teofisto T. Guingona joined by 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 (G.R. No. 201127). On the same day, another petition for certiorari and prohibition with similar prayer for injunctive relief was filed by the Solidarity for Sovereignty (S4S) represented by Ma. Linda Olaguer, and Ramon Pedrosa, Benjamin Paulino, Sr., Evelyn Coronel, Ma. Linda Olaguer Montayre and Nelson T. Montayre (G.R. No. 201121).

On April 24, 2012, this Court issued a TRO enjoining the implementation of the assailed contract of sale. The three petitions were consolidated and the respondents were directed to file their comment.²³

A fourth petition for certiorari, prohibition and mandamus filed by Tanggulang Demokrasya (Tan Dem), Inc., Evelyn L. Kilayko, Teresita D. Baltazar, Pilar L. Calderon and Elita T. Montilla (G.R. No. 201413) was likewise consolidated with the first three cases, and the respondents required to file their comment to the said petition.

Arguments of the Parties

Petitioners seek the nullification of the deed of sale entered into by COMELEC with Smartmatic-TIM for the acquisition of the subject PCOS and CCS hardware and software used in the May 10, 2010 national and local elections, pursuant to an option to purchase in the 2009 AES Contract. Their common stand proceeds from the theory that since the deadline set under the 2009 contract had lapsed without COMELEC exercising the option to buy the leased units, Smartmatic-TIM cannot extend the period of the option beyond the term of the contract which has long expired. They stress that purchase of the PCOS machines is altogether a different procurement than a lease envisioned in the original AES Contract. A new bidding for the sale of the AES equipment was therefore necessary to comply with the provisions of R.A. No. 9184. The unilateral extension of the option to purchase by Smartmatic-TIM being illegal and in contravention of the law on procurement, its acceptance by the COMELEC constitutes grave abuse of discretion amounting to lack or in excess of jurisdiction.

Petitioners cite the deficiencies, vulnerabilities and glitches that surfaced when the AES was used during the May 10, 2010 elections, as verified by government authorities, private observers, local IT experts and citizens' groups. Among these significant findings were: (1) the disabling of security features like the ultra-violet mark sensors; (2) absence or lack of digital signatures; (3) faulty compact flashcards (CF) which had to be recalled and reconfigured close to election day; (4) lack of or ineffective source code review; (5) absence of paper audit trail or audit logs; (6) insufficient or unreliable random manual audit; and (7) discovery of console port which allows unsecured access to the operating system of the PCOS machines. Because these issues have not been properly addressed by Smartmatic-TIM and completely disregarded by COMELEC when it insisted on the purchase of the defective PCOS machines, petitioners contend that COMELEC gravely abused its discretion and committed dereliction of its constitutionally mandated function of safeguarding the election process.

Petitioners assert that before the country can hope to have a speedy and credible automated elections, it must

first be able to procure the proper computerized hardware and software legally, based on a transparent and valid system of public bidding. The business of automating the coming midterm elections in 2013 (and beyond) is too critical to the survival of our democratic institutions to be entrusted to a provider whose wares have performed poorly and below par in the last general elections and failed to meet the automated election law's minimum requirement as to functional capabilities. Further on the practical side, petitioners point out that even assuming that the PCOS units leased during the 2010 election were then all brand-new, all these would at least be three years old by the time the 2013 elections are held – would these be too old by then? Prudence dictates that COMELEC should heed the prodding of its own Advisory Council and put through the grinder of a public, competitive bidding Smartmatic-TIM and every other prospective provider of AES in the next and other succeeding elections.

Finally, petitioners lament the fact that when COMELEC allowed the period of the option to purchase to expire in December 31, 2010, it should have already looked into other possible providers as recommended by the CAC, by conducting a public bidding. Why then, they ask, is COMELEC now using lack of time to conduct a public bidding to justify its dealing anew with Smartmatic-TIM for the purchase and use of its PCOS machines and related paraphernalia for the 2013 elections? It may be recalled that for the 2010 elections, COMELEC conducted the bidding some ten months before election date. Moreover, under the Multi-Year Budget Allotment System of the Department of Budget and Management (DBM), additional funding may be obtained for a more reliable and better 2013 AES through competitive public bidding.

On their part, respondents assail the petitions on both procedural and substantive grounds. They contend that petitioners availed of the wrong remedy as the proper action is a suit for annulment of contract before the Regional Trial Court; did not observe the hierarchy of courts; failed to raise a genuine constitutional issue requiring this Court's intervention; and lacked legal standing to question the Deed of Sale between COMELEC and Smartmatic-TIM.

Even assuming that this Court allows a certiorari petition questioning the Deed of Sale between COMELEC and Smartmatic-TIM, respondents argue that no grave abuse of discretion was committed by the COMELEC after considering the circumstances proving that the exercise of the option to purchase was most advantageous to the government given the budgetary and time constraints, the familiarity of the voters and Board of Election Inspectors (BEI) with the use of the PCOS machines, the general success demonstrated by the said technology during the 2010 elections, and the legality of the extended option period which did not have the effect of altering the technical and/or financial proposals of the previous bidders and there being no indication in the bidding documents that the period of the option to purchase may no longer be extended (i.e., no restrictive words used such as "non-extendible" to qualify the period fixed). It was pointed out that even if the other bidders were aware that the option period could be extended fifteen (15) months, it would have been commercially impossible for any other bidder to outbid Smartmatic-TIM.

Respondents also assert that there was no violation of R.A. No. 9184 because under Section 10 of R.A. No. 9369, COMELEC was authorized to procure supplies and equipment for the AES by "other forms of acquisition" under which the exercise of the option to purchase may be categorized. And in the determination of the mode of procurement, COMELEC has the discretion, which may not be intruded upon for as long as it is exercised within the limits of existing laws. Section 1 of R.A. No. 9369 recognizes such authority of the COMELEC "to prescribe x x x and x x x use the most suitable technology of demonstrated capability taking into account the situation prevailing

in the area and the funds available for the purpose." For the coming 2013 elections, COMELEC needs more or less 125,000 PCOS machines which would entail a total cost of approximately ₱12,854,731,547.00 to achieve a 600:1 voter-to-precinct ratio. Hence, it proposed the said amount with ₱10,436,300,399.00 allotted for the lease of the PCOS machines in the 2013 elections. Unfortunately, the DBM allotted COMELEC an overall budget of only ₱7,962,220,229.00. Despite COMELEC lobbying for more funds from Congress, the General Appropriations Act of 2012 adopted the DBM's allotment in its National Expenditures Program (NEP) for the Year 2012. COMELEC tried other possible sources and applied for a multi-year obligational authority (MYOA) with the DBM; however, upon learning that the additional funding would be sourced from the Office of the President, COMELEC turned down the supplementary budget as it did not want its independence be put in question. Under this scenario, COMELEC found the exercise of the option to purchase as feasible, explaining in its Consolidated Comment that –

139. The COMELEC has the option to purchase 80,916 PCOS machines for the price of ₱1,833,274,457.09. Together with the 980 PCOS machines it previously acquired from Smartmatic-TIM, the COMELEC will have at its disposal a total of 81,896 PCOS machines for the upcoming elections. With these, the COMELEC still hopes to at least maintain the 1,000:1 voter-to-precinct ratio.

140. Given its limited budget, the COMELEC's exercise of the OTP was a sound decision.

141. What is more, acquiring the PCOS and CCS hardware and software pursuant to the OTP reaps the following benefits:

- 1) The COMELEC will be purchasing the subject PCOS hardware and software at 33% of its actual cost;
- 2) Since the COMELEC will own the subject PCOS machines, it will no longer have to lease AES during subsequent elections;
- 3) Training costs will be reduced because COMELEC personnel, the Board of Election Inspectors (BEI) and other responsible individuals are already familiar with the handling and operation of the PCOS machines;
- 4) Voters will feel more secure and comfortable using technology which they are familiar with;
- 5) It will promote uniformity and standardization considering that the government had previously acquired 980 units of the same PCOS and CCS hardware and software;
- 6) The subject PCOS machines are now proven technology and any bugs and glitches it encountered during the past elections have been properly addressed;
- 7) Time, effort and money will be saved from having to conduct competitive public bidding.

142. It must always be borne in mind that the essence of procurement laws is to ensure that the people get maximum benefits and quality services from government contracts.²⁴ (Italics supplied.)

Legal Standing and Hierarchy of Courts

Petitioners in their capacity as citizens instituted these cases on a matter of paramount public interest and transcendental importance to the nation involving the right of suffrage, i.e., to ensure the integrity, efficiency and transparency of the automated election system, specifically the technology to be used in the next national and local elections. The suit is one for the enforcement of a public duty – the protection of the exercise of such right in the implementation of election laws, which duty the Constitution has vested on the COMELEC.

This Court has previously overruled, in the exercise of sound discretion, procedural questions on the standing of petitioners who raise issues of paramount public interest.²⁵ In the case of *Chavez v. PCGG*,²⁶ we upheld the right of a citizen to bring a suit on matters of transcendental importance to the public,²⁷ thus:

In *Tañada v. Tuvera*, the Court asserted that **when the issue concerns a public right and the object of mandamus is to obtain the enforcement of a public duty, the people are regarded as the real parties in interest; and because it is sufficient that petitioner is a citizen and as such is interested in the execution of the laws, he need not show that he has any legal or special interest in the result of the action.** In the aforesaid case, the petitioners sought to enforce their right to be informed on matters of public concern, a right then recognized in Section 6, Article IV of the 1973 Constitution, in connection with the rule that laws in order to be valid and enforceable must be published in the Official Gazette or otherwise effectively promulgated. In ruling for the petitioners' legal standing, the Court declared that the right they sought to be enforced 'is a public right recognized by no less than the fundamental law of the land.'

Legaspi v. Civil Service Commission, while reiterating *Tañada*, further declared that **'when a mandamus proceeding involves the assertion of a public right, the requirement of personal interest is satisfied by the mere fact that petitioner is a citizen and, therefore, part of the general 'public' which possesses the right.'**

Further, in *Albano v. Reyes*, we said that while expenditure of public funds may not have been involved under the questioned contract for the development, management and [the] operation of the Manila International Container Terminal, **'public interest [was] definitely involved considering the important role [of the subject contract] . . . in the economic development of the country and the magnitude of the financial consideration involved.'** We concluded that, as a consequence, the disclosure provision in the Constitution would constitute sufficient authority for upholding the petitioner's standing.²⁸

In *Roque, Jr. v. Commission on Elections*,²⁹ we brushed aside the procedural barriers of locus standi and hierarchy of courts when the implementation of the 2009 AES Contract was challenged before this Court, thus:

There is no doubt in our mind, however, about the compelling significance and the transcending public importance of the one issue underpinning this petition: the success—and the far-reaching grim implications of the failure—of the nationwide automation project that will be implemented via the challenged automation contract.

The doctrinal formulation may vary, but the bottom line is that the Court may except a particular case from the

operations of its rules when the demands of justice so require. Put a bit differently, rules of procedure are merely tools designed to facilitate the attainment of justice. Accordingly, technicalities and procedural barriers should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid adherence to the rules of procedure. This postulate on procedural technicalities applies to matters of *locus standi* and the presently invoked principle of hierarchy of courts, which discourages direct resort to the Court if the desired redress is within the competence of lower courts to grant. The policy on the hierarchy of courts, which petitioners indeed failed to observe, is not an iron-clad rule. For indeed the Court has full discretionary power to take cognizance and assume jurisdiction of special civil actions for *certiorari* and *mandamus* filed directly with it for exceptionally compelling reasons or if warranted by the nature of the issues clearly and specifically raised in the petition.

The exceptions that justify a deviation from the policy on hierarchy appear to obtain under the premises. The Court will for the nonce thus turn a blind eye to the judicial structure intended, first and foremost, to provide an orderly dispensation of justice.³⁰ (Emphasis supplied.)

SUBSTANTIVE ISSUES

Grounds for Nullity of Deed of Sale

The COMELEC is an independent constitutional body tasked to enforce and administer all laws and regulations relative to the conduct of elections. As such, it enjoys a considerable latitude in devising means and methods to carry out its mandate of ensuring free, orderly and honest elections.³¹ Absent a clear breach of the Constitution or laws, or grave abuse of discretion, this Court will not substitute its own judgment and nullify COMELEC's acts or decisions.

Under Section 5 of R.A. No. 8436, as amended, the COMELEC is authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises. Sec. 12 of R.A. No. 8436, as amended, further provides:

SEC. 12. Procurement of Equipment and Materials. - To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.

In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid. (Emphasis supplied.)

In *Roque, Jr. v. Commission on Elections*,³² one of the grounds raised for the nullification of the AES contract award to Smartmatic-TIM was that the PCOS machines do not satisfy the minimum system capabilities prescribed by R.A. No. 8436, as amended. It was suggested that the PCOS system offered by Smartmatic-TIM lacked the security features that would assure accuracy in the recording and reading of votes, as well as in the tabulation, consolidation/canvassing, electronic transmission, storage results and accurate ballot counting. This Court, however, overruled these objections, fairly satisfied with the fact that COMELEC has adopted a rigid technical evaluation mechanism, to ensure compliance with the aforesaid minimum system capabilities. As to the matter of auditability of the election results, we pointed out that PCOS, being a paper-based technology, affords audit since the voter would be able, if need be, to verify if the machine had scanned, recorded and counted his vote properly; and additionally, the PCOS machine contains an LCD screen, one that can be programmed or configured to display to the voter his votes as read by the machine. Even the possibility of the AES being hacked was considered by the Court which pointed out that unlike the voting system used in certain precincts in Florida, U.S.A. during the Gore-Bush presidential contests, the Source Code³³ for the 2010 AES shall be available and opened for review by political parties, candidates and the citizens' arms or their representatives, and the very same PCOS machines found in the precincts will also be the same device that would tabulate and canvass the votes. Besides, it was noted that the possibility of system hacking is very slim since the PCOS machines are only online when they transmit the results, would only take around one to two minutes. All in all, the Court was prepared in 2009 to give a chance for the AES be finally adopted even though it has its flaws upon the assurance that COMELEC and Smartmatic-TIM have seen to it that the system is well-protected with sufficient security measures in order to ensure honest elections.

Now, just two years after the conduct of the first automated election system in the country, COMELEC's recent decision to buy the same PCOS machines used in the 2010 elections from the same provider is being opposed by herein petitioners who prefer the conduct of a new bidding for such acquisition for the purpose of the 2013 elections in view of questions regarding the legality of COMELEC's exercise of the option to purchase, as well as the deficiencies and glitches experienced in the actual deployment and operation of the PCOS machines during the 2010 elections. Petitioners posit that such shortcomings and irregularities which COMELEC dismissed as minor problems that have already been corrected, glaringly reveal Smartmatic-TIM's failure to comply with the minimum functional capabilities of an AES under R.A. No. 8436, as amended. Petitioners thus ascribe grave abuse of discretion in COMELEC's decision to buy the PCOS machines in violation of the laws on procurement and automated election system.

Extension of the Period of Option to Purchase

An option to purchase is a condition offered or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time, or under, or in compliance with certain terms and conditions; or which gives to the owner of the property the right to sell or demand a sale. It binds the party who has given the option, not to enter into the principal contract with any other person during the period designated, and, within that period, to enter into such contract with the one to whom the option was granted, if the latter should decide to use the option.³⁴

As earlier stated, the option to purchase was incorporated in the 2009 AES Contract for the lease of the PCOS machines as required in the bidding documents. The period within which COMELEC was to exercise the option

was fixed. The use of the word "shall" in Article 6.6 of the AES Contract conveys a mandatory undertaking by COMELEC to exercise the option to purchase on or before December 31, 2010. The fixed date of the exercise of the option is likewise reflected in the bidding documents.

Perusing the exchange of communication between respondents, it is undeniable that COMELEC was apprised by Smartmatic-TIM that the December 31, 2010 had already expired. COMELEC was then banking solely on the successive unilateral extensions offered by Smartmatic-TIM. When COMELEC finally resolved to exercise the option to purchase, it cited as legal basis Article 19 of the AES Contract which states:

This Contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties.

Since the option to purchase expired on December 31, 2010 without COMELEC exercising the same, said contract clause ceased to exist. The revised option to purchase offered by Smartmatic-TIM did not have the effect of extending the option period which had lapsed. Even assuming that the option clause may be amended by extending its period in the AES Contract on or before December 31, 2010, such extension must be done by mutual agreement because a unilateral amendment is not allowed under the AES Contract. While COMELEC and Smartmatic-TIM indeed executed a written mutual agreement for such extension, this was done only on March 30, 2012, or one year and three months after the deadline fixed in the AES Contract.

COMELEC argues that the exercise of the option to purchase was merely an implementation of a provision in the 2009 AES Contract which subsists in view of the retention by COMELEC of P50 million of the Performance Security for the remaining unfulfilled obligations of Smartmatic-TIM (Resolution No. 9293 dated October 6, 2011), and the Precautionary Protection Order (PPO) issued on August 31, 2010³⁵ by the Presidential Electoral Tribunal in PET Case No. 004 involving the election protest filed by vice-presidential candidate Manuel A. Roxas against the proclaimed winner Vice-President Jejomar C. Binay directing the COMELEC "to PRESERVE and SAFEGUARD the integrity of the ballot boxes, their contents and keys, lists of voters with voting records, books of voters and other documents and paraphernalia used in the May 2010 elections for the position of Vice-President of the Republic of the Philippines, as well as the data storage devices containing the electronic data evidencing the results of elections in the contested 76,340 clustered precincts subject of the Protest and Counter-Protest, effective immediately and continuing until further orders from this Tribunal."³⁶

COMELEC then cites Article 5.11 of the 2009 AES Contract which provides:

5.11 All Goods or Equipment in the possession of COMELEC because of any election contest or audit requirement after December 31, 2010 shall be considered sold to COMELEC pursuant to its purchase option under this Contract, and COMELEC shall pay the corresponding price within the first five (5) business days of January 2011. In case the election protest was due to any defect in the machines or the system or that the audit will show the same, COMELEC shall return the machines to the PROVIDER for full refund.³⁷

On its part, Smartmatic-TIM asserts that even if the period of the option to purchase had lapsed, there is no prohibition, legal or otherwise, to revive a lapsed period by mutual agreement of the parties. Such extension of the option did not constitute a substantial amendment that would alter the parameters of the 2009 AES Contract. Stressing that no bidder was prejudiced by the extension of the option period, Smartmatic-TIM recalls that from

the date of the May 2010 elections until the execution of the Extension Agreement on March 31, 2012, there were continuing negotiations between COMELEC and Smartmatic-TIM which clearly showed the intent to keep the option to purchase alive. Since the benefit of the option period pertained to COMELEC, it was therefore at liberty to demand performance from Smartmatic-TIM for the exercise of its option. Additionally, Smartmatic-TIM posits that the "deadline" specified in the 2009 AES Contract for the exercise of the option had no special significance or urgency to COMELEC; such date was arbitrarily chosen by the parties though in actuality the exercise of the option was at the pleasure of COMELEC for whose benefit the period was provided.³⁸

We are not persuaded by respondents' submissions.

There can be no debate that the contracting parties are free to waive by mutual agreement the option period in their contract. Such is a valid argument if both are private individuals or juridical persons. Where, as in this case, one of the contracting parties is a government entity, the exercise of an option to buy should not contravene the laws on procurement.

Thus, despite the expiration of the option to purchase, COMELEC may still enter into a contract of sale with Smartmatic-TIM. However, such acquisition of the PCOS hardware and software for the purpose of the 2013 elections is deemed as a new procurement which is distinct and separate from the 2009 AES lease with option to buy. "Procurement" in its dictionary meaning refers to the act of obtaining, attainment, acquisition, bringing about, effecting.³⁹ A procurement contract is a government contract with a manufacturer or supplier of goods or machinery or services under the terms of which a sale is made to the government; such contracts are governed by government regulations, standard forms, etc.⁴⁰ R.A. No. 9184 defines "procurement" as the acquisition of goods, consulting services, and the contracting for Infrastructure Projects by the Procuring Entity which refers to any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/or -controlled corporations, government financial institutions, and local government units. The term procurement includes the lease of goods and real estate.⁴¹

R.A. No. 9184 established the basic policy that all government procurement shall be done through competitive bidding, except for certain specified alternative modes of procurement.⁴² Competitive public bidding aims to protect the public interest by giving the public the best possible advantages through open competition. It is a mechanism that enables the government agency to avoid or preclude anomalies in the execution of public contracts.⁴³

Respondents have not shown any right to enter into the subject contract of sale of the PCOS machines without going through the process of bidding other than the expired option clause in the 2009 AES Contract. COMELEC's argument that it was authorized under Sec. 12 of R.A. No. 9369 to procure goods or equipment not only by purchase, lease, rent but also by "other forms of acquisition" under which the exercise of the option to purchase may be categorized, is misplaced. As already established, the option to purchase provided in the original lease contract had already expired. Moreover, the phrase "other forms of acquisition" can only be interpreted as referring to those alternative modes of procurement as provided in R.A. No. 9184, considering that the authority to procure granted to COMELEC under the aforesaid provision is qualified by the words "in accordance with existing laws." Respondents are therefore burdened to prove that their contract of sale falls under those alternative modes of procurement provided in R.A. No. 9184, which are exempt from the public bidding

requirement.

COMELEC posits that the exercise of the option to purchase is analogous to direct contracting and negotiated procurement, which are among the alternative modes provided in R.A. No. 9184. The reasons given are: (1) the PCOS, CCS and Election Management System (EMS) have already been customized, modified and configured for Philippine elections and certified to be operating properly, securely and accurately, and with enough machines to automate the 2013 elections given COMELEC's budgetary constraints; (2) no other manufacturer or producer has such goods; (3) the acquisition of a new AES for the 2013 elections is not only a near commercial impossibility because of the limited budget but also a near logistical impossibility; (4) based on the 2010 elections timeline, COMELEC is deeply concerned if it will have to bid out the supply of the AES for use in the 2013 elections; and (5) the policy considerations that prompted the issuance of Resolution No. 06-2005 ("Guidelines on the Use of an Ordering Agreement under the Government Procurement Reform Act") find relevance in the astute appreciation of COMELEC's decision to exercise the option to purchase considering that the EMS, PCOS and CCS machines are non-routine or non-recurring items that were not ordinarily kept in stock by COMELEC but admittedly necessary after it failed to secure the budget needed to conduct the 2013 elections, the quantity required was not accurately pre-determined.⁴⁴

We disagree.

Direct Contracting, otherwise known as Single Source Procurement is defined as 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 invoice together with the conditions of sale, which offer may be accepted immediately or after some negotiations.⁴⁵ On the other hand, Negotiated Procurement refers to a method of Procurement that may be resorted to under the extraordinary circumstances provided for in Section 53 of R.A. No. 9184 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.⁴⁶

COMELEC would justify resort to direct contracting under Sec. 50 (a) on 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 item. However, while it is true that the license for the software of Smartmatic-TIM's PCOS machines is exclusively owned by Dominion with which it has a licensing agreement, Smartmatic-TIM is not the sole manufacturer of PCOS-type machines, a mere component of the paper-based AES offered by said provider. Precinct Count Optical Scan or PCOS refers to a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted.⁴⁷ PCOS is thus merely one of several automated voting, counting or canvassing technologies coming within the term AES. It is simply a variation of an optical scan system where the scanner is in the precinct (precinct optical scanning), the other one refers to scanning performed at the election office (central optical scanning).⁴⁸ There is likewise no showing that no suitable substitute to PCOS is available or can be obtained at more advantageous terms to the government.

Neither can we consider the acquisition of Smartmatic-TIM's PCOS machines as a negotiated procurement. Section 53 of the Implementing Rules and Regulations of R.A. No. 9184 provides:

Section 53. Negotiated Procurement

Negotiated Procurement is a method of procurement of goods, infrastructure projects and consulting services, whereby the procuring entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant only in the following cases:

- a) Where there has been failure of public bidding for the second time as provided in Section 35 of the Act and this IRR-A;
- b) In case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities. In the case of infrastructure projects, the procuring entity has the option to undertake the project through negotiated procurement or by administration or, in high security risk areas, through the AFP;
- c) Take-over of contracts, which have been rescinded or terminated for causes provided for in the contract and existing laws, where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities;
- d) Where the subject contract is adjacent or contiguous to an on-going infrastructure project: x x x
- e) Purchases of goods from another agency of the Government, such as the PS-DBM x x x;
- f) In the case of individual consultants hired to do work that is (i) highly technical or proprietary; or (ii) primarily confidential or policy determining, where trust and confidence are the primary consideration for the hiring of the consultant: x x x (Emphasis and italics supplied.)

It is clear from the foregoing that the claimed budgetary and time constraints in the procurement of AES for the 2013 elections do not even come close to any of the extraordinary circumstances above-enumerated in order to consider the sale transaction of PCOS machines between COMELEC and Smartmatic-TIM as a negotiated procurement exempt from the bidding requirement. To stress, the IRR has declared that alternative methods of procurement shall be resorted to only in highly exceptional cases,⁴⁹ which is not the situation here. COMELEC faced the same obstacles and pressures in 2009 when the use of Smartmatic-TIM's PCOS machines for the first time was met with great scepticism. But the bidden AES contract was implemented as scheduled after a similar petition against it was filed and decided by this Court.

In fine, while R.A. No. 9184 allows procurement without competitive bidding under certain conditions, or extraordinary circumstances, respondents failed to demonstrate that the questioned purchase of the PCOS machines falls under any of these recognized exceptions.

Competitive public bidding may not be dispensed with nor circumvented, and alternative modes of procurement for public service contracts and for supplies, materials, and equipment may only be resorted to in the instances provided for by law.⁵⁰ A contract granted without the competitive bidding required by law is void, and the party to

whom it is awarded cannot benefit from it.⁵¹

Because the option to purchase had long expired and the lease contract itself had been terminated save for the warranties and unfulfilled obligations of Smartmatic-TIM, it is clear that respondents' insistence on reviving the option period has no other purpose but to avoid compliance with R.A. No. 9184 which requires the conduct of a new bidding for the purchase of the same PCOS machines leased under the 2009 AES Contract.

Compliance with the Minimum Functional Capabilities Under R.A. No. 9369

But the more compelling reason advanced by petitioners to nullify the Deed of Sale over the remaining PCOS machines, is Smartmatic-TIM's failure to comply with the minimum technical requirements of an automated election system. Petitioners enumerated the serious deficiencies observed during the actual operation of these machines in the 2010 elections but the COMELEC insists these have already been resolved.

COMELEC's posture that even assuming those perceived defects of the PCOS machines were confirmed, it does not warrant rejection of the units because they did not materially affect the results of the 2010 elections, is not well-taken. Compliance by the AES provider with the minimum functional capabilities laid down by R.A. No. 9369 is mandatory for an AES to be acceptable. Besides, sticking to the same AES lacking in critical security features simply because many of the election protests filed in connection with the 2010 elections have been dismissed by COMELEC does not augur well for the future of automated elections in our country. COMELEC's constitutional duty is to ensure free, orderly and honest elections, and not to gamble on the people's vote by buying defective voting machines hoping that they will work all the time, completely relying on the provider's willingness to just undertake the needed fixes and enhancements on the technology already chosen and used.

Indeed, R.A. No. 9369 vested COMELEC with the authority to determine the most suitable technology, but such must be one "of demonstrated capability." COMELEC is set to spend anew huge public funds on technology with serious security issues, from a provider who never publicly admitted responsibility for the deficiencies in their AES. The Court finds that COMELEC's utter disregard of such deficiencies and resort to stop-gap solutions like ordering "fixes and enhancements" on the PCOS machines instead of conducting a new bidding to secure the most advantageous terms for the government, constitutes grave abuse of discretion.

Questions and Issues on the Integrity and Reliability of the PCOS Machines

During the oral argument, former COMELEC Commissioner Augusto C. Lagman, who had opposed the Commission En Banc's decision to purchase the remaining PCOS machines, was asked to explain his position and his opinion as an IT expert. He confirmed the lack of critical safeguards and the real possibility of tampering due to the open port found in the PCOS machines which allowed unsecured access to its operating system. He likewise affirmed that despite the fixes supposedly done, the actual demonstration showed that up to that time Smartmatic-TIM was not really able to resolve deficiencies and other issues, such as the "re-zero functionality" and hardware problem. Thus, Commissioner Lagman's concern is the lack of assurance on the part of Smartmatic-TIM that they will be able to correct all operational problems and issues with the PCOS machines.⁵²

As earlier mentioned, in Roque, Jr. v. Commission on Elections,⁵³ one of the grounds raised for the nullification of the AES contract awarded to Smartmatic-TIM was that the PCOS machines do not satisfy the minimum system capabilities prescribed by Sec. 7 of R.A. No. 8436, as amended, which provides:

SEC. 6. Minimum System Capabilities. - The automated election system must at least have the following functional capabilities:

- (a) Adequate security against unauthorized access;
- (b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;
- (c) Error recovery in case of non-catastrophic failure of device;
- (d) System integrity which ensures physical stability and functioning of the vote recording and counting process;
- (e) Provision for voter verified paper audit trail;
- (f) System auditability which provides supporting documentation for verifying the correctness of reported election results;
- (g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election results in the shortest time possible;
- (h) Accessibility to illiterates and disabled voters;
- (i) Vote tabulating program for election, referendum or plebiscite;
- (j) Accurate ballot counters;
- (k) Data retention provision;
- (l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;
- (m) Utilize or generate official ballots as herein defined;
- (n) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and
- (o) Configure access control for sensitive system data and functions.

In the procurement of this system, the Commission shall develop and adopt an evaluation system to ascertain that the above minimum system capabilities are met. This evaluation system shall be developed with the

assistance of an advisory council.

Since the PCOS has passed the technical evaluation conducted by COMELEC using a 26-item/check list criteria, and with the Court's finding that COMELEC and Smartmatic-TIM have seen to it that the system is well-protected with sufficient security measures in order to ensure honest elections, we declared that the project award complied with legal prescriptions, and the terms and conditions of the AES Contract valid. At the time, the PCOS machines still had to undergo acceptance tests as specified in the RFP prior to actual deployment in the 2010 elections.

Before us now, the integrity and reliability of the PCOS machines are again being questioned and its purchase by the COMELEC despite their evident flaws and deficiencies is sought to be nullified.

A major deficiency observed in the 2010 elections is the absence of digital signature in the election returns. The requirement of digital signatures as the primary means of ensuring the authenticity of electronically transmitted election results is found in Sec. 25 of R.A. No. 9369, which reads:

SEC. 25. A new Section 30 is hereby provided to read as follows:

"Sec. 30. Authentication of Electronically Transmitted Election Results. - The manner of determining the authenticity and due execution of the certificates shall conform with the provisions of Republic Act No. 7166 as may be supplemented or modified by the provisions of this Act, where applicable, by appropriate authentication and certification procedures for electronic data, electronic documents and electronic signatures as provided in Republic Act No. 8792 as well as the rules promulgated by the Supreme Court pursuant thereto."

"Electronic signature" refers to any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or electronic document or any methodology or procedures employed or adopted by a person and executed or adopted by such person with the intention of authenticating or approving an electronic data message or electronic document.⁵⁴ A digital signature is defined as an electronic signature consisting of a transformation of an electronic document or an electronic data message using an asymmetric or public cryptosystem such that a person having the initial untransformed electronic document and the signer's public key can accurately determine: (a) whether the transformation was created using the private key that corresponds to the signer's public key; and, (b) whether the initial electronic document had been altered after the transformation was made.⁵⁵ "Digitally signed" refers to an electronic document or electronic data message bearing a digital signature verified by the public key listed in a certificate.⁵⁶

Smartmatic-TIM insists that its PCOS machines had digital certificates but COMELEC disabled this feature in the May 2010 elections. COMELEC, on its part, asserts that the "machine signature" of a PCOS machine is the functional equivalent of a digital signature to assure that the election returns being received by the canvassing boards come from a valid source. COMELEC also pointed out that this is not among the mandated minimum system capabilities. The non-adoption of the digital signature was further justified by security concerns such as the possibility that the BEIs might be coerced or lose their digital keys.

COMELEC's interpretation of the requisite digital signature is erroneous and belied by the very terms of reference it had issued to the bidders of the AES in 2009. The RFP expressly required that "[t]he system shall transmit

digitally signed and encrypted election results and reports enabled by public/private key cryptography to provide authenticity, integrity and non-repudiation utilizing at least 128-bit encryption scheme."⁵⁷ It further specified that the Board of Election Inspectors (BEI) shall digitally sign and encrypt the internal copy of the Election Return (ER) and the Board of Canvassers be allowed to digitally sign all electronic results and reports before transmission.⁵⁸ It was also clarified in the bidding documents that three (3) digital certificates – one for each member – shall be issued to all BEIs and BOCs.⁵⁹ Clearly, the automatically generated machine digital signature envisioned by the COMELEC is not sufficient for the purpose of authenticating the election returns.

The possibility of coercion of BEI members mentioned by COMELEC, as well as the huge cost of activating the digital signature capability of the PCOS machines, are not valid excuses to disregard the requirement set by law. Violence, intimidation and harassment are constant threats being faced by election officers and workers every election in this country. As for the financial side, it bears to stress that the cost of implementing the digital signature should have already been factored in by Smartmatic-TIM when it bided for the Automation Project in 2009, as these have been included in the RFP and bid documents.

Another serious cause for concern is the existence of the open port in the PCOS machines which allowed unsecured access to its operating system. Smartmatic-TIM claims that this has been remedied by placing tamper-proof mechanical seals and current version of the PCOS firmware to prevent access through the console port. There is, however, no guarantee that firmware manipulation will not occur. At least one study made by computer technology experts in the US has demonstrated that the firmware component of a proprietary computing system is vulnerable to an attack even by someone who has no extensive resources, an in-depth knowledge of the targeted system, and access to source code and/or hardware specifications. Said study focused on analysing how to gain control over the memory card access and the serial port access.⁶⁰

The Court is mindful that the determination of functional capabilities of the PCOS machines is a question of fact pertaining to technical matters best left to the COMELEC and IT experts. However, there are admissions on record regarding critical security features as mandated by R.A. No. 9369 and RFP for the 2009 Automation Project which were not implemented during the 2010 elections. Notably, COMELEC manifested that the contract of sale over the remaining PCOS machines was subject to the completion of "fixes and enhancements" to be done by Smartmatic-TIM as directed by COMELEC.

Perusing the records, the fixes and enhancements turn out to be minor program modifications. The serious deficiencies and issues affecting the integrity of the PCOS system appear to have not been fully resolved. Thus, the absence of digital signatures, presence of an open port and lack of a voter verified paper audit trail should have been duly considered by COMELEC in deciding whether to buy the same PCOS machines of Smartmatic-TIM or search for a new technology or system from other suppliers or providers.

The deficiencies noted are critical to the success of the next automated elections because they pertain to those minimum functional capabilities mandated by R.A. No. 9369. For instance, the lack of a voter verified paper audit trail. A "voter verified paper audit trail" consists of physical paper records of voter ballots as voters have cast them on an electronic voting system. The "voter-verified" part refers to the fact that the voter is given the opportunity to verify that the choices indicated on the paper record correspond to the choices that the voter has made in casting the ballot. Thus, the result of an election is an electronic tally of the votes cast and a paper record of the individual

votes that have been cast.⁶¹

In Roque, we found no merit in the issue regarding the auditability of the election results explaining that PCOS, being a paper-based technology, affords audit since the voter would be able, if need be, to verify if the machine had scanned, recorded and counted his vote properly. Moreover, we had noted that the PCOS machine contains an LCD screen, one that can be programmed or configured to display to the voter his votes as read by the machine. But even this LCD screen did not function or was disabled. The verified paper audit trail did not materialize and the voters did not have a way of knowing how and if the votes they cast were duly recorded by the PCOS machines. Again, the COMELEC invoked logistical difficulty and insisted that the machines have the capability to print out all these as an audit log. But note that under Sec. 7 of R.A. No. 8436, as amended, the provision for a voter verified paper audit trail is a separate requirement from system auditability and provision for verification by the voter whether the machine has registered his vote. And as can be gleaned from the aforesaid description of a voter verified paper audit trail, there was no compliance with this requirement. Clearly, COMELEC failed in discharging its duty to implement vital safeguards set by law to ensure the accuracy and reliability of election results.

COMELEC emphasizes the positive findings of the international certification entity it had contracted, Systest Labs, Inc., which is accredited by the Election Assistance Commission (EAC) for Voting System Test Laboratory (VSTL) Status, to conduct the certification testing on Smartmatic-TIM's AES. Based on the source code review, documentation review, hardware and functional testing, volume, stress and transmission testing, conducted before the 2010 elections, Systest found that Smartmatic-TIM's system "conforms to key requirements and is operationally suitable for use" and that "[a]ll issues are considered however to be minor in nature or reconcilable using appropriate manual processes and/or compensating controls."⁶² After the elections, or on November 7, 2011, Systest, now SLI Global Solutions conducted another system review and issued a Final Certification Test Report stating that it recommends the AES for certification, as it is "conformant with operational requirements and is suitable for use in applicable future elections."⁶³ These results, according to COMELEC, far outweigh petitioners' allegation of defects in the PCOS machines.

The Court, however, cannot give more weight to the findings and conclusions of the certification firm engaged by COMELEC than the established fact that Smartmatic-TIM's AES did not fully comply with the minimum system requirements set by our election automation law. COMELEC's assertion that even Commissioner Lagman concedes that those defects and deficiencies can be "solved" anyway only raises questions as to the wisdom of buying election hardware and software that still needs repair and "fixes". Indeed, COMELEC must now realize that at this point the best way to determine what is most advantageous to the government in the acquisition of an AES for the 2013 elections is still by public competitive bidding. COMELEC should not use as an excuse the insufficient budget allocated by Congress because it should be able to convince Congress to grant its budget proposal for the 2013 automated elections. Given the lessons and experiences from the first automated elections held in the country, it would not be difficult for COMELEC to justify its budgetary requirements for the next automated elections in 2013.

In fine, the Court holds that COMELEC's exercise of the option to purchase under the 2009 AES Contract which had long expired was ineffective and invalid. The subsequent contract of sale between COMELEC and Smartmatic-TIM in pursuance of such lapsed option clause and in circumvention of the competitive bidding

process under R.A. No. 9184, is consequently illegal and void.

We reiterate that the award of public contracts through public bidding is a matter of public policy. Provisions of applicable laws, especially provisions relating to matters affected with public policy, are deemed written into the contract, more so, to a government contract which is imbued with public interest.⁶⁴

In this case, the exercise of the option to purchase under the 2009 AES Contract, though a contractual privilege on which COMELEC and Smartmatic-TIM may mutually agree upon such terms most advantageous to the government, must not contravene existing laws which form part of their contract. Reasons of budgetary limitations, time constraints and practical convenience in using a familiar technology advanced by COMELEC cannot take precedence over the dictates of public policy. The Court thus cannot uphold the subject contract of sale as to allow circumvention of the policy on competitive public bidding.

I therefore VOTE to GIVE DUE COURSE to the present petitions and to GRANT the writs prayed for therein. Consequently, I also VOTE to declare as NULL and VOID COMELEC Resolution Nos. 9373 and 9376 dated March 6, 2012 and March 21, 2012, respectively, the "Agreement on the Extension of the Option to Purchase under the Contract for the Provision of the Automated Election System for the May 10, 2010 Synchronized National and Local Elections" dated March 30, 2012 and the Deed of Sale dated March 30, 2012 by and between COMELEC and Smartmatic TIM Corporation.

I further VOTE that the Temporary Restraining Order issued by this Court on April 24, 2012 enjoining respondents COMELEC and Smartmatic TIM Corporation from implementing COMELEC En Banc Resolution No. 9376 be **MADE PERMANENT**.

MARTIN S. VILLARAMA, JR.

Associate Justice

Footnotes

¹ An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing The Commission On Elections To Use An Automated Election System in the May 11, 1998 National Or Local Elections and in Subsequent National and Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending For The Purpose Batas Pambansa Blg. 881, as amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor and For Other Purposes". Signed into law on January 23, 2007.

² Rollo (G.R. No. 201112), pp. 721-722, 725-726.

³ Id. at 248.

⁴ Id. at 441-481.

⁵ Id. at 481.

⁶ Id. at 507-530.

⁷ Id. at 872-874, 881-882. Smartmatic-TIM's letter dated December 28, 2011 (Annex "13") states that from September 30, 2011, the deadline for the revised option to purchase was extended by it to December 31, 2011. [Rollo (G.R. No. 201112), pp. 906-907.]

⁸ Id. at 885-886, 888-895.

⁹ Id. at 901-904, 906-907.

¹⁰ Id. at 272-273.

¹¹ Id. at 274-276.

¹² Id. at 274-275.

¹³ Id. at 310-314.

¹⁴ Id. at 279-280.

¹⁵ Id. at 277-309.

¹⁶ Id. at 281.

¹⁷ Id. at 295-307.

¹⁸ Id. at 909-917.

¹⁹ Id. at 911-912.

²⁰ Id. at 315-317.

²¹ Id. at 932-938.

²² Id. at 50-51.

²³ Id. at 72-73.

²⁴ *Rollo* (G.R. No. 201112), pp. 159-161.

²⁵ *Kilosbayan, Incorporated v. Guingona, Jr.*, G.R. No. 113375, May 5, 1994, 232 SCRA 110, 139.

- ²⁶ G.R. No. 130716, December 9, 1998, 299 SCRA 744.
- ²⁷ As cited in *Gamboa v. Teves*, G.R. No. 176579, June 28, 2011, 652 SCRA 690, 713.
- ²⁸ *Id.* at 713-714.
- ²⁹ G.R. No. 188456, September 10, 2009, 599 SCRA 69.
- ³⁰ *Id.* at 112-113.
- ³¹ *Sumulong v. Commission on Elections*, 73 Phil. 288, 294-295 (1941) as cited in *Macalintal v. Commission on Elections*, G.R. No. 157013, July 10, 2003, 405 SCRA 614, 655.
- ³² *Supra* note 29, at 128-130, 139, 148-149.
- ³³ Under Sec. 2 (12) of R.A. No. 9369, "Source Code" refers to "human readable instructions that define what the computer equipment will do."
- ³⁴ *Eulogio v. Apeles*, G.R. No. 167884, January 20, 2009, 576 SCRA 561, 572 and *Carceller v. Court of Appeals*, G.R. No. 124791, February 10, 1999, 302 SCRA 718, 724, citing Tolentino, *Commentaries and Jurisprudence on the Civil Code of the Philippines* (Vol. IV), 1991 ed., pp. 466-467.
- ³⁵ *Rollo* (G.R. No. 201112), pp. 1968-1969.
- ³⁶ *Id.* at 1758-1773.
- ³⁷ *Id.* at 724, 1759-1760.
- ³⁸ *Id.* at 1905-1914.
- ³⁹ *Black's Law Dictionary*, Fifth Ed., p. 1087.
- ⁴⁰ *Id.*
- ⁴¹ Sec. 5 (n) and (o), Art. I.
- ⁴² Sec. 10, Art. IV in relation to Art. XVI.
- ⁴³ *Public Estates Authority v. Bolinao Security and Investigation Service, Inc.*, G.R. No. 158812, October 5, 2005, 472 SCRA 165, 187, citing *National Food Authority v. Court of Appeals*, G.R. Nos. 115121-25, February 9, 1996, 253 SCRA 470, 481.

⁴⁴ Rollo (G.R. No. 201112), pp. 1773-1781.

⁴⁵ Sec. 48 (b), Art. XVI, R.A. No. 9184.

⁴⁶ Sec. 48 (e), id.

⁴⁷ Request for Proposal (RFP) Annex A, Glossary of Terms, as cited in *Roque, Jr. v. Commission on Elections*, supra note 29, at 124.

⁴⁸ Stephen Ansolabehere, "The Search For New Voting Technology", originally published in October/November 2001 issue of the Boston Review, accessed at <<http://bostonreview.net/BR26.5/ansolabehere.html>>.

⁴⁹ Sec. 48.2, Implementing Rules and Regulations of R.A. No. 9184.

⁵⁰ Manila International Airport Authority v. Olongapo Maintenance Services, Inc., G.R. Nos. 146184-85, 161117 and 167827, January 31, 2008, 543 SCRA 269, 294.

⁵¹ Oani v. People, G.R. No. 139984, March 31, 2005, 454 SCRA 416, 439, citing Malaga v. Penachos, Jr., G.R. No. 86695, September 3, 1992, 213 SCRA 516, 526.

⁵² TSN, May 2, 2012, pp. 164-168, 178-184, 187-192, 201-202.

⁵³ Supra note 29, at 128-129.

⁵⁴ Sec. 6 (g), Implementing Rules and Regulations of the Electronic Commerce Act (R.A. No. 8792).

⁵⁵ Sec. 1 (e), Rule 2, Rule on Electronic Evidence.

⁵⁶ Sec. 1 (f), id.

⁵⁷ Request for Proposal for Solutions, Terms and Conditions for the Automation of the May 10, 2010 Synchronized National and Local Elections, p. 17; *rollo* (G.R. No. 201112), p. 230.

⁵⁸ Id. at 8 and 19; id. at 221, 232.

⁵⁹ Bid Bulletin No. 13 dated April 17, 2009 issued for the April 27, 2009 Public Bidding of the 2010 Elections Automation Project, id. at 495.

⁶⁰ Seda Davtyan, Sotiris Kentros, Aggelos Kiayias, Laurent Michel, Nicolas Nicolaou, Alexander Russell, Andrew See, Narasimha Shashidhar and Alexander A. Shvartsman, "Taking Total Control of Voting Systems: Firmware Manipulations on an Optical Scan Voting Terminal", Voting Technology Research Center and Computer Science and Engineering Department, University of Connecticut, Storrs, CT 06269,

USA. Accessed at <<http://voter.engr.uconn.edu/voter/wp-content/uploads/sac09.pdf>>.

⁶¹ The National Academy of Science's 2005 report "Asking the Right Questions About Electronic Voting," cited in What Is A Voter Verified Paper Audit Trail (VVPAT)?, General Reference (not clearly pro or con), accessed at <<http://votingmachines.procon.org/view.answers.php?questionID=000291>>.

⁶² *Rollo* (G.R. No. 201112), p. 1180.

⁶³ *Id.* at 570.

⁶⁴ *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines Incorporated*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 240, 243, citing *Halagueña v. Philippine Airlines, Inc.*, G.R. No. 172013, October 2, 2009, 602 SCRA 297, 313 and *Sargasso Construction & Development Corporation/Pick & Shovel, Inc./Atlantic Erectors, Inc. (Joint Venture) v. Philippine Ports Authority*, G.R. No. 170530, July 5, 2010, 623 SCRA 260, 279-280.

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DISSENTING OPINION

PERLAS-BERNABE, J.:

It is not the province of the Court to inquire into the wisdom of a government act for each great branch of our legal system is an expert in its own field and supreme in its own sphere. However, public acts should always be consistent with our laws and made within the bounds of the Constitution. Pragmatism may be one of the tools in policy making but law is the lone tool given to this Court to perform its judicial function. For legality of government actions should be tested against what the law says and not what practicality dictates.

I respectfully dissent from the majority opinion that the Option to Purchase ("OTP") under the *Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections*¹ ("AES Contract") was validly extended and therefore, did not violate Republic Act No. 9184² or the Government Procurement Reform Act ("GPRA").

From March 13 to 16, 2009, the Commission on Elections ("COMELEC") published and posted an invitation for vendors to apply for eligibility and to bid "for the procurement of counting machines, including the supply of ballot paper; electronic transmission services using public telecommunications networks; training; technical support; warehousing; deployment; installation; pull-out; systems integration; and overall project management" to be used in the automation of the counting, transmission and canvassing of the votes for the May 10, 2010 synchronized national and local elections.

The invitation to bid was made in accordance with Section 52 of Batas Pambansa Bilang 881³ which confers upon

the COMELEC the "exclusive charge of the enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly and honest elections," as well as Republic Act No. 8436,⁴ as amended by Republic Act No. 9369,⁵ which recognizes the mandate and authority of the COMELEC "to prescribe adoption and use of the most suitable technology" that will improve the election process by adopting an automated election system "that will ensure the secrecy and sanctity of the ballot and all election, consolidation and transmission documents" in line with the purpose of conducting a transparent and credible election.

The Terms of Reference/Request for Proposal for Solutions, Terms and Conditions for the Automation of the May 10, 2010 Synchronized National and Local Elections⁶ ("TOR/RFP") expressly provided that the COMELEC, through its Bids and Awards Committee ("BAC"), is "accepting bids for the lease, with an option to purchase, of an automated election system ("AES")..."

After accomplishing the necessary procedures for the conduct of a public bidding, the COMELEC En Banc promulgated Resolution No. 8608 on June 9, 2009, awarding the contract for the automation of the elections on May 10, 2010 to Smartmatic-TIM Corporation ("SMARTMATIC") as the bidder with the "lowest calculated responsive bid."

On July 10, 2009, COMELEC and SMARTMATIC executed the AES Contract, into which was incorporated an OTP the Precinct-Count Optical Scan ("PCOS") and Consolidation/Canvassing System ("CCS") components, to wit:

"ARTICLE 4 CONTRACT FEE AND PAYMENT

x x x

4.3 OPTION TO PURCHASE

In the event COMELEC exercises its option to purchase the Goods as listed in Annex 'L', COMELEC shall pay the PROVIDER an additional amount of Two Billion One Hundred Thirty Million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (PhP 2,130,635,048.15) as contained in the Financial Proposal of the joint venture partners—SMARTMATIC and TIM.

In case COMELEC should exercise its option to purchase, a warranty shall

be required in order to assure that: (a) manufacturing defects shall be corrected; and/or (b) replacements shall be made by the PROVIDER, for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment, after performance of this Contract. The obligation for the warranty shall be covered by retention money of ten (10%) of every option to purchase payment made.

x x x"

The AES Contract also provided the period within which the OTP shall be exercised. Article 6.6 thereof states that the "COMELEC shall notify the PROVIDER on or before 31 December 2010 of its option to purchase x x x."

On May 10, 2010, the first National Automated Elections was held utilizing the goods and services provided by SMARTMATIC under the AES Contract.

On September 23, 2010, COMELEC partially exercised the OTP with regard to 920 PCOS machines and 36 CCS hardware from SMARTMATIC for the conduct of the Special Elections in Basilan, Lanao del Sur and Bulacan.

On December 18, 2010, thirteen (13) days before the lapse of the period to exercise the OTP, SMARTMATIC inquired⁷ whether COMELEC would be exercising the option for the remaining PCOS machines. In the same letter of inquiry, SMARTMATIC unilaterally extended the period to exercise the OTP until March 31, 2011.

In a second letter⁸ dated March 23, 2011, SMARTMATIC once again extended the period for COMELEC to exercise the OTP to December 31, 2011. Thereafter, and with the intention of giving the COMELEC more time to evaluate whether it should exercise its OTP, SMARTMATIC unilaterally extended⁹ the period for another three (3) months or until March 31, 2012.

Subsequently, or on March 21, 2012, the COMELEC *En Banc* issued Resolution No. 9376¹⁰ resolving to exercise its OTP over the PCOS and CCS hardware, subject to the conditions that:

- i. The warranties agreed upon under Articles 4 and 8 of the 2010 AES Contract shall be in full force and effect.
- ii. The original price for the hardware and software covered by the Option to Purchase as specified under Annex "L" of the 2010 AES Contract shall be maintained, excluding the cost of the nine hundred twenty (920) units of PCOS and related peripherals previously purchased for use in the 2010 special elections; and
- iii. All other services related to the 2013 Automated Election System shall be subject to public bidding.

On March 30, 2012, after three (3) unilateral extensions of the period of the OTP and more than a year after the lapse of the original period of the AES Contract itself, COMELEC and SMARTMATIC entered into an *Agreement on the Extension of the Option to Purchase Under the Contract for the Provision of An Automated Election System for the May 10, 2010 Synchronized National and Local Elections*¹¹ where they stipulated that the period within which the COMELEC may exercise its OTP shall be extended to March 31, 2012. On even date, a Deed of Sale¹² was executed between COMELEC and SMARTMATIC.

Hence, the present consolidated petitions were filed questioning the validity of the Deed of Sale for allegedly violating the GPRA and the policy that all government procurement should undergo public bidding.

On April 24, 2012, the Court issued a Temporary Restraining Order (TRO) enjoining the implementation of the assailed Deed of Sale.

The *ponencia* has underscored the validity of the extensions of the period to exercise the OTP on the basis of the effectivity clause of the AES Contract, effectively validating as well the assailed Deed of Sale between COMELEC and SMARTMATIC. However, I respectfully dissent from this position and express the view that the period for the

exercise of the OTP had already lapsed, and that its extension is a circumvention of the explicit provisions of the GPRA.

Validity of the AES Contract with Option to Purchase

The Court has previously upheld the validity of the AES Contract and its compliance with the procedures laid down in the GPRA and its implementing rules in the case of Roque, Jr. v. Commission on Elections,¹³ as follows:

"Assayed against the provisions of the Constitution, the enabling automation law, RA 8436, as amended by RA 9369, the RFP and even the Anti-Dummy Law, which petitioners invoked as an afterthought, *the Court finds the project award to have complied with legal prescriptions, and the terms and conditions of the corresponding automation contract in question to be valid. x x x*" (emphasis supplied)

With the foregoing pronouncement, the Court has effectively upheld the validity of the OTP integrated in the AES Contract.

The GPRA requires public bidding in all procurement of infrastructure, goods and services. Section 10, Article IV thereof provides:

"Section 10. Competitive Bidding. — All procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act."

A lease with an option to purchase is not an uncommon arrangement in modern commercial transactions. In fact, the Implementing Rules and Regulations of the GPRA recognizes the feasibility of such an arrangement, which can be considered as falling within the term "similar variations," to wit:

"RULE XIV – LEASE OF COMPUTERS, COMMUNICATIONS, INFORMATION AND OTHER EQUIPMENT

Section 46. Lease Contracts

The lease of construction and office equipment, including computers, communication and information technology equipment are subject to the same public bidding and to the processes prescribed under this IRR-A. Lease may also cover lease purchases or lease-to-own and similar variations." (Emphasis supplied)

Thus, when COMELEC bidded out the AES Contract for the May 2010 elections, it bidded not only the lease of the PCOS and CCS machines but also the privilege to purchase the same. These two prestations formed part of the contract that was properly bidded out, reviewed and eventually awarded to SMARTMATIC.

Further, it must be noted that the OTP was part of the COMELEC-issued TOR/RFP, the terms of which are as follows:

"28.1 An offer for an option to purchase by component to be decided by COMELEC before December 31, 2010 shall be included by the bidder in its proposal.

28.2 The price of the option-to-purchase shall not exceed 50% of the lease price of the equipment."

Guided by the TOR/RFP, the foregoing conditions were thus included in the Financial Proposal submitted by SMARTMATIC to the Special Bids and Awards Committee ("SBAC") which was later approved by the COMELEC. Thus, the OTP was an essential component of the proposal offered by SMARTMATIC to SBAC, which the latter duly evaluated and reviewed.

Having undergone the necessary bidding process and being a required condition in the TOR/RFP issued by the COMELEC, the OTP, therefore, is unquestionably valid. The Court cannot rule otherwise in the absence of evidence that it was entered into to circumvent the law on public bidding, or that SMARTMATIC was unduly given preference with its incorporation into the AES Contract. It must be noted that *all* the participating bidders were required to include an option to purchase in their respective proposals. Further, the terms of the OTP, with respect to the period of its exercise and the range of consideration for the price are presumed to have passed the required test of reasonableness.

Extension of the period to exercise the Option to Purchase is invalid

However, while I uphold the validity of the OTP, I disagree with the conclusion of the *ponencia* that since the Performance Security of SMARTMATIC has not been released, the AES Contract continues to be effective, hence, the extension of the period to exercise the OTP is likewise valid.

It should be stressed that the National Automated Elections for which the goods and services provided by SMARTMATIC under the AES Contract had long been concluded. Similarly, the period to exercise the OTP had expired. What remains to be done is merely the release of SMARTMATIC's Performance Security, which has no bearing on the **non-extendible limited period** within which the OTP may be exercised, taken in the light of Article 2.2 of the AES Contract which provides:

"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 supplied*)

A cursory reading of the above-quoted provision shows that the effectivity of the AES Contract is **separate** and **independent** of the period of the OTP which expired on December 31, 2010 as well as the warranty provisions of the AES Contract, had the OTP been timely exercised by COMELEC. To hold that the period within which the OTP can be validly exercised may be extended solely on the basis of the non-release of the Performance Security would be stretching the provisions of the AES Contract too far so as to include what has not been contemplated when it was awarded to SMARTMATIC.

On the other hand, I maintain the view that the extensions for the exercise of the OTP are invalid for the following reasons:

First. The original period within which the COMELEC may exercise its OTP, which is December 31, 2010, had already long expired;

Second. Considering that the OTP expired without the COMELEC exercising the same, said option *ceased to exist* and can no longer be revived by a unilateral offer or even by mutual agreement of the parties.

Third. The extension of the period to exercise the OTP beyond the original period is deemed to be a *fresh procurement* which should undergo a new and separate public bidding.

Fourth and finally, the Deed of Sale executed by SMARTMATIC and COMELEC under the extended period does not fall under any of the alternative modes of procurement provided in the GPRA that would have exempted it from the competitive public bidding requirement.

To reiterate, the OTP as part of the AES Contract provides two significant terms for its exercise: the option price and the period for its *actual* exercise on or before December 31, 2010. The limited period of the OTP bears a practical significance to the option price of the subject machines. Any extension of the period would have left the option price undetermined and/or made dependent upon the whims of the contracting parties, thereby ignoring transparency and accountability as required of a government contract.

Moreover, extensions were never contemplated upon by the parties in executing the AES Contract, otherwise, it would have so expressly provided, or fixed another or the same price as the period is extended. As it is, the option price has been pegged as of the last day of the option period or on December 31, 2010.

Besides, important factors with respect to the **integrity** of the subject machines militate against the validity of the extension of the period to exercise the OTP. The nature of the machines, the technological advances which may have rendered them obsolete over time, considering the rapid pace in which technology improves, and their further depreciation for the period from December 31, 2010 up to the date when the COMELEC acquired them on March 31, 2012 – a period of more than a year – are all compelling reasons necessitating a re-evaluation of the option price to correspond with the machines' reasonable cost, which can only be done through a separate competitive public bidding. Only then can it be rightfully said that the procurement was advantageous to the government. To exercise the OTP under the original terms but beyond the original period under changed conditions will definitely fail the test of reasonableness. Thus, to allow the parties to freely extend without limit the period within which to exercise the OTP directly contravenes the purposes and rationale of the GPRA.

Extension of the period of the OTP defeats the purpose and rationale of public bidding

In a public bidding, there must be competition that is legitimate, fair and honest. The three principles of a public bidding are (1) the offer to the public; (2) an opportunity for competition; and (3) a basis for exact comparison of bids.¹⁴

In these cases, the extension of the period not provided in the AES Contract effectively deprived other potential bidders the equal opportunity to participate in the bidding process and offer better terms to the government. This gravely violates the principles on government procurement through competitive bidding which aims to obtain the best deal possible by fostering transparency and preventing favoritism, collusion and fraud in the awarding of contracts.¹⁵

It bears to stress that the government procuring entity, in construing contracts with options to purchase, should be mindful of the strong policy consideration underlying the enactment of the government procurement law. Thus, badges to circumvent public bidding should be investigated and eliminated before any government contract is awarded.

To hold, therefore, that the *extension* of the period within which to exercise the OTP is valid and enforceable creates dire and serious consequences on future dealings or negotiations with the government, and directly collides with the *raison d'etre* for the requirement of public bidding. Consequently, the COMELEC's argument that time and budgetary constraints, among others, justify the validity of the extensions and consequently, the Deed of Sale, is specious. Pragmatic considerations cannot legitimize what is illegal under our laws.

In the light of all the foregoing, it is my view that, while the OTP under Article 4.3 of the AES Contract is valid and enforceable, the extension of the period within which to exercise it, however, is proscribed by law and violates R.A. 9184 or the Government Procurement Reform Act. Consequently, the Deed of Sale entered into by COMELEC and SMARTMATIC pursuant to the *extended* option to purchase and executed without the competitive bidding required by law is NULL and VOID.¹⁶

Accordingly, I vote to **GRANT** the petitions.

ESTELA M. PERLAS-BERNABE

Associate Justice

Footnotes

¹ *Rollo*, G.R. No. 201121, pp. 26-49.

² Dated January 10, 2003.

³ Otherwise known as the "Omnibus Election Code of the Philippines."

⁴ Election Modernization Act.

⁵ An Act Amending Republic Act No. 8436, dated January 23, 2007.

⁶ *Rollo*, G.R. No. 201112, pp. 214-271.

⁷ *Id.* at 872-874.

⁸ *Id.* at 881-882.

⁹ *Id.* at 885-886.

¹⁰ *Id.* at 39-47.

¹¹ *Id.* at 919-921.

¹² *Rollo*, G.R. No. 201413, pp. 31-36.

¹³ G.R. No. 188456, September 10, 2009, 599 SCRA 69.

¹⁴ *JG Summit Holdings, Inc. v. Court of Appeals*, 345 SCRA 143 (2000).

¹⁵ *Demosthenes P. Agan, Jr. et al. v. PIATCO, et al.*, G.R. No. 155001, May 5, 2003.

¹⁶ *See Leopoldo Oani v. People of the Philippines*, G.R. No. 139984, March 31, 2005.

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SEPARATE OPINION

ABAD, J.:

This case is about the circumstances that will justify a government agency's negotiated procurement of equipment and supplies.

The Facts and the Case

In 1997 Congress enacted Republic Act 8436 (R.A. 8436), otherwise known as the "Election Modernization Act", which authorized the Commission on Elections (COMELEC) to adopt an Automated Election System (AES) for the processes of voting, counting of votes, and canvassing or consolidation of results of the national and local elections.¹ The law also authorized COMELEC to procure the supplies, equipment, materials, and services that it needed for holding an AES through an expedited public bidding. A decade later, Congress enacted Republic Act 9369 (R.A. 9369) which amended R.A. 8436 and declared it the policy of the law to use an AES in all national and local elections.²

Following the requirements of the Government Procurement Act,³ the COMELEC published and posted from March 13 to 16, 2009, an invitation to interested parties to apply for eligibility and to bid for the procurement of counting machines, including the supply of ballot paper; electronic transmission services using public telecommunications networks; training; technical support; warehousing; deployment; installation; pull-out; systems integration; and overall project management, to be used in the automation of counting, transmission, and canvassing of votes for the May 10, 2010 synchronized national and local elections. The COMELEC also approved and issued a request for proposal (RFP) that would enable its Bids and Awards Committee (BAC) to

accept bids for the lease of an AES, with an option to purchase.⁴

Ten prospective bidders paid for an RFP but only seven submitted bid proposals. Of the seven, only two bidders, Indra Consortium and SMARTMATIC-TIM, met the eligibility requirements. The COMELEC Special Bids and Awards Committee (SBAC) examined their technical proposals and found these acceptable. Upon opening of their financial proposals, however, Indra did not qualify with the result that SBAC issued Omnibus SBAC Resolution 09-007 declaring SMARTMATIC-TIM as the single complying calculated bid.⁵

The COMELEC Technical Working Group (TWG) also reported that SMARTMATIC-TIM's proposed AES "passed all tests as required in the 26-item criteria specified in the RFP."⁶ The COMELEC Advisory Council (CAC) submitted its observations to the COMELEC noting that SMARTMATIC-TIM's Precinct Count Optical Scan (PCOS) machines had a 100% accuracy rating. As a result, COMELEC awarded the contract for the 2010 AES to SMARTMATIC-TIM.⁷ The following day, COMELEC and SMARTMATIC-TIM entered into an AES contract that included an Option to Purchase (OTP) Clause that read:

4.3 OPTION TO PURCHASE

In the event COMELEC exercises its option to purchase the Goods as listed in Annex "L", COMELEC shall pay the PROVIDER an additional amount of Two Billion One Hundred Thirty million Six Hundred Thirty Five Thousand Forty Eight Pesos and Fifteen Centavos (Php2,130,635,048.15) as contained in the Financial Proposal of the joint venture partners – SMARTMATIC and TIM.

...

6.6 COMELEC shall notify the PROVIDER on or before 31 December 2010 of its option to purchase the Goods as listed in Annex "L".⁸

On May 10, 2010 the Philippines held its first fully-automated nationwide elections, using SMARTMATIC-TIM automated system. Four months later on September 23, 2010 the COMELEC, exercising its option to purchase, acquired 920 PCOS machines for the special elections in certain areas in the Philippines.⁹

On December 18, 2010, as the deadline for exercising the option to purchase was nearing, SMARTMATIC-TIM wrote COMELEC a letter, unilaterally extending the period for the option to purchase from December 31, 2010 to March 31, 2011. Subsequently, on April 1, 2011 SMARTMATIC wrote COMELEC another letter, offering a "Revised Extended Option to Purchase." On April 28, 2011 the COMELEC and SMARTMATIC signed a Term Sheet in connection with SMARTMATIC's April 1, 2011 letter. This Term Sheet included various items not covered by the original option to purchase. Months later, however, COMELEC cancelled the Term Sheet.

Apparently, COMELEC was hopeful in getting Congress to provide it the budget it needed for acquiring or leasing a new AES for the 2013 elections. Indeed, it asked Congress for ₱ 10,436,300,399.00 for the lease of a new AES for the elections. On September 23, 2011 SMARTMATIC wrote COMELEC, inquiring about the status of the option to purchase the equipment and systems that were used in the 2010 elections. Evidently trying to put pressure on COMELEC to exercise the option, SMARTMATIC informed it that the price increase of 10% would

remain in effect until September 30, 2011.¹⁰ SMARTMATIC later recanted and offered to retain the original price until December 31, 2011 under certain conditions.¹¹ Yet again, the OTP was revised and COMELEC was warned that instead of the 10% increase, a 20% increase would be in effect from October 1 – December 31, 2011.¹²

In October 2011 Congress passed the General Appropriations Act of 2012, allocating to COMELEC a budget of only P 7,962,221,000.00 for the 2013 elections,¹³ ruling out the possibility of acquiring or leasing a new AES from other providers.

On February 6, 2012, the COMELEC Law Department expressed the view in a memorandum that COMELEC could still legally exercise its option to purchase from SMARTMATIC provided the period of the extension had not yet expired and that its offer was identical to that contained in their AES Contract. The CAC expressed the view, however, that COMELEC should not exercise its option to purchase if, as a consequence, the rest of the system must come from the same vendor."¹⁴ With the little money allocated to it and time running out, the COMELEC resolved to seriously consider exercising that option subject to certain conditions.¹⁵ The next day, the CAC advised COMELEC to ensure that it would have full control of the election process.¹⁶

Eventually, COMELEC accepted SMARTMATIC-TIM's March 31, 2012 offer to extend the period of its option to purchase.¹⁷ On March 30, 2012 COMELEC entered into a contract with SMARTMATIC-TIM for the purchase of the PCOS machines and related systems used in the 2010 elections for P 1,833,274,457.09. COMELEC's intention was to directly manage the operation of the AES for the 2013 elections using those machines and systems.

On April 10, 2012 petitioners Archbishop Fernando R. Capalla, et al. came to this Court by a petition for certiorari, prohibition, and mandamus with prayer for temporary restraining order (TRO) against COMELEC, seeking the annulment of COMELEC's March 30, 2012 contract with SMARTMATIC-TIM. On April 24, 2010 the Court issued a TRO enjoining the implementation of the contract of sale pending hearing of the case. The Court likewise ordered the consolidation of the three petitions that sought identical relief and directed the COMELEC and SMARTMATIC-TIM to file their comment.

Question Presented

The central question presented in this case is whether or not COMELEC gravely abused its discretion in entering into a contract with SMARTMATIC-TIM for the purchase of its PCOS machines and related systems in connection with the forthcoming 2013 elections.

Discussion

The country made many attempts in the past to replace the manual elections that had been in use from the time of the founding of the Philippine government.¹⁸ But circumstances did not permit the change even when at last Congress enacted the election modernization law. The bidding for the needed equipment and processes in connection with the 2001 elections was found riddled with irregularities and so had to be set aside.¹⁹ Only in connection with the 2010 elections did the COMELEC succeed in meeting all that the law required, overcoming the objections of the cynics who cried mightily for a return to fully manual voting. The automated elections took

place, producing results that were generally accepted by the electorates.

Then, the need to prepare for the 2013 elections came. Evidently, the COMELEC was open to using a new AES since it applied with Congress for the amount of money this will require and held out for as long as it could on its option to purchase from SMARTMATIC-TIM the equipment and systems used in the 2010 elections. When the money did not come, COMELEC settled for buying the latter equipment and systems under an extended option that the owners gave it.

But petitioners filed the present actions to block COMELEC's purchases basically on two grounds: 1) since its option period already expired, COMELEC actually bought SMARTMATIC-TIM's equipment and systems without the benefit of public bidding; and 2) these equipment and systems suffered from defects and glitches.

Petitioners are right that COMELEC's option to purchase under the AES contract for the 2010 elections already expired when it did not exercise the same on or before December 31, 2010, the deadline set in that contract. But COMELEC is also right that it bought SMARTMATIC-TIM's equipment and systems based on the terms of the option to purchase. These positions are not exactly incompatible. They can actually be reconciled.

True, COMELEC's original option had already expired when it made its purchase. The original contract was gone and the parties' rights and obligations under the same had in fact been extinguished. But SMARTMATIC-TIM made an offer to COMELEC for it to purchase the 2010 equipment and systems based on the terms provided in the expired option to purchase. And COMELEC accepted the offer, giving it a new option to purchase that it eventually exercised.

Petitioners are of course also right that COMELEC's purchase could not as a rule be made without the benefit of a public bidding where other parties can make offers to supply COMELEC with the equipment and systems that it needs for the 2013 elections. But R.A. 9184, the Government Procurement Act, allows certain exceptions to such requirement. It provides that the procuring government agency may, in order to promote economy and efficiency, resort to any of the alternative methods of procurement, including negotiated procurement, provided the procuring agency ensures the most advantageous price for the government.

Negotiated procurement is allowed, says the law, "when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities."²⁰ The infrastructures needed to enable the people to exercise their right to vote is of course a public service that is as vital if not more vital than some roads and bridges.

Here, the following circumstances gave COMELEC no choice but to enter into what amounts to a negotiated purchase:

First. The Constitution vests in Congress the power to make laws, including election laws.²¹ Thus --

Section 1. The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.²²

In the exercise of such power, Congress alone can determine the process by which elections are to be conducted. It alone can prescribe the use of a more advanced technology for enabling the people to exercise their fundamental right to vote.²³

On the other hand, it is in the COMELEC that Constitution vests the power and duty to enforce all laws relative to the conduct of the elections.²⁴ Thus --

Sec. 2. The Commission on Elections shall exercise the following powers and functions :

(1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum, and recall.²⁵

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The COMELEC has no power to hold elections that are not in accord with the Election Modernization Act (R.A. 8436, as amended). Indeed, that Act is entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises..." In this regard, Section 12 of the Act directs the COMELEC to procure a tested and successfully used AES for use in the 2010 election and "succeeding electoral exercises..." Thus --

SEC.12. *Procurement of Equipment and Materials.* - To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness. (Emphasis supplied.)

XXXX

Although it is true that when the Court declared void the 2003 Purchase Contract for election automation machines (EAMs), COMELEC had valid recourse to the old system for the conduct of the 2007 elections. But the situation then was different. The AES that the original RA 8436 authorized had yet to be elevated to a compulsory mechanism. The failed implementation of an AES in the 1998 ARMM elections prevented COMELEC from a forward implementation of the AES under Section 6,²⁶ sending the process back to the drawing board.²⁷

With the amendment of the Election Modernization Act, however, a return to the old system is no longer legally possible. To be faithful to its constitutional duty to enforce that law, COMELEC has to come up with an AES for the 2013 elections with whatever resources are available to it. The law does not contemplate any other system of elections.

With the functions of Congress and the COMELEC so clearly delineated by the Constitution, the Court must tread carefully when, as in this case, the mechanism for executing the preferred system of elections is assailed as

invalid and its implementation, sought to be enjoined.²⁸ The Court must give the COMELEC substantial latitude to enforce the Election Modernization Act.²⁹ For, otherwise, the Court must assume responsibility for the consequences of meddling in something beyond its competence.³⁰

Second. Although COMELEC has the duty to enforce and implement the law prescribing an AES for the 2013 national and local elections, it does not have the money to acquire or lease new equipment and systems for those elections.

Petitioners of course point out that the circumstances are not so extraordinary as to permit negotiated procurement since COMELEC had faced the same problems in 2009 yet was able to overcome them. COMELEC cannot use as an excuse its time and budgetary constraints since it should be able to convince Congress to grant what it needs for the 2013 automated elections.

But unlike the problems that it faced in connection with the 2010 elections, the solutions to its problems with respect to the 2013 elections are not up to COMELEC. Those solutions largely depend on the Executive Department and Congress. COMELEC requested the Department of Budget and Management (DBM) under the Office of the President for a ₱ 12 billion budget to enable the election body to acquire or lease a new AES for the 2013 elections. But the DBM turned this down and allocated only ₱ 7 billion for the automation of the 2013 elections. Of the ₱ 7 billion, only ₱ 2.2 billion has been earmarked for the acquisition of the machines needed for an AES.

In the 2010 elections, the COMELEC spent ₱ 4.3 billion for the lease of 82,200 PCOS machines. If the COMELEC is to pursue its goal of achieving the 600:1 ratio or the same number of machines last elections, then it must have at least ₱ 4.2 billion or even more, giving allowance for inflation, to be able to purchase machines of the same kind. If new biddings were held with the money it actually got, COMELEC would get only half of the desired number of machines. This result would cause pandemonium in the election precincts and dampening of the enthusiasm of voters.

COMELEC could of course plead with Congress to give it more money for the elections. But it had already done that. Unfortunately, Congress was not sympathetic and did not swell the amount of its budget. Although there is always a possibility that Congress may relent as some suggest can happen, that is a risk that the COMELEC, charged with making do with the resources given it, cannot afford. It could not postpone preparations at the risk of failed elections if Congress does not soon change its mind.

Third. Assuming that some funds would be available for acquiring or leasing a new AES for the 2013 elections, COMELEC does not have the time for holding a competitive bidding, evaluating the bids, and making an award with the expectations that the new AES will be in place by May 2013 for the national and local elections.

COMELEC cannot afford to procrastinate. There are less than twelve months between today and the May 2013 elections. Based on the 2010 elections timeline a new bidding for the 2013 elections would result in a logistical impossibility. The bidding process alone will take about four months. This means that the earliest COMELEC can make an award for the 2013 elections will be in mid-October. Since it would take based on experience about seven months from the signing of the AES Contract to complete the delivery of the fully customized hardware and software, delivery would be completed about mid-May 2013, already past the election Day. There would be no

elections since it would take an additional three months more or less for testing the machines in their actual configuration with the ballots. Super human efforts could of course cause a miracle, but reasonableness in the exercise of discretion is not judged by the standards of miracles.

Fourth. COMELEC's negotiated purchase meets the last requirement, ensuring "that the most advantageous price for the government is obtained." Here, the procurement will enable the government to reap the following advantages:

- a. The COMELEC needs to pay only 1/3 of the price of the PCOS machines, a saving of 2/3 of what it would cost COMELEC to lease machines of the same kind in a new bidding;
- b. The COMELEC will spend less for voter education because the people are already familiar with the system;
- c. The costs for training COMELEC personnel will also be reduced since they are already familiar with the handling and operation of the PCOS machines;
- d. The purchase will promote standardization since the COMELEC already acquired 980 units of those PCOS machines; and
- e. The usual glitches in new machines are unavoidable, whereas the glitches in the PCOS machines have been identified and could be addressed.

Petitioners would also have the sale of the PCOS machines to COMELEC nullified because of the alleged failure of the machines to comply with the minimum technical requirements of an AES and the glitches that occurred. Particularly, petitioners point to the absence of digital signatures, the existence of open console port in the machines, and the lack of a voter verified paper audit trail.

Based on the records and the admissions made during oral arguments, the disabling of the digital signatures and the lack of a voter verified paper audit trail cannot be attributed to the machines. This was done on orders of the COMELEC due to shortage of funds. These concerns are, therefore, not intrinsic to the machines itself. It is up to COMELEC, based on its best judgment, if there is a need to activate these features of the system. The presence of the open console port has not been a problem in the past election as this was covered and sealed on the election day to avoid unauthorized access.

More importantly, these alleged problems are not irremediable. As admitted by the parties, these can be rectified by simply activating these inherent features of the machines. Suffice it to say that the Court had already resolved the allegations regarding the failure of the machines to meet the requirements of the law in *Roque v. COMELEC*.³¹ The Court determined that "the COMELEC has adopted a rigid technical evaluation mechanism, a set of 26-item/check list criteria ... to ensure compliance with the above minimum system capabilities." Also, the "PCOS meets the minimum capabilities standards."

Lastly, the petitioners failed to substantiate their claims that the alleged defects in the PCOS machines resulted in cheating or fraud in the 2010 elections. Petitioners have been unable to cite even one decision rendered based on evidence that this was so. Petitioners claim are, to borrow the language of the COMELEC, anecdotal.

Consequently, I vote to DISMISS the consolidated petitions.

ROBERTO A. ABAD

Associate Justice

Footnotes

¹ An Act Authorizing the Commission on elections to Use an Automated Election System in the May 11, 1998 National or Local elections and in Subsequent National and Local Electoral Exercises, Providing Funds Therefor and for Other Purposes, Republic Act No. 8436 § 6 (Dec. 22, 1997).

² An Act Amending Republic Act No. 8436, entitled "An Act Authorizing the Commission on elections to Use an Automated Election System in the May 11, 1998 National or Local elections and in Subsequent National and Local Electoral Exercises, Providing Funds Therefor and for Other Purposes", Republic Act no. 9369 § 1 (Jan. 23, 2007)

³ An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes, Republic Act No. 9184 art. VII, § 21 (Jan. 10, 2003).

⁴ Office of the Solicitor General (OSG), Consolidated Comment, Annex "1" (April 30, 2012); Commission on Elections, Request for Proposal (Mar. 11, 2009).

⁵ OSG, Consolidated Comment, 7.

⁶ Id. at 9.

⁷ Id.; Commission on Elections, Resolution No. 8608 (June 9, 2009).

⁸ Solidarity for Sovereignty (S4S), Petition, Annex "A" 24 (April 3, 2012); Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections 8 & 12 (July 10, 2009).

⁹ S4S, Petition, Annex "C"; Contract of Sale (Sep. 23, 2010).

¹⁰ Guigona, Memorandum, Annex "A" (May 18, 2012); Cesar Flores, Re: Final Extension of option to purchase (Mar. 23, 2011).

¹¹ Id. Annex "B"; Cesar Flores, Re: Final Extension of Option to Purchase (April 1, 2011).

¹² Id. Annex "C"; Cesar Flores, "Re: Option to Purchase, PCOS Machines (Sep. 23, 2011).

- ¹³ General Appropriations Act, Republic Act No. 10155 (Dec. 15, 2011).
- ¹⁴ Resolution 2012-003, Feb. 8, 2012.
- ¹⁵ Resolution 9373, Mar. 6, 2012.
- ¹⁶ Resolution 2012-005, Mar. 7, 2012.
- ¹⁷ Resolution 9377, Mar. 29, 2012.
- ¹⁸ The first attempt was in 1995. RA 8046 authorized a computerized election system. An Act Authorizing the Commission on Elections to Conduct a Nationwide Demonstration of a Computerized Election System and Pilot-test it in the March 1996 Elections in the Autonomous Region in Muslim Mindanao (ARMM) and for Other Purpose, Republic Act No. 8046 (1995).
- ¹⁹ Information Technology Foundation of the Philippines v. COMELEC, G.R. No. 159139, Jan. 13, 2004
- ²⁰ RA 9184, § 53 (b) (emphasis supplied)
- ²¹ R.A. No. 9369, § 1; See Bush v. Gore, 121 S. Ct. 525, 529 (2000).
- ²² Section 1, Article VI, 1987 Constitution.
- ²³ See Matter of Municipal Election Held on May 10, 1994, for Three Positions on Sparta Tp. Council, 139 N.J. 553, 656 A.2d 5 (1995).
- ²⁴ Paragraph 1, Section 2, Article IX of the 1987 Constitution of the Philippines
- ²⁵ Section 2, Article IX, 1987 Constitution of the Philippines.
- ²⁶ Requiring the unconditional full automation in of elections.
- ²⁷ Loong v. COMELEC, G.R. No. 133676, April 14, 1999.
- ²⁸ See Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2D 245 (1992).
- ²⁹ See John Doe No. 1 v. Reed, 130 S. Ct. 2811 (2010).
- ³⁰ See Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (U.S. 2008).
- ³¹ G.R. No. 188456, September 10, 2009.

