

G.R. No. 201112 – ARCHBISHOP FERNANDO R. CAPALLA, OMAR SOLITARIO ALI and MARY ANNE L. SUSANO, Petitioners, versus THE HONORABLE COMMISSION ON ELECTIONS, Respondent.

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, versus COMMISSION ON ELECTIONS, represented by its Chairman, Commissioner SIXTO S. BRILLANTES, JR., Respondent.

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, versus COMMISSION ON ELECTIONS and SMARTMATIC TIM CORPORATION, Respondents.

G.R. No. 201413 – TANGGULANG DEMOKRASYA (TAN DEM), INC., EVELYN L. KILAYKO, TERESITA D. BALTAZAR, PILAR L. CALDERON and ELITA T. MONTILLA, Petitioners, versus COMMISSION ON ELECTIONS and SMARTMATIC-TIM CORPORATION, Respondents.

Promulgated:

OCTOBER 23, 2012

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DISSENTING OPINION

BRION, J.:

With due respect, I register my dissent to the *ponencia*'s conclusion that the: (i) COMELEC-SMARTMATIC-TIM's Agreement on the Extension of the Option to Purchase (*OTP*) Under the Contract for the Provision of an Automated Election System (*AES*) for the May 10, 2010 synchronized National and Local Elections; (ii) the Deed of Sale of March

30, 2012; and (iii) COMELEC Resolution No. 9378 (approving the Deed of Sale) are valid and constitutional. In my June 13, 2012 Dissent, I held the view that the aforementioned contracts and COMELEC issuance are null and void, as viewed from the prism of contract law, the law on government procurement, and the constitutional set-up of the COMELEC's independence.

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

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

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

Third, the *ponencia* asserts that the amendment, if any, to the AES Contract was not substantial because no additional right was given to SMARTMATIC-TIM that was not available to the other bidders. It emphasizes that except for the extension of the option period, the exercise of

the option remained subject to the same terms and conditions; in fact, the amendment is more advantageous to the COMELEC and the public.

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

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

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

¹ 107 Phil. 118 (1960).

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

a. The OTP clearly lapsed

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

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

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

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

COMELEC's OTP simply because the option already expired after December 31, 2010.³ (*italics and emphases supplied*)

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

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

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

**ARTICLE 2
EFFECTIVITY**

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

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

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

As explained in my Dissent, while I concede that the AES Contract still technically subsists because of the COMELEC's retention of SMARTMATIC-TIM's performance security, Section 2.2, Article 2 of the AES Contract clearly mandates that its continued effectivity is without

³ Dissenting Opinion dated June 13, 2012.

prejudice to “the period of the option to purchase.” Thus, I conclude that under these terms, the COMELEC and SMARTMATIC-TIM clearly recognized that the OTP and the period for its exercise stand differently from the main contract of lease of goods and service. In other words, **the effectivity of the warranty provision and of the OTP are covered by an entirely different period and not by the term of the main contract of lease of goods.** Properly viewed from this perspective, this interpretation thus demolishes the *ponencia*’s position that the OTP in this case still subsists. As emphasized in my Dissent:

In the present case, COMELEC and SMARTMATIC-TIM’s intention to extend an already expired option period could not have validly gone past the negotiation stage. Specifically, SMARTMATIC-TIM formally made an offer to the COMELEC to extend the original period and, upon its lapse, to provide for a *new* period to exercise the same option; these, COMELEC simply ignored. *Thus, this offer is merely an imperfect promise (politacion) that, by reason of lack of acceptance before the expiration of the period, did not give rise to any binding commitment.* [italics and emphasis supplied]

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

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

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

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

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

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

⁴ *Ibid.*

⁵ *Supra* note 1.

option is a vital and essential particular to the contract. Thus, in *San Diego*, the Court held:

Furthermore, it has been ruled that *statutes requiring public bidding apply to amendments of any contract already executed* in compliance with the law where such amendments alter the original contract in some vital and essential particular. Inasmuch as *the period* in a lease *is a vital and essential particular to the contract*, we believe that the extension of the lease period in this case, which was granted without the essential requisite of public bidding, is not in accordance with law. And it follows that Resolution 222, series of 1951, and the contract authorized thereby, extending the original five-year lease to another five years are null and void as contrary to law and public policy.⁶ [citations omitted, emphases and underscores ours]

Thus, I cited the case for the reason that:

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

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

If the present case simply involves an ordinary contract where, ordinarily, only the pertinent provisions of the Civil Code would apply, I would not perhaps have qualms with the suggestion that since the option period was a limitation imposed by SMARTMATIC-TIM on the COMELEC’s *right* to exercise its OTP, then nothing prevents

⁶*Id.* at 123.

SMARTMATIC-TIM from waiving the period it imposed. *The present case, however, involves not just any government contract but one involving a constitutional office tasked with the independent enforcement and administration of all laws and regulations relating to the conduct of elections to public office to ensure a free, orderly and honest electoral exercise*; it involves an ambitious step to replicate the first ever automated election held in 2010 by purchasing, out of the national coffers, the same PCOS machines and the CCS hardware and software worth billions of pesos. The respondents sorely miss this point of distinction between a government contract, on one hand, and an ordinary contract, on the other hand, by approaching the issue *from the perspective of a purely private contract*.⁷ (emphases and italics supplied)

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

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

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

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

⁷ *Supra* note 3.

⁸ *Supra* note 2.

Section 26 of Republic Act No. 8436, the subsequent bidding for services (for technical support involving the operation of the items purchased from SMARTMATIC-TIM) would result in the same scheme of a shared responsibility that would put the COMELEC in continuous violation of the law and the Constitution. To my mind, this is constitutionally objectionable.⁹ (emphasis and italics supplied)

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

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


ARTURO D. BRION
Associate Justice

⁹ *Supra* note 3.