

## **EN BANC**

**[ G.R. No. 201112, October 23, 2012 ]**

**ARCHBISHOP FERNANDO R. CAPALLA, OMAR SOLITARIO ALI  
AND MARY ANNE L. SUSANO, PETITIONERS, VS. THE  
HONORABLE COMMISSION ON ELECTIONS, RESPONDENT.**

**[G.R. NO. 201121 ]**

**SOLIDARITY FOR SOVEREIGNTY (S4S) REPRESENTED BY MA.  
LINDA OLAGUER; RAMON PEDROSA, BENJAMIN PAULINO SR.,  
EVELYN CORONEL, MA. LINDA OLAGUER MONTAYRE, AND  
NELSON T. MONTAYRE, PETITIONERS, VS. COMMISSION ON  
ELECTIONS REPRESENTED BY ITS CHAIRMAN, COMMISSIONER  
SIXTO S. BRILLANTES, JR., RESPONDENT.**

**[G.R. NO. 201127]**

**TEOFISTO T. GUINGONA, BISHOP BRODERICK S. PABILLO,  
SOLITA COLLAS MONSOD, MARIA CORAZON MENDOZA ACOL, FR.  
JOSE DIZON, NELSON JAVA CELIS, PABLO R. MANALASTAS,  
GEORGINA R. ENCANTO AND ANNA LEAH E. COLINA,  
PETITIONERS, VS. COMMISSION ON ELECTIONS AND  
SMARTMATIC TIM CORPORATION, RESPONDENTS.**

**[G.R. NO. 201413]**

**TANGGULANG DEMOKRASYA (TAN DEM), INC., EVELYN L.  
KILAYKO, TERESITA D. BALTAZAR, PILAR L. CALDERON AND  
ELITA T. MONTILLA, PETITIONERS, VS. COMMISSION ON  
ELECTIONS AND SMARTMATIC-TIM CORPORATION,  
RESPONDENTS.**

## **R E S O L U T I O N**

**PERALTA, J.:**

Before the Court are the Motions for Reconsideration separately filed by movants Teofisto T. Guingona, Bishop Broderick S. Pabillo, Solita Collas Monsod, Maria Corazon Mendoza Acol, Fr. Jose Dizon, Nelson Java Celis, Pablo R. Manalastas, Georgina R. Encanto and Anna Leah E. Colina (herein referred to as Guingona, et al.) in G.R. No. 201127;<sup>[1]</sup> Solidarity for Sovereignty (S4S) represented by Ma. Linda Olaguer, Ramon Pedrosa, Benjamin Paulino Sr., Evelyn Coronel, Ma. Linda Olaguer Montayre, and Nelson T. Montayre (referred to as S4S, et al.) in G.R. No. 201121;<sup>[2]</sup> and Tanggulang Demokrasya (Tan Dem), Inc., Evelyn L. Kilayko, Teresita D. Baltazar, Pilar L. Calderon and Elita T. Montilla (Tan Dem, et al. for brevity) in G.R. No. 201413.<sup>[3]</sup> Movants implore the Court to take a second look at the June

13, 2012 Decision<sup>[4]</sup> dismissing their petitions filed against respondents Commission on Elections (Comelec), represented by its Chairman Commissioner Sixto S. Brillantes, Jr. (Chairman Brillantes), and Smartmatic-TIM Corporation (Smartmatic-TIM).

For a proper perspective, the facts as found by the Court in the assailed decision are briefly stated below:

On July 10, 2009, the Comelec and Smartmatic-TIM entered into a *Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections* (AES Contract) which is a Contract of Lease with Option to Purchase (OTP) the goods listed therein consisting of the Precinct Count Optical Scan (PCOS), both software and hardware.<sup>[5]</sup> The Comelec was given until December 31, 2010 within which to exercise the option but opted not to exercise the same except for 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>[6]</sup>

On March 6, 2012, the Comelec issued Resolution No. 9373 resolving to seriously consider exercising the OTP subject to certain conditions.<sup>[7]</sup> It issued another Resolution numbered 9376 resolving to exercise the OTP in accordance with the AES Contract.<sup>[8]</sup> On March 29, 2012, it issued Resolution No. 9377 resolving to accept Smartmatic-TIM's offer to extend the period to exercise the OTP until March 31, 2012.<sup>[9]</sup> The Agreement on the Extension of the OTP under the AES Contract (Extension Agreement) was eventually signed on March 30, 2012.<sup>[10]</sup> Finally, it issued Resolution No. 9378 resolving to approve the Deed of Sale between the Comelec and Smartmatic-TIM to purchase the latter's PCOS machines to be used in the upcoming 2013 elections.<sup>[11]</sup> The Deed of Sale was forthwith executed.<sup>[12]</sup>

Claiming that the foregoing Comelec issuances and transactions entered pursuant thereto are illegal and unconstitutional, movants filed separate petitions for *certiorari*, prohibition and mandamus before the Court.

Movants failed to obtain a favorable decision when the Court rendered a Decision<sup>[13]</sup> on June 13, 2012 dismissing their petitions. Hence, the motions for reconsideration based on the following grounds:

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I. THE HONORABLE COURT, WITH ALL DUE RESPECT, ERRED IN HOLDING THAT THE PERIOD OF THE OPTION TO PURCHASE HAS NOT EXPIRED;

II. THE HONORABLE COURT, WITH ALL DUE RESPECT, ERRED IN HOLDING THAT THERE WAS NO SUBSTANTIAL AMENDMENT TO THE AES CONTRACT; [AND]

II. THE HONORABLE COURT, WITH ALL DUE RESPECT, ERRED IN HOLDING THAT THE SUBJECT AMENDMENT IS ADVANTAGEOUS TO THE PUBLIC.<sup>[14]</sup>

Movants Guingona, *et al.* disagree with the Court's interpretation of Article 2.2 of the AES Contract and insist that the use of the words "without prejudice" and "surviving" explicitly distinguished the "period of the option to purchase" from the "Term of this Contract." They thus conclude that the warranty provision and the OTP are covered by a totally different period and not by the term of the AES Contract.<sup>[15]</sup> They also argue that the bid bulletins relative to the AES Contract expressly stated the deadline for Comelec to exercise the OTP<sup>[16]</sup> and that the parties intended that the stated period be definite and non-extendible.<sup>[17]</sup> Movants likewise aver that the Court erred in holding that there was no substantial amendment to the AES Contract.<sup>[18]</sup> Citing *San Diego v. The Municipality of Naujan, Province of Mindoro*,<sup>[19]</sup> as discussed in Justice Arturo D. Brion's Dissenting Opinion,<sup>[20]</sup> and as allegedly reiterated in *San Buenaventura v. Municipality of San Jose, Camarines Sur, et al.*,<sup>[21]</sup> Guingona et al. points out that an extension, however short, of the period of a publicly bidden out contract is a substantial amendment that requires public bidding because the period in an OTP is a vital and essential particular to the contract.<sup>[22]</sup> Movants add that the Court erred in holding that the subject amendment is advantageous to the public as the extended option contract is void and thus can never be said to inure to the benefit of the public.<sup>[23]</sup> Lastly, movants claim that the Comelec still has the time to conduct public bidding to procure the items necessary for the 2013 elections and that the needed budget could be provided by Congress.<sup>[24]</sup>

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Petitioners humbly submit that the Order of this Honorable Court dismissing the petition by upholding the validity of the extended option to purchase and the constitutionality of the AES Contract implementation is contrary to law and the Constitution.<sup>[25]</sup>

Movants S4S, *et al.* implore the Court to take a second look at the relevance of the release of the performance security to the subject expired option contract since it did not alter the fact of such expiration.<sup>[26]</sup> They explain that the Court's conclusion is a dangerous precedent, because it would encourage circumvention of the laws and rules on government contracts since the parties could enter into collusion to defer the release of the performance security for the sole purpose of prolonging the effectivity of the contract.<sup>[27]</sup> They reiterate their argument that any extension of the option period amounts to a new procurement which must comply with the requirements of bidding under Republic Act (RA) No. 9184<sup>[28]</sup> and stress that the March 31, 2012 Deed of Sale is not a special transaction which warrants any exemption from the mandatory requirements of a public bidding.<sup>[29]</sup> It is likewise their view that time constraints, budgetary consideration and other advantages in extending the option period are not plausible justifications for non-compliance with the requirements of public bidding.<sup>[30]</sup> Finally, movants assail the constitutionality of the entire AES Contract and consequently of the option contract because of its failure to provide that the mandatory minimum system capabilities be complied with; and because of the provision on shared responsibility between the Comelec

and Smartmatic.<sup>[31]</sup>

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I. THE NON-RELEASE OF THE SECURITY DEPOSIT BY COMELEC INDICATES THE EXISTENCE OF UNFULFILLED OBLIGATIONS BY THE CONTRACTOR, AND THEREFORE, IT IS ABSURD TO CITE THIS UNCURED BREACH BY THE CONTRACTOR TO JUSTIFY THE GRANT OF MORE RIGHTS TO THE SAID CONTRACTOR BY EXTENDING THE EXPIRED OPTION TO PURCHASE WHICH EFFECTIVELY CIRCUMVENTS THE GOVERNMENT PROCUREMENT LAW.

II. THERE IS NO JUSTIFIABLE BASIS TO ACCEPT MERE ARGUMENTS THAT THE PCOS IS CAPABLE OF RUNNING WITH DIGITAL SIGNATURES, SECURE[D] FROM HACKING AND COMPLIANT WITH THE MINIMUM ACCURACY RATE OF 99.995%, WHEN IN ACTUAL PERFORMANCE DURING MAY 2010 [ELECTIONS,] THE PCOS OPERATED WITHOUT DIGITAL SIGNATURES, FOUND VULNERABLE TO HACKING AND FAILED BY THE ACCURACY REQUIREMENT, AS SHOWN BY THE APPLICABLE COMELEC RESOLUTIONS, TWG-RMA REPORT, AUDIT LOGS AND PRINT LOGS.<sup>[32]</sup>

Movants Tan Dem, *et al.* convey their view on the absurdity of the Court's decision in justifying the resurrection of the dead OTP with the continuing effectivity of the stipulation on performance security notwithstanding the presumed existence of uncured contractual breach by the contractor.<sup>[33]</sup> They also express doubt that the PCOS machines are capable of running with digital signatures compliant with the minimum accuracy rate.<sup>[34]</sup>

For their part, respondents offer the following comments:

#### **COMELEC**

The Comelec, on the other hand, argues that it validly exercised the OTP because the period for its exercise was amended and accordingly extended to March 31, 2012. It highlights the provision in the AES Contract on the right to amend the contract which the parties did during its effectivity.<sup>[35]</sup> It does not agree with movants' claim that the parties to the contract intended that the option period be definite.<sup>[36]</sup> Rather, it maintains that the parties are free to extend the option period in the same way that they can amend the other provisions of the contract.<sup>[37]</sup> Moreover, the Comelec insists that the extension of the option period is neither a material nor substantial amendment considering that after the extension, the AES Contract taken as a whole still contains substantially the same terms and conditions as the original contract and does not translate to concrete financial advantages to Smartmatic-TIM.<sup>[38]</sup> It also argues that the extension of the option period could not have affected the bid prices or financial proposals of the bidders since they understood from the RFP that it had no separate price allocation.<sup>[39]</sup> It emphasizes that a longer period was not a benefit but a burden to the bidders such that they would not have submitted a lower but in fact a higher bid because they would have

to give up the opportunity to lease or sell the PCOS machines to third parties and it would also result in higher costs in warehousing and security.<sup>[40]</sup> The Comelec also opines that *San Diego* and *San Buenaventura*, cited by movants, are not applicable because they involve alterations of the essential terms and conditions of the main contract to the disadvantage of the government unlike this case where there is an alteration only with respect to the ancillary provision of the AES Contract and for the benefit of the Comelec.<sup>[41]</sup> The Comelec reiterates that the extension of the option period is advantageous to it and burdensome for Smartmatic-TIM.<sup>[42]</sup> Lastly, it posits that the exercise of the OTP was the more prudent choice for the Comelec taking into consideration the budget and time constraints.<sup>[43]</sup>

#### SMARTMATIC-TIM

Smartmatic-TIM contends that the OTP is only an ancillary provision in the subsisting AES Contract which has already satisfied the public bidding requirements.<sup>[44]</sup> It disagrees with petitioners that the extension of the option period was unilateral and claims instead that it was mutual as the parties in fact executed an agreement on the extension.<sup>[45]</sup> Assuming that the option period had already expired, the extension is not a substantial or material amendment since it only pertains to a residual component of the AES Contract.<sup>[46]</sup> It also echoes the Comelec's argument that the *San Diego* and *San Buenaventura* cases are not applicable to the present case because of the difference in factual circumstances.<sup>[47]</sup> Moreover, it reiterates its claim that the extension is favorable to the Comelec and does not prejudice the other bidders.<sup>[48]</sup> Smartmatic-TIM explains that the retention of the performance security is due to its residual continuing obligations to maintain the PCOS machines and update the software in anticipation of their possible use for elections after 2010, and not due to the existence of unfulfilled obligations as provided in the AES Contract.<sup>[49]</sup> It likewise points out that the alleged flaws and deficiencies of the PCOS machines do not affect its compliance with the requirements of RA 9369.<sup>[50]</sup> It emphasizes that the use of digital signatures and their availability for use in future elections have been adequately established.<sup>[51]</sup> It also defends PCOS machines' compliance with the minimum requirements under RA 9369 as found by the Court in *Roque v. Comelec*.<sup>[52]</sup> As to the alleged glitches, Smartmatic-TIM claims that they are not attributable to any inherent defect in the PCOS machines and, in any case, enhancements have already been made.<sup>[53]</sup> Lastly, Smartmatic-TIM stresses that the arguments challenging the validity and constitutionality of the AES Contract and the performance by the Comelec of its mandate have already been rejected with finality by the Court in *Roque v. Comelec*.<sup>[54]</sup>

We find no reason to disturb our June 13, 2012 Decision.

Clearly, under the AES Contract, the Comelec was given until December 31, 2010 within which to exercise the OTP the subject goods listed therein including the PCOS machines. The option was, however, not exercised within said period. But the parties later entered into an extension agreement giving the Comelec until March 31, 2012 within which to exercise it. With the extension of the period, the Comelec validly exercised the option and eventually entered into a contract of sale of the subject goods. The extension of the option period, the subsequent exercise thereof, and the