



Republic of the Philippines
SUPREME COURT
Manila

EN BANC

**LEO Y. QUERUBIN, MARIA
CORAZON M. AKOL, and
AUGUSTO C. LAGMAN**
Petitioners,

G.R. No. 218787

Present:

- versus -

**COMMISSION ON ELECTIONS
EN BANC, represented by
Chairperson J. ANDRES D.
BAUTISTA, and JOINT
VENTURE OF SMARTMATIC-
TIM CORPORATION, TOTAL
INFORMATION MANAGEMENT
CORPORATION, SMARTMATIC
INTERNATIONAL HOLDING
B.V. and JARLTECH
INTERNATIONAL
CORPORATION, represented by
partner with biggest equity share,
SMARTMATIC-TIM
CORPORATION, its general
manager ALASTAIR JOSEPH
JAMES WELLS, Smartmatic
Chairman LORD MALLOCH-
BROWN, Smartmatic-Asia Pacific
President CESAR FLORES, and
any or all persons acting for and on
behalf of the Joint Venture,**
Respondents.

**SERENO, C.J.,
CARPIO,
VELASCO, JR.,
LEONARDO-DE CASTRO,
BRION,*
PERALTA,
BERSAMIN,
DEL CASTILLO,
VILLARAMA, JR.,
PEREZ,
MENDOZA,
REYES,
PERLAS-BERNABE,
LEONEN,
JARDELEZA, JJ.**

Promulgated:

December 8, 2015

X-----*P. K. Linares*-----X

DECISION

VELASCO, JR., J.:

* On official leave.

Nature of the Case

Before the Court is a petition for certiorari or prohibition under Rule 64 of the Rules of Court, with prayer for injunctive relief, assailing the validity and seeking to restrain the implementation of the Commission of Elections (COMELEC) *en banc*’s June 29, 2015 Decision¹ for allegedly being repugnant to the provisions of *Batas Pambansa Blg. 68* (BP 68), otherwise known as the *Corporation Code of the Philippines*, and Republic Act No. 9184 (RA 9184) or the *Government Procurement Reform Act*.

The Facts

On October 27, 2014, the COMELEC *en banc*, through its Resolution No. 14-0715, released the bidding documents for the “Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System.”² Specified in the published Invitation to Bid³ are the details for the lease with option to purchase, through competitive public bidding, of twenty-three thousand (23,000) new units of precinct-based OMRs or OP-SCAN Systems, with a total Approved Budget for Contract of ₱2,503,518,000,⁴ to be used in the 2016 National and Local Elections.⁵ The COMELEC Bids and Awards Committee (BAC) set the deadline for the submission by interested parties of their eligibility requirements and initial technical proposal on December 4, 2014.⁶

The joint venture of Smartmatic-TIM Corporation (SMTC), Smartmatic International Holding B.V., and Jarltech International Corporation (collectively referred to as “Smartmatic JV”) responded to the call and submitted bid for the project on the scheduled date. Indra Sistemas, S.A. (Indra) and MIRU Systems Co. Ltd. likewise signified their interest in the project, but only Indra, aside from Smartmatic JV, submitted its bid.⁷

¹ *Rollo*, pp. 61-72. Rendered by Chairman J. Andres D. Bautista and Commissioners Christian Robert S. Lim, Al A. Parreño, Luie Tito F. Guia, Arthur D. Lim, Ma. Rowena Amelia V. Guanzon and Sheriff M. Abas.

² *Id.* at 213-329. The bid documents are divided into eight (8) sections, namely: the Invitation to Bid, Instruction to Bidders, Bid Data Sheet, General Conditions of Contract, Special Conditions of Contract, Schedule of Requirements, Technical Specifications, and Bidding Forms.

³ *Id.* at 216-218.

⁴ *Id.* at 216.

COMPONENT	QUANTITY	UNIT COST	TOTAL
1 – Voting Machines	23,000 units	Php 90,000.00	Php 2,070,000,000.00
2 – Ballots	16,500,000 pieces	Php 20.00	Php 330,000,000.00
3 – Ballot Boxes	20,406 units	Php 3,000.00	Php 61,218,000.00
4 – Technical Support	4,550 Technicians (Polling Centers)		Php 42,300,000.00
	150 Technicians (National Technical Support Group)		
APPROVED BUDGET FOR THE CONTRACT (ABC)			Php 2,503,518,000.00

⁵ *Id.* at 61-62.

⁶ *Id.* at 217-218.

⁷ *Id.* at 621.

During the opening of the bids, Smartmatic JV, in a sworn certification, informed the BAC that one of its partner corporations, SMTC, has a pending application with the Securities and Exchange Commission (SEC) to amend its Articles of Incorporation (AOI), attaching therein all pending documents.⁸ The amendments adopted as early as November 12, 2014 were approved by the SEC on December 10, 2014.⁹ On even date, Smartmatic JV and Indra participated in the end-to-end testing of their initial technical proposals for the procurement project before the BAC.

Upon evaluation of the submittals, the BAC, through its Resolution No. 1 dated December 15, 2014, declared Smartmatic JV and Indra eligible to participate in the second stage of the bidding process.¹⁰ The BAC then issued a Notice requiring them to submit their Final Revised Technical Tenders and Price proposals on February 25, 2015, to which the eligible participants complied. Finding that the joint venture satisfied the requirements in the published Invitation to Bid, Smartmatic JV, on March 26, 2015, was declared to have tendered a complete and responsive Overall Summary of the Financial Proposal.¹¹ Meanwhile, Indra was disqualified for submitting a non-responsive bid.¹²

Subsequently, for purposes of post-qualification evaluation, the BAC required Smartmatic JV to submit additional documents and a prototype sample of its OMR.¹³ The prototype was subjected to testing to gauge its compliance with the requirements outlined in the project's Terms of Reference (TOR).¹⁴

After the conduct of post-qualification, the BAC, through Resolution No. 9 dated May 5, 2015, disqualified Smartmatic JV on two grounds, viz:¹⁵

1. Failure to submit valid AOI; and
2. The demo unit failed to meet the technical requirement that the system shall be capable of writing all data/files, audit log, statistics and ballot images simultaneously in at least two (2) data storages.

The ruling prompted Smartmatic JV to move for reconsideration.¹⁶ In denying the motion, the BAC, through Resolution No. 10¹⁷ dated May 15, 2015, declared that Smartmatic JV complied with the requirements of Sec. 23.1(b) of the Revised Implementing Rules and Regulations of RA 9184 (GPRA IRR), including the submission of a valid AOI, but was nevertheless

⁸ Id. at 623; *see also* BAC Resolution No. 10, Memorandum of Divida Blaz-Perez, id. at 433.

⁹ Id. at 546.

¹⁰ Id. at 623, 437.

¹¹ Id. at 624.

¹² Id. at 624, 441-442.

¹³ Id. at 624, 447-448.

¹⁴ Id. at 900-901.

¹⁵ Id. at 62, 449-451.

¹⁶ Id. at 452-468.

¹⁷ Id. at 424-429.

disqualified as it still failed to comply with the technical requirements of the project.¹⁸

Aggrieved, Smartmatic JV filed a Protest,¹⁹ seeking permission to conduct another technical demonstration of its SAES 1800 plus OMR (OMR+), the OMR Smartmatic JV presented during the public bidding before the COMELEC *en banc*.²⁰ Accordingly, on June 19, 2015, Smartmatic JV was allowed to prove compliance with the technical specifications for the second time, but this time before the electoral tribunal's Technical Evaluation Committee (TEC).²¹ This was followed, on June 23, 2015, by another technical demonstration before the Commission *en banc* at the Advanced Science and Technology Institute (ASTI) at the University of the Philippines, Diliman, Quezon City.²²

Ruling of the COMELEC *en banc*

Though initially finding that the OMR+'s ability to simultaneously write data in two storage devices could not conclusively be established,²³ the TEC, upon the use of a Digital Storage Oscilloscope (DSO) during the second demonstration,²⁴ determined that the OMR+ complied with the requirements specified in the TOR.²⁵ Adopting the findings of the TEC as embodied in its Final Report, the COMELEC *en banc*, on June 29, 2015, promulgated the assailed Decision granting Smartmatic JV's protest. The dispositive portion of the Decision reads:²⁶

WHEREFORE, the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated responsive bid in connection with the public bidding for the lease with option to purchase of 23,000 new units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.

Let the Bids and Awards Committee implement this Decision.

¹⁸ Id. at 428.

¹⁹ Id. at 469-506.

²⁰ Id. at 62-63.

²¹ Id. at 63.

²² Id. at 64.

²³ Id. at 63.

²⁴ Id. at 23. The DOS was used to visualize the electrical signals sent to the memory cards without modifying the OMR+ hardware and software. During the June 23, 2015 demonstration, the DSO displayed waveforms of time dimension and electrical voltage, which were then analyzed by the electronics design engineers of the ASTI.

²⁵ Id. at 23-26.

²⁶ Id. at 26.

SO ORDERED.

The seven-man commission was unanimous in holding that Smartmatic JV's OMR+ sufficiently satisfied the technical requirements itemized in the TOR, reproducing in the assailed Decision, verbatim and with approbation, the entirety of the TEC's Final Report, thusly:²⁷

This is to report on the result of the public test conducted on 23 June of the claim of Smartmatic TIM (SMTT) that their proposed SAES 1800 (PCOS+) has the capability to write ballot images, audit logs, and elections results on two separate storage (devices) simultaneously.

Technical discussion, demonstrations, and design reviews were conducted over two day period before the actual demonstration to the Comelec En Banc. These reviews were conducted between SMTT engineers and a team of embedded electronics design engineers from the Advanced Science and Technology Institute of the Department of Science and Technology.

Though these reviews are important to validate the behavior and functionality of the PCOS+, the best way to validate the claim of SMTT is to use a specialized test instrument connected to the actual electrical inputs of both storage cards.

To visualize the electrical signals being sent to the memory cards, an Agilent DSO7054A Digital Storage Oscilloscope (DSO) from ASTI connected to the same data input line on two SD card adapters with a micro SD card inside. This was done to simulate an actual SC card and to make the DSO probe connections accessible and secure without modifying anything in the PCOS+ hardware or software. x x x

During normal operation such as on Election day, when the PCOS+ is accepting ballots from voters, the PCOS+ is designated to write data on both SD cards after the ballots has been determined to be valid and the voter choices have been shown to the voter for verification.

The data being written on the storage devices consist mainly of the scanned ballots image of the front and back of the ballot at 200 dots per inch in both the horizontal and vertical dimension with each dot encoded into a 4 bit value corresponding to 16 shades of gray. The other data saved on the storage device consists of the vote interpretation and updates to the audit log. Each time that data is written on the two storage device, the date is encrypted and a verification step is done to check that identical data is written on both devices. The entire write process lasts a few seconds for each ballot.

x x x x

The DSO display the time dimension on the horizontal axis and the electrical voltage in the vertical axis, the display is generated left to right over time (earlier events are on the left). The yellow line on top shows the electrical signal on the Data 2 pin of the main storage card and the green line shows the electrical signal on the Data 2 pin of the backup storage

²⁷ Id. at 69-71.

card. The orange dashed horizontal and vertical lines are used for measuring the differences in time and voltage.

The vertical dashed line on the left marks the start of the data being written on the main and backup storage card and the vertical dashed line on the right marks the ends of the writing operation for one ballot. The time difference in this case is about 2.616 seconds as shown near the bottom left corner of the display.

The yellow and green vertical lines in between the two vertical dashed lines represent the digital ones and zeros being written on both storage cards. The yellow and green traces are not exactly identical because the main car also contains the operating system of the PCOS+ and additional data operations are being performed on it. Because the time scale is the same on both probes, we conclude that the PCOS+ is writing on both cards simultaneously during this time interval.

Notwithstanding Smartmatic JV's compliance with the technical requirements in the TOR, Commissioner Luie Tito F. Guia (Guia) would nonetheless dissent in part, questioning the sufficiency of the documents submitted by the Smartmatic JV.²⁸ Taking their cue from Commissioner Guia's dissent, petitioners now assail the June 29, 2015 Decision of the COMELEC through the instant recourse.

The Issues

Petitioners framed the issues in the extant case in the following wise:²⁹

A. Procedural Issues

- I. WHETHER OR NOT THE PETITION IS THE PROPER REMEDIAL VEHICLE TO ASSAIL THE SUBJECT DECISION OF THE COMELEC EN BANC;
- II. WHETHER OR NOT THE SUPREME COURT HAS THE RIGHT AND DUTY TO ENTERTAIN THIS PETITION;
- III. WHETHER OR NOT A JUSTICIABLE CASE OR CONTROVERSY EXISTS;
- IV. WHETHER OR NOT THE CASE OR CONTROVERSY IS RIPE FOR JUDICIAL ADJUDICATION;
- V. WHETHER OR NOT UNDER THE CIRCUMSTANCES, THE RULE ON "HIERARCHY OF COURTS" MAY BE DISPENSED WITH;
- VI. WHETHER OR NOT THE PETITIONERS POSSESS LOCUS STANDI;

²⁸ Id. at 74-76.

²⁹ Id. at 32-34.

B. Substantive Issues

- VII. WHETHER OR NOT THE COMELEC EN BANC ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN GRANTING THE PROTEST AS WELL AS IN DECLARING THE JOINT VENTURE OF SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. AND JARLTECH INTERNATIONAL CORPORATION AS THE BIDDER WITH THE LOWEST CALCULATED RESPONSIVE BID IN CONNECTION WITH THE PUBLIC BIDDING FOR THE LEASE WITH OPTION TO PURCHASE OF 23,000 NEW UNITS OF PRECINCT-BASED OPTICAL MARK READER OR OPTICAL SCAN SYSTEM FOR USE IN THE MAY 9, 2016 NATIONAL AND LOCAL ELECTIONS
- VIII. WHETHER OR NOT A WRIT OF PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER SHOULD ISSUE

In challenging the June 29, 2015 Decision, petitioners, filing as taxpayers, alleged that the COMELEC *en banc* acted with grave abuse of discretion amounting to lack or excess of jurisdiction in declaring Smartmatic JV as the bidder with the lowest calculated responsive bid.³⁰ According to petitioners, Smartmatic JV cannot be declared eligible, even more so as the bidder with the lowest calculated responsive bid, because one of its proponents, SMTC, holding 46.5% of the shares of Smartmatic JV, no longer has a valid corporate purpose as required under Sec. 14 of BP 68, which pertinently reads:

Section 14. Contents of the articles of incorporation. – All corporations organized under this code shall file with the Securities and Exchange Commission articles of incorporation in any of the official languages duly signed and acknowledged by all of the incorporators, containing substantially the following matters, except as otherwise prescribed by this Code or by special law:

x x x x

2. The **specific purpose or purposes for which the corporation is being incorporated.** Where a corporation has more than one stated purpose, the articles of incorporation shall state which is the primary purpose and which is/are the secondary purpose or purposes: Provided, That a non-stock corporation may not include a purpose which would change or contradict its nature as such x x x.

As proof, petitioners cite the primary purpose of SMTC as stated in the company's AOI, which was submitted to the COMELEC on December 4, 2014 as part of the joint venture's eligibility documents. To quote SMTC's primary purpose therein:³¹

³⁰ Id. at 34.

³¹ Id. at 75, 532.

To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management Corporation (“TIM”) and Smartmatic International Corporation (“Smartmatic”) arising under the Request for Proposal and the Notice of Award issued by the Commission on Elections (“COMELEC”) for the **automation of the 2010 national and local elections (“Project”)**, including the leasing, selling, importing and/or assembling of automated voting machines, computer software and other computer services and/or otherwise deal in all kinds of services to be used, offered or provided to the COMELEC **for the preparations and the conduct of the Project** including project management services. (emphasis added)

In concurrence with Commissioner Guia’s opinion, petitioners argue that the foregoing paragraph readily evinces that SMTC was created solely for the automation of the 2010 National and Local Elections, not for any other election.³² Having already served its purpose, SMTC no longer has authority to engage in business, so petitioners claim. To allow SMTC then to have a hand in the succeeding elections would be tolerating its performance of an *ultra vires* act.

Petitioners hasten to add that without a valid purpose, the company could not have submitted a valid AOI, a procurement eligibility requirement under Sec. 23.1 (b) of the IRR of RA 9184. For them, the SEC’s subsequent approval, on December 10, 2014, of the amendments to SMTC’s AOI cannot cure the partner corporation’s ineligibility because eligibility is determined at the time of the opening of the bids, which, in this case, was conducted on December 4, 2014.³³

Finally, petitioners contend that SMTC misrepresented itself by leading the BAC to believe that it may carry out the project despite its limited corporate purpose, and by claiming that it is a Philippine corporation when it is, allegedly, 100% foreign-owned.³⁴ They add that misrepresentation is a ground for the procuring agency to consider a bidder ineligible and disqualify it from obtaining an award or contract.³⁵

In its Comment,³⁶ public respondent COMELEC, through the Office of the Solicitor General (OSG), refuted the arguments of petitioners on the main postulation that the sole issue raised before the COMELEC *en banc* was limited to the technical aspect of the project.³⁷ According to the OSG, the sufficiency of the documents submitted was already decided by the BAC on May 15, 2015 when it partially granted Smartmatic JV’s motion for reconsideration through BAC Resolution No. 10. Anent the procedural

³² Id. at 48.

³³ Id. at 46.

³⁴ Id. at 46.

³⁵ Id. at 49.

³⁶ Id. at 587-618.

³⁷ Id. at 593-596.

issues, the OSG, in its bid to have the case dismissed outright, questioned petitioners' *locus standi* and failure to observe the hierarchy of courts.³⁸

Meanwhile, private respondents, in their Comment/Opposition,³⁹ countered that the BAC has thoroughly explained and laid down the factual and legal basis behind its finding on Smartmatic JV's legal capacity to participate as bidder in the project procurement; that the issue on SMTC's AOI has been rendered moot by the SEC's subsequent approval on December 10, 2014 of the AOI's amendment broadening the company's primary purpose;⁴⁰ that SMTC's primary purpose, as amended, now reads:⁴¹

To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

that the alleged defect in SMTC's AOI is of no moment since neither the law nor the bidding documents require a bidder to submit its AOI;⁴² that even assuming for the sake of argument that SMTC's primary purpose precludes it from further contracting for the automation of the Philippine elections beyond 2010, its secondary purposes⁴³ and Sec. 42 of BP 68⁴⁴ authorize the

³⁸ Id. at 596-604.

³⁹ Id. at 619-663.

⁴⁰ Id. at 647.

⁴¹ Id. at 549.

⁴² Id. at 637-639.

⁴³ Id. at 533-534. Its secondary purposes read: a. to acquire by purchase, lease, contract, concession or otherwise, within the limits allowed by law, any and all real and/or personal properties of every kind and description whatsoever, whether tangible or intangible, which the Corporation may deem necessary or appropriate in connection with the conduct of any business in which the Corporation may lawfully engage, and, within the limits allowed by law, to own, hold, operate, improve, develop, manage, grant, lease, sell, assign, convey, transfer, exchange, or otherwise dispose of the whole or any part thereof;

x x x x

h. To carry out any of the above-mentioned purposes as principal, agent, factor, licensee, concessionaire, contractor, or otherwise, either alone or on conjunction with any other person, firm, association, corporation, or entity, whether public or private;

i. To enter into contracts and arrangements of every kind and description for any lawful purpose with any person, firm, association, corporation, municipality, body politic, country, territory, province, state, or government, and to obtain from any government or authority such rights, privileges, contracts and concessionaires which the Corporation may deem desirable.

⁴⁴ **Section 42.** *Power to invest corporate funds in another corporation or business or for any other purpose.* – Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation or business or for any purpose other than the primary purpose for which it was organized when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of non-stock corporations, at a stockholder's or member's meeting duly called for the purpose. Written notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary.

company to do so;⁴⁵ and that the COMELEC, in fact, has already dealt with SMTC numerous times after the 2010 elections.⁴⁶

Private respondents would likewise debunk petitioners' allegation that SMTC misrepresented its nationality. They argue that based on its General Information Sheet (GIS), SMTC is a Filipino corporation, not a foreign one as petitioners alleged. Moreover, what is only required under RA 9184 is that the nationality of the joint venture be Filipino, and not necessarily that of its individual proponents.⁴⁷ In any event, so private respondents claim, the COMELEC, under the law, is not prohibited from acquiring election equipment from foreign sources, rendering SMTC and even Smartmatic JV's nationality immaterial.⁴⁸

Lastly, private respondents pray for the petition's outright dismissal, following petitioner Akol and Lagman's alleged failure to comply with the rules on verifications, on the submission of certifications against forum-shopping, and on the efficient use of paper.⁴⁹

The Court's Ruling

The petition lacks merit.

Rule 64 is not applicable in assailing the COMELEC *en banc*'s Decision granting Smartmatic JV's protest

In arguing for the propriety of the remedial vehicle chosen, petitioners claim that under Rule 64, Sec. 2 of the Rules of Court, “[a] **judgment or final order or resolution of the Commission on Elections x x x may be brought by the aggrieved party to the Supreme Court on certiorari under Rule 65.**”⁵⁰ They postulate that the June 29, 2015 Decision of the COMELEC *en banc* declaring Smartmatic JV as the eligible bidder with the lowest calculated responsive bid is a “judgment” within the contemplation of the rule, and is, therefore, a proper subject of a Rule 64 petition.

The argument fails to persuade.

a. Rule 64 does not cover rulings of the COMELEC in the exercise of its administrative powers

⁴⁵ *Rollo*, pp. 640-646.

⁴⁶ *Id.* at 646-647. Contract dated January 14, 2013 for the supply of 82,000 CF Cards Main, Contract dated January 28, 2013 for the supply of 82,000 CF Cards WORM, Contract dated January 18, 2013 for the Electronic Transmission of Election Results of the May 13, 2013 elections, Contract dated May 14, 2013 for the supply of 15,000 MTD Modems, and Contract dated March 22, 2013 for the National Support Center.

⁴⁷ *Id.* at 647-648.

⁴⁸ *Id.* at 648-652.

⁴⁹ *Id.* at 652-657.

⁵⁰ *Id.* at 34.

The rule cited by petitioners is an application of the constitutional mandate requiring that, unless otherwise provided by law, the rulings of the constitutional commissions shall be subject to review only by the Supreme Court on certiorari. A reproduction of Article IX-A, Section 7 of the 1987 Constitution is in order:

Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. **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. (emphasis added)

Though the provision appears unambiguous and unequivocal, the Court has consistently held that the phrase “decision, order, or ruling” of constitutional commissions, the COMELEC included, that may be brought directly to the Supreme Court on certiorari is not all-encompassing, and that it only relates to those rendered in the commissions’ exercise of **adjudicatory or quasi-judicial powers**.⁵¹ In the case of the COMELEC, this would limit the provision’s coverage to the decisions, orders, or rulings issued pursuant to its authority to be the sole judge of generally all controversies and contests relating to the elections, returns, and qualifications of elective offices.⁵²

Consequently, Rule 64, which complemented the procedural requirement under Article IX-A, Section 7, should likewise be read in the same sense—that of excluding from its coverage decisions, rulings, and orders rendered by the COMELEC in the exercise of its **administrative** functions. In such instances, a Rule 65 petition for certiorari is the proper remedy. As held in *Macabago v. COMELEC*:⁵³

[A] judgment or final order or resolution of the COMELEC may be brought by the aggrieved party to this Court on certiorari under Rule 65, as amended, except as therein provided. We ruled in *Elpidio M. Salva, et al. vs. Hon. Roberto L. Makalintal, et al.* (340 SCRA 506 (2000)) that Rule 64 of the Rules applies only to judgments or final orders of the COMELEC in the exercise of its quasi-judicial functions. The rule does not apply to interlocutory orders of the COMELEC in the exercise of its quasi-judicial functions or to its administrative orders. In this case, the assailed order of the COMELEC declaring private respondents petition to be one for annulment of the elections or for a declaration of a failure of elections in the municipality and ordering the production of the original copies of the VRRs for the technical examination is administrative in nature. Rule 64, a procedural device for the review of final orders, resolutions or decision of the COMELEC, does not foreclose recourse to

⁵¹ *Garces v. Court of Appeals*, G.R. No. 114795, July 17, 1996, 259 SCRA 99, 107.

⁵² *Bedol v. Comelec*, G.R. No. 179830, December 3, 2009, 606 SCRA 554.

⁵³ G.R. No. 152163, November 18, 2002, 392 SCRA 178.

this Court under Rule 65 from administrative orders of said Commission issued in the exercise of its administrative function.

As applied herein, recall that the instant petition revolves around the issue on whether or not Smartmatic JV is eligible to participate in the bidding process for the COMELEC's procurement of 23,000 units of optical mark readers. The case does not stem from an election controversy involving the election, qualification, or the returns of an elective office. Rather, it pertains to the propriety of the polling commission's conduct of the procurement process, and its initial finding that Smartmatic JV is eligible to participate therein. It springs from the COMELEC's compliance with the Constitutional directive to enforce and administer all laws and regulations relative to the conduct of an election.⁵⁴ Specifically, it arose from the electoral commission's exercise of Sec. 12 of RA 8436, otherwise known as the Automated Elections Law, as amended by RA 9369,⁵⁵ which authorized the COMELEC **"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 regulation."**

The subject matter of Smartmatic JV's protest, therefore, does not qualify as one necessitating the COMELEC's exercise of its adjudicatory or quasi-judicial powers that could properly be the subject of a Rule 64 petition, but is, in fact, administrative in nature. Petitioners should then have sought redress *via* a petition for the issuance of the extraordinary writ of certiorari under Rule 65 to assail the COMELEC *en banc*'s June 29, 2015 Decision granting the protest. As a caveat, however, the writ will only lie upon showing that the COMELEC acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Decision, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.⁵⁶ Mere abuse of discretion will not suffice.

It goes without saying that petitioners' action, having been lodged through an improper petition, is susceptible to outright dismissal. As the Court held in *Pates v. COMELEC*,⁵⁷ a Rule 64 petition cannot simply be equated to Rule 65 even if it expressly refers to the latter rule.⁵⁸ The clear

⁵⁴ CONSTITUTION, Art. IX-C, Sec. 2(1).

⁵⁵ 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 Pampansa Blg. 881, As Amended, Republic Act No. 7166 and Other Related Elections Laws, Providing Funds Therefor and for Other Purposes."

⁵⁶ *Duco v. Comelec*, G.R. No. 183366, August 19, 2009, 596 SCRA 572.

⁵⁷ G.R. No. 184915, June 30, 2009, 591 SCRA 481.

⁵⁸ *Pates v. Comelec*, *id.* They exist as separate rules for substantive reasons as discussed below. Procedurally, the most patent difference between the two – *i.e.*, the exception that Section 2, Rule 64 refers to – is Section 3 which provides for a special period for the filing of petitions for *certiorari* from decisions or rulings of the COMELEC *en banc*. The period is 30 days from notice of the decision or ruling (instead of

distinction between the instant petition and *Pates*, however, is that in *Pates*, therein petitioner failed to present an exceptional circumstance or any compelling reason that would have warranted the liberal application of the Rules of Court. In stark contrast, herein petitioners, as will later on be discussed, were able to establish a meritorious case for the relaxation of the rules, relieving them from the rigid application of procedural requirements. We therefore treat the instant recourse as one filed not merely in relation to, but under Rule 65.

This brings us now to the question on where the petition ought to have been filed.

b. *Jurisdiction of the RTC over rulings of the head of the procuring entity relating to procurement protests*

Guilty of reiteration, the COMELEC *en banc* was not resolving an election controversy when it resolved the protest, but was merely performing its function to procure the necessary election paraphernalia for the conduct of the 2016 National and Local Elections. This power finds statutory basis in Sec. 12 of RA 8436,⁵⁹ as amended, which reads:

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 board. 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 added)

In *Pabillo v. COMELEC*,⁶⁰ the Court held that the “existing laws” adverted to in the provision is none other than RA 9184. The law is designed to govern all cases of 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.⁶¹ It mandates that as a

the 60 days that Rule 65 provides), with the intervening period used for the filing of any motion for reconsideration deductible from the originally-granted 30 days (instead of the fresh period of 60 days that Rule 65 provides).

⁵⁹ Formerly Section 8 of RA 8436, the provision was renumbered to Section 12 by RA 9369

⁶⁰ G.R. Nos. 216098 & 216562, April 21, 2015.

⁶¹ RA 9184, Sec. 3.

general rule, all government procurement must undergo competitive bidding⁶² and for purposes of conducting the bidding process, the procuring entity convenes a BAC.

The BAC is tasked to oversee the entire procuring process, from advertisement of the project to its eventual award.⁶³ It is the first to rule on objections or complaints relating to the conduct of the bidding process, subject to review by the head of the procuring entity via protest. As outlined in RA 9184, the protest mechanism in procurement processes is as follows:

ARTICLE XVII PROTEST MECHANISM

Section 55. *Protests on Decisions of the BAC.*- Decisions of the BAC in all stages of procurement may be **protested to the head of the procuring entity** and shall be in writing. Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the IRR.

Section 56. *Resolution of Protests.* - The protest shall be resolved strictly on the basis of records of the BAC. Up to a certain amount to be specified in the IRR, the decisions of the Head of the Procuring Entity shall be final.

Section 57. *Non-interruption of the Bidding Process.*- In no case shall any protest taken from any decision treated in this Article stay or delay the bidding process. Protests must first be resolved before any award is made.

Section 58. *Resort to Regular Courts; Certiorari.*- Court action may be resorted to only after the protests contemplated in this Article shall have been completed. **Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of jurisdiction. The regional trial court shall have jurisdiction over final decision of the head of the procuring entity.** Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure.

This provision is without prejudice to any law conferring on the Supreme court the sole jurisdiction to issue temporary restraining orders and injunctions relating to Infrastructure Projects of Government. (emphasis added)

Thus, under Sec. 58, the proper remedy to question the ruling of the head of the procuring entity is through a Rule 65 petition for certiorari with the Regional Trial Court (RTC). The term “procuring entity” is defined under the RA 9184 as “**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 procuring Goods, Consulting Services and Infrastructure Projects.**”⁶⁴ This statutory definition makes no distinction as to whether or not the procuring entity is a

⁶² Id., Sec. 10.

⁶³ Id., Sec. 12.

⁶⁴ Id., Sec. 5(o).

constitutional commission under Article IX of the Constitution. It is broad enough to include the COMELEC within the contemplation of the term. Hence, under the law, grievances relating to the COMELEC rulings in protests over the conduct of its project procurement should then be addressed to the RTC.

The mandatory recourse to the RTC in the appeal process applicable to COMELEC procurement project is not a novel development introduced by RA 9184. Even prior to the advent of the government procurement law, the requirement already finds jurisprudential support in *Filipinas Engineering and Machine Shop v. Ferrer*,⁶⁵ wherein the Court expounded this way:

[I]t has been consistently held that it is the Supreme Court, not the Court of First Instance, which has exclusive jurisdiction to review on certiorari final decisions, orders or rulings of the COMELEC relative to the conduct of elections and enforcement of election laws.

We are however, far from convince[d] that an order of the COMELEC awarding a contract to a private party, as a result of its choice among various proposals submitted in response to its invitation to bid comes within the purview of a "final order" which is exclusively and directly appealable to this court on certiorari. What is contemplated by the term "final orders, rulings and decisions" of the COMELEC reviewable by certiorari by the Supreme Court as provided by law are those rendered in actions or proceedings before the COMELEC and taken cognizance of by the said body in the exercise of its adjudicatory or quasi-judicial powers.

X X X X

[T]he order of the Commission granting the award to a bidder is not an order rendered in a legal controversy before it wherein the parties filed their respective pleadings and presented evidence after which the questioned order was issued; and that this order of the commission was issued pursuant to its authority to enter into contracts in relation to election purposes. In short, **the COMELEC resolution awarding the contract in favor of Acme was not issued pursuant to its quasi-judicial functions but merely as an incident of its inherent administrative functions over the conduct of elections, and hence, the said resolution may not be deemed as a "final order" reviewable by certiorari by the Supreme Court.** Being non-judicial in character, no contempt may be imposed by the COMELEC from said order, and no direct and exclusive appeal by certiorari to this Tribunal lie from such order. **Any question arising from said order may be well taken in an ordinary civil action before the trial courts.** (emphasis added)

Additionally, even if the Court treats the protest proceeding as part of the procuring agency's adjudicatory function, the Court notes that Sec. 58 of RA 9184 would nevertheless apply, and the RTC would still have jurisdiction, pursuant to the proviso "unless otherwise provided by law" as appearing in Article IX-A, Section 7 of the Constitution. In this case, the pertinent law provides that insofar as rulings of the COMELEC in

⁶⁵ No. L-31455, February 28, 1985, 135 SCRA 25.

procurement protests are concerned, said rulings can be challenged through a Rule 65 certiorari with the RTC.

c. The protest mechanism under RA 9184 can only be availed of by a losing bidder

Nevertheless, the application of Sec. 58 of RA 9184 has to be qualified. It cannot, in all instances, be the proper remedy to question the rulings of the heads of procuring entities in procurement protests. As in the prior case of *Roque v. COMELEC*,⁶⁶ which similarly dealt with COMELEC procurement of OMRs the Court held that only a losing bidder would be aggrieved by, and *ergo* would have the personality to challenge, the head of the procuring entity's ruling in the protest. This is bolstered by the GPRA IRR, which fleshed out the provisions of RA 9184 thusly:

RULE XVII – PROTEST MECHANISM

Section 55. Protests on Decisions of the BAC

55.1. Decisions of the BAC at any stage of the procurement process may be questioned by filing a request for reconsideration within the three (3) calendar days upon receipt of written notice or upon verbal notification. The BAC shall decide on the request for reconsideration within seven (7) calendar days from receipt thereof.

If a failed bidder signifies his intent to file a request for reconsideration, the BAC shall keep the bid envelopes of the said failed bidder unopened and/or duly sealed until such time that the request for reconsideration has been resolved.

55.2. In the event that the request for reconsideration is denied, decisions of the BAC may be protested in writing to the Head of the Procuring Entity: Provided, however, That a prior request for reconsideration should have been filed by the party concerned in accordance with the preceding Section, and the same has been resolved.

55.3. **The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC** denying its request for reconsideration. A protest may be made by filing a verified position paper with the Head of the Procuring Entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

55.4. The verified position paper shall contain the following information:

- a) The name of bidder;**
- b) The office address of the bidder;**
- c) The name of project/contract;
- d) The implementing office/agency or procuring entity;
- e) A brief statement of facts;
- f) The issue to be resolved; and

⁶⁶ G.R. No. 188456, September 10, 2009, 599 SCRA 69.

g) Such other matters and information pertinent and relevant to the proper resolution of the protest.

The position paper is verified by an affidavit that the affiant has read and understood the contents thereof and that the allegations therein are true and correct of his personal knowledge or based on authentic records. An unverified position paper shall be considered unsigned, produces no legal effect, and results to the outright dismissal of the protest.

x x x x

Section 58. Resort to Regular Courts; Certiorari

58.1. Court action may be resorted to only after the protests contemplated in this Rule shall have been completed, i.e., resolved by the Head of the Procuring Entity with finality. The regional trial court shall have jurisdiction over final decisions of the Head of the Procuring Entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure. (emphasis added)

Evidently, the remedy of certiorari filed before the RTC under Sec. 58 of RA 9184 is intended as a continuation of the motion for reconsideration filed before the BAC, and of the subsequent protest filed with the head of the procuring entity. This is confirmed by the condition *sine qua non* completion of the process under Rule XVII, Secs. 55-57 of the GPRA IRR before recourse to the trial courts become available.

It is obvious under Sec. 55.1 of Rule XVII that only a **failed bidder** can turn the cogs of the protest mechanism by first moving for reconsideration of the assailed BAC ruling. The **party concerned**, the bidder adversely affected by the resolution of the motion, shall then have seven (7) days to file a protest with the head of the procuring entity. The prerequisite that a protestant should likewise be a bidder is emphasized by Sec. 55.4 which requires that the “**name of the bidder**” and the “**office address of the bidder**” be indicated in its position paper. Accordingly, **only the bidder against whom the head of the procuring entity ruled, if it would challenge the ruling any further, is required to resort to filing a petition for certiorari before the trial courts under Sec. 58.** Ego, there is neither rhyme nor reason for petitioners herein, who are non-participants in the procurement project, to comply with the rules on protest under RA 9184, part and parcel of which is the exclusivity of the jurisdiction of the RTC under Sec. 58 thereof. Stated in the alternative, there is no legislative enactment requiring petitioners to seek recourse first with the RTC to question the COMELEC *en banc*’s June 29, 2015 Decision. Thus, if circumstances so warrant, direct resort to the Court will be allowed.

d. Hierarchy of courts and the exceptions to the doctrine

The expanded concept of judicial power under Article VIII, Section 1 of the Constitution⁶⁷ includes the duty of the judiciary not only “to settle actual controversies involving rights which are legally demandable and enforceable” but also, as an instrument of checks and balances, “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”⁶⁸ Under Rule 65 of the Rules of Court, the special civil actions for certiorari and prohibition are the available remedies for determining and correcting such grave abuses of discretion.

The power is wielded not by the Court alone, but concurrently with the Court of Appeals and the Regional Trial Courts, as provided by law. With respect to the Court of Appeals, Section 9 (1) of Batas Pambansa Blg. 129 (BP 129) gives the appellate court original jurisdiction to issue, among others, a writ of certiorari, whether or not in aid of its appellate jurisdiction. For the RTCs, the power to issue a writ of certiorari, in the exercise of their original jurisdiction, is provided under Section 21 of BP 129.⁶⁹ Additionally, the Court has already held that the CTA, by constitutional mandate, is likewise vested with jurisdiction to issue writs of certiorari.⁷⁰ So too has the Sandiganbayan been vested with certiorari powers in aid of its appellate jurisdiction.⁷¹

Notwithstanding the non-exclusivity of the original jurisdiction over applications for the issuance of writs of certiorari, however, the doctrine of hierarchy of courts dictates that recourse must first be made to the lower-ranked court exercising concurrent jurisdiction with a higher court.⁷² The rationale behind the principle is explained in *Bañez, Jr. v. Concepcion*⁷³ in the following wise:

The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of certiorari, prohibition and mandamus only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy.

⁶⁷ Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

⁶⁸ See also *Araullo v. Aquino III*, G.R. Nos. 209287 etc., July 1, 2014.

⁶⁹ *City of Manila v. Grecia-Cuerdo*, G.R. No. 175723, February 4, 2014.

⁷⁰ *Id.*

⁷¹ PD 1606, Sec. 4(c), as amended by RA 8249, Sec. 4.

⁷² *Bonifacio v. Gimenez*, G.R. No. 184800, May 5, 2010.

⁷³ G.R. No. 159508, August 29, 2012, 679 SCRA 237.

Petitioners do not have the absolute and unrestrained freedom of choice of the court to which an application for certiorari will be directed.⁷⁴ Indeed, referral to the Supreme Court as the court of last resort will simply be empty rhetoric if party-litigants are able to flout judicial hierarchy at will. The Court reserves the direct invocation of its jurisdiction only when there are special and important reasons clearly and especially set out in the petition that would justify the same.⁷⁵

In the leading case of *The Diocese of Bacolod v. Comelec*,⁷⁶ the Court enumerated the specific instances when direct resort to this Court is allowed, to wit:

- (a) When there are genuine issues of constitutionality that must be addressed at the most immediate time;
- (b) When the issues involved are of transcendental importance;**
- (c) Cases of first impression;
- (d) When the constitutional issues raised are best decided by this Court;
- (e) When the time element presented in this case cannot be ignored;**
- (f) When the petition reviews the act of a constitutional organ;**
- (g) When there is no other plain, speedy, and adequate remedy in the ordinary course of law;
- (h) When public welfare and the advancement of public policy so dictates, or when demanded by the broader interest of justice;
- (i) When the orders complained of are patent nullities; and
- (j) When appeal is considered as clearly an inappropriate remedy.

The Court finds the second and fifth, and sixth grounds applicable in the case at bar. Much has already been said of the “compelling significance and the transcending public importance” of the primordial issue underpinning petitions that assail election automation contracts: the success—and the far-reaching grim implications of the failure—of the nationwide automation project.⁷⁷ So it is that the Court, in the growing number of cases concerning government procurement of election paraphernalia and services, has consistently exhibited leniency and dispensed of procedural requirements for petitioners to successfully lodge certiorari petitions.⁷⁸ Technicalities should not stand in the way of resolving the substantive issues petitioners raised herein. On this same ground of transcendental importance, the Court may opt to treat the instant petition as one for certiorari under, not merely in relation to, Rule 65.

⁷⁴ *Macapagal v. People*, G.R. No. 193217, February 26, 2014.

⁷⁵ *Id.*

⁷⁶ G.R. No. 205728, January 21, 2015.

⁷⁷ *Roque v. COMELEC*, supra note 66; citing *Marabur v. Comelec*, G.R. No. 169513, February 26, 2007, 516 SCRA 696.

⁷⁸ *Id.*; *Pabillo v. COMELEC*, G.R. Nos. 216098 & 216562, April 21, 2015; *Capalla v. COMELEC*, G.R. No. 201112, June 13, 2012.

As regards the fifth ground, the time element, it is sufficient to state that with the 2016 polls visible in the horizon, the post-haste resolution of this case becomes all the more imperative. It would be the height of absurdity to require petitioners to undergo scrutiny through the lens of the RTC first, considering that the acquisition of 23,000 OMRs would, at the minimum, affect the clustering of precincts. Without the finalized list of clustered precincts, the polling place for the registered voters could not yet be ascertained. Needless to state, this would impede the preparations for the conduct of the polls and its unmitigated effects could very well lead to mass disenfranchisement of voters.

Lastly, the sixth ground is indubitably applicable. The rulings of the COMELEC, as a constitutional body, can immediately be reviewed by the Court on proper petition. As quoted in *The Diocese of Bacolod v. COMELEC*,⁷⁹ citing *Albano v. Arranz*,⁸⁰ **“it is easy to realize the chaos that would ensue if the Court of First Instance of each and every province were [to] arrogate itself the power to disregard, suspend, or contradict any order of the Commission on Elections: that constitutional body would be speedily reduced to impotence.”**

In sum, there exist ample compelling reasons to justify the direct resort to the Court as a departure from the doctrine of hierarchy of courts not in relation to but under Rule 65 of the Rules of Court on certiorari and prohibition, and to brush aside the procedural issues in this case to focus on the substantive issues surrounding the procurement of the 23,000 additional OMRs for the 2016 elections.

The submission of an AOI is not an eligibility criterion

It bears stressing on the outset that no issue has been brought forth questioning the technical capability of Smartmatic JV's OMR+. Instead, the pivotal point to be resolved herein is whether or not the COMELEC acted with grave abuse of discretion in declaring Smartmatic JV eligible in spite of the alleged nullity of, or defect in, SMTC's AOI.

Petitioner would first insist that the submission of an AOI is an eligibility requirement that Smartmatic JV cannot be deemed to have complied with. In addressing this assertion, a discussion of the qualification process is apropos.

a. The submission of an AOI was not a pre-qualification requirement

It is a basic tenet that except only in cases in which alternative methods of procurement are allowed, all government procurement shall be

⁷⁹ G.R. No. 205728, January 21, 2015.

⁸⁰ No. L-19260, January 31, 1962, 4 SCRA 386.

done by competitive bidding. This is initiated by the BAC, which publishes an Invitation to Bid for contracts under competitive bidding in order to ensure the widest possible dissemination thereof.⁸¹

Answering the invitation, interested participants submit their bids using the forms specified in the bidding documents in two (2) separate sealed bid envelopes submitted simultaneously. The first contains the technical component of the bid, including the eligibility requirements under Section 23.1 of GPRA IRR, while the second contains the financial component of the bid.⁸²

The BAC then sets out to determine the eligibility of the prospective bidders based on their compliance with the eligibility requirements set forth in the Invitation to Bid and their submission of the legal, technical and financial documents required under RA 9184 and the GPRA IRR.⁸³ The first screening is done via the pre-qualification stage as governed by Sec. 30.1 of RA 9184's IRR, which pertinently reads:

Section 30. Preliminary Examination of Bids

30.1. The BAC shall open the first bid envelopes of prospective bidders in public to determine each bidder's compliance with the documents required to be submitted for eligibility and for the technical requirements, as prescribed in this IRR. For this purpose, **the BAC shall check the submitted documents of each bidder against a checklist of required documents** to ascertain if they are all present, using a **nondiscretionary "pass/fail" criterion**, as stated in the Instructions to Bidders. If a bidder submits the required document, it shall be rated "passed" for that particular requirement. In this regard, bids that fail to include any requirement or are incomplete or patently insufficient shall be considered as "failed". Otherwise, the BAC shall rate the said first bid envelope as "passed." (emphasis added)

For the procurement of highly technical goods wherein the two-stage bidding process is employed, such as the subject of procurement in this case, the same procedure for pre-qualification outlined above is followed in the first stage, except that the technical specifications are only in the form of performance criteria, and that the technical proposals will not yet include price tenders.⁸⁴

⁸¹ *Commission on Audit v. Linkworth International*, G.R. No. 182559, March 13, 2009, 518 SCRA 501.

⁸² Sec. 25.1, RA 9184 IRR.

⁸³ *Commission on Audit v. Linkworth International*, supra note 81.

⁸⁴ Revised Implementing Rules and Regulations, RA 9184, Sec. 30.3. — For the procurement of goods where, due to the nature of the requirements of the project, the required technical specifications/requirements of the contract cannot be precisely defined in advance of bidding, or where the problem of technically unequal bids is likely to occur, a two (2)-stage bidding procedure may be employed. In these cases, the procuring entity concerned shall prepare the Bidding Documents, including the technical specification in the form of performance criteria only. Under this procedure, prospective bidders shall be requested at the first stage to submit their respective eligibility requirements if needed, and initial technical proposals only (no price tenders). The concerned BAC shall then 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

Based on the rule, the BAC's function in determining the eligibility of a bidder during pre-qualification is ministerial in the sense that it only needs to countercheck the completeness and sufficiency of the documents submitted by a bidder against a checklist of requirements. It cannot, therefore, declare a bidder ineligible for failure to submit a document which, in the first place, is not even required in the bid documents.

Citing Sec. 23.1 (b) of the GPRA IRR, petitioners contend that an AOI is one of such mandatory documentary requirements and that the failure of a bidder to furnish the BAC a valid one would automatically render the bidder ineligible.

We are not convinced.

Sec. 23 of the adverted GPRA IRR reads:

Section 23. Eligibility Requirements for the Procurement of Goods and Infrastructure Projects

23.1. For purposes of determining the eligibility of bidders using the criteria stated in Section 23.5 of this IRR, only the following documents shall be required by the BAC, using the forms prescribed in the Bidding Documents:

a) Class "A" Documents

Legal Documents

i) Registration certificate from SEC, Department of Trade and Industry (DTI) for sole proprietorship, or CDA for cooperatives, or any proof of such registration as stated in the Bidding Documents.

ii) Mayor's permit issued by the city or municipality where the principal place of business of the prospective bidder is located.

iii) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.

Technical Documents

iv) Statement of the prospective bidder of all its ongoing government and private contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid; and Statement identifying the bidder's single largest completed contract similar to the contract to be bid, except under conditions provided for in Section 23.5.1.3 of this IRR, within the relevant period as provided in the Bidding

revised technical specifications/requirements of the contract. Once the final revised technical specifications are completed and duly approved by the concerned 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 in accordance with this IRR, at a specified deadline, after which time no more bids shall be received. The concerned BAC shall then proceed in accordance with the procedure prescribed in this IRR.

Documents in the case of goods. All of the above statements shall include all information required in the PBDs prescribed by the GPPB.

v) In the case of procurement of infrastructure projects, a valid Philippine Contractors Accreditation Board (PCAB) license and registration for the type and cost of the contract to be bid. Financial Documents

vi) The prospective bidder's audited financial statements, showing, among others, the prospective bidder's total and current assets and liabilities, stamped "received" by the BIR or its duly accredited and authorized institutions, for the preceding calendar year which should not be earlier than two (2) years from the date of bid submission.

vii) The prospective bidder's computation for its Net Financial Contracting Capacity (NFCC).

b) Class "B" Document

Valid joint venture agreement (JVA), in case the joint venture is already in existence. In the absence of a JVA, duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful shall be included in the bid. Failure to enter into a joint venture in the event of a contract award shall be ground for the forfeiture of the bid security. Each partner of the joint venture shall submit the legal eligibility documents. The submission of technical and financial eligibility documents by any of the joint venture partners constitutes compliance. (emphasis added)

Clearly, the quoted provisions, as couched, do not require the submission of an AOI in order for a bidder to be declared eligible. The requirement that bears the most resemblance is the submission by each partner to the venture of a registration certificate issued by the Securities and Exchange Commission, but compliance therewith was never disputed by the petitioners. Moreover, it was never alleged that Smartmatic JV was remiss in submitting a copy of its joint venture agreement pursuant to Sec. 23.1(b), which petitioners specifically invoked.

It may be that the procuring entity has the option to additionally require the submission of the bidders' respective AOIs in order to substantiate the latter's claim of due registration with the government entities concerned. However, a perusal of the bidding documents would readily reveal that the procuring entity, the COMELEC in this case, did not impose such a requirement. As can be gleaned in the Instruction to Bidders,⁸⁵ only the following documents were required for purposes of determining a bidder's eligibility:

12. Documents Comprising the Bid: Eligibility and Technical Components

⁸⁵ *Rollo*, pp. 231-233.

12.1. Unless otherwise indicated in the BDS, the first envelope shall contain the following eligibility and technical documents:

(a) Eligibility Documents –

Class “A” Documents:

- (i) Registration certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorships, and Cooperative Development Authority (CDA) for cooperatives, or any proof of such registration as stated in the BDS;
- (ii) Mayor’s permit issued by the city or municipality where the principal place of business of the prospective bidder is located;
- (iii) Statement of all its ongoing and completed government and private contracts within the period stated in the BDS, including contracts awarded but not yet started, if any. The statement shall include, for each contract, the following:
 - (iii.1) name of the contract;
 - (iii.2) date of the contract;
 - (iii.3) kinds of Goods;
 - (iii.4) amount of contract and value of outstanding contracts;
 - (iii.5) date of delivery; and
 - (iii.6) end user’s acceptance or official receipt(s) issued for the contract, if completed.
- (iv) Audited financial statements, stamped “received” by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from the bid submission;
- (v) NFCC computation or CLC in accordance with ITB Clause 5.5; and
- (vi) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.(Updated pursuant to GPPB Resolution No. 21-2013 dated July 30, 2013)

Class “B” Document:

- (vii) If applicable, the JVA in case the joint venture is already in existence, or duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful;
- (viii) Social Security Clearance (SSS);

- (ix) Department of Labor and Employment Clearance (DOLE);
- (x) Court Clearance (Regional Trial Court) (emphasis omitted)

The non-requirement of an AOI is further made evident by the Bid Data Sheet (BDS)⁸⁶ which provides a “**complete list**”⁸⁷ of eligibility proposal documents to be submitted during the first stage of the bidding process. As outlined in the BDS:⁸⁸

TAB	CLASS “A” DOCUMENTS
I. LEGAL DOCUMENTS: (In case of a Joint Venture, each member of the JV shall submit the required Documents mentioned in Tabs “A”, “B”, “C” and “I”)	
A.	Registration Certificate Form Securities and Exchange Commission from the Securities and Exchange Commission (SEC) for Corporation or Partnership; or its equivalent documents in case of foreign bidder. Department of Trade and Industry (DTI) for sole proprietorship; or its equivalent documents in case of foreign bidder. Cooperative Development Authority, for Cooperatives or its equivalent documents in case of foreign bidder.
B.	Mayor’s Permit issued by the city or municipality where the principal place of business of the prospective bidder is located or its equivalent document in case of a foreign corporation.
C.	Tax Clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.
II. TECHNICAL DOCUMENTS	
D.	Statement of all ongoing and completed government and private contracts, within the last six (6) years from the date of submission and receipt of bids, including contracts awarded but not yet started, if any, using the prescribed form. Please refer to Section VIII. Bidding Forms.
E.	Statement of at least one similar completed largest contract within six (6) years from the date of the opening bids equivalent to at least 50% of the ABC, using the prescribed form. Please refer to Section VIII. Bidding Forms.
F.	Bid security in the form, amount and validity in accordance with ITB Clause 18.
III. FINANCIAL DOCUMENTS	
G.	Audited financial statements, stamped received by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from bid submission; or equivalent documents in case of foreign bidder, provided that the same is in accordance with International Financial Reporting Standards.
H.	NFCC Computation in accordance with ITB clause 5.
TAB	CLASS “B” ELIGIBILITY REQUIREMENTS
I.	Valid Joint Venture Agreement (JVA), in case the Joint

⁸⁶ Id. at 254-264.
⁸⁷ Id. at 258.
⁸⁸ Id. at 258-259.

	Venture is already in existence at the time of the submission and opening of bids, OR duly notarized statements from all potential joint venture partners stating that they will enter into and abide by the provisions of the JVA if the bid is successful;
IV. OTHER DOCUMENTS	
J.	Conformity with the Schedule of Requirements and Initial Technical Proposal (approved TOR), as enumerated and specified in Sections VI and VII of the Bidding Documents, using the prescribed form.
K.	Certification from the Election Authority or Election Management Body that the system has demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.
L.	Omnibus Sworn Statement using the prescribed form in Section VIII.

Even the furnished Schedule of Requirements⁸⁹ does not mandate the submission of an AOI:⁹⁰

REQUIREMENTS	CORPORATION/ SP/PARTNERSHIP		JOINT VENTURE	
	PASSED	FAILED	PASSED	FAILED
x x x				
ELIGIBILITY DOCUMENTS				
1. LEGAL DOCUMENTS				
I. Class “A” Documents				
a. Original/Certified true copy of Registration Certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorship, or Cooperative Development Authority (CDA) for Cooperatives or any proof of such registration as stated in the BDS; (In case of a JV, this requirement must be complied with by all the JV partners)				
b. Original/Certified true copy of valid and current Mayor’s/Business Permit/License issued by the city or municipality where the principal place of business of the prospective bidder is located; (In case of a JV, this requirement must be complied with by all the JV partners)				
c. Original/Certified true copy of valid Tax Clearance per Executive Order 398, Series of 2005 (In case of a JV, this requirement must be complied with by all the JV partners)				
2. TECHNICAL DOCUMENTS				
d. Sworn Statement of all its on-going and completed government and				

⁸⁹ Id. at 325-329.
⁹⁰ Id. at 326-328.

private contracts within the last six (6) years prior to the deadline for the submission and opening of bids, including contracts awarded but not yet started, if any. The statement shall include, for each of the contract, the following: x x x				
e. Sworn Statement of the bidder’s single largest contract completed within six (6) YEARS prior to the deadline for the submission and opening of bids, with a value of FIFTY (50%) per cent of the ABC.				
f. The bid security (Payable to COMELEC) shall be in the following amount: x x x				
3. FINANCIAL DOCUMENTS				
g. Audited Financial Statements (AFS), stamped “received” by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year x x x				
h. NFCC computation which shall be based only on the current assets and current liabilities submitted to the BIR, through Electronic Filing and Payment System (EFPS)				
4. OTHERS				
i. Conformity with Section VI: Schedule of Requirements of the Bidding Documents				
j. Conformity with Section VII. Technical Specifications of the Bidding Documents. If proposal is the same with the initial technical requirements, just put “COMPLY”				
k. Certification from the Election Authority or Election management Body that the system has demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.				
l. OMNIBUS AFFIDAVIT in accordance with Section 25.2(a)(iv) of the IRR of RA 9184 and using the form prescribed in Section VIII of the Philippine bidding Documents. Shall include: x x x				

Verily, based on Sec. 23.1(b) of the GPRA IRR, the Instruction to Bidders, the BDS, and the Checklist of Requirements, the non-submission of an AOI is not fatal to a bidder’s eligibility to contract the project at hand. Thus, it cannot be considered as a ground for declaring private respondents ineligible to participate in the bidding process. To hold otherwise would

mean allowing the BAC to consider documents beyond the checklist of requirements, in contravention of their non-discretionary duty under Sec. 30(1) of the GPRA IRR.

b. Neither is the AOI a post-qualification requirement

After the preliminary examination stage, the BAC opens, examines, evaluates and ranks all bids and prepares the Abstract of Bids which contains, among others, the names of the bidders and their corresponding calculated bid prices arranged from lowest to highest. The objective of the bid evaluation is to identify the bid with the lowest calculated price or the Lowest Calculated Bid. The Lowest Calculated Bid shall then be subject to post-qualification to determine its responsiveness to the eligibility and bid requirements.⁹¹

During post-qualification, the procuring entity verifies, validates, and ascertains all statements made and documents submitted by the bidder with the lowest calculated or highest rated bid using a non-discretionary criteria as stated in the bidding documents.⁹² 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.⁹³

To recall, the BAC, on December 15, 2014, declared that only Smartmatic JV and Indra were eligible to participate in the second stage of the bidding process. Of the two, only Smartmatic JV submitted a complete and responsive Overall Summary of the Financial Proposal and was thus subjected to post-qualification evaluation. Initially, the BAC post-disqualified Smartmatic JV for allegedly failing to submit a valid AOI. It is this preliminary finding that petitioners want reinstated.

We disagree.

Even on post-qualification, the submission of an AOI was not included as an added requirement. The Instruction to Bidders pertinently provides:⁹⁴

29. Post-Qualification

29.1. The Procuring Entity shall determine to its satisfaction whether the Bidder that is evaluated as having submitted the Lowest Calculated Bid (LCB) complies with and is responsive to all the requirements and conditions specified in ITB Clauses 5, 12 and 13.

x x x x

⁹¹ *Commission on Audit v. Linkworth International*, supra note 81.

⁹² Sec. 34.3, Revised Implementing Rules and Regulations, R.A. No. 9184.

⁹³ *Commission on Audit v. Linkworth International*, supra note 81.

⁹⁴ *Rollo*, pp. 247-248.

29.3. The determination shall be **based upon an examination of the documentary evidence of the Bidder's qualifications submitted pursuant to ITB Clauses 12 and 13, as well as other information as the Procuring Entity deems necessary and appropriate**, using a non-discretionary "pass/fail" criterion. (emphasis added)

Clauses 12 and 13 of the Instruction to Bidders pertain to the eligibility documents, technical documents, and the financial component of a participant's bid.⁹⁵ Meanwhile, the Clause 5 adverted to is an enumeration of persons or entities who may participate in the bidding.⁹⁶ Nowhere in these clauses does it appear that an AOI is a mandatory requirement even for post-qualification. Even the BAC's March 27, 2015 Notice addressed to Smartmatic JV supports this finding:⁹⁷

x x x [F]or purposes of post-qualification proceedings, please submit copies of the following documents to the Bid and Awards Committee (BAC), through the BAC Secretariat, as stated in Clause 29.2 (a) of Section III, Bid Data Sheet of the Bidding Documents, within three (3) calendar days from receipt of this Notice:

- a) Latest Income and Business Tax Returns. x x x
- b) Certificate of PhilGEPS Registration.
- c) ISO 9001:2008 Certification of the Optical Mark/reader or Optical Scan manufacturer for OMR.

In addition, the following certifications must be submitted:

- a) That all system requirements for customization as stated in the Terms of Reference and RA 9369 shall be fully complied with, subject to the application of applicable penalties for non-compliance; and
- b) That it shall not demand for additional payment from COMELEC to procure additional OMR system requirements during Project Implementation for items that it may have overlooked in its Bid Proposal.

The bidder is also required to submit the machines, including the software and hardware, back-up power supply and other equipment and peripherals necessary for the conduct of the testing during post-qualification, including the prototype sample of the ballot box based on what is required in the Terms of Reference (TOR) for the OMR on April 6, 2015 as per instruction from the Technical Working Group (TWG).

From the foregoing, the inescapable result is that mere failure to file an AOI cannot automatically result in the bidder concerned being declared ineligible, contrary to petitioners' claim.

⁹⁵ Id. at 231-234.

⁹⁶ Id. at 225-226.

⁹⁷ Id. at 447-448.

Smartmatic JV may validly undertake the project sought to be procured

- a. SMTC still has the authority to conduct business even after the conduct of the 2010 national and local elections

A thorough reading of petitioners' contention, however, would show that it is not only assailing Smartmatic JV's ineligibility based on the alleged incompleteness of its documentary requirements(i.e. for non-submission of a valid AOI), but also because they considered the subject of the procurement beyond the ambit of SMTCs corporate purpose. Petitioners postulate that SMTC's authority to conduct business ceased upon fulfillment of its primary purpose stated in its AOI– that of automating the 2010 National and Local Elections, and this allegedly rendered SMTC's subsequent involvement in the subject procurement project an *ultra vires* act.

Petitioners' myopic interpretation of SMTC's purpose is incorrect.

While it is true that SMTC's AOI made specific mention of the automation of the 2010 National and Local Elections as its primary purpose, it is erroneous to interpret this as meaning that the corporation's authority to transact business will cease thereafter. Indeed, the contractual relation between SMTC and the COMELEC has been the subject of prior controversies that have reached the Court, and We have on these occasions held that even beyond the 2010 election schedule, the parties remain to have subsisting rights and obligations relative to the products and services supplied by SMTC to the COMELEC for the conduct of the 2010 polls.

For instance, the Court, in the landmark case of *Capalla v. COMELEC (Capalla)*,⁹⁸ upheld the validity of the March 30, 2012 Deed of Sale by and between SMTC and COMELEC when the latter exercised the option to purchase (OTP) clause embodied in their 2009 Automated Election System Contract (AES Contract). Even though the original deadline for the option was only until December 31, 2010, We ruled that the parties to the AES Contract, pursuant to Art. 19 thereof,⁹⁹ can still validly extend the same by mutual agreement. The Court ratiocinated that Art. 19 of the AES Contract may still be invoked even after December 31, 2010, for the agreement subsisted in view of the COMELEC's failure to return SMTC's performance security, a condition for the contract's termination. As provided under Art. 2 of the AES Contract:¹⁰⁰

⁹⁸ G.R. Nos. 201112 etc., October 23, 2012.

⁹⁹ "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." As cited in *Capalla v. COMELEC*, id.

¹⁰⁰ Id.

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)

Based on Our ruling in *Capalla*, the cessation of SMTC's business cannot be assumed just because the May 10, 2010 polls have already concluded. For clearly, SMTC's purpose—the “automation of the 2010 national and local elections”—is not limited to the conduct of the election proper, but extends further to the fulfillment of SMTC's contractual obligations that spring forth from the AES Contract during the lifetime of the agreement (i.e. until the release of the performance security), and even thereafter insofar as the surviving provisions of the contract are concerned. In other words, regardless of whether or not SMTC's performance security has already been released, establishing even just one surviving provision of the AES Contract would be sufficient to prove that SMTC has not yet completed its purpose under its AOI, toppling petitioners' argument like a house of cards.

Unfortunately for petitioners, one such surviving provision has already been duly noted by the Court in the recent case of *Pabillo v. COMELEC (Pabillo)*.¹⁰¹ In *Pabillo*, the Court cited Art. 8.8 of the AES Contract, which significantly reads:

8.8 If COMELEC opts to purchase the PCOS and Consolidation and Canvassing System (CCS), the following warranty provisions indicated in the RFP shall form part of the purchase contract:

1) For PCOS, **SMARTMATIC shall warrant the availability of parts, labor and technical support and maintenance to COMELEC for ten (10) years, if purchased (Item 18, Part V of the RFP), beginning May 10, 2010.** Any purchase of parts, labor and technical support and maintenance not covered under Article 4.3 above shall be subject to the prevailing market prices at the time and at such terms and conditions as may be agreed upon. (emphasis added)

¹⁰¹ Supra note 60.

Pertinently, We have interpreted the foregoing contractual provision in *Pabillo* in the following wise:¹⁰²

Smartmatic-TIM warrants that its parts, labor and technical support and maintenance will be available to the COMELEC, if it so decides to purchase such parts, labor and technical support and maintenance services, within the warranty period stated, i.e., ten (10) years for the PCOS, reckoned from May 10, 2010, or until May 10, 2020. Article 8.8 skews from the ordinary concept of warranty since it is a mere warranty on availability, which entails a subsequent purchase contract, founded upon a new consideration, the costs of which (unlike in the first warranty) are still to be paid. With Article 8.8 in place, **the COMELEC is assured that it would always have access to a capable parts/service provider in Smartmatic-TIM, during the 10-year warranty period therefor, on account of the peculiar nature of the purchased goods.** (emphasis added)

Indubitably, the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections' inevitable conclusion. Several contractual provisions contained in the 2009 AES Contract, as observed in a review of our jurisprudence, continue to subsist and remain enforceable up to this date. *Pabillo*, in effect, at least guaranteed that SMTC's purpose under its AOI will not be fulfilled until May 10, 2020. Therefore, petitioners' theory—that SMTC no longer has a valid purpose—is flawed. Otherwise, there would be no way of enforcing the subsisting provisions of the contract and of holding SMTC to its warranties after the conduct of the May 10, 2010 elections.

Having resolved the continuity of SMTC's business, We now proceed to determine whether its participation in the bidding process is an authorized or an *ultra vires* act.

b. *The issue is mooted by the subsequent approval of the amendment to SMTC's AOI*

Commissioner Guia, in his dissent, opines that a bidder should be authorized to participate in the bidding as early as the time the pre-qualification was conducted, which in this case was held on December 4, 2014. Thus, the December 10, 2014 approval of SMTC's amended AOI, to Commissioner Guia's mind, cannot cure the alleged vice attending SMTC's submission of its bid, as a partner in Smartmatic JV, for a project that it was, at that time, unauthorized to undertake.

The argument fails to persuade.

As earlier discussed, the function of the BAC, in making an initial assessment as to the eligibility of the bidders during pre-qualification, is ministerial and nondiscretionary. It merely counterchecks the documents submitted by the bidder against the checklist of requirements included in the

¹⁰² Id.

bid documents disseminated by the procuring agency. It cannot consider documents not listed in the checklist for purposes of ascertaining a bidder's eligibility during pre-qualification.

The only time the procuring agency can go beyond the checklist is during post-qualification wherein it is allowed to check to its satisfaction the veracity of the information submitted to it by the bidder. To recall, Sec. 29.3 of the Invitation to Bid provides that on post-qualification, the procuring entity may utilize any **“other information as [it] may deem necessary and appropriate”** in order to test the accuracy of the information provided in the bidder's eligibility documents and bid proposal. In the end, notwithstanding the dispensability of the AOI insofar as compliance with documentary requirements is concerned, the procuring entity may nevertheless consider the same in ultimately determining a bidder's eligibility.

Stated in the alternative, the procuring entity, for purposes of post-qualification, cannot be faulted for, as it is not precluded from, considering information volunteered by the bidder with the highest bid. Bearing in mind the non-discretionary function of the BAC during pre-qualification, it is then understandable that it is only on post-qualification, when it is allowed to consider other documents, during which an extensive inquiry will be made to detect any defect in the bidder's capacity to contract. Hence, even though the submission of an AOI was not required for either pre or post-qualification purposes, the COMELEC and BAC, on post-qualification, may still consider the same in determining whether or not the project is in line with the bidder's corporate purpose, and, ultimately, in ascertaining the bidder's eligibility.

In the case at bar, We take note that during the opening of the bids on December 4, 2014, Smartmatic JV already informed the BAC that SMTC was already in the process of amending its AOI. The contents of the AOI, at that time, were immaterial since the AOI is not an eligibility requirement that can be considered by the BAC on pre-qualification. By post-qualification, however, the time the BAC can validly consider extraneous documents, SMTC's AOI has already been duly amended, and the amendments approved by the SEC on December 10, 2014, for its updated primary purpose to read:¹⁰³

To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

¹⁰³ *Rollo*, p. 549.

Hence, any doubt on SMTC's authorization to continue its business has already been dispelled by December 10, 2014. It matters not that the amendments to the AOI took effect only on that day¹⁰⁴ for as long as it preceded post-qualification.

c. SMTC's participation in the bidding is not an ultra vires act but one that is incidental to its corporate purpose

In any event, there is merit in private respondents' argument that SMTC's participation in the bidding is not beyond its declared corporate purpose; that, in the first place, there was no impediment in SMTC's AOI that could have prevented Smartmatic JV from participating in the project.

To elucidate, an *ultra vires* act is defined under BP 68 in the following wise:

Section 45. *Ultra vires acts of corporations.* – No corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and **except such as are necessary or incidental to the exercise of the powers so conferred.** (emphasis added)

The language of the Code appears to confine the term *ultra vires* to an act outside or beyond express, implied and incidental corporate powers. Nevertheless, the concept can also include those acts that may ostensibly be within such powers but are, by general or special laws, either proscribed or declared illegal.¹⁰⁵ *Ultra vires* acts or acts which are clearly beyond the scope of one's authority are null and void and cannot be given any effect.¹⁰⁶

In determining whether or not a corporation may perform an act, one considers the logical and necessary relation between the act assailed and the corporate purpose expressed by the law or in the charter, for if the act were one which is lawful in itself or not otherwise prohibited and done for the purpose of serving corporate ends or reasonably contributes to the promotion of those ends in a substantial and not merely in a remote and fanciful sense, it may be fairly considered within corporate powers.¹⁰⁷ **The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business, fairly incident to the express**

¹⁰⁴ **Section 16. Amendment of Articles of Incorporation.** – x x x The amendments shall take effect upon their approval by the Securities and Exchange Commission or from the date of filing with the said Commission if not acted upon within six (6) months from the date of filing for a cause not attributable to the corporation.

¹⁰⁵ Concurring opinion of Justice Vitug
<http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html>.

¹⁰⁶ *Gancayco v. City Government of Quezon City*, G.R. Nos. 177807 & 177933, October 11, 2011, 658 SCRA 853.

¹⁰⁷ <http://sc.judiciary.gov.ph/jurisprudence/2000/feb2000/137686_Concur.htm>.

powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not.¹⁰⁸

In the case at bar, notwithstanding the specific mention of the 2010 National and Local Elections in SMTC's primary purpose, it is not, as earlier discussed, precluded from entering into contracts over succeeding ones. Here, SMTC cannot be deemed to be overstepping its limits by participating in the bidding for the 23,000 new optical mark readers for the 2016 polls since upgrading the machines that the company supplied the COMELEC for the automation of the 2010 elections and offering them for subsequent elections is but a logical consequence of SMTC's course of business, and should, therefore, be considered included in, if not incidental to, its corporate purpose. A restricted interpretation of its purpose would mean limiting SMTC's activity to that of waiting for the expiration of its warranties in 2020. How then can the company be expected to subsist and sustain itself until then if it cannot engage in any other project, even in those similar to what the company already performed?

In the final analysis, We see no defect in the AOI that needed to be cured before SMTC could have participated in the bidding as a partner in Smartmatic JV, the automation of the 2016 National and Local Elections being a logical inclusion of SMTC's corporate purpose.

Smartmatic JV cannot be declared ineligible for SMTC's nationality

In a desperate last ditch effort to have Smartmatic JV declared ineligible to participate in the procurement project, petitioners question the nationality of SMTC. They direct the Court's attention to the 2013 Annual Report and Consolidated Financial Statements¹⁰⁹ of Smartmatic Limited to prove that SMTC is 100% foreign owned. They then contend that SMTC is the biggest shareholder in the bidding joint venture at 46.5% share, making the joint venture less than 60% Filipino-owned and, hence, ineligible.

The argument is specious.

Clause 5 of the Instruction to Bidders provides that the following may participate in the bidding process:¹¹⁰

5.1. Unless otherwise provided in the BDS, the following persons shall be eligible to participate in the bidding:

X X X X

¹⁰⁸ Concurring opinion of Justice Vitug in http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html; *see also* http://www.lawphil.net/judjuris/juri1962/may1962/gr_l-15092_1962.html.

¹⁰⁹ *Rollo*, pp. 79-128.

¹¹⁰ *Id.* at 225-226.

(e) Unless otherwise provided in the BDS, persons/entities forming themselves into a JV, i.e., group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a peculiar contract: **Provided, however, that Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%).**

While petitioners are correct in asserting that Smartmatic JV ought to be at least 60% Filipino-owned to qualify, they did not adduce sufficient evidence to prove that the joint venture did not meet the requirement. Petitioners, having alleged non-compliance, have the correlative burden of proving that Smartmatic JV did not meet the requirement, but aside from their bare allegation that SMTC is 100% foreign-owned, they did not offer any relevant evidence to substantiate their claim. Even the 2013 financial statements submitted to Court fail to impress for they pertain to the financial standing of **Smartmatic Limited**,¹¹¹ which is a distinct and separate entity from **SMTC**. It goes without saying that Smartmatic Limited's nationality is irrelevant herein for it is not even a party to this case, and even to the joint venture.

Aside from the sheer weakness of petitioners' claim, SMTC satisfactorily refuted the challenge to its nationality and established that it is, indeed, a Filipino corporation as defined under our laws. As provided in Republic Act No. 7042 (RA 7042), otherwise known as the Foreign Investments Act, a Philippine corporation is defined in the following wise:

Section 3. Definitions. - As used in this Act:

a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; **or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines;** or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national.

In *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*,¹¹² the Court held that the "control test" is the prevailing mode of determining whether or not a corporation is Filipino. Under the "control test," shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be

¹¹¹ Smartmatic International's United Kingdom office.

¹¹² G.R. No. 195580, April 21, 2014.

considered as of Philippine nationality.¹¹³ It is only when based on the attendant facts and circumstances of the case, there is, in the mind of the Court, doubt in the 60-40 Filipino-equity ownership in the corporation, that it may apply the “grandfather rule.”¹¹⁴

Perusing SMTC’s GIS¹¹⁵ proves useful in applying the control test. Upon examination, SMTC’s GIS reveals that it has an authorized capital stock of ₱226,000,000.00, comprised of 226,000,000 common stocks¹¹⁶ at ₱1.00 par value, of which 100% is subscribed and paid.¹¹⁷ The GIS further provides information on the stockholders as follows:¹¹⁸

NAME NATIONALITY AND CURRENT RESIDENTIAL ADDRESS	SHARES SUBSCRIBED				AMOUNT PAID
	TYPE	NUMBER	AMOUNT	% OF OWNERSHIP	
1920 Business Inc. Filipino King’s Court 2, 2129 Don Chino Roces Ave., Makati, Metro Manila	Common	135,599,997	135,599,997.00	60%	677,999,997.00
	“A”				
	TOTAL	135,599,997	135,599,997.00		
Smartmatic International, Corp. Barbadian 4 Stafford House, Garisson St., Michael, Barbados	Common	90,399,998	90,399,998.00	40%	451,999,998.00
	“B”				
	TOTAL	90,399,998	90,399,998.00		
Juan C. Villa, Jr. Filipino No. 74, Jalan Setiabakti, Damansara Heights, Kuala Lumpur	Common	1	1.00	0%	1.00
	“B”				
	TOTAL	1	1.00		
Jacinto R. Perez, Jr. Filipino 1211 Consuelo St., Singalong, Manila	Common	1	1.00		1.00
	“A”				
	TOTAL	1	1.00		
Alastair Joseph James Wells British 1405 Spanish Bay, Bonifacio Ridge, 1 st Avenue, Bonifacio Global City, Taguig	Common	1	1.00	0%	1.00
	“B”				
	TOTAL	1	1.00		
Marian Ivy F. Reyes-Fajardo Filipino 71-B Tindalo St., MonteVista, Subdivision, Marikina	Common	1	1.00	0%	1.00
	“A”				
	Total	1	1.00		
Salvador P. Aque Filipino 2250 P. Burgos, Pasay City	Common	1	1.00	0%	1.00
	“A”				
	Total	1	1.00		

Applying the control test, 60% of SMTC’s 226,000,000 shares, that is 135,600,000 shares, must be Filipino-owned. From the above-table, it is clear that SMTC reached this threshold amount to qualify as a Filipino-owned corporation. To demonstrate, the following are SMTC’s Filipino investors:

¹¹³ Id.; citing DOJ Opinion No. 20 s. 2005.
¹¹⁴ Id.
¹¹⁵ *Rollo*, pp. 567-573.
¹¹⁶ Common stocks are voting shares.
¹¹⁷ *Rollo*, p. 568.
¹¹⁸ Id. at 570.

NAME OF SHAREHOLDER	TYPE OF SHARE	NUMBER OF SHARES
1920 Business Inc.	Common “A”	135,599,997
Juan C. Villa, Jr.	Common “B”	1
Jacinto R. Perez, Jr.	Common “A”	1
Marian Ivy F. Reyes-Fajardo	Common “A”	1
Salvador P. Aque	Common “A”	1
TOTAL		135,600,001

Indeed, the application of the control test would yield the result that SMTC is a Filipino corporation. There is then no truth to petitioners’ claim that SMTC is 100% foreign-owned. Consequently, it becomes unnecessary to confirm this finding through the grandfather rule¹¹⁹ since the test is only employed when the 60% Filipino ownership in the corporation is in doubt.¹²⁰ In this case, not even the slightest doubt is cast since the petition is severely wanting in facts and circumstances that raise legitimate challenges to SMTC’s 60-40 Filipino ownership. The petition rested solely on petitioners’ vague assertions and baseless claims. On the other hand, SMTC countered by furnishing the Court a copy of its GIS providing its shareholders’ stock ownership details, and by submitting a copy of its AOI, which reserved all of SMTC’s 135,600,000 class A common shares to Filipinos¹²¹ in a bid to guarantee that when all of its shares are outstanding, foreign ownership will not exceed 40%.

Anent the nationality of the other joint venture partners, the Court defers to the findings of the COMELEC and the BAC, and finds sufficient their declaration that Smartmatic JV is, indeed, eligible to participate in the bidding process, and is in fact the bidder with the lowest calculated responsive bid.¹²² If petitioners would insist otherwise by reason of Smartmatic JV’s nationality, it becomes incumbent upon them to prove that the aggregate Filipino equity of the joint venture partners—SMTC, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation—does not comply with the 60% Filipino equity requirement, following the oft-cited doctrine that he who alleges must prove.¹²³ Regrettably, one fatal flaw in petitioners’ posture is that they challenged the nationality of SMTC alone, which, after utilizing the control test, turned out to be a Philippine corporation as defined under RA 7042. There was no iota of evidence presented or, at the very least, even a claim advanced that the remaining partners are foreign-owned. There are, in fact, no other submissions whence this Court can inquire as to the nationalities of the other joint venture partners. Hence, there is no other

¹¹⁹ Under the Strict Rule or Grandfather Rule Proper, the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., “grandfathered”) to determine the total percentage of Filipino ownership; see *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*, supra note 112.

¹²⁰ Id. The Grandfather Rule applies only when the 60-40 Filipino-foreign equity ownership is in doubt (i.e., in cases where the joint venture corporation with Filipino and foreign stockholders with less than 60% Filipino stockholdings [or 59%] invests in other joint venture corporation which is either 60-40% Filipino-alien or the 59% less Filipino). Stated differently, where the 60-40 Filipino-foreign equity ownership is not in doubt, the Grandfather Rule will not apply.

¹²¹ *Rollo*, p. 554. Seventh Article in SMTC’s Articles of Incorporation.


¹²² Id. at 26.

¹²³ *Lim v. Equitable PCI Bank*, G.R. No. 183918, January 15, 2014.

alternative for this Court other than to adopt the findings of the COMELEC and the BAC upholding Smartmatic JV's eligibility to participate in the bidding process, subsumed in which is the joint venture and its individual partners' compliance with the nationality requirement.


WHEREFORE, in view of the foregoing, the petition is hereby **DISMISSED** for lack of merit. The June 29, 2015 Decision of the COMELEC *en banc* is hereby **AFFIRMED**.

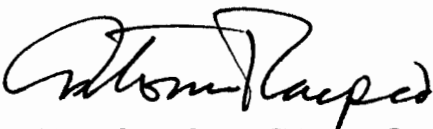
SO ORDERED.

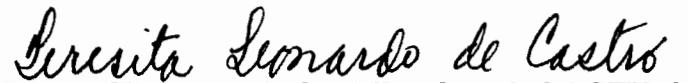


PRESBITERO J. VELASCO, JR.
Associate Justice


WE CONCUR:

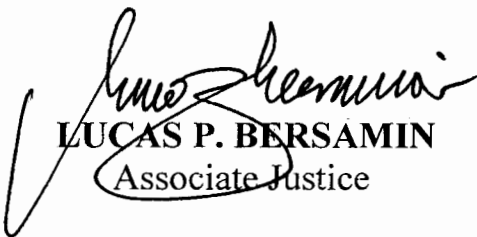

MARIA LOURDES P. A. SERENO
Chief Justice


ANTONIO T. CARPIO
Acting Chief Justice

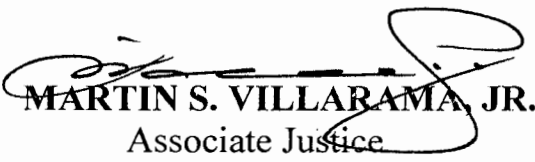

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

(On Official Leave)
ARTURO D. BRION
Associate Justice


DIOSDADO M. PERALTA
Associate Justice


LUCAS P. BERSAMIN
Associate Justice


MARIANO C. DEL CASTILLO
Associate Justice

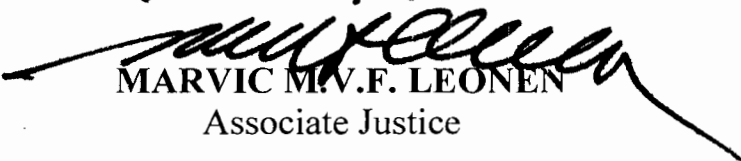

MARTIN S. VILLARAMA, JR.
Associate Justice


JOSE PORTUGAL PEREZ
Associate Justice


JOSE CATRAL MENDOZA
Associate Justice


BIENVENIDO L. REYES
Associate Justice

*I join the separate opinion of
J. Honen
J.P. Hill*
ESTELA M. FERLAS-BERNABE
Associate Justice

*See separate concurring and
dissenting opinion*

MARVIC M.V.F. LEONEN
Associate Justice


FRANCIS H. JARDELEZA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified 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.



MARIA LOURDES P. A. SERENO
Chief Justice

