

EN BANC

G.R. No. 201112 (*Archbishop Fernando R. Capalla, Omar Solitario Ali, and Mary Anne L. Susano v. Commission on Elections*)

G.R. No. 201121 (*Solidarity for Sovereignty [S4S] represented by Ma. Linda Olaguer; Ramon Pedrosa; Benjamin Paulino, et al. v. Commission on Elections*)

G.R. No. 201127 (*Teofisto T. Guingona, Bishop Broderick S. Pabillo, Solita Collas Monsod, et al. v. Commission on Elections and Smartmatic TIM Corporation*)

G.R. No. 201413 (*Tanggulang Demokrasya [TanDem], Inc., Evelyn L. Kilayko, Teresita D. Baltazar, et al. v. Commission on Elections and Smartmatic TIM Corporation*)

Promulgated:

OCTOBER 23, 2012

x-----X

CONCURRING OPINION

VELASCO, JR., J.:

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

The OTP Has Expired

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

Article 2
EFFECTIVITY

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

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

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

contract, separate and distinct from the AES Contract, by the COMELEC is invalid for lack of a public bidding.

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

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

ARTICLE IV
COMPETITIVE BIDDING

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

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

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

- a. *Limited Source Bidding, otherwise known as Selective Bidding* - a method of Procurement that involves direct invitation to bid by the Procuring Entity from a set of pre-selected suppliers or consultants with known experience and proven capability relative to the requirements of a particular contract;
- 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 asked to submit a price quotation or a pro-forma voice together with the conditions of sale, which offer may be accepted immediately or after some negotiations;
- c. *Repeat Order*. - a method of Procurement that involves a direct Procurement of Goods from the previous winning bidder, whenever there is a need to replenish Goods procured under a contract previously awarded through Competitive Bidding;

- d. *Shopping* - a method of Procurement whereby the Procuring Entity simply requests for the submission of price quotations for readily available off-the-shelf Goods or ordinary/regular equipment to be procured directly from suppliers of known qualification; or
- e. *Negotiated Procurement* - a method of Procurement that may be resorted under the extraordinary circumstances provided for in Section 53 of this Act and other instances that shall be specified in the IRR, whereby the Procuring Entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant.

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

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

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

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

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

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

Prior approval of the procuring entity

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

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

Conditions justifying a Direct Contracting

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

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

- 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), the Deed of Sale is exempt from competitive bidding as it involves goods of “proprietary nature.” Goods are considered of “**proprietary nature**” when they are owned by a person who has a protectable interest in them² or *an interest protected by the intellectual property laws*.

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

Chapter II ORIGINAL WORKS

Sec. 172. Literary and Artistic Works.-

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

x x x x

(n) **Computer programs;** and

x x x x

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

² BLACK’S LAW DICTIONARY 1339 (9th ed. for the iPhone/iPad/iPod touch, Version 2.1.0 [B112136]).

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

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

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

x x x x

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

In the present case, not only was the object of the contract a determinate thing, the parties likewise agreed that the subject Deed of Sale is for the purchase of the *entire first component*.⁵ While the hardware and

³ Id. at 223.

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

⁵ The Whereas clause of the 2009 AES Contract defines Component 1 of the AES, viz:
Component 1: Paper Based Automated Election System (AES)
1-A. Election Management System EMS)
1-B. Precinct-Count Optical Scan (PCOS) System
1-C. Consolidation/Canvassing System (CCS)
This is consistent with the items/goods listed under Annex “E” of the Deed of Sale that include:

1.1 PCOS Software

- a. EMS application
- b. PCOS application

1.2 PCOS Hardware

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

1.3 Canvassing System

- a. Canvassing units
- b. Central servers

1.4 Servers

- a. KBP servers for dominant majority and minority parties, accredited citizen’s arms
- b. Servers National BOC-COMELEC
- c. Servers National BOC-Congress

software are, by their nature, separable, the parties, however, intended to treat them as indivisible. Such being the case, the software cannot then be procured without the accompanying hardware on which they are embedded. In other words, what was purchased by the COMELEC was the *whole system*, that is, the entire first component of the original AES Contract, which includes the software needed for the PCOS machines consisting of the Election Management System (EMS) and the PCOS firmware⁶ applications, protected by our copyright laws, together with the hardware.⁷ Being inseparable by contractual stipulation, the COMELEC is thus required to procure the hardware and the proprietary software and firmware provided by Smartmatic-TIM.

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

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

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

d. Printers (canvassing)

e. Modems

f. Public Website (for publication of canvassing results)

g. Back-up data center.

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

⁷ INTELLECTUAL PROPERTY CODE, Sec. 172.

by Smartmatic-TIM⁸ to fit the needs of Philippine elections *cannot be obtained from any source other than Smartmatic-TIM*. This satisfies the requirement under Sec. 50(c) of RA 9184, *viz*:

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

x x x x

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

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

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.

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

As discussed, the specific goods subject of the assailed Deed of Sale are goods of proprietary nature as they include the Smartmatic EMS, which is a proprietary software that cannot be used, redistributed, or modified without the permission of Smartmatic.⁹ This software, together with the PCOS firmware¹⁰ and hardware, is owned and distributed exclusively by respondent Smartmatic-TIM. Hence, the first element of the condition set forth in Sec. 50(c) is clearly present.

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

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

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

On the existence of the second element, it is an uncontested fact that Smartmatic-TIM has no sub-dealers¹¹ and that there are no other persons selling the said software and hardware,¹² much less selling them at prices lower than that offered by Smartmatic-TIM under the questioned Deed of Sale.

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

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

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

¹¹ TSN, May 8, 2012, pp. 72-73.

¹² Id.

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

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


In addition to the considerations discussed above which show that the COMELEC is no longer in a position to seek other suppliers, as petitioners would have it, recall that the automation of the 2013 elections is bombarded with numerous complications, including time and budget constraints. Note that based on the bids submitted for the 2010 automated elections, the COMELEC determined that the funds needed for the procurement of 125,000 PCOS machines to ensure a 600:1 voter-to-precinct ratio is around PhP 12.85 billion. However, it was only given a PhP 7.96 billion budget for the entire automation of the 2013 elections, which will involve not only the procurement of the equipment but also the price of the allied services. This budget is obviously insufficient for the Commission to be able to perform its mandate of automating the upcoming 2013 elections.

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

Besides, to require the COMELEC to procure a new and, as demanded by petitioners, flawless AES for the 2013 elections with a budget of PhP 2.2 billion, at least PhP 5 billion short of the original amount requested, is requiring the Commission to execute a financial miracle with only a few months to pull it off.

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

ACCORDINGLY, I vote to **DENY** the Motions for Reconsideration.



PRESBITERO J. VELASCO, JR.
Associate Justice