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REPUBLIC OF THE PHILIPPINES
SUPREME COURT
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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,

G.R. No. 201127

- versus -

COMMISSION ON ELECTIONS and
SMARTMATIC TIM CORPORATION,
Respondents.

X-----X

OFFICE TRANSACTIONS
SUSPENDED DUE TO
Holy week
Date *04-09-12*
Time : *12:30*
Signature *[Signature]*

PETITION
FOR
CERTIORARI, PROHIBITION, AND MANDAMUS
[with Prayer for Temporary Restraining Order
and Writ of Preliminary Injunction]

Petitioners, by and through undersigned Counsels, unto this Honorable Court most respectfully manifest:

I.

THE PARTIES

1. PETITIONERS TEOFISTO T. GUINGONA, JR., Honorary Chair, AES Watch, Filipino, of legal age, and presently residing at 112 9th Street, New Manila, Quezon City; BISHOP BRODERICK S. PABILLO, Auxiliary Bishop of Manila and Co-Convener, AES Watch, Filipino citizen, of legal age, and with address at Sto. Nino de Tondo Parish, 600 L. Chacon Street, Tondo, Manila; SOLITA COLLAS MONSOD, Chair, Movement for Good Governance, with address at 2304 Morado Street, Dasmarinas Village, Makati City; MARIA CORAZON MENDOZA AKOL, Convenor-Transparent Elections.Org., Filipino citizen, of legal age and presently residing at 63-C P. Tuazon Street, Quezon City; FR. JOSE P. DIZON, Promoter, Solidarity Philippines and Spokesperson of KontraDaya, Filipino citizen,

of legal age, and with address at Bishop's House, Imus, Cavite City; **NELSON JAVA CELIS**, Board Member of Philippine Computer Society, Filipino citizen, of legal age and with address at U263 Cityland, dela Rosa Cond., dela Rosa Street, Pio del Pilar Village, Makati City; **PABLO R. MANALASTAS**, Founding President, Philippine Linux Users' Group (PLUG) and Co-Convener, AES Watch, Filipino citizen, of legal age, and with address at 7 Ateneo Rd., Kingsville Masinag, Antipolo City; **GEORGINA R. ENCANTO**, President, Transparency International-Philippines, Filipino citizen, of legal age, and presently residing at 73 Ifugao, La Vista, Quezon City; and **ANNA LEAH E. COLINA**, Convenor, Workers Electoral Watch (We Watch), Filipino citizen, of legal age, and presently residing at 15 Anonas Street, Unit D-24 Casal Building, Barangay Quirino 3-A, Project 3, Quezon City.

2. RESPONDENT COMMISSION ON ELECTIONS (hereinafter, "COMELEC") is the constitutional body that is mainly charged with the duty to enforce and administer all laws and regulations relative to the conduct of elections, plebiscite, initiative, and referendum; with office at Postigo St., Intramuros, Manila 1002. It may be served with summons, notices, and processes of this Honorable Court through its statutory counsel, the Office of the Solicitor General, at 134 Amorsolo St., Legaspi Village, Makati City.

PRIVATE RESPONDENT SMARTMATIC TIM CORPORATION (hereinafter, "SMARTMATIC") is a corporation organized and registered under the laws of the Republic of the Philippines. It may be served with summons, notices and other processes of the Honorable Court at its last known office address at 16th Flr., Accralaw Tower, 2nd Ave. cor. 30th Street, Crescent Park West, Bonifacio Global City, Taguig, Metro Manila.

II.

NATURE OF THE PETITION

This is a Petition for *Certiorari*, Prohibition, and *Mandamus* to question the legality, correctness and enforcement of Resolution No. 9376 of COMELEC promulgated on March 21, 2012 approving the exercise of the Option to Purchase the SMARTMATIC PCOS and CCS hardware and software in accordance with Section 4.3, Article 4 of the 2010 AES

III.

TIMELINESS OF THE PETITION

On March 21, 2012, RESPONDENT COMELEC promulgated its aforesaid Resolution to avail of and exercise its aforesaid Option to Purchase. Reckoned from said date, the instant Petition remains duly filed within the period prescribed under Rule 65 of the Rules of Court.

Certified true copy of said COMELEC Resolution No. 9376 is hereto attached as Annex A and made an integral part hereof.

The corresponding docket and other lawful fees have also been paid simultaneously with the filing of this Petition.

IV.

**BASIS OF PETITIONERS' RIGHT
TO FILE THE INSTANT PETITION**

1. PETITIONERS are filing the instant Petition in their capacities as Filipino citizens, voters, and taxpayers. In a catena of cases, this Honorable Court has often relaxed the rule for non-traditional plaintiffs, like citizens, voters, and taxpayers, when the public interest so requires, such as when the matter is of transcendental importance, of overarching significance to society, or of paramount public interest.¹

2. Thus, it has long been held that when the proceeding involves the assertion of a public right, the mere fact that he is a citizen satisfies the requirement of personal interest.² Furthermore, taxpayers are allowed to sue where there is a claim of illegal disbursement of public funds, or where the petitioners seek to restrain the respondent from

¹ *Guingona vs. COMELEC*, G.R. No. 191846, May 6, 2010; *IBP vs. Zamora*, 338 SCRA 81 (2000); *Chavez vs. PCGG*, 299 SCRA 744 (1998); *Tatad vs. Secretary*, 281 SCRA 330 (1997); *De Guia vs. COMELEC*, 208 SCRA 420 (1992); *Gonzales vs. COMELEC*, 129 Phil. 7 (1967).

² *Chavez vs. PCGG*, 299 SCRA 744 (1998); *Legaspi vs. CSC*, 150 SCRA 530 (1987); *Tañada vs. Tuvera*, 136 SCRA 27 (1985)

wasting public funds through the enforcement of an invalid or unconstitutional law³ or, as in this case, the implementation of a clearly invalid Resolution approving the exercise of an expired Option to Purchase the PCOS Machines used in the 2010 Elections.

3. As will be discussed in detail later, the assailed Resolution approved the exercise of the Option to Purchase under the said 2010 AES contract earlier executed by COMELEC with Private Respondent SMARTMATIC-TIM CORP. regarding the automated elections of 2010, which provision, however, had already long expired.

V.

STATEMENT OF RELEVANT FACTS

1. On July 10, 2009, COMELEC and SMARTMATIC executed a "Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections"(hereinafter, "2009 AUTOMATION CONTRACT").

Copy of the 2009 AUTOMATION CONTRACT (exclusive of annexes) is attached hereto as ANNEX B and made an integral part hereof.⁴

2. Articles 4.3 and 6.6 of the 2009 AUTOMATION CONTRACT provide:

ARTICLE 4 CONTRACT FEE AND PAYMENT

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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 [SMARTMATIC TIM CORPORATION] 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 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.

³ *Del Mar vs. PAGCOR*, 346 SCRA 485 (2000).

⁴ Execution copy of the 2009 AUTOMATION CONTRACT (exclusive of annexes) is available online at COMELEC's website, i.e. http://www.comelec.gov.ph/modernization/2010_natl_local/SBAC/contract/contract.html (accessible as of March 19, 2012), or http://www.comelec.gov.ph/modernization/2010_natl_local/SBAC/contract/Contract_Smartmatic-TIM.pdf (accessible as of March 19, 2012).

The retention money will be returned within five (5) working days after the expiration of the above warranty, provided, however, that the goods supplied are in good operating condition free from patent and latent defects, all the conditions imposed under the purchase contract have been fully met, and any defective machines, except to those attributable to COMELEC, have been either repaired at no additional charge or replaced or deducted from the price under the Option to Purchase.

**ARTICLE 6
COMELEC'S RESPONSIBILITIES**

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6.6 COMELEC shall notify the PROVIDER on or before 31 December 2010 of its option to purchase the Goods as listed in Annex "L".

3. However, COMELEC did not exercise its option to buy on or before the contractually specified expiration date (December 31, 2010).

4. In a letter to the COMELEC dated December 18, 2010, SMARTMATIC unilaterally extended the option period to March 31, 2011. However, COMELEC failed to perform any act relative to the extended option granted by SMARTMATIC in its aforesaid December 18, 2010 letter.

Copy of the December 18, 2010 letter is attached hereto as **ANNEX C** and made an integral part hereof.

5. Subsequently, in its letter to the COMELEC dated April 1, 2011, SMARTMATIC offered to COMELEC a "Revised Extended Option to Purchase", which contains certain contract modifications.

Copy of the April 1, 2011 letter is attached hereto as **ANNEX D** and made an integral part hereof.

6. On April 28, 2011, a **Term Sheet** was signed by COMELEC with SMARTMATIC in connection with the latter's aforesaid April 1, 2011 letter. Under said Term Sheet, various items not covered by the original option to purchase were included. However, the Term Sheet was cancelled by COMELEC on June 1, 2011.

Copy of the April 28, 2011 Term Sheet is attached hereto as **ANNEX E** and made an integral part hereof.

7. However, on September 23, 2011, SMARTMATIC wrote the COMELEC inquiring about the status of the option to purchase the PCOS machines and other equipment used during the 2010 elections. In said letter, SMARTMATIC also informed the

Commission that there will be a twenty percent (20%) price increase that shall be maintained until **December 21, 2011**.

Copy of SMARTMATIC's September 23, 2011 letter, is attached hereto as **ANNEX F** and made integral parts hereof.

8. While COMELEC had not responded to SMARTMATIC's September 23, 2011 letter, most of the PETITIONERS and other concerned citizens representing various groups addressed a letter to COMELEC dated March 5, 2012 expressing their concern regarding the COMELEC's exercising the expired Option to Purchase and, instead, urged COMELEC to conduct a public bidding but excluding SMARTMATIC from participating in the process considering its gross non-compliance with various aspects of the automated election system it adopted for the 2010 Elections.

Copy of the letter to COMELEC dated March 5, 2012 is attached as **ANNEX G** and made an integral part hereof.

9. To date, however, PETITIONERS have not received, nor are they aware of the issuance of, any official communication from COMELEC responding to their March 5, 2012 letter.

10. On March 19, 2012, COMELEC Chairman Brillantes was quoted in the Philippine Daily Inquirer issue for that day, as saying:

"We actually want them to file cases as soon as possible so that if the court will say that we cannot go with Smartmatic, then we will have time and we won't be hardpressed [to conduct a new bidding for a new automation contract]".

11. On March 22, 2012, Petitioner Nelson J. Celis, co-convener of AES Watch, by way of response to COMELEC Chairman Brillantes' challenge, wrote:

"In this regard, this is to inform your good office that the various organizations comprising AES Watch have bonded together and decided to accept your challenge to file the necessary suit in court and plan to file the action within the next few days.

It is, therefore, strongly and respectfully urged that COMELEC refrain, in the meantime, from implementing its subject decision/resolution, so as not to pre-empt the court's action on the Petition."

Copy of said March 22, 2012 letter is hereto attached as Annex H and made an integral part hereof.

12. Surprisingly, however, PETITIONERS came to know later that RESPONDENT COMELEC *en banc*, in its Resolution No. 9376, Annex "A", promulgated on March 21, 2012, decided to exercise its Option to Purchase the PCOS machines and other equipment from SMARTMATIC.

13. Moreover, despite the aforesaid March 22, 2012 letter of Petitioner Nelson J. Celis, and COMELEC's own challenge (as also posted in the March 19, 2012 issue of the Inquirer), "to those who say they will file a case should do so and we will know if there is a legal obstacle or not", COMELEC proceeded to execute a Deed of Sale with SMARTMATIC on March 30, 2012 for the purchase of the PCOS machines and other paraphernalia.

Copy of the Deed of Sale dated March 30, 2012 is hereto attached as Annex I and made an integral part hereof.

14. Hence, the present Petition filed before the Honorable Court, there being no other plain, speedy, and adequate remedy in the ordinary course of law to question the validity, constitutionality and enforceability of the COMELEC's assailed Resolution.

VI.

GROUNDS FOR THE PETITION

A. COMELEC committed grave abuse of discretion in totally disregarding the recommendation of the COMELEC Advisory Council (CAC) not to exercise the subject Option to Purchase.

1. It must be emphasized that in its Resolution No. 2012-003 dated February 8, 2012, the COMELEC Advisory Council (CAC) – the body mandated by law⁵ to recommend the most appropriate, secure, applicable, and cost-effective technology to be applied in the AES - reiterated its recommendation for the COMELEC not to exercise the subject

⁵ RA 9369, Sec. 9. Also, Sec. 7 thereof provides: "In the procurement of this [automated election] system, the Commission shall develop and adopt an evaluation system to ascertain that the above minimum system capabilities are met. This evaluation system shall be developed with the assistance of an advisory council."

Option to Purchase, as follows:

“WHEREFORE, during the COMELEC Steering Committee meeting on 6 February 2012, it was discussed that COMELEC is considering to exercise the Smartmatic purchase option or to conduct a new bidding.

WHEREFORE, the Advisory Council properly convened in a series of meetings, discussions and deliberations, resolves as it hereby resolved to recommend.

1. that for the sake of transparency and for the COMELEC to have the best option possible, **COMELEC should exert all efforts to procure the necessary AES only through a competitive public bidding process;**

2. **that the option to purchase under the 2010 national and location elections contract should not be exercised**, if as a consequence, the rest of the system must come from the same vendor as this –

a. may not afford the COMELEC the best possible total solution, as the hardware is just one component of the entire automated election system;

b. prevents the COMELEC from taking advantage of the best possible technology currently available considering technological advances and/or obsolescence;

c. will prevent other prospective vendors from competitively participating in the bidding process; and

d. may severely erode the public trust and confidence in the electoral process.”

Copy of the CAC Resolution No. 2012-003 is attached as **ANNEX J** and made an integral part hereof.

3. In fact, much earlier, the same CAC, pursuant to its mandate under the law⁶ to report its evaluation of the use of the AES used in the 2010 Elections to the Joint Congressional Oversight Committee on Automated Election System, submitted its “Post-Election Report on the Use of the Automated Election System (AES) in the 2010 National and Local Elections” dated June 2010. Said Report provides in part:

The implementation of the project encountered numerous obstacles as well. The most significant of these was the compact flash (CF) cards configuration issue that was uncovered a week before the elections. Other issues involving the AES include transmission problems, deactivation of the ultraviolet ink-based ballot authenticity verification feature, and erroneous time stamps. There were also numerous complaints during the Election Day, including long queues at polling precincts, defective precinct count optical scan (PCOS) machines or CF cards, and reports of electoral fraud, such as vote buying and ballot stuffing. What seemed so promising at the beginning of the project was suddenly becoming everyone’s worst nightmare.

(Underscoring supplied)

Significantly, the CAC concluded its report by saying that “[f]or the May 2013 elections, the COMELEC does not need to use the same PCOS machines”; and that “[t]he COMELEC would be better off not exercising the option to purchase the PCOS machines, so it can look for an even better solution for the May 2013 elections.”

Despite these grave concerns raised by COMELEC’s own statutory Advisory Council and said Council’s strong recommendation for COMELEC not to exercise its Option to Purchase, COMELEC nevertheless proceeded to adopt and promulgate its assailed Resolution No. 9376. This unjustified and unexplained disregard by COMELEC of CAC’s recommendation clearly constitute grave abuse of discretion.

B. COMELEC Resolution No. 9376 is totally null and void for being in violation of the express provisions of RA No. 9184.

1. Under the express provision of the 2009 AUTOMATION CONTRACT, COMELEC’s option to purchase expired when it failed to exercise the option on or before December 31, 2010. There is, therefore, no more option that may be exercised by the Commission after December 31, 2010.

2. It must be emphasized that no less than the COMELEC itself provided in Bid Bulletin No. 10 for a fixed and determinate period within which it could exercise the option-to-purchase provision of the AUTOMATION CONTRACT to be proposed by bidders, which period was set to end on December 31, 2010.

2.1. Thus, under Bid Bulletin No. 10⁷ issued on April 15, 2009 by the Special Bids and Awards Committee (SBAC), the following query was clarified:

Question/Issue	Answer/Clarification
Does the RFP envision a lease option to purchase arrangement for the PCOS machines? If so, when is the deadline to exercise the option to purchase?	Yes. As stated in the RFP, in Part V, OTHER SPECIFICATIONS , Sec. 28.1, the Commission shall enter into a contract of lease with option to purchase not only the PCOS machine but the entire Component 1. The deadline to exercise

⁶ *Id.* Sec. 9

⁷ Bid Bulletin No. 10 is available at http://www.comelec.gov.ph/modernization/2010_natl_local/SBAC/sbac_bid_bulletin/bid_bulletin_no10_041509.html (Accessible as of March 24, 2012)

the option is December 31, 2010.

2.2. Subsequently, the same SBAC issued on April 19, 2009 **Bid Bulletin No. 19**⁸

which states in part:

QUESTIONS/ISSUES	ANSWERS/CLARIFICATIONS
How long is the exercise period of the option to purchase?	Until December 31, 2010

2.3. Finally, under its **Bid Bulletin No. 21**⁹ dated April 20, 2009, the same SBAC again reiterated the December 31, 2010 deadline as follows:

6.2.	This Contract for an automated elections system is by way of lease for the hardware and software (for the EMS, PCOS, and CCS components) with option to purchase at a price not exceeding 50% of the lease price. COMELEC shall decide on the option to purchase by component or portions thereof (either or both the hardware and/or software components) on or before December 31, 2010. Xxx
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3. The emphasis on the deadline for the exercise of the Option to Purchase, as shown by its repeated inclusion in three (3) Bid Bulletins, clearly indicates its fixed and inextendible nature.

4. Consequently, **SMARTMATIC cannot extend the option period**, and neither can COMELEC give its consent to its extension in violation of its own **BID BULLETINS**.

5. Therefore, considering that the Option to Purchase had long expired, the purchase of the PCOS requires a public bidding for its validity since this would involve a new contract altogether. This is especially so, considering the many enhancements and requirements proposed by COMELEC, not all of which were consented to by SMARTMATIC.

6. The fundamental moorings for the necessity of a public bidding are laid down by the Supreme Court *en banc* in **Agan vs. PIATCO**.¹⁰ Thus:

By its very nature, public bidding aims to protect the public interest by giving the public the best possible advantages through open competition.

⁸ Bid Bulletin No. 19 is available at http://www.comelec.gov.ph/modernization/2010_natl_local/SBAC/sbac_bid_bulletin/bid_bulletin_no19_041909.html (Accessible as of March 24, 2012)

⁹ Bid Bulletin No. 21 is available at http://www.comelec.gov.ph/modernization/2010_natl_local/SBAC/sbac_bid_bulletin/bid_bulletin_no21_042109.html (Accessible as of March 24, 2012)

¹⁰ 402 SCRA 612 (2003), citations omitted, emphasis supplied

7. Recently, in *Power Sector Assets vs. Pozzolanic Philippines*,¹¹ the Honorable Supreme Court had occasion to reiterate the necessity of public bidding in government contracts. Thus:

It has been held that the three principles in public bidding are: (1) the offer to the public; (2) an opportunity for competition; and (3) a basis for the exact comparison of bids. A regulation of the matter which excludes any of these factors destroys the distinctive character of the system and thwarts the purpose of its adoption.

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In *Caltex (Philippines), Inc., et al. v. Delgado Brothers, Inc. et al.*, the Supreme Court likewise affirmed a decision of the trial court declaring as null and void the amendment to an arrastre contract for the reason that the same was done without public bidding. Citing the appealed decision, the Court held that:

x x x the said agreement of June 1, 1951 executed and entered into without previous public bidding, is null and void, and can not adversely affect the rights of third parties, x x x and of the public in general. x x x **the due execution of a contract after public bidding is a limitation upon the right of the contracting parties to alter or amend it without another public bidding, for otherwise what would a public bidding be good for if after the execution of a contract after public bidding, the contracting parties may alter or amend the contract, or even cancel it, at their will?** Public biddings are held for the protection of the public, and to give the public the best possible advantages by means of open competition between the bidders. He who bids or offers the best terms is awarded the contract subject of the bid, and it is obvious that such protection and best possible advantages to the public will disappear if the parties to a contract executed after public bidding may alter or amend it without another previous public bidding.

Finally, in *Information Technology Foundation of the Philippines v. Commission on Elections*, the Court nullified the award by the Commission on Elections (COMELEC) of a contract for the automation of the counting and canvassing of the ballots in the 2004 elections on the ground, among others, that it permitted the winning bidder to change and alter the subject of the contract, in effect allowing a substantive amendment without public bidding. Said the Supreme Court therein: "it is contrary to the very concept of public bidding to permit a variance between the conditions under which the bids are invited and those under which proposals are submitted and approved; or, as in this case, the conditions under which the bid is won and those under which the awarded contract will be complied with. **The substantive amendment of the contract bidded out, without any public bidding – after the bidding process had been concluded – is violative of the public policy on public biddings.** x x x. The whole point in going through the public bidding exercise was completely lost. The very rationale of public bidding was totally subverted by the Commission." x x x.

8. The foregoing pronouncements of the Supreme Court clearly show that COMELEC cannot accept SMARTMATIC's unilateral offer to extend the Option to Purchase as this would violate the existing procurement law (RA 9184). As explained earlier, the Request For Proposal (RFP) for the 2010 automated election system (AES) informed

prospective bidders of the December 31, 2010 deadline for the COMELEC's exercise of the option-to-purchase any component of their bids. In other words, during the bidding process, all the bidders were aware that there is no provision allowing extension of the option-to-purchase beyond the deadline provided.

9. It is, therefore, evident that COMELEC's exercise of the expired Option to Purchase, despite acceptance of SMARTMATIC's offer of extension is, with due respect, tantamount to giving the winning bidder, after its contract ended, a benefit that was not known and available to all bidders during the bidding of the 2010 AES. This is a clear and patent violation of the bidding rules and, more importantly, the Equal Protection Clause of the 1987 Constitution which all agencies of Government should always observe in all their dealings with private parties. Indeed, the extension of the period of the option to purchase is a substantial amendment of the bid contract that must undergo public bidding, even if the goods subject of the option and their corresponding prices remain the same despite such amendment. As mentioned earlier, consent by COMELEC to such amendment does not cure the infirmity of the violation but, in fact, compounds it.

It is to be emphasized that contracts involving the COMELEC and all other government agencies are governed not only by provisions of the Civil Code on contracts but also, and primordially, by R.A. 9184 to avoid partiality by the procuring entity and uneven competition in the procurement process.

C. COMELEC committed grave abuse of discretion in opting to buy the PCOS machines and allied paraphernalia of SMARTMATIC for use in the approaching 2013 election, despite incontrovertible findings of the glitches, malfunctions, bugs, and defects of the same.

1. Section 10 of RA 9369 expressly requires that, "[w]ith respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad."

¹¹ G.R. No. 183789, August 24, 2011, citations omitted 12

2. In addition to the various shortcomings and vulnerabilities found by COMELEC Advisory Council, citizen groups such as the Center for People Empowerment in Governance (CenPEG) and Philippine Computer Society (PCS); as well as foreign observers, have documented and reported the following failures and defects of the SMARTMATIC PCOS:

- a) CF Card misconfiguration and/or erroneous counting
- b) Ineffective ultraviolet sensor in the PCOS machines
- c) Wrong system date and time stamp
- d) Unreliable delay in electronic transmission of election returns
- e) Wrong electronic transmission of total number of registered voters to the Consolidation / Canvassing System (CCS)
- f) Problems in the Election Management System (EMS) electronic transmission for displaying results in COMELEC's website
- g) Unfounded system-generated rejection of ballots
- h) Unfounded system-generated classification of null votes
- i) Hardware malfunctioning/failure

3. It can not be gainsaid that, no less than the Honorable Supreme Court *en banc*, in *Guingona vs. COMELEC*,¹² also took judicial notice of the defects and malfunctions that befell the PCOS machines and the other equipment used by SMARTMATIC during the May 10, 2010 electoral exercise.

4. The afore-discussed circumstances, in conjunction with the public recognition of the various defects, weaknesses and vulnerabilities of the PCOS and related items, subject of the Deed of Sale, Annex I, and its confirmed shortcomings in terms of security and accuracy at various levels, should have prompted COMELEC to seriously consider and abide by the recommendations of its Advisory Council.

5. Lamentably and inexplicably, however, COMELEC chose to cast a blind eye on, and a deaf ear to, the aforesaid publicly confirmed, vulnerabilities, defects and inadequacies of SMARTMATIC's PCOS machines and equipment and, worse, ignore the strong advice and recommendation of its own Advisory Council not to exercise the Option to Purchase.

6. It must also be emphasized that, having opted not to exercise the option on or before its expiration on December 31, 2010 when it had all the time to do so, COMELEC should have already looked into other providers as recommended by its Advisory Council,

by conducting a public bidding. Why then is COMELEC now using lack of time to conduct a public bidding to justify its dealing anew with SMARTMATIC regarding the purchase and use of its PCOS machines and related paraphernalia for use in the 2013 elections?

7. It should be noted that, for the 2010 elections, COMELEC conducted its bidding for an Automated Election System in July 2010 or some ten months before election date. Therefore, what delay is COMELEC talking about to justify its Resolution dated March 21, 2012 to exercise the option to purchase and its signing of the Deed of Sale on March 30, 2012. Moreover, under the Multi-Year Budget Allotment System of the Department of Budget and Management, additional funding may be obtained for a more reliable and better 2013 Automated Election System through competitive public bidding.

8. By issuing the assailed March 21, 2012 Resolution No. 9376 approving the exercise of its Option to Purchase and, thereafter, signing the Deed of Sale on March 30, 2012 for the purchase of the SMARTMATIC's PCOS and related paraphernalia, COMELEC effectively and needlessly made the Filipino electorate a captive customer of SMARTMATIC for all elections to be conducted during the next ten (10) years, in light of the following provisions, among others, of the 2009 AUTOMATION CONTRACT:

**ARTICLE 8
PERFORMANCE SECURITY AND WARRANTY**

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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 that time and at such terms and conditions as may be agreed upon xxx

9. PETITIONERS respectfully submit that there is no valid justification in fact, in law, or in reason, for COMELEC to again entrust the electoral future of the Filipino people to the same company responsible for the various malfunctions and breakdowns of the automated system used in the May 10, 2010 national and local elections.

10. In fine, COMELEC's decision to exercise the Option to Purchase provision of its automation contract with SMARTMATIC TIM CORP., despite the clear expiration of the

period to do so, is tainted with grave abuse of discretion, as the same would amount to a total disregard or, at the very least, an **unlawful circumvention of, the country's procurement laws, particularly, Republic Act No. 9184** ("Government Procurement Reform Act").

11. More importantly, by exercising an expired and, therefore, non-existent Option to Purchase, in total disregard of the advice and recommendation of its Advisory Council in view of the many defects, shortcomings and vulnerabilities of the PCOS and related paraphernalia, COMELEC is guilty of a capricious and whimsical exercise of judgment equivalent to lack of jurisdiction.¹³ COMELEC's conduct, with due respect, constitutes, what the Supreme Court said in a recent case, an arbitrary or despotic exercise of power due to passion, prejudice or personal hostility that amounts to an evasion or refusal to perform a positive duty enjoined by law or to act at all in contemplation of law.¹⁴

VII.

GROUNDS FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER (TRO) AND/OR WRIT OF PRELIMINARY INJUNCTION

1. PETITIONERS replead the foregoing insofar as they are relevant and material to the matter at hand.

2. As extensively pleaded and explained above, PETITIONERS, as citizens, voters, and taxpayers, have a clear and undeniable right to question any unwarranted and unlawful expenditure of public funds by virtue of a decision of a government Agency to acquire equipment in contravention of the law, the Constitution and, more importantly, Public Interest.

3. Accordingly, PETITIONERS respectfully submit that, unless RESPONDENTS are forthwith restrained from implementing COMELEC Resolution No. 9376, Annex A, and subject of the instant Petition, the same would violate PETITIONERS' rights and would cause utter injustice and undue prejudice to PETITIONERS and the entire Filipino people.

¹³ *Amora vs. COMELEC*, G.R. No. 192280 : January 25, 2011

¹⁴ *Cf Land Bank vs. Pagayatan*, G.R. No. 177190, February 23, 2011

4. PETITIONERS respectfully submit further that the implementation by COMELEC of its Resolution No. 9376 through the Deed of Sale of March 30, 2012 for the acquisition of SMARTMATIC's PCOS machines and related equipment, if not abated and enjoined by this Honorable Court, would cause grave and irreparable injury to the PETITIONERS and the entire Filipino people, as well as the political and economic future and integrity of this country.

5. PETITIONERS are willing to post a bond in such amount and under such terms and conditions as this Honorable Court may deem just and equitable to impose as a requisite for the issuance of a Writ of Preliminary Injunction and/or a Temporary Restraining Order.

PETITIONERS' SUBMISSION

PETITIONERS most respectfully submit that the issues raised herein and the reliefs sought are of such extreme urgency and transcendental importance that they are compelled to seek the intervention of the Honorable Court to rectify RESPONDENT COMELEC's grave abuse of discretion, as shown by its consent to the clearly dubious maneuverings of a private company to avoid the strict requirements of Philippine procurement and bidding laws.

PETITIONERS further respectfully submit that, to remain fealty to its constitutional and statutory duties to enforce the laws concerning election and to conduct clean, credible and honest automated elections, COMELEC should desist from implementing its questioned Resolution No. 9376 and its March 30, 2012 Deed of Sale with SMARTMATIC for the purchase of the PCOS and related paraphernalia, and should, instead, conduct a public bidding for the procurement of the needed automation system for the 2013 Elections.

THE CONSTITUTIONALLY CHERISHED RIGHTS OF THE FILIPINO TO SUFFRAGE AND TRANSPARENCY DESERVE NO LESS.

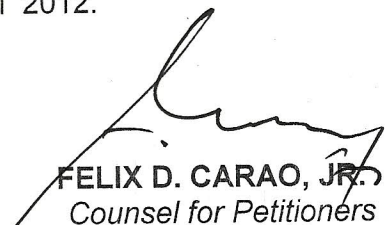
PRAYER

WHEREFORE, premises considered, PETITIONERS most respectfully pray of the Honorable Court to:

1. **ISSUE**, upon the filing of this Petition, a Temporary Restraining Order enjoining and restraining RESPONDENTS from implementing COMELEC Resolution No. 9376, Annex A and the Deed of Sale, Annex I for the acquisition and purchase of the PCOS machines and related equipment contemplated by said Resolution and Deed of Sale;
2. Thereafter, **ISSUE**, during the pendency of the instant Petition, a Writ of Preliminary Injunction enjoining and restraining Respondents from implementing COMELEC Resolution No. 9376, Annex A, including the Deed of Sale, Annex I, for the acquisition and purchase of PCOS machines and related equipment;
3. After due proceedings, **DECLARE** COMELEC Resolution No. 9376 **VOID AND UNCONSTITUTIONAL**; and **ANNUL** the Deed of Sale dated March 30, 2012, Annex I;
4. **DIRECT** RESPONDENT COMELEC to conduct public bidding soonest for the automated election system to be used for the 2013 Elections.

PETITIONERS further pray for such other and further reliefs as may be deemed just and equitable under the premises.

Makati City for Manila, 10 April 2012.


FELIX D. CARAO, JR.
Counsel for Petitioners
2nd Floor, LMC Bldg., 3741 Bautista St.
Palanan, 1235 Makati City
Tel. Nos. 551-9261 / 831-8886
IBP No. 897522; 10/04/12; Manila II
PTR No. 328978; 10/04/12; Makati
Roll No. 16716
MCLE Compliance No. III-0020761
June 29, 2011


RONA ANN V. CARITOS

PTR. No. 3285607; 03.28.2012; Makati City

IBP No. 895856; 03.28.2012; Manila City

Roll No. 57004

MCLE Compliance No. III- 0020993

MCLE Compliance Date: 08.24.2011

rcaritos@gmail.com

COPY FURNISHED:

Office of the Solicitor General

134 Amorsolo Street, Legazpi Village
Makati City

Commission on Elections

Palacio del Gobernador
Postigo Street, Intramuros
Manila City

SMARTMATIC-TIM

16th Floor, ACCRALAW Tower,
2nd Avenue, corner 30th Street
Crescent Park West
Bonifacio Global City, Taguig

EXPLANATION

(Re: Service by Registered Mail)

Pursuant to Section 11, Rule 13 of the 1997 Rules of Civil Procedure, undersigned counsel respectfully manifests that a copy of the foregoing **Petition for Certiorari, Prohibition and Mandamus with Prayer for Temporary Restraining Order and Writ of Preliminary Injunction** was served on the following:

Office of the Solicitor General

134 Amorsolo Street, Legazpi Village
Makati City

Registry Receipt No. 005216

Commission on Elections

Palacio del Gobernador
Postigo Street, Intramuros
Manila City

Registry Receipt No. 005217

SMARTMATIC-TIM

16th Floor, ACCRALAW Tower,
2nd Avenue, corner 30th Street
Crescent Park West
Bonifacio Global City, Taguig

Registry Receipt No. 005218

by registered mail in lieu of personal service due to lack of manpower in the law firm of undersigned counsel.

The registry receipts evidencing the mailing of a copy of the foregoing **Petition for Certiorari, Prohibition and Mandamus with Prayer for Temporary Restraining Order and Writ of Preliminary Injunction** to the aforementioned addressee is attached to the Affidavit of Filing and Service which is annexed hereto.


RONA ANN V. CARITOS

AFFIDAVIT OF SERVICE
(by registered mail)

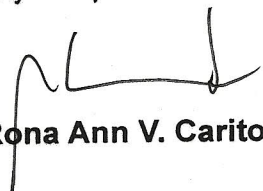
I, **RONA ANN V. CARITOS**, hereby depose and state:

1. I am one of the counsels of herein Petitioners with office address at Rm. 303 Ateneo Professional Schools, #20 Rockwell Drive, Rockwell Center, Makati City
2. I served copies of the Petition for Certiorari, Prohibition and Mandamus with a prayer for Temporary Restraining Order and Writ of Preliminary Injunction on the following parties at their respective addresses and on the dates indicated below:

Name	Address	Date of Service	Mode of Service
Office of the Solicitor General	134 Amorsolo Street, Legazpi Village, Makati City	04/10/12	Registered Mail
Commission on Elections	Palacio del Gobernador, Postigo Street, Intramuros, Manila City	04/10/12	Registered Mail
SMARTMATIC-TIM Corporation	16 th Floor, ACCRALAW Tower, 2 nd Avenue, corner 30 th Street, Crescent Park West, Bonifacio Global City, Taguig	04/10/12	Registered Mail


by depositing a copy in the post office, in a sealed envelope, plainly addressed to the addressee at its office, with postage fully prepaid, and with instructions to the postmaster to return the mail to the sender after ten (10) days if undelivered.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of April in Quezon City, Metro Manila.


Rona Ann V. Caritos

SUBSCRIBED AND SWORN to before me this 10th day of April 2012 in Quezon City, affiant exhibiting to me her Driver's License No. D12-03-003323 issued on 10th of August 2011 at Calamba City, Laguna.

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Book No. 2
Series of 2012.


ATTY. ROMEO C. CRUZ
Notary Public for Quezon City Until Dec. 31, 2013
Appointment No. NP-036 (2012-2013)
Attorney's Roll No. 31559
PTR O.R. No. 6022762, 1-02-2012-Q.C.
BP O.R. No. 823202/11-17-2011/Q.C.
Rm. 122 Alumni Center, Magsaysay Ave.,
U.P. Campus, Diliman, Q.C./Tst. No. 352-3587

**VERIFICATION AND CERTIFICATION
AS TO NON-FORUM SHOPPING**

WE, TEOFISTO T. GUINGONA, BISHOP BRODERICK S. PABILLO, SOLITA COLLAS MONSOD, MARIA CORAZON MENDOZA AKOL, FR. JOSE P. DIZON, NELSON JAVA CELIS, PABLO R. MANALASTAS, GEORGINA R. ENCANTO, and ANNA LEAH E. COLINA, all Filipinos, of legal age, all with address indicated above, after being duly sworn in accordance with law, hereby depose and state that:

1. We are the Petitioners in the above-captioned PETITION FOR CERTIORARI, PROHIBITION AND MANDAMUS;

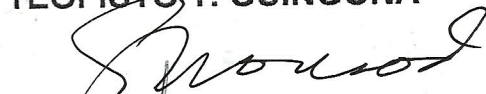
2. We caused the preparation of the herein PETITION and all the allegations of facts contained therein are true and correct to the best of our own personal knowledge, as well as on the basis of authentic records.

3. Petitioners have not commenced any other action or proceeding involving the same issues in the Supreme Court, Court of Appeals, and any other tribunal or agency.

4. To the best of our knowledge, there is no similar action or proceedings involving the same issues pending in the Supreme Court, Court of Appeals, any tribunal or agency except those manifested above.

5. If we should thereafter learn that a similar action or proceeding involving the same issues have been filed or is pending before the Supreme Court, the Court of Appeals, or any other tribunal or agency, we undertake to report this fact within five (5) days therefrom.


TEOFISTO T. GUINGONA


SOLITA COLLAS MONSOD



FR. JOSE P. DIZON


PABLO R. MANALASTAS


ANNA LEAH E. COLINA


BISHOP BRODERICK S. PABILLO


MARIA CORAZON MENDOZA AKOL


NELSON JAVA CELIS


GEORGINA R. ENCANTO

Republic of the Philippines }
QUEZON CITY } s. s.

APR 10 2012

SUBSCRIBED AND SWORN to before me this ___th day of March, 2012, at **QUEZON CITY**
City, affiants exhibiting to me their valid IDs as follows:

TEOFISTO T. GUINGONA

- Senior Citizen ID No. 1663
issued on May 28, 2006

BISHOP BRODERICK S. PABILLO

- Driver's Licence NOI-78-052527
to expire March 11, 2012

SOLITA MONSOD

- Senior Citizens ID No. 10271
Issued on May 26, 2006

MARIA CORAZON MENDOZA ACOL

- Driver's License N02-69-006413
to expire April 10, 2013

FR. JOSE DIZON

- SSS ID No. 03-4023924-3

NELSON JAVA CELIS, JR.

- PRC 0001636 issued at Manila
On January 6, 2010

PABLO R. MANALASTAS

- SSS ID No. 03-2267562-1

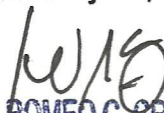
GEORGINA R. ENCANTO

- TIN 293-986-036-000

ANNA LEAH E. COLINA

- PASSPORT No. EB4795335
Issued Feb. 25, 2012 to expire
February 24, 2017

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Book No. 68
Series of 2012


ATTY. ROMEO C. CRUZ
Notary Public for Quezon City from Dec. 12, 2013
Appointment No. NP-036 (2012-2013)
Attorney's Roll No. 31559
PTR O.R. No. 6022762, 1-02-2012-Q.C.
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