



**Republic of the Philippines  
Supreme Court  
Baguio City**

**EN BANC**

<p><b>BISHOP BRODERICK S. PABILLO, DD, PABLO R. MANALASTAS, JR., PhD, MARIA CORAZON AKOL, CONCEPCION B. REGALADO, HECTOR A. BARRIOS, LEO Y. QUERUBIN, AUGUSTO C. LAGMAN, FELIX P. MUGA, II, PhD, ATTY. GREGORIO T. FABROS, EVITA L. JIMENEZ, and JAIME DL CARO, PhD,</b> Petitioners,</p>	<p><b>G.R. No. 216098</b></p>
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- versus -

**COMMISSION ON ELECTIONS, EN BANC, represented by Acting Chairperson CHRISTIAN ROBERT S. LIM, and SMARTMATIC-TIM CORPORATION, represented by Smartmatic Asia-Pacific President CESAR FLORES,**  
Respondents.

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<p><b>INTEGRATED BAR OF THE PHILIPPINES,</b> Petitioner,</p>	<p><b>G.R. No. 216562</b></p>
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Present:

- versus -

<p><b>COMMISSION ON ELECTIONS, represented by its</b></p>	<p><b>SERENO, C.J. CARPIO, VELASCO, JR.,</b></p>
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**Acting Chairperson ROBERT S. LIM, and SMARTMATIC-TIM CORPORATION,**

Respondents.

LEONARDO-DE CASTRO,  
BRION,  
PERALTA,  
BERSAMIN,  
DEL CASTILLO,  
VILLARAMA, JR.,  
PEREZ,  
MENDOZA,  
REYES,  
PERLAS-BERNABE,  
LEONEN, and  
JARDELEZA, JJ.

Promulgated:

April 21, 2015

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## DECISION

**PERLAS-BERNABE, J.:**

*“Procurement of electoral services and goods constitutes a major part of the organisation of elections in terms of planning, costs and implementation (purchasing and distribution). Integrity and transparency is thus essential; lack of integrity in the purchasing system may put the legitimacy of the whole electoral exercise at risk.”<sup>1</sup>*

Before this Court are consolidated petitions for *certiorari* and prohibition<sup>2</sup> assailing respondent the Commission on Elections’ (COMELEC) Resolution No. 9922<sup>3</sup> dated December 23, 2014, which approved<sup>4</sup> a direct contracting arrangement with respondent Smartmatic-TIM Corporation (Smartmatic-TIM) for the diagnostics, maintenance, repair, and replacement of the COMELEC’s Precinct Count Optical Scan

<sup>1</sup> “*Procurement Aspects of Introducing ICT Solutions in Electoral Processes: The Specific Case of Voter Registration.*” Published by the Joint European Commission-United Nations Development Programme task Force on Electoral Assistance (2010). <<http://www.ec-undp-electoralassistance.org/images/operational%20paper.pdf>> (visited March 30, 2015).

<sup>2</sup> Both with prayers for the issuance of a writ of preliminary injunction. *Rollo* (G.R. No. 216098), Vol. I, pp. 3-46; and *rollo* (G.R. No. 216562), Vol. I, pp. 3-29.

<sup>3</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 729-738; and *rollo* (G.R. No. 216562), Vol. I, pp. 33-42.

<sup>4</sup> In the Summary of Votes five out of the seven COMELEC Commissioners, *i.e.*, Chairman Sixto B. Brillantes, Jr., and Commissioners Lucenito N. Tagle, Elias R. Yusoph, Christian Robert S. Lim, and Al A. Parreño (with Separate Opinion), voted for the approval of Smartmatic’s PCOS Extended Warranty Contract (Program 1). Commissioners Arthur D. Lim and Luie Tito F. Guia dissented. See *rollo* (G.R. No. 216098), Vol. I, p. 739; and *rollo* (G.R. No. 216562), Vol. I, p. 43.

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(PCOS) machines, as well as the resulting contract thereof, the Extended Warranty Contract (Program 1)<sup>5</sup> dated January 30, 2015.

### The Facts

In 1997, Congress enacted Republic Act No. (RA) 8436,<sup>6</sup> which authorized the COMELEC “to use an automated election system [(AES)] x x x for the process of voting, counting of votes and canvassing/consolidation of results [for the May 11, 1998] national and local elections,”<sup>7</sup> as well as for subsequent national and local electoral exercises. To achieve this purpose, the COMELEC was “to procure by purchase, lease or otherwise any supplies, equipment, materials[,] and services needed for the holding of the elections by an expedited process of public bidding of vendors, suppliers or lessors.”<sup>8</sup> RA 8436 further provided that the AES “shall be under the exclusive supervision and control of the [COMELEC].”<sup>9</sup>

RA 9369,<sup>10</sup> signed into law on January 23, 2007, later amended RA 8436 and was passed “to encourage transparency, credibility, fairness, and accuracy of elections.” Thereunder, “the mandate and authority of the [COMELEC] to prescribe the adoption and use of the most suitable technology of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose”<sup>11</sup> were explicitly recognized. RA 9369 authorized the COMELEC “to use an [AES] or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes[,] and canvassing/consolidation and transmittal of results of electoral exercises,”<sup>12</sup> and for such purpose, “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.”<sup>13</sup>

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<sup>5</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 593-604; and *rollo* (G.R. No. 216562), Vol. I, pp. 57-68.

<sup>6</sup> Entitled “AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES” (December 22, 1997).

<sup>7</sup> RA 8436, Section 6.

<sup>8</sup> *Id.*

<sup>9</sup> RA 8436, Section 26.

<sup>10</sup> Entitled “AN ACT AMENDING REPUBLIC ACT NO. 8436, ENTITLED ‘AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, TO ENCOURAGE TRANSPARENCY, CREDIBILITY, FAIRNESS AND ACCURACY OF ELECTIONS, AMENDING FOR THE PURPOSE’ BATAS PAMBANSA BLG. 881, AS AMENDED, REPUBLIC ACT NO. 7166 AND OTHER RELATED ELECTIONS LAWS, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES” (January 23, 2007).

<sup>11</sup> RA 8436, as amended by RA 9369, Section 1.

<sup>12</sup> RA 8436, as amended by RA 9369, Section 5.

<sup>13</sup> RA 8436, as amended by RA 9369, Section 12.

On March 18, 2009, the COMELEC published a Request for Proposal (RFP)<sup>14</sup> for the public bidding of the lease with option to purchase of an AES to be used in the May 10, 2010 Automated Synchronized National and Local Elections.<sup>15</sup> Item No. 18, Part V<sup>16</sup> of the 2009 RFP states that “[t]he winning bidder shall assure the availability of parts, labor, and technical support and maintenance to the COMELEC for the duration of this [p]roject and for the next ten (10) years should the COMELEC opt to purchase the system after the lease period.”<sup>17</sup>

On June 9, 2009, the COMELEC *En Banc*, in Resolution No. 8608,<sup>18</sup> resolved to approve the report/recommendation of the COMELEC Special Bids and Awards Committee (SBAC) dated June 3, 2009, confirming Smartmatic-TIM – a joint venture company formed by Smartmatic International Corporation (Smartmatic) and Total Information Management Corporation (TIM) – as “the bidder with the ‘Lowest Calculated Responsive Bid’ [LCRB] and to award the contract for the automation of the elections on May 10, 2010 to the said joint venture.”<sup>19</sup>

On July 10, 2009, COMELEC and Smartmatic-TIM executed the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections<sup>20</sup> (2009 AES Contract). The 2009 AES Contract pertinently provides that “in the event that [the] COMELEC exercises its option to purchase [(OTP)] the Goods x x x,”<sup>21</sup> until December 31, 2010:<sup>22</sup> **(1)** the COMELEC “shall pay [Smartmatic-TIM] an additional amount of [□2,130,635,048.15]”;<sup>23</sup> **(2)** “a warranty shall be required in order to assure that: [a] manufacturing defects shall be corrected; and/or [b] replacements shall be made by [Smartmatic-TIM], for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment, after performance of this Contract”;<sup>24</sup> and **(3)** for the “PCOS, [Smartmatic-TIM] shall warrant the availability of parts, labor and technical support and maintenance to [the] COMELEC for ten (10) years, if purchased, x x x beginning May 10, 2010.”<sup>25</sup>

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<sup>14</sup> *Rollo* (G.R. No. 216098), Vol. II, pp. 848-905; and *rollo* (G.R. No. 216562), Vol. II, pp. 512-569.

<sup>15</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 773; and *rollo* (G.R. No. 216562), Vol. II, p. 461.

<sup>16</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 881; and *rollo* (G.R. No. 216562), Vol. II, p. 545.

<sup>17</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 773; and *rollo* (G.R. No. 216562), Vol. II, p. 461.

<sup>18</sup> *Rollo* (G.R. No. 216098), Vol. II, pp. 906-907; and *rollo* (G.R. No. 216562), Vol. II, pp. 570-571. Signed by Chairman Jose A.R. Melo, and Commissioners Rene V. Sarmiento, Nicodemo T. Ferrer, Lucenito N. Tagle, and Armando C. Velasco.

<sup>19</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 907; and *rollo* (G.R. No. 216562), Vol. II, p. 571.

<sup>20</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 666-703; and *rollo* (G.R. No. 216562), Vol. II, pp. 572-596.

<sup>21</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 673; and *rollo* (G.R. No. 216562), Vol. II, p. 579.

<sup>22</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 677; and *rollo* (G.R. No. 216562), Vol. II, p. 583.

<sup>23</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 673; and *rollo* (G.R. No. 216562), Vol. II, p. 579.

<sup>24</sup> *Id.*

<sup>25</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 680; and *rollo* (G.R. No. 216562), Vol. II, p. 586.

The COMELEC was able to implement for the first time the AES on a nationwide scale during the May 10, 2010 Synchronized National and Local Elections.<sup>26</sup>

On September 23, 2010, the COMELEC partially exercised the OTP when it purchased 920 units of PCOS machines with the corresponding canvassing/consolidation system (CCS) for the special elections in certain areas in Basilan, Lanao del Sur, and Bulacan.<sup>27</sup> The option period was thereafter extended several times<sup>28</sup> and on March 21, 2012, the COMELEC *En Banc* issued Resolution No. 9376<sup>29</sup> approving the full exercise of the OTP.<sup>30</sup> Thus, on March 30, 2012, the COMELEC and Smartmatic-TIM executed a Deed of Sale<sup>31</sup> (2012 Deed of Sale) for the remaining PCOS and CCS machines, which the COMELEC used during the May 13, 2013 Synchronized National and Local Elections.<sup>32</sup> Item 9 of the 2012 Deed of Sale states that the warranties under Articles 4 and 8 of the 2009 AES Contract are incorporated and that “pursuant to Article 4.3 of the [2009] AES Contract, the PCOS machines will be covered by a one (1) year warranty commencing from the acceptance by the [COMELEC] during the [Hardware Acceptance Test (HAT)] for every batch of 20,000 units as evidenced by the date of the Delivery Receipt; *Provided*, that no warranty period will expire earlier than 31 May 2013.”<sup>33</sup>

Prior to the scheduled May 13, 2013 Synchronized National and Local Elections, petitioners in the consolidated cases of *Capalla v. COMELEC*<sup>34</sup> (*Capalla*) challenged the validity and constitutionality of Resolution No. 9376. They further prayed for the issuance of a temporary restraining order (TRO) enjoining the implementation of the 2012 Deed of Sale, which the Court granted in a Resolution dated April 24, 2012. Nevertheless, the Court, in a Decision dated June 13, 2012, ruled in favor of the COMELEC, finding that the latter properly exercised its OTP, despite the extended period therefor, and, accordingly, declared the 2012 Deed of Sale legal and valid.<sup>35</sup>

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<sup>26</sup> See *rollo* (G.R. No. 216098), Vol. I, p. 774; and *rollo* (G.R. No. 216562), Vol. II, p. 462.

<sup>27</sup> See Whereas clause of the 2012 Deed of Sale; *rollo* (G.R. No. 216098), Vol. I, p. 705. See also *rollo* (G.R. No. 216562), Vol. I, p. 83.

<sup>28</sup> See *Capalla v. COMELEC*, G.R. Nos. 201112, 201121, 201127, and 201413, June 13, 2012, 673 SCRA 1, 39.

<sup>29</sup> Not attached to the records.

<sup>30</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 343; and *rollo* (G.R. No. 216562), Vol. I, p. 83.

<sup>31</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 704-709 and Vol. II, pp. 933-938; and *rollo* (G.R. No. 216562), Vol. I, pp. 396-401.

<sup>32</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 343-344; and *rollo* (G.R. No. 216562), Vol. I, pp. 83-84 and Vol. II, p. 462.

<sup>33</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 707 and Vol. II, p. 936; and *rollo* (G.R. No. 216562), Vol. I, p. 399.

<sup>34</sup> *Supra* note 28.

<sup>35</sup> *Id.*

On November 11, 2013, the COMELEC received from Smartmatic-TIM a proposal letter<sup>36</sup> to “extend the warranty” of the PCOS machines for three (3) years.<sup>37</sup> The proposal covered labor, preventive maintenance, diagnostics, repair and/or replacement of parts from 2014 to 2016.<sup>38</sup> A more detailed version of the said proposal was sent by Smartmatic-TIM to the COMELEC on November 19, 2013.<sup>39</sup>

In its Resolution No. 2014-002<sup>40</sup> dated August 13, 2014, the COMELEC Advisory Council (CAC)<sup>41</sup> recommended, among others, the re-use of the existing technology for the upcoming 2016 Elections.<sup>42</sup> The CAC also recommended that the COMELEC seriously consider the use of multiple or mixed technologies to promote interoperability and encourage innovative solutions, as well as engaging one or more secondary technologies, which shall be likewise selected through open public bidding.<sup>43</sup>

The CAC’s technology recommendations were adopted “in general” by the COMELEC in its Minute Resolution No. 14-0628<sup>44</sup> dated August 29, 2014.<sup>45</sup> Negotiations between the COMELEC and Smartmatic-TIM thereafter ensued<sup>46</sup> and on October 30, 2014, Commissioner Christian Robert S. Lim (Commissioner Christian Lim), who was the authorized negotiator for the COMELEC and the Chairperson of the Steering Committee,<sup>47</sup> submitted to the COMELEC’s Law Department the Final Extended Warranty Proposal<sup>48</sup> of Smartmatic-TIM for review.<sup>49</sup>

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<sup>36</sup> See Proposal for Extended Warranty of PCOS Machines, Central Servers and Network Equipment dated November 8, 2013. *Rollo* (G.R. No. 216098), Vol. I, pp. 535-537; and *rollo* (G.R. No. 216562), Vol. I, pp. 200-202.

<sup>37</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 344 and Vol. II, p. 775; and *rollo* (G.R. No. 216562), Vol. I, p. 84 and Vol. II, p. 463.

<sup>38</sup> *Id.*

<sup>39</sup> See Proposal for Extended Warranty of PCOS Machines, Central Servers and Network Equipment dated November 19, 2013. *Rollo* (G.R. No. 216098), Vol. I, pp. 538-542; and *rollo* (G.R. No. 216562), Vol. I, pp. 204-208.

<sup>40</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 711-714; and *rollo* (G.R. No. 216562), Vol. II, pp. 604-607.

<sup>41</sup> Under Section 9 of RA 8436, as amended by RA 9369, the CAC is tasked to provide “advice and assistance in the identification, assessment and resolution of systems problems or inadequacies as may surface or resurface in the course of the bidding, acquisition, testing, operationalization, re-use, storage or disposition of the AES equipment and/or resources as the case may be.”

<sup>42</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 775; and *rollo* (G.R. No. 216562), Vol. II, p. 463.

<sup>43</sup> See *rollo* (G.R. No. 216098), Vol. I, p. 712; and *rollo* (G.R. No. 216562), Vol. II, p. 605.

<sup>44</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 715-718; and *rollo* (G.R. No. 216562), Vol. II, pp. 608-611.

<sup>45</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 776; and *rollo* (G.R. No. 216562), Vol. II, p. 464.

<sup>46</sup> *Id.*

<sup>47</sup> See *rollo* (G.R. No. 216098), Vol. I, p. 729; and *rollo* (G.R. No. 216562), Vol. I, p. 33.

<sup>48</sup> See *rollo* (G.R. No. 216098), Vol. II, pp. 948-959; and *rollo* (G.R. No. 216562), Vol. II, pp. 612-623.

<sup>49</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 348 and Vol. II, p. 776; and *rollo* (G.R. No. 216562), Vol. I, p. 87 and Vol. II, p. 464.

On November 4, 2014, the COMELEC's Law Department issued a memorandum,<sup>50</sup> with subject heading "Review of the Draft Contract for the 2014 Extension to the Warranty (Program 1); Repair and Maintenance of the Precinct Count Optical Scan (PCOS) Machines." In the said memorandum, the COMELEC's Law Department stated that it was not provided with the copies of the annexes of the draft contract and, thus, was constrained to limit its review only on the general provisions and structure thereof, excluding the activities and negotiations conducted in the acquisition of the subject services.<sup>51</sup> Furthermore, it mentioned that prior to its review of the Final Extended Warranty Proposal, a similar proposal for the "refurbishment/preventive maintenance/extended warranty/program updates of the PCOS machines," also from Smartmatic-TIM, was submitted for its review on June 13, 2014 specifically on the aspect of procuring the same services through direct contracting under RA 9184,<sup>52</sup> otherwise known as the Government Procurement Reform Act (GPRA).<sup>53</sup> Therein, it stressed that the procedure for direct contracting shall only be applied *if* the conditions to resort to the method are present or complied with, and that the Bids and Awards Committee (BAC) and the COMELEC's Information Technology Department (ITD) should first determine and confirm if indeed Smartmatic-TIM is the sole provider of the services to be procured or otherwise the only entity capable of executing such project, to the exclusion of others, as well as if the ITD itself, given sufficient manpower, budget, and resources, will be able to conduct the same.<sup>54</sup> In this relation, it noted that the previous Smartmatic-TIM proposal was similar to the current one<sup>55</sup> and, thus, gave the same recommendation to the subject contract under review. Based on its understanding, it remarked that the ITD personnel were in the process of conducting routine and preventive maintenance of the PCOS machines (which were stored at the Cabuyao warehouse) in order to maintain satisfactory operating condition by providing for systematic inspection, detection, and correction of incipient failures either before they occur or before they develop into major defects, as well as to prevent faults from occurring by conducting a battery of maintenance tests, measurements, adjustments, and parts replacement, if necessary.<sup>56</sup> As such, it opined that the conduct of repair was premature, considering that the units requiring repair, if any, was yet to be determined.<sup>57</sup> The same was said of the replacement servers and network equipment, as well as of the need to update the MTD<sup>58</sup> modem firmware, which were yet to be evaluated.<sup>59</sup> Finally, the COMELEC's Law Department drew attention to Item No. 8, Part V of the

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<sup>50</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 548-556; and *rollo* (G.R. No. 216562), Vol. I, pp. 227-235. Issued by Director IV Atty. Esmeralda Amora Ladra CEO, VI, CESO IV.

<sup>51</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 548; and *rollo* (G.R. No. 216562), Vol. I, p. 227.

<sup>52</sup> Entitled "AN ACT PROVIDING FOR THE MODERNIZATION, STANDARDIZATION AND REGULATION OF THE PROCUREMENT ACTIVITIES OF THE GOVERNMENT AND FOR OTHER PURPOSES" (RA 9184 was approved on January 10, 2003 and took effect on January 26, 2003).

<sup>53</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 548; and *rollo* (G.R. No. 216562), Vol. I, p. 227.

<sup>54</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 549; and *rollo* (G.R. No. 216562), Vol. I, p. 228.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Not defined in the records.

<sup>59</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 549; and *rollo* (G.R. No. 216562), Vol. I, p. 228.

2009 RFP, which provides that all proposals for the AES procurement project require an extensive training and education program on the preparation of election systems, counting and canvassing systems and transmission systems for technical personnel, as well as for repair, troubleshooting, tuning up and maintenance of machines and electronic transmission facility.<sup>60</sup> In this regard, the COMELEC's Law Department stated that since the AES procurement project must necessarily form part of the 2009 AES Contract, Smartmatic-TIM must train the COMELEC's technical personnel specifically on the foregoing respects.<sup>61</sup>

These notwithstanding, the COMELEC *En Banc*, in its **Resolution No. 9922**<sup>62</sup> dated **December 23, 2014 (Resolution No. 9922)**, approved Program 1 of Smartmatic-TIM's PCOS Extended Warranty Proposal amounting to ₱300,000,000.00, exclusive of Value-Added Tax (VAT), through direct contracting, in view of the following reasons:

First, time is of the essence in the preparation for the May 9, 2016 National and Local Elections such that the Commission and the Bids and Awards Committee are constrained by the tight time schedule if public bidding are to be conducted in the refurbishment and/or repair of the machines considering all the procurement activities lined up.<sup>63</sup>

Second, to give the refurbishment and/or the repair of the PCOS Machines to any third party provider other than SMARTMATIC, the original manufacturer will be too great a risk considering the highly technical nature of the refurbishment and/or the repair to be conducted on the machines.<sup>64</sup>

Third, given that no public bidding will be conducted, it is still legal under RA 9184 for the COMELEC to resort to direct contracting in the present case.<sup>65</sup>

The Extended Warranty Contract meets the requirements of the procurement law on direct contracting, particularly,

- a) The goods procured are of propriety nature, which can be obtained only from the proprietary source of the PCOS licensed technologies and from the exclusive manufacturer, which in the case of the PCOS is SMARTMATIC.
- b) The procurement of critical component of the AES solution from SMARTMATIC-TIM is a condition precedent to hold it to guarantee the project performance in accordance with the provisions of the contract.

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<sup>60</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 551-552; and *rollo* (G.R. No. 216562), Vol. I, pp. 230-231.

<sup>61</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 552; and *rollo* (G.R. No. 216562), Vol. I, p. 231.

<sup>62</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 729-738; and *rollo* (G.R. No. 216562), Vol. I, pp. 33-42.

<sup>63</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 731. See also *rollo* (G.R. No. 216562), Vol. I, p. 35.

<sup>64</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 733. See also *rollo* (G.R. No. 216562), Vol. I, p. 37.

<sup>65</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 734. See also *rollo* (G.R. No. 216562), Vol. I, p. 38.



- c) The PCOS is exclusively manufactured in the Philippines by SMARTMATIC, which does not have sub-dealers and there is no direct substitute for the product.<sup>66</sup>

Last, the proposed extended warranty that is a part of the 2009 AES Contract – which was a product of a validly conducted public bidding – is still valid and enforceable.<sup>67</sup>

The COMELEC further pointed that it was constrained to pursue a direct contracting arrangement with Smartmatic-TIM for the re-use of the existing technology since its proposed budget for the purchase of all new technology was rejected.<sup>68</sup>

After negotiations by the parties, the contract amount was reduced to ₱240,000,000.00, exclusive of VAT, and the scope of work expanded to include all major repairs and replacement of irreparable units, up to four percent (4%) of all inventoried PCOS machines.<sup>69</sup>

On January 30, 2015, the COMELEC and Smartmatic-TIM entered into the **Extended Warranty Contract (Program 1)**,<sup>70</sup> whereby Smartmatic-TIM undertook the following during a five (5)-month period: (a) accomplish a physical inventory count of all the 81,896 PCOS machines with the authorized COMELEC representatives ensuring, among others, that the serial numbers are properly recorded and annotated in the Inventory List of the COMELEC; (b) complete a full diagnostic of every PCOS machine in accordance with the Diagnostic Program; (c) examine each PCOS machine to determine the required refurbishment to bring them back to working condition; (d) perform a full Preventive Maintenance Program<sup>71</sup> of every PCOS machine; (e) perform all repairs and replacements of the defective components; and (f) provide replacement units for those PCOS machines that are irreparable, up to a maximum of four percent (4%) of the total number of PCOS machines after the inventory count by both parties. The following were, however, excluded from the scope of work: (a) those PCOS machines that are unavailable during the five (5) month period of the Program or those units beyond the four percent (4%) cap; (b) those cosmetic changes or refinishing of the machines or furnishing of the machines or furnishing supplies for such purposes, or making specification changes; and (c) those PCOS machines, where persons or entities other than Smartmatic-TIM authorized representative, performed maintenance or repair services, as

<sup>66</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 734-735. See also *rollo* (G.R. No. 216562), Vol. I, pp. 38-39.

<sup>67</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 736. See also *rollo* (G.R. No. 216562), Vol. I, p. 40 and Vol. II, pp. 465-466.

<sup>68</sup> *Rollo* (G.R. No. 216562), Vol. II, p. 495. The proposed budget for the new technology at ₱18,436,416,378.00 was reduced to ₱16,814,910,000.00.

<sup>69</sup> *Rollo* (G.R. No. 216562), Vol. II, p. 466.

<sup>70</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 593-603.

<sup>71</sup> Preventive Maintenance procedures include: (1) checking of the completeness of the peripherals of the PCOS; (2) running the diagnostic program of the PCOS to verify if there are functionalities in the system that will fail; (3) opening of the PCOS cover and cleaning of the dust of the inside parts of the unit; and (4) closing of the PCOS cover and re-executing the diagnostic program of the PCOS. See *rollo* (G.R. No. 216562), Vol. II, p. 483.

a result of which, further repair or maintenance is required to be done by a Smartmatic-TIM authorized representative to restore the machines to good working condition.<sup>72</sup>

## The Cases

### A. G.R. No. 216098.

On February 2, 2015, a petition for *certiorari* and prohibition<sup>73</sup> with prayer for the issuance of a writ of preliminary injunction was filed by petitioners Bishop Broderick S. Pabillo, DD, Pablo R. Manalastas, Jr., PhD, Maria Corazon Akol, Concepcion B. Regalado, Hector A. Barrios, Leo Y. Querubin, Augusto C. Lagman, Felix P. Muga, II, PhD, Atty. Gregorio T. Fabros, Evita L. Jimenez, and Jaime DL Caro, PhD (Pabillo, *et al.*), as registered voters and taxpayers, alleging that the COMELEC committed grave abuse of discretion in adopting Resolution No. 9922 as it violates the GPRA, which requires competitive bidding for government procurement contracts as a general rule. In this relation, Pabillo, *et al.* point out that lack of material time is not one of the instances that would warrant the resort to direct contracting.<sup>74</sup>

In response, the COMELEC maintains<sup>75</sup> that its resort to direct contracting was legal under Section 52 (h) of Batas Pambansa Bilang (BP) 881, or the Omnibus Election Code, which authorizes the COMELEC to enter into negotiations and sealed bids if it finds the requirements of public bidding impractical to observe.<sup>76</sup> It further argues that the instances under the GPRA when resort to direct contracting may be made are attendant in the case.<sup>77</sup>

For its part, Smartmatic-TIM claims<sup>78</sup> that the elements to justify the resort to alternative modes of procurement stated in Justice Presbitero J. Velasco, Jr.'s Concurring Opinion in *Capalla*<sup>79</sup> are present, emphasizing that both the hardware and software of the PCOS machines are protected under

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<sup>72</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 596-597.

<sup>73</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 3-46.

<sup>74</sup> See *id.* at 26-27.

<sup>75</sup> See Consolidated Comment of the COMELEC; *rollo* (G.R. No. 216098), Vol. II, pp. 764-847.

<sup>76</sup> *Id.* at 766.

<sup>77</sup> *Id.* at 766-767.

<sup>78</sup> See Consolidated Comment of Smartmatic-TIM; *rollo* (G.R. No. 216098), Vol. I, pp. 327-429.

<sup>79</sup> *Supra* note 28, at 96-97.

“1. There is prior approval of the Head of the Procuring Entity on the use of alternative methods of procurement, as recommended by the BAC;

2. The conditions required by law for the use of alternative methods are present; and

3. The method chosen promotes economy and efficiency, and that the most advantageous price for the government is obtained.”

RA 8293,<sup>80</sup> or the Intellectual Property Code of the Philippines.<sup>81</sup> It also posits that under the 2009 AES Contract and the 2012 Deed of Sale, the warranty shall continue for ten (10) years *if* the COMELEC exercises the OTP and pays for the machines' maintenance and technical support subject to prevailing prices.<sup>82</sup> It further asseverates that there is no direct substitute for the PCOS machines and that it is the only entity authorized to provide the licensed technology in the Philippines.<sup>83</sup>

## **B. G.R. No. 216562.**

On February 18, 2015, another petition<sup>84</sup> assailing the validity of Resolution No. 9922 was filed, this time by petitioner the Integrated Bar of the Philippines (IBP). The IBP also assails the validity of the Extended Warranty Contract (Program 1) entered into between the COMELEC and Smartmatic-TIM, alleging that the COMELEC erroneously and invalidly resorted to direct contracting as an alternative method of procurement, thereby violating the requirements of public and competitive bidding under the GPRA, and that the supposed "tight time schedule" in the preparation for the May 9, 2016 National and Local Elections is not a ground to dispense with the conduct of public bidding under the law.<sup>85</sup>

On March 24, 2015, the Court issued a TRO enjoining the implementation of the Extended Warranty Contract (Program 1), pending resolution of the cases at hand.<sup>86</sup>

### **The Issues Before the Court**

The decisive issue in these cases is whether or not the COMELEC gravely abused its discretion in issuing Resolution No. 9922 and in subsequently entering into the Extended Warranty Contract (Program 1) with Smartmatic-TIM. To determine the existence of grave abuse of discretion, the following sub-issues are to be resolved: (a) whether or not the conditions for direct contracting stated under Section 50, Article XVI of the GPRA were complied with; (b) whether or not direct contracting may be resorted to under Section 52 (h) of the Omnibus Election Code; and (c) whether or not the Extended Warranty Contract (Program 1), being a part of the 2009 AES Contract, even required public bidding.<sup>87</sup>

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<sup>80</sup> Entitled "AN ACT PRESCRIBING THE INTELLECTUAL PROPERTY CODE AND ESTABLISHING THE INTELLECTUAL PROPERTY OFFICE, PROVIDING FOR ITS POWERS AND FUNCTIONS, AND FOR OTHER PURPOSES" (June 6, 1997).

<sup>81</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 404-409.

<sup>82</sup> See *id.* at 414-419.

<sup>83</sup> *Id.*

<sup>84</sup> *Rollo* (G.R. No. 216562), Vol. I, pp. 3-29.

<sup>85</sup> *Id.* at 9-10.

<sup>86</sup> See TRO Order and Resolution of the Court dated March 24, 2015.

<sup>87</sup> The Court does not find any need to address Pabillo, *et al.*'s arguments regarding Commonwealth Act No. 138, or the Flag Law, due to lack of substantial merit.

## The Court's Ruling

The petitions are meritorious.

### I.

At the outset, respondents invoke various procedural grounds, which would supposedly warrant the consolidated petitions' outright dismissal. They claim that petitioners<sup>88</sup> did not have the legal standing to institute their corresponding petitions;<sup>89</sup> that *certiorari* and prohibition are not the proper remedies to assail the validity of Resolution No. 9922 and the Extended Warranty Contract (Program 1);<sup>90</sup> that direct resort to the Court violated the doctrine of hierarchy of courts;<sup>91</sup> and that nonetheless the petitions were filed out of time.<sup>92</sup>

The propositions are rejected.

The Court, taking cue from its ruling in *Capalla*, which, as mentioned, involved the legality of the COMELEC's exercise of its OTP under the 2009 AES Contract, despite the extended period therefor, brushes aside any of the foregoing procedural barriers in view of the compelling significance and transcendental public importance of the matter at hand. In *Capalla*, the Court ruled:

At the outset, we brush aside the procedural barriers (i.e., *locus standi* of petitioners and the non-observance of the hierarchy of courts) that supposedly prevent the Court from entertaining the consolidated petitions. As we held in *Guingona, Jr. v. [COMELEC]*, 634 Phil. 516, 529 (2010):

There can be no doubt that the coming 10 May 2010 [in this case, May 2016] elections is a matter of great public concern. On election day, the country's registered voters will come out to exercise the sacred right of suffrage. Not only is it an exercise that ensures the preservation of our democracy, the coming elections also embodies our people's last ounce of hope for a better future. It is the final opportunity, patiently awaited by our people, for the peaceful transition of power to the next chosen leaders of our country. If there is anything capable of directly affecting the lives of ordinary Filipinos so as to come within the ambit of a public concern, it is the coming

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<sup>88</sup> May interchangeably refer to either Pabillo, *et al.* and/ or the IBP for facility of discussion.

<sup>89</sup> See *rollo* (G.R. No. 216098), Vol. II, pp. 791-793 and 795-798; and *rollo* (G.R. No. 216562), Vol. I, pp. 95-102 and Vol. II, pp. 470-471.

<sup>90</sup> See *rollo* (G.R. No. 216098), Vol. II, pp. 785-788.

<sup>91</sup> *Id.* at 788-791 and 793-795.

<sup>92</sup> *Rollo* (G.R. No. 216562), pp. 105-107.

elections, more so with the alarming turn of events that continue to unfold. The wanton wastage of public funds brought about by one bungled contract after another, in staggering amounts, is in itself a matter of grave public concern.

Thus, in view of the compelling significance and transcending public importance of the issues raised by petitioners, the technicalities raised by respondents should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid adherence to the rules of procedure.<sup>93</sup>

Corollarily, in *Roque, Jr. v. COMELEC*,<sup>94</sup> it was held that:

[The] bottom line is that the Court may except a particular case from the operations of its rules when the demands of justice so require. Put a bit differently, rules of procedure are merely tools designed to facilitate the attainment of justice. Accordingly, technicalities and procedural barriers should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid adherence to the rules of procedure.<sup>95</sup>

Indeed, the conduct of the upcoming 2016 Elections is dependent on the functional state of the existing PCOS machines purchased by the COMELEC. PCOS means “a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted, is located in every precinct.”<sup>96</sup> As the AES’s groundwork mechanism, it is imperative that the PCOS machines, come election day, are of optimal utility. Following the CAC’s recommendation to re-use the existing technology for the said elections,<sup>97</sup> the COMELEC proceeded to procure services for the repair and refurbishment of the PCOS machines. The COMELEC, however, through its Resolution No. 9922, decided to pursue a direct contracting arrangement with Smartmatic-TIM, which has now resulted in the execution of the Extended Warranty Contract (Program 1). Petitioners assail the validity of the foregoing courses of action mainly for violating the GPRA. Thus, if only to ensure that the upcoming elections is not mired with illegality at this basic, initial front, this Court, pursuant to its unyielding duty as final arbiter of the laws, deems it proper to thresh out the above-stated substantive issues, reasonably unfettered by the rigors of procedure.

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<sup>93</sup> *Capalla v. COMELEC*, supra note 28, at 47-48.

<sup>94</sup> 615 Phil. 149 (2009).

<sup>95</sup> Id. at 200.

<sup>96</sup> See Section 1 (c), Rule 2, Part I, COMELEC Resolution No. 8804 (In Re: COMELEC Rules of Procedure on Disputes in an Automated Election System in Connection with the May 10, 2010 Elections) dated March 22, 2010.

<sup>97</sup> See *rollo* (G.R. No. 216098), Vol. I, pp. 711-714.

## II.

The resolution of the substantive aspect of this case is predicated first on a basic understanding of the fundamentals of public bidding.

In this jurisdiction, public bidding is the established procedure in the grant of government contracts.<sup>98</sup> Section 3, Article I of the GPRA – the standing procurement law approved on January 10, 2003 – states that “[a]ll procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or-controlled corporations, government financial institutions and local government units, shall, in all cases, be governed by these principles:

(a) Transparency in the procurement process and in the implementation of procurement contracts.

(b) Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in public bidding.

(c) Streamlined procurement process that will uniformly apply to all government procurement. The procurement process shall be simple and made adaptable to advances in modern technology in order to ensure an effective and efficient method.

(d) System of accountability where both the public officials directly or indirectly involved in the procurement process as well as in the implementation of procurement contracts and the private parties that deal with government are, when warranted by circumstances, investigated and held liable for their actions relative thereto.

(e) Public monitoring of the procurement process and the implementation of awarded contracts with the end in view of guaranteeing that these contracts are awarded pursuant to the provisions of this Act and its implementing rules and regulations, and that all these contracts are performed strictly according to specifications.”

*Commission on Audit v. Link Worth International, Inc.*<sup>99</sup> synthesizes these principles as such:

Public bidding as a method of government procurement is governed by the principles of transparency, competitiveness, simplicity and accountability. These principles permeate the provisions of [the

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<sup>98</sup> *Capalla v. COMELEC*, supra note 28, at 52.

<sup>99</sup> 600 Phil. 547 (2009).

GPR] from the procurement process to the implementation of awarded contracts. x x x<sup>100</sup>

By its very nature, public bidding aims to protect public interest by giving the public the best possible advantages through open competition.<sup>101</sup> Under Section 5 (e), Article I of the GPR, public bidding is referred to as “Competitive Bidding,” which is defined as “a method of procurement which is open to participation by any interested party and which consists of the following processes: advertisement, pre-bid conference, eligibility screening of prospective bidders, receipt and opening of bids, evaluations of bids, post-qualification, and award of contract, the specific requirements and mechanics of which shall be defined in the [GPR’s Implementing Rules and Regulations (IRR)].”<sup>102</sup>

Case law states that competition requires not only bidding upon a common standard, a common basis, upon the same thing, the same subject matter, and the same undertaking, but also that it be legitimate, fair and honest and not designed to injure or defraud the government.<sup>103</sup> The essence of competition in public bidding is that the bidders are placed on equal footing which means that all qualified bidders have an equal chance of winning the auction through their bids.<sup>104</sup> Another self-evident purpose of competitive bidding is to avoid or preclude suspicion of favoritism and anomalies in the execution of public contracts.<sup>105</sup>

### III.

It is an established public policy,<sup>106</sup> as well as a statutory mandate<sup>107</sup> that all government procurement<sup>108</sup> shall be done through competitive public bidding. However, as an exception, Article XVI of the GPR sanctions a resort to alternative methods of procurement, among others, via direct contracting:

<sup>100</sup> Id. at 555.

<sup>101</sup> *Capalla v. COMELEC*, supra note 28, at 52.

<sup>102</sup> Entitled “IMPLEMENTING RULES AND REGULATIONS OF REPUBLIC ACT NO. 9184 OTHERWISE KNOWN AS THE GOVERNMENT PROCUREMENT REFORM ACT.” (The Revised IRR was approved by the Government Procurement Policy Board (GPPB) through its Resolution 03-2009 dated July 22, 2009 and published in the Official Gazette on August 3, 2009. It took effect on September 2, 2009.)

<sup>103</sup> *Capalla v. COMELEC*, supra note 28, at 52-53.

<sup>104</sup> Id. at 53.

<sup>105</sup> Id.

<sup>106</sup> See *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.*, G.R. No. 183789, August 24, 2011, 656 SCRA 214, 241.

<sup>107</sup> Section 10, Article IV of the GPR provides that “[a]ll Procurement shall be done through Competitive Bidding, except as provided for in Article XVI of this Act.”

<sup>108</sup> Section 5(n), Article I of the GPR states that “[p]rocurement - refers to the acquisition of Goods, Consulting Services, and the contracting for Infrastructure Projects by the Procuring Entity. Procurement shall also include the lease of goods and real estate. x x x.”

ARTICLE XVI  
ALTERNATIVE METHODS OF PROCUREMENT

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

a. Limited Source Bidding, otherwise known as Selective Bidding - a method of Procurement that involves direct invitation to bid by the Procuring Entity from a set of pre-selected suppliers or consultants with known experience and proven capability relative to the requirements of a particular contract;

**b. Direct Contracting, otherwise known as Single Source Procurement - a method of Procurement that does not require elaborate Bidding Documents because the supplier is simply asked to submit a price quotation or a pro-forma invoice together with the conditions of sale, which offer may be accepted immediately or after some negotiations;**

c. Repeat Order - a method of Procurement that involves a direct Procurement of Goods from the previous winning bidder, whenever there is a need to replenish Goods procured under a contract previously awarded through Competitive Bidding;

d. Shopping - a method of Procurement whereby the Procuring Entity simply requests for the submission of price quotations for readily available off-the-shelf Goods or ordinary/regular equipment to be procured directly from suppliers of known qualification; or

e. Negotiated Procurement - a method of Procurement that may be resorted under the extraordinary circumstances provided for in Section 53 of this Act and other instances that shall be specified in the IRR, whereby the Procuring Entity directly negotiates a contract with a technically, legally and financially capable supplier, contractor or consultant.

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

Section 48.2 of the GPRA IRR provides that alternative methods of procurement are only allowed in highly exceptional cases:

48.2. In accordance with Section 10 of this IRR, as a general rule, the Procuring Entities shall adopt public bidding as the general mode of procurement and shall see to it that the procurement program allows sufficient lead time for such public bidding. **Alternative methods shall be resorted to only in the highly exceptional cases provided for in this Rule.** (emphasis supplied)



Meanwhile, the Manual of Procedures for the Procurement of Goods and Services of the Government Procurement Policy Board (GPPB Manual) explains that the GPRA allows the use of alternative methods of procurement in some exceptional instances, provided: (a) there is prior approval of the Head of the Procuring Entity on the use of alternative methods of procurement, as recommended by the BAC; and (b) **the conditions required by law for the use of alternative methods are present**. As additional requisites, (c) the Procuring Entity must ensure that the method chosen promotes economy and efficiency, and (d) that the most advantageous price for the government is obtained.<sup>109</sup>

#### IV.

The compliance of the COMELEC with the second requisite as above-stated is one of the primary issues in these cases. It is undisputed that the COMELEC had not conducted a public bidding and, instead, resorted to direct contracting when it procured from Smartmatic-TIM the services for the repair and refurbishment of the existing PCOS machines through the Extended Warranty Contract (Program 1), as authorized under Resolution No. 9922.

Direct contracting, otherwise known as “Single Source Procurement,” refers to “a method of Procurement that does not require elaborate Bidding Documents because the supplier is simply asked to submit a price quotation or a pro-forma invoice together with the conditions of sale, which offer may be accepted immediately or after some negotiations.”<sup>110</sup>

The parameters for valid direct contracting are found in Section 50, Article XVI of the GPRA:

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

a) Procurement of Goods of proprietary nature, which can be obtained only from the proprietary source, *i.e.* when patents, trade secrets and copyrights prohibit others from manufacturing the same item;

b) When the Procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of this contract; **or**,

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

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<sup>109</sup> See GPPB Manual, Vol. 2, p. 81 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> (visited March 27, 2015).

<sup>110</sup> See Section 48 (b), Article XVI of the GPRA.

While compliance with only one condition is enough to justify the COMELEC's resort to direct contracting (as evinced by the disjunctive "or", but provided that the other requisites of approval of the Head of the Procuring Entity, promotion of economy and efficiency, and most advantageous price to the government are equally complied with), respondents are insistent that all of the foregoing conditions attend in these cases. The Court, thus, examines these claims, determinative as they are of the validity of Resolution No. 9922 and the Extended Warranty Contract (Program 1).

## V.

Under Section 50 (a), Article XVI of the GPRA, direct contracting may be allowed when the procurement involves **goods of proprietary nature**, which **can be obtained only from the proprietary source** – that is, when patents, trade secrets, and copyrights prohibit others from manufacturing the same item. The applicability of said condition was explicated in the GPPB Manual as follows:

This is applicable when the goods or services being procured are covered by a patent, trade secret or copyright duly acquired under the law. Under the Intellectual Property Code of the Philippines (R.A. No. 8293), the registered owner of a patent, a copyright or any other form of intellectual property has exclusive rights over the product, design or process covered by such patent, copyright or registration. Such exclusive right includes the right to use, manufacture, sell, or otherwise to derive economic benefit from the item, design or process.<sup>111</sup>

Petitioners contend that the "goods" sought to be procured in these cases refer to the refurbishment, maintenance, diagnostics, and repair of the PCOS machines, which are not protected by patents, trade secrets, and copyrights owned by Smartmatic-TIM. Thus, they may be contracted out from other service providers.<sup>112</sup>

On the other hand, respondents maintain that the goods sought to be procured by the COMELEC are of proprietary nature which may only be obtained from the proprietary source, in this case Smartmatic-TIM, which owns the intellectual property rights over such goods.<sup>113</sup>

The Court agrees with petitioners.

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<sup>111</sup> See GPPB Manual, Vol. 2, p. 84 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> (visited March 27, 2015).

<sup>112</sup> *Rollo* (G.R. No. 216562), Vol. I, pp. 15-16.

<sup>113</sup> See Comment of the COMELEC, *rollo* (G.R. No. 216562), Vol. II, p. 486; and Comment of Smartmatic-TIM, *rollo* (G.R. No. 216562), Vol. I, p. 111.

Goods are considered to be of “proprietary nature” when they are owned by a person who has a protectable interest in them or an interest protected by intellectual property laws.<sup>114</sup>

Here, it has not been seriously disputed that Smartmatic-TIM has intellectual property rights over the SAES 1800 AES, comprised of the PCOS machines, as well as the software program used to run the technology. In support thereof, Smartmatic-TIM has drawn attention to United States (US) Patent Application Publication No. US 2012/0259681 A1<sup>115</sup> dated October 11, 2012 for the invention called “Appending Audit Mark Image” (US Patent App. No. US 2012/0259681 A1)<sup>116</sup> and US Copyright Registration No. TX 7-921-024 dated October 16, 2014<sup>117</sup> for the work entitled “Democracy Suite Election Management System Software version 4.14” (US Copyright Reg. No. TX 7-921-024),<sup>118</sup> both in the name of Dominion Voting Systems, Inc., which – as Smartmatic-TIM alleges in a letter<sup>119</sup> dated November 25, 2014 to the COMELEC – has already granted to it the Perpetual License to use the Dominion “licensed technology” embodied in the existing machines, the transfer of PCOS and Election Management System (EMS) Intellectual Property Rights, and the exclusive rights to manufacture and sell the PCOS and EMS in the Philippines.

However, it is at once apparent that the “goods” subject of these cases neither pertain to the PCOS machines nor the software program aforementioned, but rather to the services for the machines’ repair and refurbishment, which in itself constitutes a distinct contract object that is susceptible to government procurement through competitive public bidding. As defined in Section 5 (h), Article I of the GPRA, “services such as the repair and maintenance of equipment” are included within the ambit of the term “goods” as applied within the context of the procurement law:

Section 5. Definition of Terms. – For purposes of this Act, the following terms or words and phrases shall mean or be understood as follows:

(h) Goods - refer to all items, supplies, materials and general support services, except consulting services and infrastructure projects, which may be needed in the transaction of the public businesses or in the pursuit of any government undertaking, project or activity, whether in the

<sup>114</sup> See Separate Concurring Opinion of Associate Justice Presbitero J. Velasco, Jr. in *Capalla*, citing BLACK’S LAW DICTIONARY 1339 9<sup>th</sup> ed. for the iPhone/iPad/iPod touch, Version 2.1.0 (B112136), supra note 28, id. at 99.

<sup>115</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 534; and *rollo* (G.R. No. 216562), Vol. I, p. 281.

<sup>116</sup> <<http://appft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PG01&p=1&u=%2Fnethtml%2FPTO%2Fsrchnum.html&r=1&f=G&l=50&s1=%2220120259681%22.PGNR.&OS=DN/20120259681&RS=DN/20120259681>> (visited March 25, 2015).

<sup>117</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 587; and *rollo* (G.R. No. 216562), Vol. I, p. 263.

<sup>118</sup> <<http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi>> (visited March 25, 2015). However, it must be noted that the copyright is under the name of Dominion Voting Systems, Inc. and not Smartmatic-TIM. See also *rollo* (G.R. No. 216562), Vol. I, p. 242.

<sup>119</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 579; and *rollo* (G.R. No. 216562), Vol. I, p. 254.

nature of equipment, furniture, stationery, materials for construction, or personal property of any kind, **including non-personal or contractual services such as the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related or analogous services, as well as procurement of materials and supplies provided by the [P]rocurring [E]ntity or such services.** (Emphasis supplied)

A perusal of the aforementioned patent<sup>120</sup> and copyright<sup>121</sup> documents reveals that Smartmatic-TIM's existing intellectual property rights do not

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<sup>120</sup> US Patent App. No. US 2012/0259681 A1 contains the following Abstract and Claims:

**Abstract**

A system, method and computer program for tabulating votes and creating an audit trail is provided. A ballot processing device may include a paper feed mechanism, a computer, a ballot processing application loaded on the computer, and a digital scanning device linked to the computer. The ballot processing application may process the digital image to establish a series of processing results defining one or more voting results for the paper ballot, and also an audit trail. The ballot processing application may process the digital image to define the voting results based on criteria established by election officials, including ambiguous mark criteria. The audit trail enables election officials to verify that particular paper ballots have been processed correctly in accordance with these criteria.

**Claims**

1.-26. (canceled)

27. A method for recording votes for voter-marked paper ballots, comprising: receiving optical image data comprising an optical image of a voter-marked paper ballot; identifying one or more votes recorded on the voter-marked paper ballot; generating vote stamp image data comprising the one or more identified votes; and appending the vote stamp image data to the optical image data.

x x x x

41. A system for recording votes for voter-marked paper ballots, comprising: a processor; and a memory in electronic communication with the processor, wherein the memory stores executable instructions that when executed by the processor cause the processor to perform operations comprising: receiving optical image data comprising an optical image of a voter-marked paper ballot; identifying one or more votes recorded on the voter-marked paper ballot; generating vote stamp image data comprising the one or more identified votes; and appending the vote stamp image data to the optical image data.

x x x x

(See *rollo* [G.R. No. 216098], Vol. I, p. 534; and *rollo* [G.R. No. 216562], Vol. I, p. 281. See also <<http://appft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PG01&p=1&u=%2Fnethtml%2FPTO%2Fsrchnum.html&r=1&f=G&l=50&s1=%2220120259681%22.PGNR.&OS=DN/20120259681&RS=DN/20120259681>> [visited March 25, 2015]).

<sup>121</sup> US Copyright Reg. No. TX 7-921-024 lists, *inter alia*, the following information regarding the work covered by copyright protection:

AUTHOR

Author: Dominion Voting Systems, Inc.

Author created: computer program

Work made for hire: Yes

Domiciled in: United States

x x x x



(b) reverse engineer, disassemble, decompile, modify or transmit the software in any form or by any means for any purpose other than for this Project, unless COMELEC has purchased it for Philippine elections; or

(c) use any software acquired hereunder for any purpose other than the operation of voting, counting, and canvassing/consolidation of votes.

X X X X

9.5 X X X.

X X X X

**After purchase, COMELEC shall be authorized to use the software system and make such alterations and modifications on the source code that are necessary or desirable for the proper use of the software system as provided in Article 9.2 above. COMELEC shall not sell, lease, transfer or otherwise convey the software to any other individual, company or entity.** The PROVIDER undertakes and guarantees to keep such information and documentation up-to-date. Escrow charges or expenses shall be for the account of the PROVIDER.<sup>123</sup> (Emphases and underscoring supplied)

Indeed, the license granted is but a natural incident of the COMELEC's exercise of the OTP, by which it had acquired ownership over the PCOS machines;<sup>124</sup> hence, the COMELEC should already be able to freely exploit them for the purpose that they were purchased. The only limitations, as may be above-gleaned, are on their commercialization as such would be clearly foreign to the contract's objective. It would be both absurd and unfair if the COMELEC's ability to effectively operate the machines would remain solely dependent on Smartmatic-TIM notwithstanding its acquired ownership over the same. While the intellectual property rights of Smartmatic-TIM were acknowledged by the COMELEC, by no means was it precluded – as it should not be precluded – from the complete utilization of the machines as long as it advances election-related purposes:

#### ARTICLE 10 INTELLECTUAL PROPERTY

10.1 The PROVIDER warrants that all intellectual property rights in or related to the Goods and/or Services, including but not limited to patents and other know-how and copyright, both registered and unregistered, owned and/or otherwise used by the PROVIDER, and all goodwill related thereto are, and shall remain at all times, the exclusive property of SMARTMATIC; and **COMELEC acknowledges the same, and shall**

<sup>123</sup> *Rollo* (G.R. No. 216098), Vol. II, pp. 922-923.

<sup>124</sup> Article 1.14 of the 2009 AES Contract defines "goods" as "the [PCOS] machines and their peripherals, personal computers, servers, electronic transmission, devices, printers, integrated software and other related equipment, both hardware and software, including all deliverable supplies, ballots and materials, except ballot boxes, as presented by TIM and [Smartmatic] in their Technical and Financial Proposals, and all other materials necessary to carry out the Project." See *rollo* (G.R. No. 216098), Vol. I, p. 669; and *rollo* (G.R. No. 216562), Vol. II, p. 575.

**not exploit, reproduce or use the same except as expressly provided in this Contract.**<sup>125</sup> (Emphasis and underscoring supplied)

For these reasons, the COMELEC cannot insist that the PCOS machines should be repaired and/or refurbished solely by Smartmatic-TIM. Therefore, the first condition for direct contracting under Section 50 (a), Article XVI of the GPRA does not exist.

The second scenario, under Section 50 (b), Article XVI of the GPRA, which would justify a resort to direct contracting is when the procurement of **critical components** from a specific manufacturer, supplier or distributor is **a condition precedent to hold a contractor to guarantee its project performance**, in accordance with the provisions of the contract. The GPPB Manual explains that:

This is applicable when there is a contract for an infrastructure project consisting of the construction/repair/renovation of a plant, and critical components of such plant are prescribed by the contractor for it to guarantee its contract performance. For example, in the construction of a power generation plant, the contractor may require the use of certain components manufactured by a specific manufacturer, whose products have been found to meet certain standards and are compatible with the technology used by the contractor. In this instance, Direct Contracting may be resorted to in the procurement of such critical plant components. However, the BAC must require technical proof that such critical plant components are the ONLY products compatible with the plant.<sup>126</sup>

Respondents are of the view that the direct contracting arrangement falls under this second condition. In this regard, the COMELEC claims that Smartmatic-TIM will not take responsibility for malfunctioning machines if they are tampered with by other entities as per the warranty provisions of the 2009 AES Contract, which were incorporated in the 2012 Deed of Sale. Thus, the engagement of Smartmatic-TIM constitutes a critical component or a condition precedent if the COMELEC were to hold it for its existing warranties.<sup>127</sup>

Petitioners counter that the COMELEC failed to show that Smartmatic-TIM is the sole entity which can provide the subject services. As such, it cannot be inferred that the latter is the only entity that has the technical expertise in refurbishment, maintenance, diagnostics, and repair of the PCOS machines.<sup>128</sup>

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<sup>125</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 923; and *rollo* (G.R. No. 216562), Vol. II, p. 587.

<sup>126</sup> See GPPB Manual, Vol. 2, p. 84 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> (visited March 31, 2015).

<sup>127</sup> See *rollo* (G.R. No. 216562), Vol. II, pp. 487-489.

<sup>128</sup> *Id.* at 16.

Petitioners' argument is tenable. Further reasons equally shore up their cause.

***First***, the subject "goods" to be procured, *i.e.*, repair and refurbishment services, are not critical components of any infrastructure project,<sup>129</sup> whose manufacture and/or supply may be solely availed of from Smartmatic-TIM. A component is defined as "a part or element of a larger whole."<sup>130</sup> It is critical when it has a decisive or crucial importance in the success, failure, or existence<sup>131</sup> of the project. While it may be argued that repair and refurbishment are critical to the functionality of the existing PCOS machines, they cannot be considered as "components" thereof as they are not elemental parts that make up the machine but are auxiliary services that pertain to an output that has already been completed.

***Second***, while the procurement of the parts for the repair and refurbishment of the PCOS machines may necessitate the procurement of critical components, it has not been settled that Smartmatic-TIM, who claims to be the exclusive manufacturer of the SAES 1800 PCOS machines in the Philippines, is the only entity capable of supplying parts for the machines' repair and refurbishment. Neither has it been convincingly shown that the PCOS machines could not be repaired or refurbished if the parts used are those manufactured by another company, nor would the functionality of the machines be compromised if parts of equivalent quality, although not of the exact make than that manufactured by Smartmatic-TIM, are to be used for repair and refurbishment. To recount, not only was the bidding of the 2009 AES Contract participated in by Smartmatic-TIM, but also by other technology companies, such as the consortiums of Indra Sistemas, S.A., Hart Intercivic, and SAHI; AMA Group Holdings Corp. and Election Systems and Software International Inc.; and Gilat Satellite Network Ltd., F.F. Cruz & Co., Inc., and Filipinas Systems, Inc., among others,<sup>132</sup> who may as well be capable of servicing the PCOS machines and/or providing the parts therefor. A preliminary determination could have been made if only an initial industry survey had been duly conducted by the COMELEC's BAC. The GPPB Manual relevantly provides:

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<sup>129</sup> Section 5 (k), Article I of the GPRA states that "[i]nfrastructure Projects - include the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, civil works components of information technology projects, irrigation, flood control and drainage, water supply, sanitation, sewerage and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings and other related construction projects of the government."

<sup>130</sup> <[http://www.oxforddictionaries.com/us/definition/american\\_english/component](http://www.oxforddictionaries.com/us/definition/american_english/component)> (visited March 27, 2015).

<sup>131</sup> <[http://www.oxforddictionaries.com/us/definition/american\\_english/critical?q=critical+](http://www.oxforddictionaries.com/us/definition/american_english/critical?q=critical+)> (visited March 27, 2015).

<sup>132</sup> See Omnibus SBAC Resolution No. 09-001 dated May 13, 2009; *rollo* (G.R. No. 216098), Vol. I, pp. 297-311.



### How can Direct Contracting be justified?

**To justify the need to procure through the Direct Contracting method, the BAC should conduct a survey of the industry and determine the supply source.** This survey should **confirm the exclusivity of the source of goods or services to be procured.** In all cases where Direct Contracting is contemplated, the survey must be conducted prior to the commencement of the procurement process. Moreover, **the Procuring Entity must justify the necessity for an item that may only be procured through Direct Contracting, and it must be able to prove that there is no suitable substitute in the market that can be obtained at more advantageous terms.**

### Who are involved in procurement through Direct Contracting?

The following are involved in the conduct of direct contracting:

1. The Head of the Procuring Entity;
2. The BAC;
3. The TWG;
4. The BAC Secretariat/ Procurement Unit; and
5. The supplier/manufacturer.

### Methodology: How is Direct Contracting conducted?

The following steps are undertaken in conducting Direct Contracting:

1. The method of procurement to be used shall be as indicated in the approved APP. If the original mode of procurement recommended in the APP was Public Bidding but cannot be ultimately pursued, the BAC, through a resolution shall justify and recommend the change in the mode of procurement to be approved by the Head of the Procuring Entity.
2. For information purposes, the BAC, through the BAC Secretariat shall post the notice direct contracting in the following:
  - a. The PhilGEPS;
  - b. The website of the Procuring Entity and its electronic procurement service provider, if any; and
  - c. Any conspicuous place in the premises of the Procuring Entity.
3. The BAC, through the TWG and the BAC Secretariat, prepares the Request for Quotation, technical specifications and draft contract in accordance with the procedures laid down in this Manual, in the IRR-A and in the PBDs.
4. The BAC, through the Secretariat, identifies the supplier from whom the goods will be procured.
5. If **a pre-procurement conference is required or deemed necessary,** as previously discussed in this Manual, the BAC holds such a conference. **If a pre-procurement conference is held, the participants should confirm the existence of the conditions required by law for procurement through Direct Contracting.**

x x x x<sup>133</sup> (Emphases and underscoring supplied)

<sup>133</sup> See GPPB Manual, Vol. 2, p. 85 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> (visited March 31, 2015).

Unfortunately, it was not shown that the said procedures, *i.e.*, that of **(a) an initial industry survey** (during which the BAC “should confirm the exclusivity of the source of goods or services to be procured,” and “must justify the necessity for an item that may only be procured through Direct Contracting” and “be able to prove that there is no suitable substitute in the market that can be obtained at more advantageous terms”) and even **(b) a pre-procurement conference**<sup>134</sup> (which is required since the “goods” to be procured amount to more than ₱2,000,000.00, and during which the participants, led by the BAC, “ensures that the procurement will proceed in accordance with the PPMP<sup>135</sup> [(Project Procurement Management Plan,

<sup>134</sup> The GPPB Manual explains that “[t]he pre-procurement conference is the forum where all officials involved in the procurement meet and discuss all aspects of a specific procurement activity, which includes the technical specifications, the ABC [(Approved Budget for the Contract)], the applicability and appropriateness of the recommended method of procurement and the related milestones, the bidding documents, and availability of the pertinent budget release for the project.” (See GPPB Manual, Vol. 2, p. 20 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> [visited March 31, 2015].)

Meanwhile, Section 20.1 of the GPRA IRR states that during the pre-procurement conference, the BAC shall, among others, review and adopt the procurement schedule, including deadlines and timeframes, for the different activities:

- 20.1. x x x During this conference, the participants, led by the BAC, shall:
- a) Confirm the description and scope of the contract, the ABC, and contract duration.
  - b) Ensure that the procurement is in accordance with the project and annual procurement plans;
  - c) Determine the readiness of the procurement at hand, including, among other aspects, the following:
    - i) availability of appropriations and programmed budget for contract;
    - ii) completeness of the Bidding Documents and their adherence to relevant general procurement guidelines;
    - iii) completion of the detailed engineering according to the prescribed standards in the case of infrastructure projects; and
    - iv) confirmation of the availability of ROW and the ownership of affected properties.
  - d) Review, modify and agree on the criteria for eligibility screening, evaluation, and post-qualification;
  - e) **Review and adopt the procurement schedule, including deadlines and timeframes, for the different activities;** and
  - f) Reiterate and emphasize the importance of confidentiality, in accordance with Section 19 of this IRR, and the applicable sanctions and penalties, as well as agree on measures to ensure compliance with the foregoing. (Emphasis and underscoring supplied)

<sup>135</sup> Under Section 20.2 of the GPRA IRR, only small procurements are not required to undergo pre-procurement conference:

- 20.2. The holding of a pre-procurement conference may not be required for small procurements, *i.e.*, procurement of goods costing two million pesos (₱2,000,000.00) and below, procurement of infrastructure projects costing five million pesos (₱5,000,000.00) and below, and procurement of consulting services costing one million pesos (₱1,000,000.00) and below.

The GPPB Manual mirrors this and further explains:

**Why is a Pre-procurement Conference necessary?**

For projects involving an ABC amounting to more than Two Million Pesos (₱ 2 Million), a pre-procurement conference is conducted to determine the readiness of the Procuring Entity to procure goods and services in terms of the legal, technical and financial requirements of the project. More specifically, it **ensures that the procurement will proceed in accordance with the PPMP [(Project Procurement Management Plan)] and APP [(Annual Procurement Plan)], confirms the availability of appropriations and**

whereby the schedule of milestone activities is identified and the method of procurement determined<sup>136</sup>)” had been observed by the COMELEC in these cases.<sup>137</sup> Note that the foregoing were prescribed itself by the GPPB in its issued Manual of Procedures for the Procurement of Goods and Services, which is currently posted at its own website.<sup>138</sup> Under Section 63, Article XX of the GPRA, the GPPB was “established to: (a) protect national interest in all matters affecting public Procurement, having due regard to the country’s regional and international obligations; (b) formulate and amend, whenever necessary, the IRR and the corresponding standard forms for Procurement; (c) ensure that Procuring Entities regularly conduct Procurement training programs and prepare a Procurement operations manual for all offices and agencies of government; and (d) conduct an annual review of the effectiveness of [the GPRA] and recommend any amendments thereto, as may be necessary. x x x.” Thus, owing to the GPPB’s statutory mandate, its issuances, in so far as matters of government procurement are concerned, should be accorded with authoritative value. In fine, the COMELEC’s non-compliance with the GPPB’s set procedures – formative as they are of the bidding rules which have been crafted precisely to realize the objectives of the procurement law and give life to the State’s

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**programmed budget for the contract, and reviews all relevant documents in relation to their adherence to the law.**

Even when the ABC amounts to □ 2 Million and below, the BAC is encouraged to conduct a pre-procurement conference if the circumstances, like the complexity of the technical specifications, warrant the holding of such conference before the Procuring Entity proceeds with the procurement. (See GPPB Manual, Vol. 2, p. 20 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> [last visited March 31, 2015]; emphases and underscoring supplied.)

<sup>136</sup> Under the GPPB Manual, “[f]ormulating the PPMP involves identifying the procurement project requirements, writing the technical specifications, determining the ABC, **identifying the schedule of milestone activities**, and **determining the method of procurement**.” (GPPB Manual, Vol. 2, p. 7 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> (visited March 31, 2015); emphases and underscoring supplied.)

On the other hand, Section 7.3.2 of the GPRA IRR provides:

7.3.2. The end-user units of the procuring entity shall prepare their respective Project Procurement Management Plan (PPMP) for their different programs, activities, and projects (PAPs). The PPMP shall include:

x x x x

d) the procurement methods to be adopted, and indicating if the procurement tasks are to be outsourced as provided in Section 53.6 of this IRR;

e) the time schedule for each procurement activity and for the contract implementation;

x x x x

<sup>137</sup> The Court observes that the COMELEC attached BAC-issued documents providing detailed timelines requiring a minimum of 31 days and a maximum of 88 days for a two-stage procurement process; and a minimum of 28 days and a maximum of 55 days for a single-stage procurement process (see *rollo* [G.R. No. 216562], Vol. II, pp. 781-782). However, in no way can these be considered as part of the required PPMP since the foregoing timelines are but general estimations of how long it would take to complete an entire bidding cycle within the COMELEC. More significantly, nothing in the foregoing documents would show that it specifically pertains to the procurement of the services sought for in the instant cases.

<sup>138</sup> <<http://www.gppb.gov.ph/downloadables/ProcurementManuals.html>> (visited March 30, 2013).

policy on public bidding – may, in itself, be considered as a ground to invalidate the resultant contract.<sup>139</sup>

Besides, it is even speculative, at this point, to say that the procurement of the subject services is necessary since it appears that an initial diagnostics of the PCOS machines had yet to be conducted by the COMELEC's in-house personnel. The COMELEC's Law Department, in its November 4, 2014 memorandum,<sup>140</sup> in fact, conceded that the conduct of repair was premature:

Also, while under storage at the Cabuyao warehouse, it was our understanding that the ITD personnel are in the process of conducting routine and periodic preventive maintenance on the PCOS machines in order to maintain satisfactory operating condition by providing for systematic inspection, detection, and correction of incipient failures either before they occur or before they develop into major defects as well as to prevent faults from occurring by conducting a battery of maintenance tests, measurements, adjustments, and parts replacement, if necessary.

As such, **the conduct of repair is premature** considering that the units requiring repair, if any, is yet to be determined. The same can be said for the replacement of servers and network equipment which has yet to be evaluated.

Most noteworthy of all is that as of the time of such proposal, even to this writing, **the ITD has yet to determine if MTD modem firmware upgrades are essential and necessary** considering that under the current set-up, the PCOS machines, as well as the whole Automated Elections System were able to successfully function for the May 10, 2010 Automated Synchronized National and Local Elections as well as in the May 13, 2013 Automated Synchronized National, Local and ARMM Elections.<sup>141</sup> (Emphases and underscoring supplied)

And ***lastly***, even if the foregoing were to be discounted, Smartmatic-TIM's exclusive engagement cannot be considered as a condition precedent to guarantee the performance of its warranties under the 2009 AES Contract or the 2012 Deed of Sale.

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<sup>139</sup> See *Power Sector Assets and Liabilities Management Corporation v. Pozzolanic Philippines, Inc.* (supra note 106, at 241) where the Court held that “public bidding is the established procedure in the grant of government contracts [and that] [t]he award of public contracts through public bidding is a matter of public policy.”

“Public policy has been defined as that principle under which freedom of contract or private dealing is restricted for the good of the community. Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will not recognize or uphold a transaction when its object, operation, or tendency is calculated to be prejudicial to the public welfare, to sound morality or to civic honesty.” (See also *Agan, Jr. v. Phil. International Air Terminals, Co., Inc.*, 450 Phil. 744 [2003].)

<sup>140</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 548-556.

<sup>141</sup> *Id.* at 549.

Albeit undefined in our local statutes, a warranty has been ordinarily considered as an agreement to be responsible for all damages that arise from the falsity of a statement or assurance of fact. In other words, a warranty promises indemnity against defects in an article sold.<sup>142</sup> In *Ang v. CA*,<sup>143</sup> a warranty was defined as “a statement or representation made by the seller of goods, contemporaneously and as part of the contract of sale, having reference to the character, quality or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them.”<sup>144</sup>

There are two warranties under the 2009 AES Contract, which were all explicitly incorporated and made part of the 2012 Deed of Sale.<sup>145</sup>

The first is found in **Articles 4.3<sup>146</sup> and 8.4<sup>147</sup>** of the 2009 AES Contract, both of which pertain to a **warranty on manufacturing defects of supplies and equipment**.

Article 4.3 of the 2009 AES Contract states that once the COMELEC exercises the OTP, it is required that Smartmatic-TIM warrants that manufacturing defects shall be corrected, and/or replacements shall be made by it, for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment (such as the PCOS machines), after performance of the contract:

#### 4.3 OPTION TO PURCHASE

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

In case COMELEC should exercise its option to purchase, **a warranty shall be required in order to assure that: (a) manufacturing defects shall be corrected; and/or (b) replacements shall be made by the PROVIDER, for a minimum period of three (3) months, in the case of supplies, and one (1) year, in the case of equipment, after performance**

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<sup>142</sup> 67 AmJur 2d, §425, p. 586

<sup>143</sup> 588 Phil. 366 (2008).

<sup>144</sup> Id. at 373.

<sup>145</sup> “9. The warranties agreed upon by the parties under Articles 4 and 8 of the AES Contract, including the limitations on warranties under Article 8.5, shall continue to remain in full force and effect. Articles 4 and 8 of the AES Contract are incorporated herein by way of reference. Pursuant to Article 4.3 of the AES Contract, the PCOS machines will be covered by a one (1) year warranty commencing from the acceptance by the BUYER during the HAT for every batch of 20,000 units as evidenced by the date of the Delivery Receipt; *Provided*, that no warranty period will expire earlier than 31 May 2013. The procedure in enforcing the warranty shall be in accordance with the Warranty Procedure attached as Annex “G” hereof.” See *rollo* (G.R. No. 216098), Vol. I, p. 707; and *rollo* (G.R. No. 216562), Vol. II, p. 600.

<sup>146</sup> See *rollo* (G.R. No. 216098), Vol. II, p. 915.

<sup>147</sup> See id. at 921.

**of this Contract.** The obligation for the warranty shall be covered by retention money of ten percent (10%) of every option to purchase payment made.

x x x x<sup>148</sup> (Emphases and underscoring supplied)

In similar light, Article 8.4 of the 2009 AES Contract reads:

8.4 **The PROVIDER shall, at its sole expense, repair or replace any Equipment found to contain manufacturing defects and it shall be returned to the PROVIDER's premises at its sole expense.** All costs of handling, transportation and labor relative to the return of the repaired or replaced Equipment to COMELEC's designated Sites shall also be at the PROVIDER's expense.<sup>149</sup> (Emphasis and underscoring supplied)

The limitations to the warranty on manufacturing defects, which was also carried over in the 2012 Deed of Sale, are stated in Article 8.5 of the 2009 AES Contract:

8.5 Limitations of Warranties. The warranty obligation of the PROVIDER shall not extend to:

(a) Equipment the serial number, model number or any other identification, marking, and security seal of which has been removed or rendered illegible by COMELEC personnel, without any authority from the PROVIDER or its technical personnel.

(b) Equipment that has been damaged by malicious misuse, accident or *force majeure*.

(c) Equipment the selected component of which has been opened without the PROVIDER's prior written approval; or

(d) Equipment wherein COMELEC or its agents have made changes to its physical, mechanical, electrical, software or interconnection components without written authorization of the PROVIDER.<sup>150</sup>

To put it simply, these provisions state that Smartmatic-TIM had warranted that the PCOS machines purchased by the COMELEC are free from manufacturing defects; otherwise, it will repair or replace, if irreparable, any defective machines at its own expense for as long as: **(a)** the defect occurs within the warranty period, *i.e.*, three (3) months, in the case of supplies, and one (1) year, in the case of equipment, reckoned from March 30, 2012, *i.e.*, the date on which the OTP was exercised and the corresponding 2012 Deed of Sale was executed; and **(b)** none of the warranty limitations are breached.

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<sup>148</sup> See *id.* at 915.

<sup>149</sup> See *id.* at 921.

<sup>150</sup> *Id.*

The foregoing warranty on manufacturing defects is separate and distinct from the second warranty found in Article 8.8 of the 2009 AES Contract, to wit:

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.<sup>151</sup>

x x x x (Emphases supplied)

Under Article 8.8, 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,<sup>152</sup> 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.

However, in no way does Article 8.8 pre-condition the warranty on availability on Smartmatic-TIM's exclusive engagement. There are two reasons for this:

***First***, it cannot be deduced from the **deliberate arrangement of the provisions** that the warranty limitations under Article 8.5 (which, in essence, prohibits unauthorized tampering by the COMELEC and/or by a third party) apply to the subsequently situated Article 8.8 (*i.e.*, warranty on availability of parts, labor and technical support and maintenance). On the other hand, Article 8.5 logically follows Article 8.4 (*i.e.*, warranty on manufacturing defects), evincing that it (Article 8.5) constitutes a limitation to the provision preceding it (Article 8.4);

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<sup>151</sup> Id. at 922.

<sup>152</sup> Hence, the phrase "if purchased" in the provision.

***Second***, and more substantially, the Court finds no discernible reason to void a warranty on availability on account of previous tampering. As mentioned, under Article 8.8, the COMELEC would still have to engage Smartmatic-TIM in a subsequent purchase contract, founded upon a new consideration altogether, and, thus, pay the costs of the parts and services procured. The fact that the goods had been previously tampered with is immaterial to Smartmatic-TIM's future engagement as the warranty would not be voided if a different service contractor has been engaged by the COMELEC to conduct repair and refurbishment works. On other hand, it is reasonable – as it is usually the case – that a warranty on manufacturing defects would be voided if the goods had already been tampered with; in such an instance, it is difficult, if not, improbable, to ascertain the cause of the malfunction, and, hence, determine if the manufacturing defects were attributable to the seller's fault. Accordingly, the seller (Smartmatic-TIM) should not repair or replace the defective goods without the buyer (the COMELEC) shouldering the costs.

Simply put, the variance is that Article 8.8 only warrants access to the purchase of parts and services, whereas Article 8.4 (in relation to Article 4.3) warrants the functionality of the machines themselves. In fact, the direct contracting arrangement subject of these cases is the very manifestation of Article 8.8's enforcement: the COMELEC engaged Smartmatic-TIM for the repair and refurbishment of the PCOS machines and, now, has to pay a distinct purchase price therefor. In so doing, the records are bereft of any showing that the limitations under Article 8.5 were relevant in enforcing the warranty found in Article 8.8. The COMELEC could very well enforce – as it did enforce – the warranty on availability notwithstanding a breach of Article 8.5 as the latter limits only the enforcement of the warranty on manufacturing defects found in Article 8.4 in relation to Article 4.3, which, however, was stipulated to last only for three (3) months, in the case of supplies, and **one (1) year, in the case of equipment, reckoned from March 30, 2012 (i.e., March 30, 2013)** and as such, had already lapsed way before Resolution No. 9922 was passed on December 23, 2014. Smartmatic-TIM, in fact, admits this in its Comment to the Pabillo Petition:

3.170 The original responsibility of [Smartmatic-TIM] on the warranty of the PCOS machines was only until 2014.<sup>153</sup> [Smartmatic-TIM] was not obligated to diagnose, repair, and refurbish the PCOS machines that would be used for the 2016 Elections. **There is no obligation on the part of [Smartmatic-TIM] to fulfill the warranty provision of the Deed of Sale when the same has already expired.** In fact, the Warranty Procedure of the 2012 Deed of Sale states that if the equipment is no longer in warranty, then the client [(the COMELEC)] will be charged for the diagnostic and repair of the machine. Without the Extended Warranty Agreement, the COMELEC would have to incur additional expenses to

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<sup>153</sup> This is inaccurate. The warranty on manufacturing defects in the case of equipment lapsed last March 30, 2013.



pay [Smartmatic-TIM], or any other entity, for the repair and refurbishment of the same.<sup>154</sup> (Emphasis supplied)

Hence, with the warranty on manufacturing defects having lost its effect, there is no way that the COMELEC's engagement of another service contractor would constitute a breach of that warranty.

That the Extended Warranty Contract (Program 1) excludes from the scope of work those PCOS machines, where persons or entities other than Smartmatic-TIM authorized representative, performed maintenance or repair services, as a result of which, further repair or maintenance is required to be done by a Smartmatic-TIM authorized representative to restore the machines to good working condition<sup>155</sup> does not call for a different conclusion. Said exclusion was inserted as part of the Extended Warranty Contract (Program 1) that was **agreed upon only after the expiration of the original warranty on manufacturing defects**. In other words, the exclusion was only part of Smartmatic-TIM's offer for a new contract, which the COMELEC accepted only after the warranty on manufacturing defects had lapsed.

In fine, the procurement of the repair and refurbishment services from Smartmatic-TIM cannot be deemed as a **condition precedent** to hold it to any of its **existing warranties** as prescribed by Section 50 (b) of the GPRA.

As a last instance, direct contracting may be legally rationalized under Section 50 (c), Article XVI of the GPRA when what is involved is the procurement of goods sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the Government. The GPPB Manual, once more, illustrates:

This condition anticipates a situation where the goods are sold by an exclusive dealer or distributor, or directly sold by the manufacturer. In this instance, it is highly unlikely that sub-dealers can sell the same at lower prices. Further, the Procuring Entity has not identified a suitable substitute for the product that can be procured at terms more advantageous to the government.<sup>156</sup>

Petitioners argue that the COMELEC failed to establish that the repair and refurbishment of the PCOS machines may be done exclusively by Smartmatic-TIM. Thus, it cannot be said that no suitable substitute can be obtained at more advantageous terms to the government.<sup>157</sup>

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<sup>154</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 411-412. See also *id.* at 419.

<sup>155</sup> *Id.* at 596-597.

<sup>156</sup> See GPPB Manual, Vol. 2, p. 84 found at <<http://www.gppb.gov.ph/downloadables/forms/GPM%20-%20Vol.2.pdf>> (visited March 27, 2015).

<sup>157</sup> *Rollo* (G.R. No. 216562), Vol. I, p. 16.

On the other hand, respondents insist that since Smartmatic-TIM is the exclusive manufacturer and distributor of the SAES 1800 PCOS machines in the Philippines, it is the only certified entity to perform repair and refurbishment works on the same.<sup>158</sup> To support their claim, they presented a document entitled “Certificates of Intellectual Property Rights Ownership and Distributorship”<sup>159</sup> dated November 25, 2014 signed by Filipinas Ordoño for Smartmatic International Corporation and Alastair Wells for Smartmatic-TIM Corporation, which reads:

We hereby certify that the undersigned Smartmatic International Corporation is the exclusive intellectual property rights owner of the SAES 1800 Automated Election System (AES), comprising amongst other items, the Precinct Count Optical Scan (PCOS) machines acquired by COMELEC in March 2012, including its spare parts and critical accessories such as Transmission Modem, Secured Memory Cartridges/Devices, etc. In addition, Smartmatic International Corporation and its Affiliate, Smartmatic Tim Corporation are the only entities authorized to access, modify and upgrade the software and firmware contained within the said AES in accordance with the Deed of Sale and Extended Warranty arrangements agreed between Smartmatic-TIM Corporation and the COMELEC.

We further certify that Smartmatic International Corporation is the exclusive distributor of SAES 1800 PCOS machines in the Philippines and that its affiliate Smartmatic TIM Corporation is the sole entity authorized by Smartmatic International Corporation to distribute the SAES 1800 PCOS machines in the territory of the Republic of the Philippines.

We affirm and certify that Smartmatic International Corporation is the only competent entity with the knowledge, tools, expertise, and capability to upgrade the Hardware, Firmware and Software as well as maintain the functionalities required by the customer to assure the integrity of the machines and ultimately, the electoral processes and data.

Petitioners are correct.

While Smartmatic-TIM may be the exclusive manufacturer and distributor of the PCOS machines and software in the Philippines, there is no evidence to show that it is the sole entity capable of repairing and/or refurbishing the same. Smartmatic-TIM’s certification – aside from being self-serving and, thus, of doubtful probative value – is not evidence of the company’s exclusive capability. A business dictionary defines “certification” as a “formal procedure by which an accredited or authorized person or agency assesses and verifies (and attests in writing by issuing a certificate) the attributes, characteristics, quality, qualification, or status of individuals or organizations, goods or services, procedures or processes, or events or situations, in accordance with established requirements or standards.”<sup>160</sup> Paralleled against this definition, the certification thus

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<sup>158</sup> See *rollo* (G.R. No. 216098), Vol. I, pp. 405-408.

<sup>159</sup> See *Id.* at 589-590.

<sup>160</sup> <<http://www.businessdictionary.com/definition/certification.html>> (visited March 27, 2015).

operates only as a formal assurance that any work performed by the issuer's employees would conform to its own established requirements and standards, for which the client, based on the issuer's goodwill and reputation, is led to expect a certain quality of work. With the COMELEC appearing to rely solely on Smartmatic-TIM's certification, and more importantly, absent the conduct of an initial industry survey (which again may, in itself, be considered as a ground to invalidate the resultant contract as above-explained), it remains uncertain if the repair and refurbishment of the PCOS machines can be accomplished by other equally capable service providers at more advantageous terms to the government. With this, the Court concludes that the third condition – similar to the previous two conditions – which would justify a resort to direct contracting under Section 50, Article XVI of the GPRA had not been complied with.

## VI.

Non-compliance with the foregoing GPRA requisites notwithstanding, the COMELEC, nevertheless, justifies its exclusive engagement of Smartmatic-TIM on account of Section 52 (h) of BP 881, or the Omnibus Election Code, which, in its view, has not been repealed by the GPRA:<sup>161</sup>

### ARTICLE VII THE COMMISSION ON ELECTIONS

*Sec. 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:

x x x x

(h) Procure any supplies, equipment, materials or services needed for the holding of the election by public bidding: Provided, That, if it finds the requirements of public bidding impractical to observe, then by negotiations or sealed bids, and in both cases, the accredited parties shall be duly notified.

Invoking this provision, the COMELEC asserts that it took into account various advantages of directly contracting with Smartmatic-TIM, such as the price thereof. It claims that statutory, as well as daily operational constraints and budgetary limitations, preclude it from bidding the subject services.<sup>162</sup> It further points out that its ITD personnel are not capable of performing the required services.<sup>163</sup>

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<sup>161</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 825; and *rollo* (G.R. No. 216562), Vol. II, p. 492.

<sup>162</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 492.

<sup>163</sup> *Id.* at 497.

For their part, petitioners submit that the bidding process can be shortened depending on the COMELEC's efficiency, and that the period for refurbishment is merely an approximation, which means that public bidding is very much feasible.<sup>164</sup> They also propound that since two (2) automated elections have been held, the COMELEC's ITD should have acquired the necessary knowledge and expertise in performing basic maintenance and repair on the PCOS machines.<sup>165</sup>

First, on the law's applicability, Section 52 (h) of BP 881 basically allows the COMELEC to engage in negotiations or sealed bids if it finds the requirements of public bidding impractical to observe. BP 881 was passed way back in 1985, before the advent of both the GPRA (signed into law on January 10, 2003) and the automated election law (RA 8436, as amended by RA 9369, signed into law on December 22, 1997). BP 881's datedness notwithstanding, the Court deems that said provision remains valid and effective, absent its express repeal. Indeed, "[b]asic is the principle in statutory construction that interpreting and harmonizing laws is the best method of interpretation in order to form a uniform, complete, coherent, and intelligible system of jurisprudence, in accordance with the legal maxim *interpretare et concordare leges legibus est optimus interpretandi modus*."<sup>166</sup> **Simply because a later statute relates to a similar subject matter as that of an earlier statute does not result in an implied repeal of the latter.**<sup>167</sup>

In order to harmonize the provisions of the pertinent laws, the COMELEC's exercise of its power to conduct negotiations and sealed bids based on the standard of "impracticality" under Section 52 (h) of BP 881 should be read in conjunction with the GPRA, the latter being the special law currently governing all matters of government procurement. Notably, the approach is called for by Section 76, Article XXV of the GPRA, which provides that "[a]ny other law, presidential decree or issuance, executive order, letter of instruction, administrative order, proclamation, charter, rule or regulation and/or parts thereof contrary to or inconsistent with the provisions of this Act, are hereby repealed, modified or amended accordingly." It is further consistent with Sections 12 and 36 of the automated elections law, *i.e.*, RA 8436, as amended by RA 9369, which respectively state that in order "[t]o 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 regulation x x x,"<sup>168</sup> and that "[t]he provision of Batas Pambansa Blg. 881, as amended, otherwise known as the 'Omnibus Election Code of

<sup>164</sup> *Rollo* (G.R. No. 216562), Vol. I, p. 18.

<sup>165</sup> *Id.* at 17.

<sup>166</sup> Meaning, "[t]o interpret and reconcile laws so they harmonize is the best mode of construction," Black's Law Dictionary (8<sup>th</sup> Edition), p. 1726.

<sup>167</sup> *Civil Service Commission v. Court of Appeals*, G.R. Nos. 176162 and 178845, October 9, 2012, 682 SCRA 353, 377-378; emphasis supplied.

<sup>168</sup> RA 8436, as amended by RA 9369, Section 12; emphasis supplied.

the Philippines,' and other election laws **not inconsistent with this Act shall apply.**"<sup>169</sup>

Adopting the foregoing, the Court finds that the most reconciliatory method of construction, to the extent that fairness and reason would allow, is to consider the situations stated under the GPRA which would justify a resort to alternative methods of procurement as **instances that particularize Section 52 (h)'s broad gauge of "impracticality."**

As an example, Section 50 (b), Article XVI of the GPRA allows direct contracting when the procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance, in accordance with the provisions of his contract. Surely, it is an impractical course of action for a Procuring Entity to allow an existing warranty to be voided by procuring the subject goods from another contractor. On the other hand, direct contracting under Section 50 (a), Article XVI, *i.e.*, procurement of goods of proprietary nature, which can be obtained only from the proprietary source, and Section 50 (c), Article XVI, *i.e.*, the procurement of goods sold by an exclusive dealer or manufacturer, which does not have sub-dealers selling at lower prices and for which no suitable substitute can be obtained at more advantageous terms to the government, both of the GPRA, are allowed since it is utterly impractical and in fact, almost impossible to do otherwise.

Considerations of impracticality are also written all over Section 53, Article XVI of the GPRA which governs Negotiated Procurement:

**Sec. 53. Negotiated Procurement.** - Negotiated Procurement shall be allowed only in the following instances:

- a. In case of two (2) failed biddings as provided in Section 35 hereof;
- b. In case of imminent danger to life or property during a state of calamity, or when time is of the essence arising from natural or man-made calamities or other causes where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities;
- c. Take-over of contracts, which have been rescinded or terminated for causes provided for in the contract and existing laws, where immediate action is necessary to prevent damage to or loss of life or property, or to restore vital public services, infrastructure facilities and other public utilities;
- d. Where the subject contract is adjacent or contiguous to an on-going infrastructure project, as defined in the IRR: Provided, however, That the original contract is the result of a Competitive Bidding; the subject contract to be negotiated has similar or related scopes of work; it is within the contracting capacity of the contractor; the contractor uses the same

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<sup>169</sup> RA 8436, as amended by RA 9369, Section 36 (emphasis supplied).

prices or lower unit prices as in the original contract less mobilization cost; the amount involved does not exceed the amount of the ongoing project; and, the contractor has no negative slippage: Provided, further, That negotiations for the procurement are commenced before the expiry of the original contract. Wherever applicable, the principle shall also govern consultancy contract, where the consultants have unique experience and expertise to deliver the required service; or,

e. Subject to the guidelines specified in the IRR, purchases of Goods from another agency of the government, such as the Procurement Service of the DBM, which is tasked with a centralized procurement of commonly used Goods for the government in accordance with Letters of Instruction No. 755 and Executive Order No. 359, series of 1989.

The same goes for the alternative procurement methods of Limited Source Bidding, Repeat Order, and Shopping respectively governed by Sections 49, 51, and 52, Article XVI of the GPRA:

**Sec. 49. Limited Source Bidding.** - Limited Source Bidding may be resorted to only in any of the following conditions:

a. Procurement of highly specialized types of Goods and Consulting Services which are known to be obtainable only from a limited number of sources; or

b. Procurement of major plant components where it is deemed advantageous to limit the bidding to known eligible bidders in order to maintain an optimum and uniform level of quality and performance of the plant as a whole.

X X X X

**Sec. 51. Repeat Order.** - When provided for in the Annual Procurement Plan, Repeat Order may be allowed wherein the Procuring Entity directly procures Goods from the previous winning bidder whenever there arises a need to replenish goods procured under a contract previously awarded through Competitive Bidding, subject to post-qualification process prescribed in the Bidding Documents and provided all the following conditions are present:

a. The unit price must be equal to or lower than that provided in the original contract;

b. The repeat order does not result in splitting of requisitions or purchase orders;

c. Except in special circumstances defined in the IRR the repeat order shall be availed of only within six (6) months from the date of the Notice to Proceed arising from the original contract; and,

d. The repeat order shall not exceed twenty-five percent (25%) of the quantity of each item of the original contract.

**Sec. 52. Shopping.** - shopping may be resorted to under any of the following instances:

a. When there is an unforeseen contingency requiring immediate purchase: Provided, however, That the amount shall not exceed Fifty thousand pesos (₱50,000); or

b. Procurement of ordinary or regular office supplies and equipment not available in the Procurement Service involving an amount not exceeding Two hundred fifty thousand pesos (₱250,000): Provided, however, That the Procurement does not result in Splitting of Contracts: Provided, further, That at least three (3) price quotations from bona fide suppliers shall be obtained.

The above amounts shall be subject to a period review by the GPPB. For this purpose, the GPPB shall be authorized to increase or decrease the said amount in order to reflect changes in economic conditions and for other justifiable reasons.

When dissected to their core, these conditions are, in truth, **specific manifestations of impracticality**, for which a deviation from the general rule on public bidding may be extraordinarily permitted. Thus, it may be reasonably inferred that the parameters of impracticality are, if at all, already fleshed out in the current procurement law.

It has already been resolved that the COMELEC failed to comply with any of the conditions by which its selected mode of procurement, *i.e.*, direct contracting, would have been allowed. Meanwhile, it has not argued that any other alternative method of procurement can be applied. This notwithstanding, the COMELEC attempts to go beyond the scope of the GPRA and extend Section 52 (h)'s application based on two (2) practical considerations, namely: (**a**) the alleged tight schedule of conducting a public bidding and having the PCOS machines repaired/refurbished in time for the 2016 elections; and (**b**) the great risk of having the PCOS machines repaired/refurbished by any third party provider in view of the highly technical nature of the goods:

First, time is of the essence in the preparation for the May 9, 2016 National and Local Elections such that the Commission and the Bids and Awards Committee are constrained by the tight time schedule if public bidding are to be conducted in the refurbishment and/or repair of the machines considering all the procurement activities lined up.<sup>170</sup>

Second, to give the refurbishment and/or the repair of the PCOS Machines to any third party provider other than SMARTMATIC, the original manufacturer will be too great a risk considering the highly technical nature of the refurbishment and/or the repair to be conducted on the machines.<sup>171</sup>

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<sup>170</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 731; and *rollo* (G.R. No. 216562), Vol. I, p. 35.

<sup>171</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 733.

Practicality is a relative term which, to stand the mettle of law, must be supported by independently verified and competent data. As an exception to the public policy and statutory command requiring all government procurement to be conducted through competitive public bidding, a claim of impracticality should only be based on substantiated projections, else it would be easy to contrive, and the rule on public bidding easily circumvented.

As above-intimated, the COMELEC decries that there will not be enough time to complete the intended repair and refurbishment works on the PCOS machines by the 2016 National and Local Elections, if it were not to directly procure the same from Smartmatic-TIM.<sup>172</sup> In this relation, it purports in Resolution No. 9922 that:

In a Memorandum of the BAC to the Commission *en banc* dated December 9, 2014, it submitted a timeline stating that a **two-stage bidding needs eighty eight (88) calendar days to complete the process**. If there is a failure of bidding, the BAC needs to repeat the whole process **doubling the time needed**. After two instances of failed biddings, only then is the Commission allowed to proceed to negotiated procurement.

The refurbishment of the machines is already slated to start by March 2015. The Steering Committee in its Implementation Calendar requires at least eight months for the refurbishment of existing machines, and intends to start by March 2, 2015 and to end by November 30, 2015. The COMELEC Information Technology (ITD) has declared that it requires **forty (40) days to inspect and diagnose the PCOS, and an additional two hundred (200) days to refurbish them**.

Note that it is already December and the BAC has a little more than sixty (60) days to conduct the bidding for the refurbishment and/or repair of the machines so the two-stage procurement is not within the timeline and even assuming that the BAC will adopt a single stage procurement, the time needed, which is fifty five (55) calendar days, **is only sufficient to cover one cycle of the process – meaning, there is no room for failure which is very likely to happen**.

It is glaringly evident that the remaining period of about sixty days before the March target date is terribly insufficient for the conduct of the two-stage bidding for the refurbishment and/or repair of the machines. Failed biddings must also be considered in calculating the time required, and would only further delay the schedule.

Moreover, there is only one BAC tasked to handle all procurement activities related to the election. These include the Sangguniang Kabataan procurement scheduled for February 2015 and the regular procurement aside from and the procurement of the DRE, the additional OMR and all other election propaganda for 2016. The bidding for the refurbishment and/or repair of the machines, which is no longer necessary given the exemptions under Rep. Act No. 9184, will only impede other procurement activities and impair the efficiency of the BAC.<sup>173</sup> (Emphases supplied)

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<sup>172</sup> See *rollo* (G.R. No. 216562), Vol. II, pp. 493-494.

<sup>173</sup> See *rollo* (G.R. No. 216562), Vol. I, p. 36



The conclusion is not well-taken.

While the COMELEC's 88 calendar day estimation (double if the first bidding fails) to conduct a two-stage bidding process is correct, the rest of its projection, *i.e.*, the forty (40) day inspection and diagnosis period, and the two hundred (200) day refurbishment period, lacks material basis. The Court expounds.

Section 38, Article XI of the GPRA provides a three (3)-month cap for the conduct of each procurement process:

Sec. 38. Period of Action on Procurement Activities. - The procurement process from the opening of bids up to the award of contract **shall not exceed three (3) months**, or a shorter period to be determined by the procuring entity concerned. Without prejudice to the provisions of the preceding section, the different procurement activities shall be completed within reasonable periods to be specified in the IRR.

If no action on the contract is taken by the head of the procuring entity or by his duly authorized representative, or by the concerned board, in the case of government-owned and/or -controlled corporations, within the periods specified in the preceding paragraph, the contract concerned shall be deemed approved. (Emphasis supplied)

Based on the IRR, it is approximated that it will take a little less than 83 calendar days, more or less, to complete the procurement process, broken down as follows: (a) 7 days for the advertisement/posting of the invitation to bid;<sup>174</sup> (b) a maximum of 45 days for the submission of bids within which the pre-bid conference is likewise conducted;<sup>175</sup> (c) a maximum of 7 days for the bid evaluation wherein bids are opened and examined as well as the determination of the lowest calculated bid or the highest rated bid is made;<sup>176</sup> (d) a maximum of 7 days for the post-qualification process wherein the BAC makes its recommendation/s to the head of the procuring entity; (e) a maximum of 7 days for the approval of award; and (f) a maximum of 10 days for the contract signing between the procuring entity and the winning bidder.

This period would be doubled when a first bidding fails, and resort to negotiated procurement, upon a second failed bidding, would be allowed. Section 35, Article X of the GPRA reads:

Sec. 35. Failure of Bidding. - there shall be a failure of bidding if:

- a. No bids are received;
- b. No bid qualifies as the Lowest Calculated Responsive Bid; or,

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<sup>174</sup> See Section 21.2.1, Revised IRR of the GPRA.

<sup>175</sup> See Section 25.4 (a) and Section 22.2, Revised IRR of the GPRA.

<sup>176</sup> See Section 32.4, Section 29, and Section 30, Revised IRR of the GPRA.

c. Whenever the bidder with the highest rated/lowest calculated responsive bid refuses, without justifiable cause to accept the award of contract, as the case may be.

Under any of the above instances, the contract shall be re-advertised and re-bid. The BAC shall observe the same process and set the new periods according to the same rules followed during the first bidding. After the second failed bidding, however, the BAC may resort to negotiated procurement as provided for in Section 53 of this Act.

Thus, the COMELEC's projection that it will take **88 calendar days, as maximum**,<sup>177</sup> to complete a two-stage bidding process (double, if the first bidding fails) is theoretically correct. Applying the same, this means that the COMELEC from the time this Decision is promulgated (*i.e.*, May 2015) will be able to bid out the same in three (3) months (*i.e.*, by August 2015), which gives it, more or less, nine (9) months until the May 2016 National and Local Elections to have the machines repaired and/or refurbished. Assuming that a first bidding fails, the second bidding process should be completed in six (6) months (*i.e.*, by November 2015); as such, it will still have, more or less, another six (6) months until the May 2016 National and Local Elections to have the machines repaired and/or refurbished.<sup>178</sup>

Note, however, that the COMELEC itself concedes in Resolution No. 9922 that it can shorten the bidding process to **55 calendar days, as maximum**,<sup>179</sup> if only to expedite the procurement of refurbishment/repair services of the PCOS Machines via a single-stage procurement. Hence, a substantial reduction of the foregoing periods is altogether possible. In such instance, the bidding process should be finished in two months (*i.e.*, by July 2015), leaving it with ten (10) months until the May 2016 National and Local Elections to have the machines repaired and/or refurbished.

Note further that the periods would be greatly reduced if the minimum periods of 31 calendar days (for two-stage procurement) and 28 calendar days (for single-stage procurement), as the COMELEC itself projected, are successfully followed.<sup>180</sup>

While the Court finds the COMELEC's conservative bidding timeframe tenable, it cannot do the same with respect to its projections covering the inspection and diagnosis (*i.e.*, 40 days), and the repair and/or refurbishment (*i.e.*, 200 days) of the PCOS machines.

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<sup>177</sup> The COMELEC admits in its Comment that a two-stage bidding process may be done in at least **31 calendar days**. (See *rollo* [G.R. No. 216562], Vol. II, p. 493.)

<sup>178</sup> The filing of a motion for reconsideration would not alter the periods left for the COMELEC to act, should it decide to continue with the procurement of the subject services, since, as stated in the dispositive portion, this Decision is immediately executory in view of the time considerations attendant herein.

<sup>179</sup> **The COMELEC admits that a single-stage bidding process may be done in at least 28 calendar days**. (See *rollo* [G.R. No. 216562], Vol. II, p. 493.)

<sup>180</sup> *Id.*

At the outset, it should be underscored that the COMELEC could have already had the PCOS machines inspected and diagnosed by its own in-house personnel as early as the time it had resolved to re-use the same. The COMELEC's ITD could have even proceeded to conduct preventive maintenance procedures, which it admits it is capable of under its memorandum<sup>181</sup> dated May 14, 2014:

This refers to your memorandum dated 13 May 2014 re Query whether the ITD is capable of providing the Preventive Maintenance and Repair of PCOS as proposed by the (*sic*) Smartmatic.

Preventive maintenance procedures include (1) checking of the completeness of peripherals of the PCOS (2) running the diagnostic program of the PCOS to verify if there are functionalities in the system that will fail (3) opening of the PCOS cover and cleaning of dust of the inside parts of the unit, and (4) closing of the PCOS cover and re-executing the diagnostic program of the PCOS.

Repair includes evaluating the problem of the PCOS functionalities that failed, identifying the parts that need to be replaced and replacing the parts that failed.

**Please be informed that the ITD can only do the preventive maintenance procedures. We can identify the reason for PCOS failure by running the diagnostic program but we do not have the tools for repair and parts for replacement.**

For your information. (Emphases and underscoring supplied)

In fact, as may be above-gleaned, it appears that the COMELEC could have just procured the “the tools for repair and parts for replacement,” and have the repair and refurbishment done by its own in-house personnel. Note that a sufficient number of ITD personnel could have well been trained by Smartmatic-TIM itself on matters related to the repair, refurbishment, tuning up and maintenance of the PCOS machines, as well as the electronic transmission facility, pursuant to Item No. 8.2.4, Part V<sup>182</sup> of the 2009 RFP. As correctly observed by the COMELEC's Law Department in its November 4, 2014 Memorandum:<sup>183</sup>

Part V – OTHER SPECIFICATIONS provides:

“8. Training Plans

All proposals shall include the following training requirements:

8.1 A training program for COMELEC Executives;

8.2 An **extensive training and education program** on the preparation of elections systems, counting and canvassing systems and transmission systems for technical

<sup>181</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 972. Signed by COMELEC ITD Acting Director IV Jeannie V. Flororita.

<sup>182</sup> *Rollo* (G.R. No. 216098), Vol. II, p. 878; and *rollo* (G.R. No. 216562), Vol. II, p. 542.

<sup>183</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 548.

personnel. Such training shall be sufficient to the point that the COMELEC technical personnel shall be able to operate the systems with their own. The training shall address, but shall not be limited to, the following topics:

8.2.1. x x x.

x x x x

8.2.4. **Repair, troubleshooting, tuning up and maintenance of machines and electronic transmission facility** x x x”

**As such, it is clear that under the AES Procurement Project which must necessarily form part of the AES Contract executed between Smartmatic-TIM and the Commission**, the former must train COMELEC Technical Personnel specifically for the **repair, troubleshooting, tuning up and maintenance of machines and electronic transmission facility** which includes the subject PCOS machines. (Emphases and underscoring supplied)

Clearly, Smartmatic-TIM’s training obligation – an obligation that was incipiently required in the RFP to which all bidders at that time were subjected to and, in fact, included in the 2009 AES Contract’s project scope<sup>184</sup> – spans both aspects of preventive maintenance and repair. With this, the Court is in a quandary as to why the services subject of these cases would still have to be procured by the COMELEC from an outside service provider, let alone under an exclusive direct contracting arrangement with Smartmatic-TIM. Curiously, Smartmatic-TIM has been communicating with the COMELEC about its proposed extended warranty as early as 2013.<sup>185</sup> Hence, unless the COMELEC was already bent on pursuing its current deal with Smartmatic-TIM, then the latter’s training obligation should have been enforced. To the Court’s mind, this would have been the more prudent course of action: ideally, this would not only narrow down the COMELEC’s task to the procurement of the necessary tools and replacement parts, but also provide it with a considerable degree of sustainability by minimizing – if not eliminating – its reliance on Smartmatic-TIM with respect to the upkeep of the PCOS machines.

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<sup>184</sup> The RFP was categorized as one of the “Bidding Documents” under the 2009 AES Contract (See Article 1.1 of the 2009 AES Contract; *rollo* (G.R. No. 216562), Vol. II, p. 573). In turn, Article 3.1 of the 2009 AES Contract states:

3.1 The scope of the Project shall include:

x x x x

(b) The provision of the Services specified in the Bidding Documents, with Systems Integrations and Project Management; Electoral Advocacy; Training and Information Campaign Materials; Pre-Election Testing and Rollout Support; Site Preparation; Ballot Box Design; Deployment, Intallation, Pullout and Warehousing; Election Day Support; Post-Election Support; Supplies and Others as listed in the Financial Proposal hereunder appended and made integral parts of this Contract, x x x

x x x x

<sup>185</sup> *Rollo* (G.R. No. 216562), Vol. I, pp. 201-202.

Be that as it may, the Court is unable to determine the extent of work to be accomplished without the machines undergoing initial diagnostics. As such, it cannot resolve if the COMELEC's 200-day timetable for repair and/or refurbishment is cogent. In fact, there is no concrete assurance that the repair and/or refurbishment of the PCOS machines are even necessary. To reiterate, the COMELEC's Law Department even admitted that the conduct of repair is premature:<sup>186</sup>

Also, while under storage at the Cabuyao warehouse, it was our understanding that the ITD personnel are in the process of conducting routine and periodic preventive maintenance on the PCOS machines in order to maintain satisfactory operating condition by providing for systematic inspection, detection, and correction of incipient failures either before they occur or before they develop into major defects as well as to prevent faults from occurring by conducting a battery of maintenance tests, measurements, adjustments, and parts replacement, if necessary.

As such, **the conduct of repair is premature** considering that the units requiring repair, if any, is yet to be determined. The same can be said for the replacement of servers and network equipment which has yet to be evaluated.

x x x<sup>187</sup> (Emphasis and underscoring supplied)

At this point, it should be noted that under the GPRA, the Procuring Entity is required to prepare bidding documents which shall include, among others, the delivery time or completion schedule for the goods/services sought to be procured.<sup>188</sup> Similarly, when the Procuring Entity advertises/posts the invitation to bid, it should contain the contract duration for such procurement.<sup>189</sup> Thus, had the COMELEC decided to bid out the project, it would have been able to convey to all prospective bidders the tight timeline it is supposedly working with, and may even receive a proposal with a more efficient timeframe. At the very least, the COMELEC should have conducted an initial industry survey to ascertain if other service providers are capable of accomplishing the works under more favorable terms to it, as well as the required pre-procurement conference to ensure that the procurement will proceed in accordance with the PPMP. Unfortunately, the records do not indicate that these procedures were followed. The reasons for the COMELEC's non-compliance can only be second-guessed and may even elude these present cases, but the glaring reality it must face is that projections tracked on uncertainty cannot be upheld, else it would be easy to efface the State's mandate on public bidding. The timeline which the COMELEC had submitted is therefore speculative at best.

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<sup>186</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 548-556.

<sup>187</sup> *Id.*

<sup>188</sup> See Section 17(g) of the GPRA.

<sup>189</sup> See Section 21(g) of the GPRA.

The same conclusion obtains with respect to the COMELEC's risk concern. In Resolution No. 9922, the COMELEC finds it too great of a risk to have the PCOS machines serviced by a different contractor other than Smartmatic-TIM in view of their highly technical nature. Particularly, it expresses fears over the reverse engineering of the PCOS machines, a process which would likely be undertaken if the machines were to be serviced by a contractor unfamiliar with the system, and if so done, may end up jeopardizing its integrity.<sup>190</sup> However, without the required industry survey having first been conducted, the COMELEC's reservation once again borders on the speculative. In fact, nothing on record convinces this Court that there is no other service provider which is capable of servicing the PCOS machines without the need to reverse engineer the same. Neither is this Court convinced that reverse engineering, if done properly, would impair the machines' integrity or put "back to zero" the know-how already accumulated.<sup>191</sup> The bid guidelines may very well qualify the COMELEC's desired body of work, and the bidding process itself screens the capability of potential bidders to comply with the same. As it was in its earlier asseveration, the COMELEC is quick to assume the worst but its assumptions remain unsubstantiated. Accordingly, the COMELEC's arguments at this juncture are denied altogether.

## VII.

Lastly, the COMELEC argues that the Extended Warranty Contract (Program 1) is a mere extension of the 2009 AES Contract, and thus need not undergo the rigorous process of bidding. In this relation, it draws attention to Article 8.8 of the 2009 AES Contract, which was incorporated under Item No. 9 of the 2012 Deed of Sale, and deemed as a surviving provision under Article 2.2<sup>192</sup> of the 2009 AES Contract. It also makes mention of the Court's ruling in *Capalla*, wherein it was declared that a contract is still effective as long as the performance security has not been released.<sup>193</sup>

The theory is flawed.

The Extended Warranty Contract (Program 1) cannot be validated by the mere expedient of characterizing the same as a part of the 2009 AES Contract. The services of repair and refurbishment cannot be procured from Smartmatic-TIM through an "extended warranty" mode, unless this Court assents to a blatant circumvention of the procurement law.

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<sup>190</sup> *Rollo* (G.R. No. 216098), Vol. I, pp. 733-734; and *rollo* (G.R. No. 216562), Vol. I, pp. 37-38.

<sup>191</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 733; and *rollo* (G.R. No. 216562), Vol. I, p. 37.

<sup>192</sup> 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. (See *rollo* [G.R. No. 216098], Vol. I, p. 670).

<sup>193</sup> *Rollo* (G.R. No. 216098), Vol. II, pp. 830-832.

As earlier discussed, under Article 8.8 of the 2009 AES Contract, 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. Since Article 8.8 is a mere **warranty on availability**, it entails a subsequent purchase contract, founded upon a new consideration, to be effectively invoked. However, **by no means does this provision dispense with the need to bid out the ensuing purchase contract. Neither does this presuppose that the COMELEC is – for the stated period of ten (10 years) – already beholden to Smartmatic-TIM.** Certainly, the COMELEC's hands cannot be hamstrung by a mere warranty on availability, which is precisely a warranty provision that should operate in its favor. In any event, the spirit of competition which primordially animates the procurement law cannot be undercut absent the law's own exceptive conditions. Otherwise, other potential bidders would be deprived of the opportunity to participate and offer better terms to the government. That Smartmatic-TIM has already acquired complete monopoly over any subsequent need the government would have in relation to the PCOS machines for a period of ten (10) years is a notion this Court, under these circumstances, cannot accept.

Besides, there is an inaccurate portrayal of the Extended Warranty Contract (Program 1) as a mere “warranty extension.”

An extended warranty gives a prolonged warranty to consumers to provide the additional service of replacing or repairing goods, **the defects of which are directly related to how the item was manufactured.**<sup>194</sup> **As an “extension,” the defect to be repaired should occur within the extended period covered in the agreement.**<sup>195</sup>

In these cases, the warranty period for manufacturing defects had, as above-discussed, lapsed a long time ago, or last March 30, 2013, which follows the one (1) year warranty period for the PCOS machines, reckoned from March 30, 2012 when the 2012 Deed of Sale was executed. Hence, there was nothing more that could be extended. As Smartmatic-TIM itself admits:

3.170 The original responsibility of [Smartmatic-TIM] on the warranty of the PCOS machines was only until 2014.<sup>196</sup> [Smartmatic-TIM] was not obligated to diagnose, repair, and refurbish the PCOS machines that would be used for the 2016 Elections. **There is no obligation on the part of**

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<sup>194</sup> “*Extended Warranties vs. Extended Service Plans*” by Kevin Paul Hanson, <<http://extended-warranty-services-review.toptenreviews.com/extended-warranties-vs.extended-service-plans.html>> (visited March 31, 2015).

<sup>195</sup> See “*Extended Warranty Law & Legal Definition*,” <<http://definitions.uslegal.com/e/extended-warranty/>> (visited March 30, 2015).

<sup>196</sup> This is inaccurate. The warranty on manufacturing defects in the case of equipment lapsed last March 30, 2013.

**[Smartmatic-TIM] to fulfill the warranty provision of the Deed of Sale when the same has already expired. x x x .<sup>197</sup> (Emphasis supplied)**

Based on said admission,<sup>198</sup> the expiration of the aforesated warranty period becomes an established fact which therefore renders Article 8.1 of the Extended Warranty Contract (Program 1) false insofar as it states that “[t]he warranties agreed upon under Articles 4 and 8 of the 2009 AES contract, including the limitations on warranties under Article 8.5, shall continue to remain in full force and effect.” Clearly, the warranty on manufacturing defects contained under Articles 4.3 in relation to Articles 8.4 and 8.5 of the 2009 AES Contract is already defunct and thus, cannot “continue to remain in full force and effect.” For the same reason, these provisions cannot be “incorporated herein by way of reference.”<sup>199</sup> Meanwhile, the parties could not have contemplated the extension of Article 8.8 of the 2009 AES Contract since: **(a)** the Extended Warranty Contract (Program 1) already provides for the actual performance of work, and thus does not extend a warranty on the mere availability of parts, labor, and technical support and maintenance; and **(b)** the warranty on availability still subsists, *i.e.*, ten (10) years for the PCOS, reckoned from May 10, 2010, or until May 10, 2020.

At best, one can construe the Extended Warranty Contract (Program 1) as a revival, rather than an extension. However, if the Court were to condone this way of thinking, then the bidding for any service related to the PCOS, or any government project for that matter, would never be needed at all. All the Procuring Entity has to do is simply revive the provisions of a dead contract and perpetually hold itself to the original contract awardee. Clearly, this undermines the very core of the procurement law – it eliminates competition, deprives the government of the opportunity to receive offers with more advantageous terms, and, more significantly, erodes the public’s faith by rousing suspicions of favoritism and anomaly; perforce, the COMELEC’s “extended warranty mode” cannot – as it should not – be sanctioned.

On another front, the COMELEC invokes the Court’s ruling in *Capalla* to justify its position. However, *Capalla* is not on all fours with the present cases; hence, the *stare decisis* doctrine (to adhere to precedents and not to unsettle things which are established) is inapplicable.

*Capalla* essentially validated the COMELEC’s exercise of the extended OTP, which characterization as an option contract was never in doubt. **The option amount was already part of the original amount bidded upon in 2009 for the AES Contract**, thereby negating the need for another competitive bidding:

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<sup>197</sup> *Rollo* (G.R. No. 216098), Vol. I, p. 411. See also *id.* at 419.

<sup>198</sup> See Section 4, Rule 129 of the Rules of Court.

<sup>199</sup> Article 8.1 of the Extended Warranty Contract (Program 1).



One. Smartmatic-TIM was not granted additional right that was not previously available to the other bidders. x x x. Section 4.3 thereof gives the Comelec the OTP the goods agreed upon. The same provision states the conditions in exercising the option, **including the additional amount that the Comelec is required to pay should it exercise such right**. It is, therefore, undisputed that this grant of option is recognized by both parties and is already a part of the principal contract of lease. Having been included in the RFP and the bid bulletins, this right given to the Comelec to exercise the option was known to all the bidders and was considered in preparing their bids. x x x.

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

**The Solicitor General himself clarified during the oral arguments that the purchase price of the remaining PCOS machines stated in the assailed Deed of Sale was the price stated in Article 4.3 of the AES contract. Therefore, the said amount was already part of the original amount bid upon in 2009 for the AES contract which negates the need for another competitive bidding.**<sup>200</sup> (Emphases supplied)

In stark contrast, the Extended Warranty Contract (Program 1), despite its titular denomination, is actually a separate service contract for the repair and refurbishment of the PCOS machines, to be accomplished within a five (5)-month period. Since it extends no subsisting warranty, it is really no different from a contract for the servicing of appliances, automobiles and the like, by which a routine check-up and repairs, if need be, are made by the service contractor. In other words, it is a **distinct contract, founded upon a new offer and a new consideration**, and for which a **new payment** – as evinced by the ₱240,000,000.00 purchase price under Article 2 thereof – is needed. This much is clear from one of the contract's "whereas clauses"<sup>201</sup>

<sup>200</sup> *Capalla v. COMELEC*, supra note 28, at 55-57.

<sup>201</sup> See *rollo* (G.R. No. 216098), Vol. I, p. 596; and *rollo* (G.R. No. 216562), Vol. I, p. 60.

which states that the contract amount was a product of subsequent negotiations by the parties:

WHEREAS, after negotiations by the parties, the Contract Amount was reduced to Philippine Pesos Two Hundred Forty Million (Php240,000,000.00), exclusive of VAT.<sup>202</sup>

In fact, if only to highlight its individuality, Smartmatic-TIM's October 24, 2014 proposal reveals that the Extended Warranty Contract (Program 1) was formulated as part of a full service program package, i.e., from bringing back the PCOS machines to its working condition to the upgrading of the different hardware and software components, that subsists on its own.<sup>203</sup>

#### V. Proposal Elements

The proposal consists of three major programs, which cover the various elements which Smartmatic suggest are required to ensure the PCOS are in peak condition for 2016.

The first program covers the extension of the warranty to bring the PCOS back to working condition following a prolonged storage and lack of preventive maintenance for over two years.

The second program covers the refurbishment of the machines to change physical components at the end of life and as precautionary measures to eliminate potential risk. It also includes the repair of machines through 2015, 2016 pre-election preparation and 2016 post-election repair, firmware upgrades to the MTD Moderns and return to storage preparation.

For the third program, Smartmatic has reviewed the requirements of the current installed platform and identified a range of improvements to the different hardware and software components of the solution to make it equivalent of any technology available in the market today.

Hence, different from the character of the OTP, it would be absurd to conclude that the Extended Warranty Contract (Program 1) was a mere "warranty extension" that could masquerade as an adjunct of the 2009 AES Contract if only to evade the procurement law. For the same reasons, it cannot even pass as a mere amendment. Needless to state, the true nature of every contract is ascertained through judicial determination, undergirded by principles of law. It is never what the parties deem it to be.<sup>204</sup>

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<sup>202</sup> Id.

<sup>203</sup> See Smartmatic-TIM PCOS Extended Warranty Proposal Summary; *rollo* (G.R. No. 216562), pp. 614-615.

<sup>204</sup> "It is true that contracts are not what the parties may see fit to call them, but what they really are as determined by the principles of law." (*Borromeo v. Court of Appeals*, 150-B Phil 770, 778-779 [1972]; citation omitted.)

To stretch the argument further, neither should the principle of autonomy of contracts preclude the Extended Warranty Contract's (Program 1) scrutiny. The principle is not a safe haven to just leave the parties to their agreement – it bears a sharp limitation that although parties may agree to stipulations, clauses, terms and conditions as they may deem appropriate, they should not be contrary to law, morals, good customs, public order or public policy;<sup>205</sup> hence, the Court, after ascertaining the contract's true nature, should proceed to assess if it transgresses this limitation. Ironically, *Capalla* itself exhorts that “[g]overnment contracts shall be void, as against the law and public policy, where a statutory requirement of open competitive bidding has been ignored. As a corollary, agreements directly tending to prevent bidding for covered government contracts may violate public policy.”<sup>206</sup> The exhortation holds true with respect to the Extended Warranty Contract (Program 1), which is unquestionably a government contract imbued with public interest.

As a final point, it is noteworthy that *Capalla* upheld the amendment of the 2009 AES Contract (*i.e.*, the OTP's extension) since the OTP's exercise was, in the Court's appreciation, more advantageous to the COMELEC and the public. It was observed that the ₱7,191,484,739.48 rentals paid for the lease of goods and purchase of services under the 2009 AES Contract was already considered as part of the purchase price, and that for the COMELEC to own the subject goods, it was required to pay only an additional ₱2,130,635,048.15. On the other hand, if the COMELEC did not exercise the option, the rentals already paid would just be one of the government expenses for the past election and, in effect, would be of no use to future elections:

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

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**We agree with respondents that the exercise of the option is more advantageous to the Comelec, because the ₱7,191,484,739.48 rentals paid for the lease of goods and purchase of services under the AES contract was considered part of the purchase price. For the Comelec to own the subject goods, it was required to pay only ₱2,130,635,048.15. If the Comelec did not exercise the option, the rentals already paid would just be one of the government expenses for the past election and would be of no use to future elections.** Assuming that the exercise of the option is nullified, the Comelec would again conduct another public bidding for the AES for the 2013 elections with its available budget of ₱7 billion. Considering that the said amount is the available fund for the whole election process, the amount for the purchase or lease of new AES will definitely be less than ₱7 billion. Moreover, it is

<sup>205</sup> “The autonomy of contracts allows the parties to establish such stipulations, clauses, terms and conditions as they may deem appropriate provided only that they are not contrary to law, morals, good customs, public order or public policy.” (*Bricktown Dev't Corp. v. Amor Tierra Dev't Corp.*, G.R. No. 112182, December 12, 1994, 239 SCRA 126, 128.)

<sup>206</sup> See Separate Concurring Opinion of Justice Presbitero J. Velasco, Jr in *Capalla v. COMELEC*, supra note 28, at 91.

possible that Smartmatic-TIM would again participate in the public bidding and could win at a possibly higher price. The Comelec might end up acquiring the same PCOS machines but now at a higher price.<sup>207</sup> (Emphases and underscoring supplied)

The same cannot be said of the Extended Warranty Contract (Program 1) whereby the COMELEC had agreed to pay a distinct purchase price of ₱240,000,000.00 in order to procure Smartmatic-TIM's services. In fact, it appears that it would be more advantageous for the government if the COMELEC's own in-house personnel had undertaken the diagnostics, preventive maintenance, and even the actual repair and refurbishment of the machines. It could have held Smartmatic-TIM to its training obligation under Item No. 8.2.4, Part V of the RFP, as incorporated in the 2009 AES Contract, as above-mentioned. If such were the case, then only the necessary tools and replacement parts, after the COMELEC's own examination of the actual number of defective machines and the extent of the defects, would be needed to be procured. This course of action would seem to be cheaper than the wholesale engagement of Smartmatic-TIM under the Extended Warranty Contract (Program 1). But then again, the COMELEC's reasons as to why it did not proceed as such can only be second-guessed.

At any rate, it is plainly unclear to this Court that the ₱240,000,000.00 purchase price gives the best price advantage to the government. The COMELEC mentions in its Comment that the said price, coupled with the 4% maximum replacement threshold, translates into the cost of ₱131.26 per PCOS machine for their inspection, diagnosis, and repair, including the cost for the parts and components.<sup>208</sup> However, as already pointed out, the Court has not been assured that no other service contractor is capable of providing more suitable terms to the government. And more so, the COMELEC's perceived price advantage under the Smartmatic-TIM deal assumes that all PCOS machines have to be repaired. This assumption may very well end up to be false after the initial diagnostics of the PCOS machines, again a course of action that the COMELEC should have preliminarily taken. Therefore, as a worst case, the government may end up shelling out ₱240,000,000.00 for the mere diagnostics and/or preventive maintenance of the machines, if it turns out that no PCOS machine needs to be repaired. The contingency of determining the extent of work to be accomplished simply precludes an objective assessment of whatever price advantage may be gained. That being said, the COMELEC's invocation of *Capalla* is misplaced.

### VIII.

In an article published just recently, last March 30, 2015, COMELEC spokesperson James Jimenez stated that the COMELEC can actually push

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<sup>207</sup> Id. at 58-60.

<sup>208</sup> *Rollo* (G.R. No. 216098) Vol. II, p. 823.

through with an automated elections for 2016, even not through the previous PCOS route. Far from the distraught tenor of the COMELEC's submitted pleadings, wherein it flustered over the catastrophic return to manual elections if Resolution No. 9922 and the Extended Warranty Contract (Program 1) would not hold, the spokesperson sensibly explains that it all boils down to how the COMELEC marshals its own resources:

The Commission on Elections (COMELEC) is eyeing the use of other computerized voting machines in the May 2016 elections should the Supreme Court decide against reusing the precinct count optical scan (PCOS) machines.

Comelec spokesman James Jimenez said the poll body is considering the use of 23,000 optical mark reader (OMR) units.

**“If we push through with the bidding now, we will have 23,000 (OMR) machines. So we can do it. It can be done. It’s really just a question of how you’re going to marshal your resources,”** Jimenez said.

The Comelec earlier started the bidding for the OMR that will be used to supplement the existing PCOS machines.

However, the possible reuse of the PCOS machines for the May 2016 elections is being questioned before the Supreme Court (SC).

Though fewer machines can be used **if the high court rules against PCOS**, Jimenez said Comelec is still not giving up on computerized elections in 2016. The poll body had used less units in past automated elections nationwide.

According to Jimenez, Comelec will adopt the Central Count Optical Scan (CCOS) system if the OMR machines will be used.

He said the adoption of CCOS is already being discussed, including the possible number of counting centers.

x x x<sup>209</sup>

The Court has not even gone to this extreme and prohibited the re-use of the PCOS machines. Yet, the COMELEC's own spokesperson has conceded that when push comes to shove, automated elections are still possible.

There are no qualms about the task of having the PCOS machines repaired and refurbished. However, there are serious and unignorable legal flaws about how the COMELEC intends to pursue this undertaking. Bluntly, the COMELEC has failed to justify its reasons for directly contracting with Smartmatic-TIM: it had not shown that any of the conditions under Section 50, Article XVI of the GPRA exists; its claims of impracticality were not

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<sup>209</sup> Jaymalin, Mayen. “*Comelec Eyes Alternative Voting Machines*,” The Philippine Star, March 30, 2015 <<http://www.philstar.com/headlines/2015/03/30/1439009/comelec-eyes-alternative-voting-machines>> (visited April 5, 2015).

supported by independently verified and competent data; and lastly, its perceived “warranty extension” is, in reality, just a circumvention of the procurement law. For all these counts, the conclusion thus reached is that the COMELEC had committed grave abuse of discretion amounting to lack or excess of jurisdiction.<sup>210</sup> As a result, its Resolution No. 9922 and the Extended Warranty Contract (Program 1) should be stricken down, and necessarily, all amounts paid to Smartmatic-TIM pursuant to the said contract, if any, being public funds sourced from taxpayers’ money, should be returned to the government in accordance with the procedures contained in existing rules and regulations. Note that the disposition of these cases does not prohibit the COMELEC from resorting to direct contracting anew or other alternative method of procurement with any service contractor, subject to compliance with the conditions provided in the GPRA and all the pertinent rules and procedures.

While this Court recognizes that the COMELEC should be given sufficient leeway in exercising its constitutional mandate to enforce and administer all election laws, it demands equal recognition that it is the Court’s constitutional duty to see to it that all governmental actions are legally permissible. In so doing, the Court decides not only with pragmatism in mind, but pragmatism within the fair bounds of law. Such is the case in examining the COMELEC’s apprehensions under the lens of the procurement law, with heightened considerations of public accountability and transparency put to the fore. With due deference to the COMELEC, it should be made to understand that this Court does not stand to thwart the conduct of automated elections; but only steps in to preserve its sanctity. After all, in a democracy, nothing is more vital than an unimpaired vote.

**WHEREFORE**, the petitions are **GRANTED**. Accordingly, COMELEC Resolution No. 9922 and the Extended Warranty Contract (Program 1) are hereby declared **NULL** and **VOID**. This Decision is immediately executory in view of the time considerations attendant herein.<sup>211</sup>

**SO ORDERED.**

  
**ESTELA M. PERLAS-BERNABE**  
Associate Justice

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<sup>210</sup> “There is grave abuse of discretion (1) when an act is done contrary to the Constitution, the law or jurisprudence; (2) when it is executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias.” (*Information Technology Foundation of the Phils. v. COMELEC*, 464 Phil. 173, 190 [2004]).

<sup>211</sup> See Section 4, Rule 52 in relation to Section 2, Rule 56 of the Rules of Court.

WE CONCUR:

*I concur; the questions I wanted answered during oral arguments on feasibility of automated elections despite nullification of questioned contract have been addressed in my remarks in this Ponencia.*

MARIA LOURDES P. A. SERENO  
Chief Justice



ANTONIO T. CARPIO  
Associate Justice

*(Please see Concurring and Dissenting Opinion)*

PRESBITERO J. VELASCO, JR.  
Associate Justice

*Teresita Leonardo de Castro*  
TERESITA J. LEONARDO-DE CASTRO  
Associate Justice

*Arturo D. Brion*  
ARTURO D. BRION  
Associate Justice

*Diosdado M. Peralta*  
DIOSDADO M. PERALTA  
Associate Justice

*Lucas P. Bersamin*  
LUCAS P. BERSAMIN  
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*Mariano C. Del Castillo*  
MARIANO C. DEL CASTILLO  
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MARTIN S. VILLARAMA, JR.  
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*Jose Portugal Perez*  
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*Bienvenido L. Reyes*  
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*Marvic Mario Victor F. Leonen*  
MARVIC MARIO VICTOR F. LEONEN  
Associate Justice

*Francis H. Jardeleza*  
FRANCIS H. JARDELEZA  
Associate Justice

**CERTIFICATION**

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



**MARIA LOURDES P. A. SERENO**  
Chief Justice