

EN BANC

G.R. 218787 – LEO Y. QUERUBIN, MARIA CORAZON M. AKOL, and AUGUSTO C. LAGMAN, Petitioners, v. 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.

Promulgated:

December 8, 2015

x-----

[Signature]

CONCURRING and DISSENTING OPINION

LEONEN, J.:

I concur in the result. The original and exclusive jurisdiction over matters pertaining to the administrative actions of the head of a procuring agency is by law vested in the Regional Trial Court. Hence, the Petition should have been dismissed. There is no need to go into the merits of the controversy.

I, therefore, disagree with the ponencia's further statement that valid Articles of Incorporation is not an eligibility requirement in bidding for government projects. The Commission on Elections' (COMELEC) issuance requires this document. A corporation must be disqualified from bidding if it lacks valid Articles of Incorporation on the day it submitted the bid documents. A corporation's Articles of Incorporation determines the limits and extent of its corporate powers. Acts done outside its stated purposes are *ultra vires*.

I

Petitioners Leo Y. Querubin, Maria Corazon M. Akol, and Augusto C. Lagman come to this court through a Petition¹ for certiorari or prohibition

¹ Rollo, pp. 3-54.

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under Rule 64 in relation to Rule 65 of the 1997 Rules of Civil Procedure,² with prayer for the issuance of a temporary restraining order or writ of preliminary injunction. This Petition assails the COMELEC En Banc’s Decision³ dated June 29, 2015.

The COMELEC En Banc granted the Protest of the joint venture of Smartmatic-TIM Corporation (SMTC), Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation (collectively, Smartmatic Joint Venture) relative to the Two-Stage Competitive Bidding for the Lease of Election Management System and Precinct-Based Optical Mark Reader or Optical Scan System (OMR Project).⁴ The COMELEC En Banc also declared Smartmatic Joint Venture as the “bidder with the lowest calculated responsive bid[.]”⁵

II

On October 27, 2014, the bidding documents for the OMR Project were released by the COMELEC Bids and Awards Committee (BAC).⁶ Under the OMR Project, the COMELEC would lease with option to purchase 23,000 new units⁷ of precinct-based Optical Mark Reader or Optical Scan System for the May 9, 2016 elections.⁸

The bidding documents contained the following: an Invitation to Bid setting forth the Approved Budget for Contract amounting to ₱2.5 billion,⁹ and an instruction for interested bidders “to submit eligibility and technical components, which includes an original or certified true copy of its registration certificate from the Securities and Exchange Commission[.]”¹⁰

The deadline for submitting the Initial Technical Proposals and Eligibility Requirements was set on December 4, 2014.¹¹

² Id. at 34.

³ Id. at 61–72. The COMELEC En Banc was composed of Commissioners J. Andres D. Bautista (Chair), Christian Robert S. Lim, Al A. Parreño, Luie Tito F. Guia, Arthur D. Lim, Ma. Rowena Amelia V. Guanzon, and Sheriff M. Abas. Commissioner J. Andres D. Bautista penned a brief Concurring and Dissenting Opinion (Id. at 73). Commissioner Luie Tito F. Guia penned a Separate Opinion (Id. at 74–76). Commissioner Arthur D. Lim participated via telephone and submitted a separate Concurring Opinion (Id. at 77–78). Commissioners Al A. Parreño and Sheriff M. Abas joined Commissioner Arthur D. Lim’s separate Concurring Opinion. Commissioner Ma. Rowena Amelia V. Guanzon abstained.

⁴ Id. at 32, Commissioner Arthur D. Lim’s Memorandum, and 71, COMELEC En Banc Decision.

⁵ Id. at 71, COMELEC En Banc Decision.

⁶ Ponencia, p. 2.

⁷ *Rollo*, p. 61, COMELEC En Banc Decision.

⁸ Id. at 588, COMELEC’s Comment.

⁹ Id. at 167, Smartmatic Joint Venture’s Comment/Opposition. The amount is exactly ₱2,503,518,000.00.

¹⁰ Id. at 168, *citing* Bidding Documents, sec. II, Bid Data Sheet, p. 4.

¹¹ Id.

Smartmatic Joint Venture, Indra Sistemas, S.A. (Indra), and MIRU Systems Co. Ltd. bought Bidding Documents from the COMELEC.¹²

SMTC, the biggest shareholder with 46.5%¹³ shares in the Smartmatic Joint Venture, has in its Articles of Incorporation the following as its primary corporate purpose:

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.¹⁴ (Emphasis supplied)

On November 12, 2014, SMTC adopted amendments to its Articles of Incorporation.¹⁵ Among others, it changed its primary corporate purpose from operating solely for the automation of the 2010 elections¹⁶ to doing the following acts:

To sell, supply, lease, import, export, develop, assemble, repair and deal with the 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.¹⁷

The proposed amendments were pending with the Securities and Exchange Commission for approval.¹⁸

On December 4, 2014, the COMELEC received and opened the bids for prospective OMR Project suppliers.¹⁹ Only Smartmatic Joint Venture

¹² Id.

¹³ Id. at 76, Commissioner Luie Tito F. Guia’s Memorandum.

¹⁴ Id. at 6, Petition.

¹⁵ Id. at 546, Certificate of Filing of [Smartmatic-TIM Corporation’s] Amended Articles of Incorporation.

¹⁶ Id. at 75, Commissioner Luie Tito F. Guia’s Memorandum, which states that “[t]here is no indication that the project was for the automation of any other elections.”

¹⁷ Id. at 549, Amended Articles of Incorporation of Smartmatic-TIM Corporation.

¹⁸ Id. at 546, Certificate of Filing of [Smartmatic-TIM Corporation’s] Amended Articles of Incorporation. The Securities and Exchange Commission approved the proposed amendments only on December 10, 2014.

¹⁹ Id. at 75, Commissioner Luie Tito F. Guia’s Memorandum.

and Indra participated in the opening of bids.²⁰ Meanwhile, the proposed amendments to SMTC's Articles of Incorporation had yet to be acted upon by the Securities and Exchange Commission. Thus, when Smartmatic Joint Venture submitted the required documents, SMTC, its biggest shareholder partner, still contained the automation of the 2010 elections as the latter's primary corporate purpose. Smartmatic Joint Venture informed the BAC, through a sworn Certification, of the Securities and Exchange Commission's pending action on the amendments to the Articles of Incorporation.²¹

On December 10, 2014, six days after the deadline for submission of the bidding documents, the Securities and Exchange Commission approved SMTC's amended Articles of Incorporation.²² Smartmatic Joint Venture and Indra had their initial technical proposals tested on the same day.²³

On December 15, 2014, in its Resolution No. 1, the BAC declared Smartmatic Joint Venture and Indra eligible to proceed to the second stage of bidding.²⁴ The BAC required Smartmatic Joint Venture and Indra to present their Final Revised Technical Tenders and Price Proposals.²⁵

On February 25, 2015, the date set for opening the second envelope, Smartmatic Joint Venture and Indra submitted nonresponsive bids.²⁶ Smartmatic Joint Venture failed to submit a complete financial proposal, while Indra submitted one in excess of the approved budget for the contract.²⁷ They were both disqualified, and the BAC declared a failure of bidding.²⁸

A Motion for Reconsideration was filed by Smartmatic Joint Venture.²⁹ Upon the BAC's denial of the Motion, Smartmatic Joint Venture filed a (First) Protest before the COMELEC En Banc.³⁰

Ruling on the Protest, the COMELEC En Banc suspended on March 26, 2015 the "opening of the Financial Bids and Eligibility Documents for the on-going Second Round of Bidding for the [OMR Project.]"³¹

The BAC then proceeded to the post-qualification evaluation to

²⁰ Id. at 621, Smartmatic Joint Venture's Comment/Opposition.

²¹ Id. at 629.

²² Id. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation. The deadline for submitting the bidding documents was on December 4, 2015.

²³ Id. at 170, Smartmatic Joint Venture's Comment/Opposition.

²⁴ Id.

²⁵ Id. at 171.

²⁶ Id. at 589, COMELEC's Comment.

²⁷ Id. at 894, COMELEC Bids and Awards Committee Resolution No. 4.

²⁸ Id. at 589, COMELEC's Comment.

²⁹ Id.

³⁰ Id.

³¹ Id. at 589–590.

determine whether Smartmatic Joint Venture followed the specifications in the Bidding Documents.³² The BAC sought for additional documents as well as a model unit of Smartmatic Joint Venture's SAES 1800 plus Optical Mark Reader (OMR+).³³ It tested³⁴ the sample OMR+ to determine Smartmatic Joint Venture's compliance with the OMR Project's Terms of Reference.

In its Resolution No. 9 dated May 5, 2015, the BAC post-disqualified the Smartmatic Joint Venture on the following grounds: (1) nonsubmission of the Articles of Incorporation; and (2) failure of the demo unit to comply with the technical requirements (i.e., that the system should have at least two storage devices, and it be capable of simultaneously writing to these devices "all data/files, audit log, statistics and ballot images").³⁵

On May 9, 2015, Smartmatic Joint Venture filed a Motion for Reconsideration before the BAC.³⁶ It sought to conduct a redemonstration of the OMR+ system's compliance with the OMR Project's Terms of Reference.³⁷

On May 12, 2015, Smartmatic Joint Venture conducted the redemonstration before the BAC, BAC-Special Technical Working Group, Information Technology Department, COMELEC En Banc, "and other stakeholders[.]"³⁸

Through its Resolution No. 10 dated May 15, 2015, the BAC partially granted the Motion for Reconsideration:³⁹

Regarding the required legal documents, the BAC declared that the Articles of Incorporation of the Smartmatic Joint Venture partners complied with Section 23.1(b) of the Revised Implementing Rules and Regulations of Republic Act No. 9184, otherwise known as the Government Procurement Reform Act.⁴⁰

In his dissent, however, Commissioner Luie Tito F. Guia (Commissioner Guia) observes that the COMELEC "failed to elaborate on

³² Id. at 590.

³³ Id. at 447-448, COMELEC Bids and Awards Committee Notice dated March 27, 2015, and 605, COMELEC's Comment.

³⁴ Id. at 624-625, Smartmatic Joint Venture's Comment/Opposition.

³⁵ Id. at 62, COMELEC En Banc Decision.

³⁶ Id. at 590, COMELEC's Comment.

³⁷ Id. at 62, COMELEC En Banc Decision.

³⁸ Id. COMELEC En Banc Decision contains a typographical error, stating the date as May 12, 2016 instead of May 12, 2015.

³⁹ Id.

⁴⁰ Id.

[the] reasons”⁴¹ for suddenly reversing itself and finding that Smartmatic-TIM Corporation has “legal capacity . . . to participate in the subject procurement[.]”⁴²

Regarding the required technical documents, the BAC ruled that Smartmatic Joint Venture “remain[ed] post-disqualified”⁴³ due to the OMR+ system’s failure to meet technical specifications in the Terms of Reference.⁴⁴

On May 25, 2015, Smartmatic Joint Venture filed a (Second) Protest before the COMELEC En Banc, “seeking the conduct of another technical demonstration[.]”⁴⁵

On June 16, 2015, in response to the query as to whether BAC requires the “submission of Articles of Incorporation and By-laws of each bidder[.]”⁴⁶ the BAC confirmed the need for each joint venture partner’s Articles of Incorporation,⁴⁷ but not the latter’s by-laws. This is found in its Bid Bulletin No. 5,⁴⁸ to wit:

The [Special Bids and Awards Committee] 1 *requires* the submission of copies of SEC Registration *and Articles of Incorporation* only of *each* bidder, including *partner to the joint venture*, and sub-contractor if already identified by the bidder before the submission and opening of bids.⁴⁹ (Emphasis supplied)

On June 19, 2015, the Technical Evaluation Committee began the technical demonstration of the OMR+ in the Department of Science and Technology, University of the Philippines Diliman Campus.⁵⁰ Engr. Peter Antonio B. Banzon, Chairman of the Technical Evaluation Committee, reported that the “actual simultaneous writing of data”⁵¹ was inconclusive, and that there was a need “to use a specialized test instrument such as a Digital Storage Oscilloscope (DSO) that can access and compare the timing waveforms of electric signals on the inputs of the storage card itself[.]”⁵² He

⁴¹ Id. at 74, Commissioner Luie Tito F. Guia’s Memorandum.

⁴² Id., *citing* COMELEC Bids and Awards Committee Resolution No. 10.

⁴³ Id. at 62, COMELEC En Banc Decision.

⁴⁴ Id.

⁴⁵ Id. at 62–63.

⁴⁶ COMELEC Bids and Awards Committee Bid Bulletin No. 5, Lease with Option to Purchase of Election Management System (EMS) and Precinct-based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System for the 2016 National and Local Elections, Reference No. BAC 01-2014-AES-OMR, June 16, 2015, Query No. 54. <<http://www.comelec.gov.ph/?r=AboutCOMELEC/BidsandAwards/ProcurementProjects/BAC012014AESOMRSecondBidding/BAC012014AESOMRSecondBiddingBidBul5>> (visited December 7, 2015).

⁴⁷ COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.

⁴⁸ COMELEC Bids and Awards Committee Bid Bulletin No. 5.

⁴⁹ COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.

⁵⁰ *Rollo*, p. 63, COMELEC En Banc Decision.

⁵¹ Id.

⁵² Id.

suggested further testing of the system.⁵³

On June 23, 2015, Smartmatic Joint Venture conducted another technical demonstration before the COMELEC En Banc.⁵⁴ The Technical Evaluation Committee submitted its Final Report dated June 24, 2015, finding that Smartmatic Joint Venture complied with the technical requirements.⁵⁵

On June 29, 2015, the COMELEC En Banc granted the Protest of Smartmatic Joint Venture. The dispositive portion reads as follows:

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 [sic] 23,000 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.⁵⁶ (Emphasis in the original)

In his Separate Opinion, COMELEC Chairman J. Andres D. Bautista wrote that “it is still in the best interest of the government that [the COMELEC] proceed with the *opening of the bids* for the procurement of 23,000 units of precinct-based Optical Mark Reader or Optical Scan System on 30 June 2015.”⁵⁷ His statement comes on the heels of the COMELEC’s Decision awarding the bid to Smartmatic Joint Venture.

Commissioner Guia agrees that the COMELEC must review the basis of the award, as having more bidders “would surely be more advantageous to the government.”⁵⁸ Assailing SMTC’s Articles of Incorporation, he states that the COMELEC should “resolve the AOI issue conclusively[.]”⁵⁹ Commissioner Guia adds that the joint venture partner “should be established at the time of the submission of the document, that is[,] on [December 4,] 2014.”⁶⁰

⁵³ Id. at 63–64.

⁵⁴ Id. at 64.

⁵⁵ Id. at 64, 68–71.

⁵⁶ Id. at 71.

⁵⁷ Id. at 73, Commissioner J. Andres D. Bautista’s Memorandum, emphasis supplied.

⁵⁸ Id. at 76, Commissioner Luie Tito F. Guia’s Memorandum.

⁵⁹ Id. at 75.

⁶⁰ Id. at 76.

Aggrieved by the COMELEC En Banc Decision, petitioners filed this Petition for certiorari or prohibition with injunctive relief before this court.

This case concerns both procedural and substantive issues. For the procedural issues, it explores whether petitioners have legal standing and whether this court has jurisdiction to hear the case. For the substantive issues, this case inquires as to whether a valid Articles of Incorporation is a requirement for eligibility to bid.

III

“Suing as taxpayers and registered voters,”⁶¹ petitioners pray that this court annul the Decision of the COMELEC En Banc and issue a writ of preliminary injunction or temporary restraining order against public respondents.⁶² Petitioners allegedly “suffered mortal wounds”⁶³ that only this court can vindicate.⁶⁴ They claim that the case also involves the “imperious necessity”⁶⁵ of preventing COMELEC’s “illega[l] spending [of] public money”⁶⁶ while this Petition is being considered.⁶⁷

Petitioners argue that this case is a proper subject of this court’s jurisdiction.⁶⁸ They state that, pursuant to Rule 64, Section 2 in relation to Rule 65 of the Rules of Court, this court can review on certiorari the Decision of the COMELEC En Banc.⁶⁹ They also invoke the “transcendental importance”⁷⁰ of this case.

On the other hand, public respondent, as represented by the Office of the Solicitor General, alleges that petitioners, not being bidders themselves, lack a “material interest”⁷¹ to pursue this case.⁷² Public respondent further claims that “[p]etitioners do not have a right *in esse* [or] urgent necessity for the grant of injunctive relief.”⁷³

The concept of real party in interest for private suits under Rule 3, Section 2⁷⁴ of the Rules of Court is different from *locus standi* for public suits under the Constitution.

⁶¹ Id. at 51, Petition.

⁶² Id. at 52.

⁶³ Id. at 51

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id. at 34.

⁶⁹ Id.

⁷⁰ Id. at 40.

⁷¹ Id. at 590, COMELEC’s Comment.

⁷² Id.

⁷³ Id. at 614.

⁷⁴ RULES OF COURT, Rule 3, sec. 2 provides:

Locus standi pertains to government actions wherein a person, being a taxpayer or a voter, may suffer injury. In a number of cases,⁷⁵ this court has applied a liberal stance on taxpayer suits where it was shown that the case involves public funds. This is true in this case.

On the matter of jurisdiction, I disagree with the ponencia's statement that "the transcending public importance"⁷⁶ of the case allows for a procedural shortcut to this court.

Transcendental interest is the exception, not the rule.⁷⁷ The transcendental doctrine should not justify a "blatant disregard of procedural rules, [especially if] petitioner[s] had other available remedies[.]"⁷⁸

Section 7 of Article IX-A (Constitutional Commission) of the Constitution states:

SECTION 7 . . . *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 supplied)

We interpreted this to refer to certiorari under Rule 65, and not appeal under Rule 45.⁷⁹ Rule 65 in relation to Rule 64 of the Rules of Court provides for resort to this court from the ruling of the COMELEC En Banc only when there is no other "plain, speedy, and adequate remedy in the ordinary course of law"⁸⁰ to assail the COMELEC's exercise of a quasi-judicial function.

SECTION 2. Parties in Interest. — A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest.

⁷⁵ *Spouses Constantino, Jr. v. Hon. Cuisia*, 509 Phil. 486, 504–505 (2005) [Per J. Tinga, En Banc], *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 896–897 (2003) [Per J. Carpio Morales, En Banc], *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, 450 Phil. 744, 803–804 (2003) [Per J. Puno, En Banc].

⁷⁶ Ponencia, p. 20.

⁷⁷ *Rollo*, p. 599, COMELEC's Comment.

⁷⁸ *Galicto v. H.E. President Aquino III, et al.*, 683 Phil. 141, 169 (2012) [Per J. Brion, En Banc], *citing Concepcion, Jr. v. Commission on Elections*, 609 Phil. 201, 217 (2009) [Per J. Brion, En Banc].

⁷⁹ *Ambil, Jr. v. Commission on Elections*, 398 Phil. 257, 275 (2000) [Per J. Pardo, En Banc].

⁸⁰ RULES OF COURT, Rule 65, sec. 1 provides:

SECTION 1. Petition for Certiorari. — When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

Quasi-judicial power is an administrative agency’s power to “adjudicate the rights of persons before it.”⁸¹ It involves hearing and determining questions of fact and application of the standards laid down by the law to enforce this same law.⁸² The COMELEC Decision dated June 29, 2015 adjudicated the rights of Smartmatic Joint Venture. It was promulgated in pursuit of the COMELEC’s role of procuring election-related supplies and enforcing election-related laws. Batas Pambansa Blg. 881 provides the following:

SECTION 52. Powers and functions of the Commission on Elections. – In addition to the powers and functions conferred upon it by the Constitution, the Commission shall have *exclusive* charge of the *enforcement and administration of all laws relative to the conduct of elections* for the purpose of ensuring free, orderly and honest elections . . . and shall:

. . . .

(h) *Procure any supplies, equipment, materials or services* needed for the holding of the election by public bidding . . .

(i) Prescribe the use or adoption of the latest technological and electronic devices, taking into account the situation prevailing in the area and the funds available for the purpose[.] (Emphasis supplied)

Meanwhile, the Implementing Rules and Regulations (Part A) of Republic Act No. 9184 states that “[d]ecisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity[.]”⁸³

Thus, COMELEC, being the head of the entity for procuring election supplies by public bidding, has quasi-adjudicative powers. To enforce election-related laws, it adjudicates protests relative to the procurement process by applying both the law and the facts of the case.

⁸¹ *DOLE Philippines, Inc. v. Esteva*, 538 Phil. 817, 860 (2006) [Per J. Chico-Nazario, First Division].

⁸² *Id.*

⁸³ Rep. Act No. 9184, Implementing Rules and Regulations Part A, sec. 55.1 provides:
Section 55. Protests on Decisions of the BAC

55.1. Decisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity: Provided, however, That a prior motion for reconsideration should have been filed by the party concerned within the reglementary periods specified in this IRR-A, and the same has been resolved. The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC denying its motion 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.

The ponencia emphasizes that *Macabago v. Commission on Elections*⁸⁴ clarifies Rule 64.⁸⁵ He states that Rule 64 applies only to the judgments of the COMELEC in the exercise of its power to resolve controversies “involving the election, qualification, or the returns of an elective office[,]”⁸⁶ and not “in the exercise of its administrative functions.”⁸⁷

Even assuming that the correct remedy is Rule 65 and not Rule 64 in relation to Rule 65, resort to this court cannot be had if there is another plain, speedy, and adequate remedy.

Petitioners’ remedy lies with the Regional Trial Court. Section 58 of Republic Act No. 9184 provides that the Regional Trial Court has “jurisdiction over final decisions of the head of the procuring entity[,]” which is COMELEC in this case.

SEC. 58. Report 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 decisions of the head of the procuring entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure.

Jurisprudence further solidifies this rule. In *Dimson (Manila), Inc., et al. v. Local Water Utilities Administration*,⁸⁸ this court held that the Regional Trial Court is the proper venue for Rule 65 petitions pertaining to issues on the procurement and bidding process.⁸⁹ Likewise, this court said in *First United Constructors Corporation v. Poro Point Management Corporation (PPMC), et al.*⁹⁰ that, notwithstanding the Regional Trial Court’s concurrent certiorari jurisdiction with that of this court, this court should still refuse to permit an unrestricted freedom to directly seek this court’s intervention when there are other remedies available.⁹¹

In government procurement cases, the decisions of the COMELEC En Banc must be appealed before the Regional Trial Court, which has the power to issue an injunctive writ while the cases are pending before it. As this court held in *Bañez, Jr. v. Judge Concepcion, et al.*:⁹²

⁸⁴ 440 Phil. 683 (2002) [Per J. Callejo, Sr., En Banc].

⁸⁵ Ponencia, pp. 11–12.

⁸⁶ Id. at 12.

⁸⁷ Id. at 11.

⁸⁸ 645 Phil. 309 (2010) [Per J. Peralta, Second Division].

⁸⁹ Id. at 319.

⁹⁰ 596 Phil. 334 (2009) [Per J. Nachura, Third Division].

⁹¹ Id. at 342.

⁹² 693 Phil. 399 (2012) [Per J. Bersamin, First Division].

The strictness of the policy is designed to shield the [Supreme] Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the [Supreme] Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it.⁹³

IV

Petitioners claim that the COMELEC En Banc Decision dated June 29, 2015 “is repugnant to the letter and spirit”⁹⁴ of Republic Act No. 9184 and Batas Pambansa Blg. 68 (Corporation Code).⁹⁵ For petitioners, the COMELEC committed grave abuse of discretion in promulgating its ruling.⁹⁶

Petitioners echo Commissioner Guia’s dissent. First, SMTC’s primary corporate purpose is only for the 2010 national and local elections.⁹⁷ This is the limit of its authority to contract with others.⁹⁸ Second, the COMELEC did not address “satisfactorily”⁹⁹ why it accepted the submission of a document (invalid Articles of Incorporation) in which one of the joint venture partners is ineligible.¹⁰⁰ Petitioners also claim that SMTC committed a material misrepresentation in declaring that it “complies with the equity requirement under Philippine law[.]”¹⁰¹ They assert that SMTC is 100% foreign-owned, based on an annual report.¹⁰²

Meanwhile, the ponencia agrees with public respondent’s arguments that the COMELEC En Banc did not commit grave abuse of discretion for the following reasons: the submission of the Articles of Incorporation is not a criterion for eligibility;¹⁰³ the issue has become moot because the Securities and Exchange Commission already approved the amendments;¹⁰⁴ and SMTC’s secondary purpose and the Corporation Code allow it to participate in the bidding.¹⁰⁵

It appears that in granting private respondent’s protest, the COMELEC acted in reckless disregard of its own bidding rules and procedure.

⁹³ Id. at 412.

⁹⁴ *Rollo*, p. 44, Petition.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id. at 48, Petition, and 75, Commissioner Luie Tito F. Guia’s Memorandum.

⁹⁸ Id. at 45.

⁹⁹ Id. at 48, Petition, and 76, Commissioner Luie Tito F. Guia’s Memorandum.

¹⁰⁰ Id.

¹⁰¹ Id. at 36, Petition.

¹⁰² Id. at 46, *citing* Annual Report and Consolidated financial statements Registration number 07477910 dated 31 December 2013 of Smartmatic Limited.

¹⁰³ Ponencia, pp. 21–30.

¹⁰⁴ Id. at 33–34.

¹⁰⁵ Id. at 35–36.

For the OMR Project, the COMELEC required the submission of the Articles of Incorporation. This is shown in BAC Bid Bulletin No. 5, which respondents and the ponencia fail to mention. BAC Bid Bulletin No. 5 mandates all bidders in the OMR Project, including every joint venture partner, to submit their Articles of Incorporation, to wit:¹⁰⁶

#	Query	Answer
54	<p>Statement: A. Securities [and] Exchange Commission, for Corporation or Partnership; or its equivalent documents in case of foreign bidder.</p> <p>Question: <i>Will BAC still require the submission of Articles of Incorporation</i> and By-laws of each bidder? Section 12A of the [Invitation to Bid] only mentions the SEC registration or any proof of registration. (Emphasis supplied)</p>	<p>The [Special Bids and Awards Committee] 1 <i>requires the submission</i> of copies of SEC Registration and <i>Articles of Incorporation</i> only of each bidder, including partner to the joint venture, and sub-contractor if already identified by the bidder before the submission and opening of bids.</p> <p>Even though, Clause 12.1 of Section II (Instructions to Bidders) of the Bidding Documents mentions only SEC Registration, such requirement is not exclusive and absolute as the same clause gives the BAC a leeway to modify or add the requirement through the Bid Data Sheet (BDS). The clause “<i>unless otherwise stated in the BDS</i>” expressly gives the BAC such authority.¹⁰⁷ (Emphasis supplied)</p>

When SMTC failed to submit its Articles of Incorporation, the COMELEC should have disqualified Smartmatic Joint Venture.

The COMELEC has the power to review a bidder’s lack of eligibility at *any stage* of the procurement process. Section 23.7 (Eligibility Requirements for the Procurement of Goods and Infrastructure Projects) of the Revised Implementing Rules and Regulations of Republic Act No. 9184 and Section 30¹⁰⁸ of the bidding documents provide for this. Section 23.7 of

¹⁰⁶ COMELEC Bids and Awards Committee Bid Bulletin No. 5, Lease with Option to Purchase of Election Management System (EMS) and Precinct-based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System for the 2016 National and Local Elections, Reference No. BAC 01-2014-AES-OMR, June 16, 2015 <<http://www.comelec.gov.ph/?r=AboutCOMELEC/BidsandAwards/ProcurementProjects/BAC012014AESOMRSecondBidding/BAC012014AESOMRSecondBiddingBidBul5>> (visited December 7, 2015).

¹⁰⁷ Id.

¹⁰⁸ *Rollo*, p. 249, COMELEC Bids and Award Committee’s Philippine 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, secs. 30.1 and 30.2(b), which provide:
[Section] 30. Reservation Clause
30.1. Notwithstanding the eligibility or post-qualification of a Bidder, the Procuring Entity concerned reserves the right to review its qualifications at any stage of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility

the Implementing Rules and Regulations states:

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

....

23.7. Notwithstanding the eligibility of a prospective bidder, the procuring entity concerned *reserves the right to review* the qualifications of the bidder at *any stage* of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility requirements, statements or documents, or any changes in the situation of the prospective bidder which will affect the capability of the bidder to undertake the project so that it fails the eligibility criteria, the procuring entity shall *consider the said prospective bidder as ineligible and shall disqualify it from obtaining an award or contract* . . . (Emphasis supplied)

Moreover, this court cannot be estopped by the findings of the BAC or the COMELEC En Banc. When Smartmatic Joint Venture submitted noncompliant legal requirements, there was no basis for the COMELEC to have allowed it to proceed to the next stage of bidding.

SMTC’s transgression is already *fait accompli*, and amending its Articles of Incorporation (by changing its corporate purpose) cannot cure the defect. The Articles of Incorporation is part of the requirements for the issuance of a Certificate of Registration.¹⁰⁹ Thus, for the submitted Certificate of Registration to have been considered valid, the Articles of Incorporation forming part of it should likewise have been valid.

The purpose clause in the Articles of Incorporation “confers, as well as limits, the powers which a corporation may exercise.”¹¹⁰ That way, corporate officers shall know the limits of their actions, shareholders shall be

and bidding requirements, statements or documents, or any changes in the situation of the Bidder which will affect its capability to undertake the project so that it fails the preset eligibility or bid evaluation criteria, the Procuring Entity shall consider the said Bidder as ineligible and shall disqualify it from submitting a bid or from obtaining an award or contract.

30.2. Based on the following grounds, the Procuring Entity reserves the right to reject any and all bids, declare a failure of bidding at any time prior to the contract award, or not to award the contract, without thereby incurring any liability, and make no assurance that a contract shall be entered into as a result of the bidding:

....

(b) If the Procuring Entity’s BAC is found to have failed in following the prescribed bidding procedures[.]

¹⁰⁹ See Registration of Corporations and Partnerships with the SEC <<http://www.sec.gov.ph/cmanual/CITIZENS%20MANUAL%20NO.%202.pdf>> (visited December 7, 2015).

¹¹⁰ SEC OGC Opinion No. 07-14, July 18, 2007 <<http://www.sec.gov.ph/investorinfo/opinions/ogc/cy%202007/07-14.pdf>> (visited December 7, 2015).

informed of the corporation's type of business, and third parties shall know whether the corporation they are transacting with is actually authorized to act or has legal personality to conduct business.

This court cannot grant corporate personality where there previously was none. Acts done beyond the express, implied, and incidental powers of the corporation, as provided for in the law or its Articles of Incorporation, are *ultra vires*.

According to Section 45 of the Corporation Code, “[n]o 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.” It is clear from the provision that the necessary or incidental powers must relate to the express powers conferred by law or the Articles of Incorporation.

“[E]xpress powers cannot be enlarged by implication.”¹¹¹ If a corporate charter's recital of specific powers is followed by a general language, this general language “is construed and confined within the limitations of the specific power named.”¹¹² SMTC has a specific power: The Articles of Incorporation expressly “accord[s] legal personality to [SMTC] for the automation of the 2010 national and local elections[.]”¹¹³ The ensuing general language (as stated in the secondary purpose) which supposedly allows SMTC to “enter into contracts . . . of every kind and description and for any lawful purpose”¹¹⁴ cannot be enlarged to contemplate the OMR Project for the 2016 national and local elections.

Further, while it is true that Section 42 of the Corporation Code allows corporations to invest its funds in another corporation or business, and that SMTC's secondary purpose also provides for this, one must make a distinction between investment of funds (such as in banks, stocks, or money market placements) and active pursuit of business (i.e., bidding for the lease with option to purchase 23,000 new units of the OMR+ system for the 2016 elections).

The corporate charter of SMTC is time-bound, limited, restricted, and specific. Thus, insofar as the 2016 elections are concerned, SMTC was disqualified on the date it submitted the eligibility documents.

By participating in the bidding for the OMR Project, SMTC committed an *ultra vires* act.

¹¹¹ SEC OGC Opinion No. 07-14.

¹¹² *Id.*

¹¹³ *Rollo*, p. 6, Petition.

¹¹⁴ *Id.* at 534, Articles of Incorporation of Smartmatic-TIM Corporation.

The ponencia further asserts that the COMELEC and SMTC maintained their contractual relations after the 2010 election schedule. He states that for this reason, Smartmatic Joint Venture may validly undertake the OMR Project.¹¹⁵

I disagree.

The COMELEC cannot be made to accommodate an ineligible bidder. While there may be legal ties between the COMELEC and SMTC for some of the post-2010 transactions related to the refurbishment of the precinct count optical scan (PCOS) voting machines, this bond of law ends for the OMR Project.

The ponencia cites two cases to show how “the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections[.]”¹¹⁶

In *Archbishop Capalla, et al. v. Commission on Elections*,¹¹⁷ this court upheld the COMELEC’s purchase of the PCOS machines in 2012, which it leased from SMTC for the 2010 elections.¹¹⁸ This was pursuant to the lease with an option-to-purchase clause in the amended Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (2009 Automated Election System Contract).¹¹⁹

In *Pabillo, et al. v. Commission on Elections*,¹²⁰ the 2009 Automated Election System Contract states that SMTC would make available parts, labor, and technical support and maintenance of the PCOS machines to the COMELEC for the next 10 years (10-year warranty), if the latter decides to exercise its option to purchase the PCOS machines.¹²¹

In contrast, the Terms of Reference of the OMR Project do not speak of the leased and purchased 2010 PCOS machines, but of an OMR+ with new and different specifications, for use specifically in the 2016 elections. The 2009 Automated Election System Contract cannot be unduly stretched to contemplate the OMR Project.

¹¹⁵ Ponencia, pp. 30–33.

¹¹⁶ Id. at 33.

¹¹⁷ 687 Phil. 617 (2012) [Per J. Peralta, En Banc].

¹¹⁸ Id. at 663–664.

¹¹⁹ Id. at 665.

¹²⁰ G.R. No. 216098, April 21, 2015
<<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/april2015/216098.pdf>> [Per J. Perlas-Bernabe, En Banc].

¹²¹ Id. at 31.

SMTC's authority to bid for the 2016 elections was determined on December 4, 2015, the date of submission of its legal documents. Section 25 of Republic Act No. 9184 provides that bid documents "submitted after the deadline shall not be accepted." Neither may the bid documents be modified after the deadline for submission of bids.¹²²

The party that sleeps on its rights necessarily suffers the consequences of its own inaction. SMTC, the company that won the bidding for the automation of the 2010 elections, sought to amend its primary corporate purpose only *two weeks after* the Invitation to Bid for the 2016 elections had been released.¹²³ Being slow to act, SMTC has no one to blame but itself for submitting its amended Articles of Incorporation *six days after deadline*. A seasoned business enterprise such as SMTC is expected to exercise prudence in conducting its corporate affairs.

A corporation cannot amend its Articles of Incorporation without the state's consent. Thus, the effects of the amendment do not retroact to December 4, 2014.

During post-qualification, the BAC validated and ascertained whether the documents Smartmatic Joint Venture submitted on December 4, 2014 complied with the required bidding documents. On May 5, 2015, the BAC answered negatively, thus, disqualifying Smartmatic Joint Venture. Ten days after, however, the BAC reversed itself without adequate explanations. Pursuant to the Implementing Rules and Regulations of Republic Act No. 9184, the COMELEC En Banc should have exercised its all-encompassing right to review the qualifications of the partners in the Smartmatic Joint Venture, notwithstanding any previous declaration of eligibility.

SMTC has the biggest equity share in the Smartmatic Joint Venture. SMTC's ineligibility militates against the qualifications of the Smartmatic Joint Venture. The acts of a joint venture partner bind the joint venture itself.

V

Petitioners failed to present any evidence relating to the nationality of the owners of the corporations. The only proof they showed was the

¹²² *Rollo*, p. 242, COMELEC Bids and Award Committee's Philippine 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.

¹²³ Sixteen days from October 27, 2014, when COMELEC released the eligibility requirements, to November 12, 2014, when SMTC adopted the amendments for approval of the Securities and Exchange Commission.

financial report¹²⁴ of Smartmatic Limited, which is not a party to this case. Only SMTC and Smartmatic International Holding B.V. are partners in the Smartmatic Joint Venture. Respondents, on the other hand, presented SMTC's General Information Sheet,¹²⁵ showing that Smartmatic Joint Venture is Filipino-owned, not foreign-owned. In any case, the law allows the COMELEC to procure from foreign sources. Thus:

SECTION 12. *Procurement of Equipment and Materials.* — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from *local or foreign sources* free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad.¹²⁶ (Emphasis supplied)

ACCORDINGLY, for the reasons stated, I vote to **DISMISS** this Petition.


MARVIC M. V. LEONEN
Associate Justice

¹²⁴ *Rollo*, pp. 79–133.

¹²⁵ *Id.* at 1023.

¹²⁶ Rep. Act No. 8436 (1997), sec. 8, as amended by Rep. Act No. 9369, sec. 10.