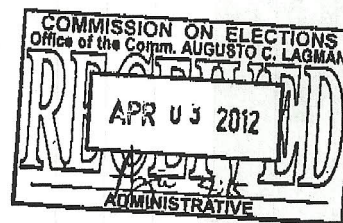


Department of Budget and Management
GOVERNMENT PROCUREMENT POLICY BOARD
TECHNICAL SUPPORT OFFICE

28 March 2012

HONORABLE AUGUSTO C. LAGMAN
 Commissioner, Member of COMELEC 2013 Steering Committee
 COMMISSION ON ELECTIONS (COMELEC)
 Intramuros, Manila



Re: Purchase of Goods for the Automated Election System (AES) Under an Expired Option to Purchase and Institutional Development of a Canvassing and Consolidation System (CCS)

Dear Commissioner Lagman:

We refer to your letters dated 8 February 2012 and 1 March 2012, elaborating on the issues faced by COMELEC as regards the preparations for the 2013 elections.

We understand from your letters that the COMELEC has already developed its own CCS by contracting the assistance of certain DOST employees, and completed the same last December 2011. However, COMELEC decided to set aside the proposed voting machine development component of the project because it is contemplating on entering into a contract with Smartmatic-TIM, the winning bidder for the 2010 Automated Elections System (AES), for the purchase of goods pursuant to an Option to Purchase (OTP) contained in the "Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections" (Contract).

The OTP was valid until 31 December 2010 but as early as 18 December 2010, Smartmatic-TIM unilaterally offered to extend the OTP until 31 March 2011. COMELEC took no action on the offer; hence, on 1 April 2011, Smartmatic-TIM offered, *motu proprio*, a Revised and Extended OTP proposed to be effective until 31 December 2011, with a ten percent (10%) price increase on the items eligible for purchase per Annex "L" of the Contract. The offer of 1 April 2011 not having been accepted, Smartmatic-TIM made another offer dated 23 September 2011 increasing by twenty percent (20%) the price of the eligible items, but maintaining the proposed extension until 31 December 2011. As in the previous offers, COMELEC did not accept the last offer made by Smartmatic-TIM.

Culled from the letter-requests sent us, we are requested to provide opinion on the following issues:

A. On COMELEC's Purchase of Goods for the AES under an expired OTP: 4

1. Whether or not the Commission may accept the Revised and Extended OTP and enter into a contract with Smartmatic-TIM for the goods covered by Annex "L" of the 2010 AES Contract without need of a public bidding; and
 2. If in the affirmative, would this cover only the goods listed in Annex "L" of the 2010 AES Contract or may the Commission be allowed to procure the required services from Smartmatic-TIM without need of public bidding? If additional machines are required, may these be purchased from Smartmatic-TIM without need of public bidding?
- B. On COMELEC's Purchase and Institutional Development of a Canvassing and Consolidation System (CCS):
1. Whether or not COMELEC may develop its own CCS; and
 2. Whether or not the development of the CCS falls within the term "procurement" as contemplated in Republic Act (RA) No. 9184 and its revised Implementing Rules and Regulations (IRR).

***A. Acceptance of the Revised and Extended OTP
and Purchase of Goods Without Public
Bidding***

Unilateral Offer to Extend OTP Needs Acceptance

As in any other kind of contract, the obligations, agreements, covenants and stipulations in *government contracts* shall be binding upon the parties as these are considered the law between them,¹ such that, an option to purchase agreed to be valid and shall expire on a certain date, *i.e.*, 31 December 2010, shall cease to be effective unless extended prior to the expiration of such option through the "mutual" and "consensual" agreement of both parties. It is common acceptance in law and jurisprudence that a "contract must bind both contracting parties, its validity or compliance cannot be left to the will of one of them."² The principle of mutuality of contracts dictates that its validity and compliance cannot be left solely upon the will of any of the contracting parties, lest the consensual nature of contracts and the meeting of the will of the parties through a valid offer and timely acceptance may be totally negated and brushed aside.

The contractual relation between COMELEC and Smartmatic-TIM, specifically on the exercise by the former of the OTP, is deemed automatically terminated upon expiration of the option on 31 December 2010. When the option to purchase expired on 31 December 2010, there is nothing more to extend thereafter because the existing "offer" that served as basis of the option to purchase had already ceased to exist, particularly, when COMELEC did not accept the unilateral and voluntary extension made by Smartmatic-TIM on 18 December 2011. Consequently, the subsequent extensions have no leg to stand on, so to speak, as the

¹Article 1159, Civil Code of the Philippines - "Obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith."

²Article 1308, Civil Code of the Philippines.

original "offer", that is, the offer for COMELEC to exercise the option to purchase, was already non-existent. Concomitantly, the succeeding offers made by Smartmatic-TIM proposing to extend the option to purchase until 31 December 2011 are regarded as "new" offers that need to comply with existing laws, rules and regulations on government contracting before it may be accepted legally.

Amendment to or Changes in the Contract Must be Mutually Agreed and in Writing

A careful perusal of the terms and conditions of the Contract, particularly Article 4.3, shows that COMELEC has the option to buy the Goods as listed in Annex "L" of the Contract upon the payment of 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). On the other hand, Article 6.6 of the Contract provides that COMELEC can exercise its OTP on or before 31 December 2010. As a matter of fact, COMELEC exercised the OTP for the special elections in ARMM by purchasing 920 units of Precinct-Count Optical Scan System (PCOS) and 36 units of Consolidated Canvassing System (CCS). Be that as it may, COMELEC did not exercise the OTP for the remainder of the goods – 81,280 of the PCOS and 1,684 CCS – on or before 31 December 2010. Thus, although Smartmatic-TIM made unilateral offers to extend the OTP under various terms and conditions, COMELEC, on its part, did not accept the proposed extension and revision of the terms of the OTP, much less acted on the offers.

Pursuant to Article 19, "the Contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties." Absent any mutual agreement, which must be reduced in writing and signed by the authorized representatives of both parties, the Extended and Revised OTP did not effectively serve as a valid amendment to the OTP provisions of the Contract. Accordingly, Article 19 of the Contract renders the unilateral extension of the period and amendment of the terms of the OTP ineffectual. As such, the proposals may be treated as new offers, which are separate and distinct from the original Contract.

Smartmatic-TIM Recognized No Obligation to COMELEC upon Expiration of OTP

The consequential outcome of the non-exercise by COMELEC of its OTP is known to and even recognized by Smartmatic-TIM. In clear and unequivocal statement contained in its 1 April 2011 letter, Smartmatic-TIM stressed that it "has no obligation to sell the equipments(*sic*) to COMELEC anymore, and will only decide to do so, if COMELEC's request is convenient for the company, and if the equipment, in total or partiality, is still available." Similarly, the "no obligation" claim and posturing of Smartmatic-TIM was reiterated in its 23 September 2011 letter when it insisted that "[S]martmatic will decide on any request for purchase, if said request is convenient for the company, and if the equipment, in total or partiality, is still available."

Indeed, Smartmatic-TIM is correct in claiming that it has "no obligation" to sell the equipment because the OTP has already expired on 31 December 2010; this being so, Smartmatic-TIM may categorically and boldly claim that it may decide to sell "if COMELEC's request is convenient for the company".

Procurement of PCOS and CCS Must Conform with R.A. 9184 and its IRR

From the foregoing, COMELEC may not belatedly act on the original OTP that ceased to be effective and binding upon the parties upon the expiration of the option period. In that regard, COMELEC may not accept the Revised and Extended OTP and enter into a contract with Smartmatic-TIM for the goods covered by Annex "L" of the 2010 AES Contract without need of a public bidding. There are two (2) instances when an offer becomes ineffective - when the subject matter has become *illegal* or *impossible* before acceptance is communicated; and, when the period of time within which the offeree must signify his acceptance has already lapsed.³ COMELEC's situation falls on the latter category. Hence, after the period to exercise the option to purchase has expired, there is no more option or right to speak of. Should the period, which has already expired, be extended by the offeror as in this case, this may be treated as a new offer.

We wish to stress, however, that notwithstanding the expiration of the original OTP, nothing prevents Smartmatic-TIM from unilaterally extending the period and revising the terms and conditions of the OTP. Such Revised and Extended OTP, as earlier mentioned, would be in the nature of a new offer, separate and distinct from the original OTP. It remains a new unilateral promise to sell, which if not accepted, produces no juridical effect, and creates no juridical and legal tie. Elsewise put, this remains a mere offer that has not been converted into a contract.⁴ Emphasis must be made, however, that before such unilateral offer can be converted into a valid contract, which is legally binding and effective upon the parties, the rules, processes and procedures set forth in Republic Act (RA) 9184, otherwise known as the Government Procurement Reform Act, and its Implementing Rules and Regulations (IRR) shall be complied with.

Section 10 of RA 9184 and its IRR mandate that competitive bidding is the primary mode of procurement, in that, government acquisition shall be done through competitive bidding. The Supreme Court in *Manila International Airport Authority and Antonio P. Gana v. Olongapo Maintenance Services, Inc. et al.*⁵ held that "competitive public bidding may not be dispensed with nor circumvented, and alternative modes of procurement for public service contracts and for supplies, materials, and equipment may only be resorted to in the instances provided for by law." Needless to say, competitive or public bidding is regarded as the primary mode of procurement because it is "[t]he accepted method for arriving at a fair and reasonable price [for government] and it ensures that overpricing and favoritism, and other anomalous practices are eliminated or minimized."⁶ Thus, in the event any of the alternative procurement modality is available for use by a procuring entity, "it is necessary to show why an alternative mode of procurement was resorted to."⁷

All told, considering that the original OTP has already expired, all juridical relations between the parties as regards the OTP are legally severed. Hence, the Revised and Extended OTP of Smartmatic-TIM, including all related, incidental and collateral consequences, being in the nature of a new offer, may only be accepted pursuant to RA 9184 and its IRR.

³See *Laudico v. Arias*, 43 Phil. 270.

⁴See *Raroque v. Maquez, et al.*, (C.A.), 37 O.G. 1911.

⁵G.R. Nos. 146184-85; 161117; and, 167827, January 31, 2008.

⁶*Manila International Airport Authority v. Mabunay*, G.R. No. 126151, January 20, 2000.

⁷*Cabrera, et al. v. Marcelo*, G.R. Nos. 157419-20, December 13, 2004.

Pointedly, COMELEC must utilize "competitive bidding"⁸ as the primary mode of procurement in the acquisition/lease of the PCOS and CCS and other related election materials, paraphernalia and equipment for the 2013 Elections, unless in highly exceptional, valid and justifiable circumstances, alongside the principles of efficiency and economy, any of the alternative methods of procurement, such as, Limited Source Bidding, Direct Contracting, Repeat Order, or Negotiated Procurement is available for use.

B. Purchase and Institutional Development of its CCS

COMELEC-Developed CCS

Anent the next query relative to the issue of COMELEC's purchase and institutional development of its own CCS, we refer to the institutional knowledge and expertise of COMELEC on the matter. Although not within the ambit of our expertise, we are of the opinion that nothing prohibits COMELEC from developing its own CCS.

As stated in Section 1 of RA 8436 as amended by RA 9369, "the State recognizes the mandate and authority of the Commission to prescribe 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." Such "adoption and use" may necessarily include the development of the most suitable technology for the purpose of ensuring the secrecy and sanctity of the ballot and all election, consolidation and transmission documents in order that the process shall be transparent and credible and that the results shall be fast, accurate and reflective of the genuine will of the people in accordance with Section 10⁹, Article XVI of the 1987 Philippine Constitution.

Moreover, as to the eventual use of the institutionally developed CCS, we conform to the concurring opinion of former Chief Justice Reynato S. Puno in the case *Roque, et al. v. COMELEC, et al.*¹⁰ that "what the law requires is that the system must have been successfully utilized in a prior electoral exercise, not that the provider should have been the one that previously used or employed the system." Hence, the COMELEC-developed CCS may form part of the AES or system that has been successfully utilized in a prior electoral exercise, i.e. the AES provided by Smartmatic-TIM. At the expense of being overlooked, an AES is not synonymous to, and ought not to be confused with the PCOS, or in the instant case, the CCS (which like the PCOS is only part of the several components of the AES utilized in the May 2010 elections).¹¹

The CCS refers to the Canvassing and Consolidating System Component of the AES which requires the use of a CCS software program and off-the shelf hardware - laptops, servers, and modems. On the other hand, an AES is "a system using appropriate technology

⁸ Section 10, R.A. 9184 - All procurement shall be done through competitive bidding, except as provided in Article XVI of the Act.

⁹ Section 10 provides that: "Science and technology are essential for national development and progress. The State shall give priority to research and development, invention, innovation, and their utilization; and to science and technology education, training, and services. It shall support indigenous, appropriate, and self-reliant scientific and technological capabilities, and their application to the country's productive systems and national life."

¹⁰ G.R. No. 188456, September 10, 2009

¹¹ See majority opinion in *Roque et al. vs. COMELEC et al.*, *ibid.*

which has been demonstrated in the voting, counting, consolidating, canvassing and transmission of election results, and other electoral processes.¹² Thus, it may be deduced, as discussed in *Roque*, that the CCS is merely one of several automated counting or canvassing technologies coming within the term-AES. Accordingly the requirement of "successful prior use and demonstrated capability" does not apply specifically to the CCS, but to the AES as an integral system.

Notwithstanding all the foregoing, it is our considered view that the development and eventual use of the CCS and/or the AES as a whole, must still comply with existing election and procurement laws and jurisprudence.

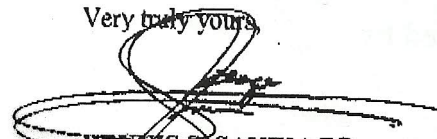
CCS Development as Procurement under RA 9184 and its IRR

As regards the last inquiry, considering that the CCS is an Information Technology project funded by public funds, its development and use is covered by the provisions of RA 9184 and its IRR.¹³

Under Section 5(aa) of the IRR, "[p]rocurement refers to the acquisition of goods, consulting services, and the contracting of infrastructure projects by the procuring entity. In case of projects involving mixed procurements, the nature of the procurement shall be determined based on the primary purpose of the contract." Notably, the development of the CCS, which is an information technology (IT) system that comprises the use of software program and computer hardware, falls within the term "procurement" and may be regarded as mixed procurement, *i.e.*, a combination of goods and consulting services, as contemplated in RA 9184 and its IRR. Absent any circumstances justifying resort to alternative methods of procurement, the development of the CCS by COMELEC must necessarily undergo public and competitive bidding.

We hope that our opinion on the matter sufficiently addresses your concerns. Note that this opinion is being rendered on the basis of the facts and particular circumstances as presented. Should you have further inquiries, please do not hesitate to contact us.

Very truly yours,


DENNIS S. SANTIAGO
Executive Director III

¹²Sec. 2(a) of RA 8436, as amended.

¹³See *DFA and BSP vs. Falcon et al.*, G.R. No. 176657, September 1, 2010.