Republic of the Philippines
SUPREME COURT
Manila

EN BANC

LEO Y. QUERUBIN, MARIA CORAZON M. AKOL, and AUGUSTO C. LAGMAN Petitioners, - versus - **COMMISSION ON ELECTIONS EN BANC, represented by Chairperson J. ANDRES D. BAUTISTA, and JOINT VENTURE OF SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. and JARLTECH INTERNATIONAL CORPORATION, represented by partner with biggest equity share, SMARTMATIC-TIM CORPORATION, its general manager ALASTAIR JOSEPH JAMES WELLS, Smartmatic Chairman LORD MALLOCH-BROWN, Smartmatic-Asia Pacific President CESAR FLORES, and any or all persons acting for and on behalf of the Joint Venture,** Respondents.	**G.R. No. 218787** Present: SERENO, *C.J.*, CARPIO, VELASCO, JR., LEONARDO-DE CASTRO, BRION,* PERALTA, BERSAMIN, DEL CASTILLO, VILLARAMA, JR., PEREZ, MENDOZA, REYES, PERLAS-BERNABE, LEONEN, JARDELEZA, *JJ.* Promulgated: December 8, 2015

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D E C I S I O N

VELASCO, JR., *J.*:

* On official leave.

Nature of the Case

Before the Court is a petition for certiorari or prohibition under Rule 64 of the Rules of Court, with prayer for injunctive relief, assailing the validity and seeking to restrain the implementation of the Commission of Elections (COMELEC) *en banc's* June 29, 2015 Decision[1] for allegedly being repugnant to the provisions of *Batas Pambansa Blg.* 68 (BP 68), otherwise known as the *Corporation Code of the Philippines*, and Republic Act No. 9184 (RA 9184) or the *Government Procurement Reform Act.*

The Facts

On October 27, 2014, the COMELEC *en banc*, through its Resolution No. 14-0715, released the bidding documents for the "Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System."[2] Specified in the published Invitation to Bid[3] are the details for the lease with option to purchase, through competitive public bidding, of twenty-three thousand (23,000) new units of precinct-based OMRs or OP-SCAN Systems, with a total Approved Budget for Contract of ₱2,503,518,000,[4] to be used in the 2016 National and Local Elections.[5] The COMELEC Bids and Awards Committee (BAC) set the deadline for the submission by interested parties of their eligibility requirements and initial technical proposal on December 4, 2014.[6]

The joint venture of Smartmatic-TIM Corporation (SMTC), Smartmatic International Holding B.V., and Jarltech International Corporation (collectively referred to as "Smartmatic JV") responded to the call and submitted bid for the project on the scheduled date. Indra Sistemas, S.A. (Indra) and MIRU Systems Co. Ltd. likewise signified their interest in the project, but only Indra, aside from Smartmatic JV, submitted its bid.[7]

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[1] *Rollo*, pp. 61-72. Rendered by Chairman J. Andres D. Bautista and Commissioners Christian Robert S. Lim, Al A. Parreño, Luie Tito F. Guia, Arthur D. Lim, Ma. Rowena Amelia V. Guanzon and Sheriff M. Abas.

[2] Id. at 213-329. The bid documents are divided into eight (8) sections, namely: the Invitation to Bid, Instruction to Bidders, Bid Data Sheet, General Conditions of Contract, Special Conditions of Contract, Schedule of Requirements, Technical Specifications, and Bidding Forms.

[3] Id. at 216-218.

[4] Id. at 216.

COMPONENT	QUANTITY	UNIT COST	TOTAL
1 – Voting Machines	23,000 units	Php 90,000.00	Php 2,070,000,000.00
2 – Ballots	16,500,000 pieces	Php 20.00	Php 330,000,000.00
3 – Ballot Boxes	20,406 units	Php 3,000.00	Php 61,218,000.00
4 – Technical Support	4,550 Technicians (Polling Centers)		Php 42,300,000.00
	150 Technicians (National Technical Support Group)		
APPROVED BUDGET FOR THE CONTRACT (ABC)			**Php 2,503,518,000.00**

[5] Id. at 61-62.

[6] Id. at 217-218.

[7] Id. at 621.

During the opening of the bids, Smartmatic JV, in a sworn certification, informed the BAC that one of its partner corporations, SMTC, has a pending application with the Securities and Exchange Commission (SEC) to amend its Articles of Incorporation (AOI), attaching therein all pending documents.[8] The amendments adopted as early as November 12, 2014 were approved by the SEC on December 10, 2014.[9] On even date, Smartmatic JV and Indra participated in the end-to-end testing of their initial technical proposals for the procurement project before the BAC.

Upon evaluation of the submittals, the BAC, through its Resolution No. 1 dated December 15, 2014, declared Smartmatic JV and Indra eligible to participate in the second stage of the bidding process.[10] The BAC then issued a Notice requiring them to submit their Final Revised Technical Tenders and Price proposals on February 25, 2015, to which the eligible participants complied. Finding that the joint venture satisfied the requirements in the published Invitation to Bid, Smartmatic JV, on March 26, 2015, was declared to have tendered a complete and responsive Overall Summary of the Financial Proposal.[11] Meanwhile, Indra was disqualified for submitting a non-responsive bid.[12]

Subsequently, for purposes of post-qualification evaluation, the BAC required Smartmatic JV to submit additional documents and a prototype sample of its OMR.[13] The prototype was subjected to testing to gauge its compliance with the requirements outlined in the project's Terms of Reference (TOR).[14]

After the conduct of post-qualification, the BAC, through Resolution No. 9 dated May 5, 2015, disqualified Smartmatic JV on two grounds, viz:[15]

1. Failure to submit valid AOI; and
2. The demo unit failed to meet the technical requirement that the system shall be capable of writing all data/files, audit log, statistics and ballot images simultaneously in at least two (2) data storages.

The ruling prompted Smartmatic JV to move for reconsideration.[16] In denying the motion, the BAC, through Resolution No. 10[17] dated May 15, 2015, declared that Smartmatic JV complied with the requirements of Sec. 23.1(b) of the Revised Implementing Rules and Regulations of RA 9184 (GPRA IRR), including the submission of a valid AOI, but was nevertheless

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[8] Id. at 623; *see also* BAC Resolution No. 10, Memorandum of Divida Blaz-Perez, id. at 433.
[9] Id. at 546.
[10] Id. at 623, 437.
[11] Id. at 624.
[12] Id. at 624, 441-442.
[13] Id. at 624, 447-448.
[14] Id. at 900-901.
[15] Id. at 62, 449-451.
[16] Id. at 452-468.
[17] Id. at 424-429.

disqualified as it still failed to comply with the technical requirements of the project.[18]

Aggrieved, Smartmatic JV filed a Protest,[19] seeking permission to conduct another technical demonstration of its SAES 1800 plus OMR (OMR+), the OMR Smartmatic JV presented during the public bidding before the COMELEC *en banc*.[20] Accordingly, on June 19, 2015, Smartmatic JV was allowed to prove compliance with the technical specifications for the second time, but this time before the electoral tribunal's Technical Evaluation Committee (TEC).[21] This was followed, on June 23, 2015, by another technical demonstration before the Commission *en banc* at the Advanced Science and Technology Institute (ASTI) at the University of the Philippines, Diliman, Quezon City.[22]

Ruling of the COMELEC *en banc*

Though initially finding that the OMR+'s ability to simultaneously write data in two storage devices could not conclusively be established,[23] the TEC, upon the use of a Digital Storage Oscilloscope (DSO) during the second demonstration,[24] determined that the OMR+ complied with the requirements specified in the TOR.[25] Adopting the findings of the TEC as embodied in its Final Report, the COMELEC *en banc*, on June 29, 2015, promulgated the assailed Decision granting Smartmatic JV's protest. The dispositive portion of the Decision reads:[26]

> **WHEREFORE**, the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated responsive bid in connection with the public bidding for the lease with option to purchase of 23,000 new units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.
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> Let the Bids and Awards Committee implement this Decision.

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[18] Id. at 428.
[19] Id. at 469-506.
[20] Id. at 62-63.
[21] Id. at 63.
[22] Id. at 64.
[23] Id. at 63.
[24] Id. at 23. The DOS was used to visualize the electrical signals sent to the memory cards without modifying the OMR+ hardware and software. During the June 23, 2015 demonstration, the DSO displayed waveforms of time dimension and electrical voltage, which were then analyzed by the electronics design engineers of the ASTI.
[25] Id. at 23-26.
[26] Id. at 26.

SO ORDERED.

The seven-man commission was unanimous in holding that Smartmatic JV's OMR+ sufficiently satisfied the technical requirements itemized in the TOR, reproducing in the assailed Decision, verbatim and with approbation, the entirety of the TEC's Final Report, thusly:[27]

> This is to report on the result of the public test conducted on 23 June of the claim of Smartmatic TIM (SMTT) that their proposed SAES 1800 (PCOS+) has the capability to write ballot images, audit logs, and elections results on two separate storage (devices) simultaneously.
>
> Technical discussion, demonstrations, and design reviews were conducted over two day period before the actual demonstration to the Comelec En Banc. These reviews were conducted between SMTT engineers and a team of embedded electronics design engineers from the Advanced Science and Technology Institute of the Department of Science and Technology.
>
> Though these reviews are important to validate the behavior and functionality of the PCOS+, the best way to validate the claim of SMTT is to use a specialized test instrument connected to the actual electrical inputs of both storage cards.
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> To visualize the electrical signals being sent to the memory cards, an Agilent DSO7054A Digital Storage Oscilloscope (DSO) from ASTI connected to the same data input line on two SD card adapters with a micro SD card inside. This was done to simulate an actual SC card and to make the DSO probe connections accessible and secure without modifying anything in the PCOS+ hardware or software. x x x
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> During normal operation such as on Election day, when the PCOS+ is accepting ballots from voters, the PCOS+ is designated to write data on both SD cards after the ballots has been determined to be valid and the voter choices have been shown to the voter for verification.
>
> The data being written on the storage devices consist mainly of the scanned ballots image of the front and back of the ballot at 200 dots per inch in both the horizontal and vertical dimension with each dot encoded into a 4 bit value corresponding to 16 shades of gray. The other data saved on the storage device consists of the vote interpretation and updates to the audit log. Each time that data is written on the two storage device, the date is encrypted and a verification step is done to check that identical data is written on both devices. The entire write process lasts a few seconds for each ballot.
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> x x x x
>
> The DSO display the time dimension on the horizontal axis and the electrical voltage in the vertical axis, the display is generated left to right over time (earlier events are on the left). The yellow line on top shows the electrical signal on the Data 2 pin of the main storage card and the green line shows the electrical signal on the Data 2 pin of the backup storage

[27] Id. at 69-71.

> card. The orange dashed horizontal and vertical lines are used for measuring the differences in time and voltage.
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> The vertical dashed line on the left marks the start of the data being written on the main and backup storage card and the vertical dashed line on the right marks the ends of the writing operation for one ballot. The time difference in this case is about 2.616 seconds as shown near the bottom left corner of the display.
>
> The yellow and green vertical lines in between the two vertical dashed lines represent the digital ones and zeros being written on both storage cards. The yellow and green traces are not exactly identical because the main car also contains the operating system of the PCOS+ and additional data operations are being performed on it. Because the time scale is the same on both probes, we conclude that the PCOS+ is writing on both cards simultaneously during this time interval.

Notwithstanding Smartmatic JV's compliance with the technical requirements in the TOR, Commissioner Luie Tito F. Guia (Guia) would nonetheless dissent in part, questioning the sufficiency of the documents submitted by the Smartmatic JV.[28] Taking their cue from Commissioner Guia's dissent, petitioners now assail the June 29, 2015 Decision of the COMELEC through the instant recourse.

The Issues

Petitioners framed the issues in the extant case in the following wise:[29]

A. Procedural Issues

I. WHETHER OR NOT THE PETITION IS THE PROPER REMEDIAL VEHICLE TO ASSAIL THE SUBJECT DECISION OF THE COMELEC EN BANC;

II. WHETHER OR NOT THE SUPREME COURT HAS THE RIGHT AND DUTY TO ENTERTAIN THIS PETITION;

III. WHETHER OR NOT A JUSTICIABLE CASE OR CONTROVERSY EXISTS;

IV. WHETHER OR NOT THE CASE OR CONTROVERSY IS RIPE FOR JUDICIAL ADJUDICATION;

V. WHETHER OR NOT UNDER THE CIRCUMSTANCES, THE RULE ON "HIERARCHY OF COURTS" MAY BE DISPENSED WITH;

VI. WHETHER OR NOT THE PETITIONERS POSSESS LOCUS STANDI;

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[28] Id. at 74-76.
[29] Id. at 32-34.

B. Substantive Issues

VII. WHETHER OR NOT THE COMELEC EN BANC ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN GRANTING THE PROTEST AS WELL AS IN DECLARING THE JOINT VENTURE OF SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. AND JARLTECH INTERNATIONAL CORPORATION AS THE BIDDER WITH THE LOWEST CALCULATED RESPONSIVE BID IN CONNECTION WITH THE PUBLIC BIDDING FOR THE LEASE WITH OPTION TO PURCHASE OF 23,000 NEW UNITS OF PRECINCT-BASED OPTICAL MARK READER OR OPTICAL SCAN SYSTEM FOR USE IN THE MAY 9, 2016 NATIONAL AND LOCAL ELECTIONS

VIII. WHETHER OR NOT A WRIT OF PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER SHOULD ISSUE

In challenging the June 29, 2015 Decision, petitioners, filing as taxpayers, alleged that the COMELEC *en banc* acted with grave abuse of discretion amounting to lack or excess of jurisdiction in declaring Smartmatic JV as the bidder with the lowest calculated responsive bid.[30] According to petitioners, Smartmatic JV cannot be declared eligible, even more so as the bidder with the lowest calculated responsive bid, because one of its proponents, SMTC, holding 46.5% of the shares of Smartmatic JV, no longer has a valid corporate purpose as required under Sec. 14 of BP 68, which pertinently reads:

> **Section 14.** *Contents of the articles of incorporation.* – All corporations organized under this code shall file with the Securities and Exchange Commission articles of incorporation in any of the official languages duly signed and acknowledged by all of the incorporators, containing substantially the following matters, except as otherwise prescribed by this Code or by special law:
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> x x x x
>
> 2. The **specific purpose or purposes for which the corporation is being incorporated**. Where a corporation has more than one stated purpose, the articles of incorporation shall state which is the primary purpose and which is/are the secondary purpose or purposes: Provided, That a non-stock corporation may not include a purpose which would change or contradict its nature as such x x x.

As proof, petitioners cite the primary purpose of SMTC as stated in the company's AOI, which was submitted to the COMELEC on December 4, 2014 as part of the joint venture's eligibility documents. To quote SMTC's primary purpose therein:[31]

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[30] Id. at 34.
[31] Id. at 75, 532.

> To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management Corporation ("TIM") and Smartmatic International Corporation ("Smartmatic") arising under the Request for Proposal and the Notice of Award issued by the Commission on Elections ("COMELEC") for the **automation of the 2010 national and local elections ("Project")**, including the leasing, selling, importing and/or assembling of automated voting machines, computer software and other computer services and/or otherwise deal in all kinds of services to be used, offered or provided to the COMELEC **for the preparations and the conduct of the Project** including project management services. (emphasis added)

In concurrence with Commissioner Guia's opinion, petitioners argue that the foregoing paragraph readily evinces that SMTC was created solely for the automation of the 2010 National and Local Elections, not for any other election.[32] Having already served its purpose, SMTC no longer has authority to engage in business, so petitioners claim. To allow SMTC then to have a hand in the succeeding elections would be tolerating its performance of an *ultra vires* act.

Petitioners hasten to add that without a valid purpose, the company could not have submitted a valid AOI, a procurement eligibility requirement under Sec. 23.1 (b) of the IRR of RA 9184. For them, the SEC's subsequent approval, on December 10, 2014, of the amendments to SMTC's AOI cannot cure the partner corporation's ineligibility because eligibility is determined at the time of the opening of the bids, which, in this case, was conducted on December 4, 2014.[33]

Finally, petitioners contend that SMTC misrepresented itself by leading the BAC to believe that it may carry out the project despite its limited corporate purpose, and by claiming that it is a Philippine corporation when it is, allegedly, 100% foreign-owned.[34] They add that misrepresentation is a ground for the procuring agency to consider a bidder ineligible and disqualify it from obtaining an award or contract.[35]

In its Comment,[36] public respondent COMELEC, through the Office of the Solicitor General (OSG), refuted the arguments of petitioners on the main postulation that the sole issue raised before the COMELEC *en banc* was limited to the technical aspect of the project.[37] According to the OSG, the sufficiency of the documents submitted was already decided by the BAC on May 15, 2015 when it partially granted Smartmatic JV's motion for reconsideration through BAC Resolution No. 10. Anent the procedural

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[32] Id. at 48.
[33] Id. at 46.
[34] Id. at 46.
[35] Id. at 49.
[36] Id. at 587-618.
[37] Id. at 593-596.

issues, the OSG, in its bid to have the case dismissed outright, questioned petitioners' *locus standi* and failure to observe the hierarchy of courts.[38]

Meanwhile, private respondents, in their Comment/Opposition,[39] countered that the BAC has thoroughly explained and laid down the factual and legal basis behind its finding on Smartmatic JV's legal capacity to participate as bidder in the project procurement; that the issue on SMTC's AOI has been rendered moot by the SEC's subsequent approval on December 10, 2014 of the AOI's amendment broadening the company's primary purpose;[40] that SMTC's primary purpose, as amended, now reads:[41]

> To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

that the alleged defect in SMTC's AOI is of no moment since neither the law nor the bidding documents require a bidder to submit its AOI;[42] that even assuming for the sake of argument that SMTC's primary purpose precludes it from further contracting for the automation of the Philippine elections beyond 2010, its secondary purposes[43] and Sec. 42 of BP 68[44] authorize the

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[38] Id. at 596-604.
[39] Id. at 619-663.
[40] Id. at 647.
[41] Id. at 549.
[42] Id. at 637-639.
[43] Id. at 533-534. Its secondary purposes read: a. to acquire by purchase, lease, contract, concession or otherwise, within the limits allowed by law, any and all real and/or personal properties of every kind and description whatsoever, whether tangible or intangible, which the Corporation may deem necessary or appropriate in connection with the conduct of any business in which the Corporation may lawfully engage, and, within the limits allowed by law, to own, hold, operate, improve, develop, manage, grant, lease, sell, assign, convey, transfer, exchange, or otherwise dispose of the whole or any part thereof;

x x x x

h. To carry out any of the above-mentioned purposes as principal, agent, factor, licensee, concessionaire, contractor, or otherwise, either alone or on conjunction with any other person, firm, association, corporation, or entity, whether public or private;

i. To enter into contracts and arrangements of every kind and description for any lawful purpose with any person, firm, association, corporation, municipality, body politic, country, territory, province, state, or government, and to obtain from any government or authority such rights, privileges, contracts and concessionaires which the Corporation may deem desirable.

[44] **Section 42.** *Power to invest corporate funds in another corporation or business or for any other purpose.* – Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation or business or for any purpose other than the primary purpose for which it was organized when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of non-stock corporations, at a stockholder's or member's meeting duly called for the purpose. Written notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary.

company to do so;[45] and that the COMELEC, in fact, has already dealt with SMTC numerous times after the 2010 elections.[46]

Private respondents would likewise debunk petitioners' allegation that SMTC misrepresented its nationality. They argue that based on its General Information Sheet (GIS), SMTC is a Filipino corporation, not a foreign one as petitioners alleged. Moreover, what is only required under RA 9184 is that the nationality of the joint venture be Filipino, and not necessarily that of its individual proponents.[47] In any event, so private respondents claim, the COMELEC, under the law, is not prohibited from acquiring election equipment from foreign sources, rendering SMTC and even Smartmatic JV's nationality immaterial.[48]

Lastly, private respondents pray for the petition's outright dismissal, following petitioner Akol and Lagman's alleged failure to comply with the rules on verifications, on the submission of certifications against forum-shopping, and on the efficient use of paper.[49]

The Court's Ruling

The petition lacks merit.

Rule 64 is not applicable in assailing the COMELEC *en banc*'s Decision granting Smartmatic JV's protest

In arguing for the propriety of the remedial vehicle chosen, petitioners claim that under Rule 64, Sec. 2 of the Rules of Court, "**[a] judgment or final order or resolution of the Commission on Elections x x x may be brought by the aggrieved party to the Supreme Court on certiorari under Rule 65.**"[50] They postulate that the June 29, 2015 Decision of the COMELEC *en banc* declaring Smartmatic JV as the eligible bidder with the lowest calculated responsive bid is a "judgment" within the contemplation of the rule, and is, therefore, a proper subject of a Rule 64 petition.

The argument fails to persuade.

a. *Rule 64 does not cover rulings of the COMELEC in the exercise of its administrative powers*

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[45] *Rollo*, pp. 640-646.

[46] Id. at 646-647. Contract dated January 14, 2013 for the supply of 82,000 CF Cards Main, Contract dated January 28, 2013 for the supply of 82,000 CF Cards WORM, Contract dated January 18, 2013 for the Electronic Transmission of Election Results of the May 13, 2013 elections, Contract dated May 14, 2013 for the supply of 15,000 MTD Modems, and Contract dated March 22, 2013 for the National Support Center.

[47] Id. at 647-648.

[48] Id. at 648-652.

[49] Id. at 652-657.

[50] Id. at 34.

The rule cited by petitioners is an application of the constitutional mandate requiring that, unless otherwise provided by law, the rulings of the constitutional commissions shall be subject to review only by the Supreme Court on certiorari. A reproduction of Article IX-A, Section 7 of the 1987 Constitution is in order:

> Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. **Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court on *certiorari*** by the aggrieved party within thirty days from receipt of a copy thereof. (emphasis added)

Though the provision appears unambiguous and unequivocal, the Court has consistently held that the phrase "decision, order, or ruling" of constitutional commissions, the COMELEC included, that may be brought directly to the Supreme Court on certiorari is not all-encompassing, and that it only relates to those rendered in the commissions' exercise of **adjudicatory or quasi-judicial powers.**[51] In the case of the COMELEC, this would limit the provision's coverage to the decisions, orders, or rulings issued pursuant to its authority to be the sole judge of generally all controversies and contests relating to the elections, returns, and qualifications of elective offices.[52]

Consequently, Rule 64, which complemented the procedural requirement under Article IX-A, Section 7, should likewise be read in the same sense—that of excluding from its coverage decisions, rulings, and orders rendered by the COMELEC in the exercise of its **administrative** functions. In such instances, a Rule 65 petition for certiorari is the proper remedy. As held in *Macabago v. COMELEC*:[53]

> [A] judgment or final order or resolution of the COMELEC may be brought by the aggrieved party to this Court on certiorari under Rule 65, as amended, except as therein provided. We ruled in *Elpidio M. Salva, et al. vs. Hon. Roberto L. Makalintal, et al.* (340 SCRA 506 (2000)) that Rule 64 of the Rules applies only to judgments or final orders of the COMELEC in the exercise of its quasi-judicial functions. The rule does not apply to interlocutory orders of the COMELEC in the exercise of its quasi-judicial functions or to its administrative orders. In this case, the assailed order of the COMELEC declaring private respondents petition to be one for annulment of the elections or for a declaration of a failure of elections in the municipality and ordering the production of the original copies of the VRRs for the technical examination is administrative in nature. Rule 64, a procedural device for the review of final orders, resolutions or decision of the COMELEC, does not foreclose recourse to

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[51] *Garces v. Court of Appeals*, G.R. No. 114795, July 17, 1996, 259 SCRA 99, 107.
[52] *Bedol v. Comelec*, G.R. No. 179830, December 3, 2009, 606 SCRA 554.
[53] G.R. No. 152163, November 18, 2002, 392 SCRA 178.

> this Court under Rule 65 from administrative orders of said Commission issued in the exercise of its administrative function.

As applied herein, recall that the instant petition revolves around the issue on whether or not Smartmatic JV is eligible to participate in the bidding process for the COMELEC's procurement of 23,000 units of optical mark readers. The case does not stem from an election controversy involving the election, qualification, or the returns of an elective office. Rather, it pertains to the propriety of the polling commission's conduct of the procurement process, and its initial finding that Smartmatic JV is eligible to participate therein. It springs from the COMELEC's compliance with the Constitutional directive to enforce and administer all laws and regulations relative to the conduct of an election.[54] Specifically, it arose from the electoral commission's exercise of Sec. 12 of RA 8436, otherwise known as the Automated Elections Law, as amended by RA 9369,[55] which authorized the COMELEC "**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.**"

The subject matter of Smartmatic JV's protest, therefore, does not qualify as one necessitating the COMELEC's exercise of its adjudicatory or quasi-judicial powers that could properly be the subject of a Rule 64 petition, but is, in fact, administrative in nature. Petitioners should then have sought redress *via* a petition for the issuance of the extraordinary writ of certiorari under Rule 65 to assail the COMELEC *en banc's* June 29, 2015 Decision granting the protest. As a caveat, however, the writ will only lie upon showing that the COMELEC acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Decision, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[56] Mere abuse of discretion will not suffice.

It goes without saying that petitioners' action, having been lodged through an improper petition, is susceptible to outright dismissal. As the Court held in *Pates v. COMELEC*,[57] a Rule 64 petition cannot simply be equated to Rule 65 even if it expressly refers to the latter rule.[58] The clear

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[54] CONSTITUTION, Art. IX-C, Sec. 2(1).

[55] 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 Pampansa Blg. 881, As Amended, Republic Act No. 7166 and Other Related Elections Laws, Providing Funds Therefor and for Other Purposes."

[56] *Duco v. Comelec*, G.R. No. 183366, August 19, 2009, 596 SCRA 572.

[57] G.R. No. 184915, June 30, 2009, 591 SCRA 481.

[58] *Pates v. Comelec*, id. They exist as separate rules for substantive reasons as discussed below. Procedurally, the most patent difference between the two – *i.e.*, the exception that Section 2, Rule 64 refers to – is Section 3 which provides for a special period for the filing of petitions for *certiorari* from decisions or rulings of the COMELEC *en banc*. The period is 30 days from notice of the decision or ruling (instead of

distinction between the instant petition and *Pates*, however, is that in *Pates*, therein petitioner failed to present an exceptional circumstance or any compelling reason that would have warranted the liberal application of the Rules of Court. In stark contrast, herein petitioners, as will later on be discussed, were able to establish a meritorious case for the relaxation of the rules, relieving them from the rigid application of procedural requirements. We therefore treat the instant recourse as one filed not merely in relation to, but under Rule 65.

This brings us now to the question on where the petition ought to have been filed.

b. Jurisdiction of the RTC over rulings of the head of the procuring entity relating to procurement protests

Guilty of reiteration, the COMELEC *en banc* was not resolving an election controversy when it resolved the protest, but was merely performing its function to procure the necessary election paraphernalia for the conduct of the 2016 National and Local Elections. This power finds statutory basis in Sec. 12 of RA 8436,[59] as amended, which reads:

> SEC.12. *Procurement of Equipment and Materials.* - To achieve the purpose of this Act, **the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources** free from taxes and import duties, subject to accounting and auditing rules and regulation. With 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 board. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.
>
> In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid. (emphasis added)

In *Pabillo v. COMELEC*,[60] the Court held that the "existing laws" adverted to in the provision is none other than RA 9184. The law is designed to govern all cases of 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.[61] It mandates that as a

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the 60 days that Rule 65 provides), with the intervening period used for the filing of any motion for reconsideration deductible from the originally-granted 30 days (instead of the fresh period of 60 days that Rule 65 provides).

[59] Formerly Section 8 of RA 8436, the provision was renumbered to Section 12 by RA 9369

[60] G.R. Nos. 216098 & 216562, April 21, 2015.

[61] RA 9184, Sec. 3.

general rule, all government procurement must undergo competitive bidding[62] and for purposes of conducting the bidding process, the procuring entity convenes a BAC.

The BAC is tasked to oversee the entire procuring process, from advertisement of the project to its eventual award.[63] It is the first to rule on objections or complaints relating to the conduct of the bidding process, subject to review by the head of the procuring entity via protest. As outlined in RA 9184, the protest mechanism in procurement processes is as follows:

ARTICLE XVII
PROTEST MECHANISM

> **Section 55.** *Protests on Decisions of the BAC.*- Decisions of the BAC in all stages of procurement may be **protested to the head of the procuring entity** and shall be in writing. Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the IRR.
>
> **Section 56.** *Resolution of Protests.* - The protest shall be resolved strictly on the basis of records of the BAC. Up to a certain amount to be specified in the IRR, the decisions of the Head of the Procuring Entity shall be final.
>
> **Section 57.** *Non-interruption of the Bidding Process.*- In no case shall any protest taken from any decision treated in this Article stay or delay the bidding process. Protests must first be resolved before any award is made.
>
> **Section 58.** *Resort to Regular Courts; Certiorari.*- Court action may be resorted to only after the protests contemplated in this Article shall have been completed. **Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of jurisdiction. The regional trial court shall have jurisdiction over final decision of the head of the procuring entity**. Court actions shall be governed by **Rule 65** of the 1997 Rules of Civil Procedure.
>
> This provision is without prejudice to any law conferring on the Supreme court the sole jurisdiction to issue temporary restraining orders and injunctions relating to Infrastructure Projects of Government. (emphasis added)

Thus, under Sec. 58, the proper remedy to question the ruling of the head of the procuring entity is through a Rule 65 petition for certiorari with the Regional Trial Court (RTC). The term "procuring entity" is defined under the RA 9184 as "**any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/or - controlled corporations, government financial institutions, and local government units procuring Goods, Consulting Services and Infrastructure Projects.**"[64] This statutory definition makes no distinction as to whether or not the procuring entity is a

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[62] Id., Sec. 10.
[63] Id., Sec. 12.
[64] Id., Sec. 5(o).

constitutional commission under Article IX of the Constitution. It is broad enough to include the COMELEC within the contemplation of the term. Hence, under the law, grievances relating to the COMELEC rulings in protests over the conduct of its project procurement should then be addressed to the RTC.

The mandatory recourse to the RTC in the appeal process applicable to COMELEC procurement project is not a novel development introduced by RA 9184. Even prior to the advent of the government procurement law, the requirement already finds jurisprudential support in *Filipinas Engineering and Machine Shop v. Ferrer*,[65] wherein the Court expounded this way:

> [I]t has been consistently held that it is the Supreme Court, not the Court of First Instance, which has exclusive jurisdiction to review on certiorari final decisions, orders or rulings of the COMELEC relative to the conduct of elections and enforcement of election laws.
>
> We are however, far from convince[d] that an order of the COMELEC awarding a contract to a private party, as a result of its choice among various proposals submitted in response to its invitation to bid comes within the purview of a "final order" which is exclusively and directly appealable to this court on certiorari. What is contemplated by the term "final orders, rulings and decisions" of the COMELEC reviewable by certiorari by the Supreme Court as provided by law are those rendered in actions or proceedings before the COMELEC and taken cognizance of by the said body in the exercise of its adjudicatory or quasi-judicial powers.
>
> x x x x
>
> [T]he order of the Commission granting the award to a bidder is not an order rendered in a legal controversy before it wherein the parties filed their respective pleadings and presented evidence after which the questioned order was issued; and that this order of the commission was issued pursuant to its authority to enter into contracts in relation to election purposes. In short, **the COMELEC resolution awarding the contract in favor of Acme was not issued pursuant to its quasi-judicial functions but merely as an incident of its inherent administrative functions over the conduct of elections, and hence, the said resolution may not be deemed as a "final order" reviewable by certiorari by the Supreme Court.** Being non-judicial in character, no contempt may be imposed by the COMELEC from said order, and no direct and exclusive appeal by certiorari to this Tribunal lie from such order. **Any question arising from said order may be well taken in an ordinary civil action before the trial courts.** (emphasis added)

Additionally, even if the Court treats the protest proceeding as part of the procuring agency's adjudicatory function, the Court notes that Sec. 58 of RA 9184 would nevertheless apply, and the RTC would still have jurisdiction, pursuant to the proviso "unless otherwise provided by law" as appearing in Article IX-A, Section 7 of the Constitution. In this case, the pertinent law provides that insofar as rulings of the COMELEC in

[65] No. L-31455, February 28, 1985, 135 SCRA 25.

procurement protests are concerned, said rulings can be challenged through a Rule 65 certiorari with the RTC.

c. *The protest mechanism under RA 9184 can only be availed of by a losing bidder*

Nevertheless, the application of Sec. 58 of RA 9184 has to be qualified. It cannot, in all instances, be the proper remedy to question the rulings of the heads of procuring entities in procurement protests. As in the prior case of *Roque v. COMELEC*,[66] which similarly dealt with COMELEC procurement of OMRs the Court held that only a losing bidder would be aggrieved by, and *ergo* would have the personality to challenge, the head of the procuring entity's ruling in the protest. This is bolstered by the GPRA IRR, which fleshed out the provisions of RA 9184 thusly:

RULE XVII – PROTEST MECHANISM

Section 55. Protests on Decisions of the BAC

55.1. Decisions of the BAC at any stage of the procurement process may be questioned by filing a request for reconsideration within the three (3) calendar days upon receipt of written notice or upon verbal notification. The BAC shall decide on the request for reconsideration within seven (7) calendar days from receipt thereof.

If a failed bidder signifies his intent to file a request for reconsideration, the BAC shall keep the bid envelopes of the said failed bidder unopened and/or duly sealed until such time that the request for reconsideration has been resolved.

55.2. In the event that the request for reconsideration is denied, decisions of the BAC may be protested in writing to the Head of the Procuring Entity: Provided, however, That a prior request for reconsideration should have been filed by the party concerned in accordance with the preceding Section, and the same has been resolved.

55.3. **The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC** denying its request for reconsideration. A protest may be made by filing a verified position paper with the Head of the Procuring Entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

55.4. The verified position paper shall contain the following information:
a) The name of bidder;
b) The office address of the bidder;
c) The name of project/contract;
d) The implementing office/agency or procuring entity;
e) A brief statement of facts;
f) The issue to be resolved; and

[66] G.R. No. 188456, September 10, 2009, 599 SCRA 69.

> g) Such other matters and information pertinent and relevant to the proper resolution of the protest.
>
> The position paper is verified by an affidavit that the affiant has read and understood the contents thereof and that the allegations therein are true and correct of his personal knowledge or based on authentic records. An unverified position paper shall be considered unsigned, produces no legal effect, and results to the outright dismissal of the protest.
>
> x x x x
>
> Section 58. Resort to Regular Courts; Certiorari
>
> 58.1. **Court action may be resorted to only after the protests contemplated in this Rule shall have been completed**, i.e., resolved by the Head of the Procuring Entity with finality. The regional trial court shall have jurisdiction over final decisions of the Head of the Procuring Entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure. (emphasis added)

Evidently, the remedy of certiorari filed before the RTC under Sec. 58 of RA 9184 is intended as a continuation of the motion for reconsideration filed before the BAC, and of the subsequent protest filed with the head of the procuring entity. This is confirmed by the condition *sine qua non* completion of the process under Rule XVII, Secs. 55-57 of the GPRA IRR before recourse to the trial courts become available.

It is obvious under Sec. 55.1 of Rule XVII that only a **failed bidder** can turn the cogs of the protest mechanism by first moving for reconsideration of the assailed BAC ruling. The **party concerned**, the bidder adversely affected by the resolution of the motion, shall then have seven (7) days to file a protest with the head of the procuring entity. The pre-requisite that a protestant should likewise be a bidder is emphasized by Sec. 55.4 which requires that the "**name of the bidder**" and the "**office address of the bidder**" be indicated in its position paper. Accordingly, **only the bidder against whom the head of the procuring entity ruled, if it would challenge the ruling any further, is required to resort to filing a petition for certiorari before the trial courts under Sec. 58**. Ego, there is neither rhyme nor reason for petitioners herein, who are non-participants in the procurement project, to comply with the rules on protest under RA 9184, part and parcel of which is the exclusivity of the jurisdiction of the RTC under Sec. 58 thereof. Stated in the alternative, there is no legislative enactment requiring petitioners to seek recourse first with the RTC to question the COMELEC *en banc*'s June 29, 2015 Decision. Thus, if circumstances so warrant, direct resort to the Court will be allowed.

d. Hierarchy of courts and the exceptions to the doctrine

The expanded concept of judicial power under Article VIII, Section 1 of the Constitution[67] includes the duty of the judiciary not only "to settle actual controversies involving rights which are legally demandable and enforceable" but also, as an instrument of checks and balances, "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[68] Under Rule 65 of the Rules of Court, the special civil actions for certiorari and prohibition are the available remedies for determining and correcting such grave abuses of discretion.

The power is wielded not by the Court alone, but concurrently with the Court of Appeals and the Regional Trial Courts, as provided by law. With respect to the Court of Appeals, Section 9 (1) of Batas Pambansa Blg. 129 (BP 129) gives the appellate court original jurisdiction to issue, among others, a writ of certiorari, whether or not in aid of its appellate jurisdiction. For the RTCs, the power to issue a writ of certiorari, in the exercise of their original jurisdiction, is provided under Section 21 of BP 129.[69] Additionally, the Court has already held that the CTA, by constitutional mandate, is likewise vested with jurisdiction to issue writs of certiorari.[70] So too has the Sandiganbayan been vested with certiorari powers in aid of its appellate jurisdiction.[71]

Notwithstanding the non-exclusivity of the original jurisdiction over applications for the issuance of writs of certiorari, however, the doctrine of hierarchy of courts dictates that recourse must first be made to the lower-ranked court exercising concurrent jurisdiction with a higher court.[72] The rationale behind the principle is explained in *Bañez, Jr. v. Concepcion*[73] in the following wise:

> The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of certiorari, prohibition and mandamus only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy.

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[67] Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[68] See also *Araullo v. Aquino III*, G.R. Nos. 209287 etc., July 1, 2014.

[69] *City of Manila v. Grecia-Cuerdo*, G.R. No. 175723, February 4, 2014.

[70] Id.

[71] PD 1606, Sec. 4(c), as amended by RA 8249, Sec. 4.

[72] *Bonifacio v. Gimenez*, G.R. No. 184800, May 5, 2010.

[73] G.R. No. 159508, August 29, 2012, 679 SCRA 237.

Petitioners do not have the absolute and unrestrained freedom of choice of the court to which an application for certiorari will be directed.[74] Indeed, referral to the Supreme Court as the court of last resort will simply be empty rhetoric if party-litigants are able to flout judicial hierarchy at will. The Court reserves the direct invocation of its jurisdiction only when there are special and important reasons clearly and especially set out in the petition that would justify the same.[75]

In the leading case of *The Diocese of Bacolod v. Comelec*,[76] the Court enumerated the specific instances when direct resort to this Court is allowed, to wit:

(a) When there are genuine issues of constitutionality that must be addressed at the most immediate time;
(b) When the issues involved are of transcendental importance;
(c) Cases of first impression;
(d) When the constitutional issues raised are best decided by this Court;
(e) When the time element presented in this case cannot be ignored;
(f) When the petition reviews the act of a constitutional organ;
(g) When there is no other plain, speedy, and adequate remedy in the ordinary course of law;
(h) When public welfare and the advancement of public policy so dictates, or when demanded by the broader interest of justice;
(i) When the orders complained of are patent nullities; and
(j) When appeal is considered as clearly an inappropriate remedy.

The Court finds the second and fifth, and sixth grounds applicable in the case at bar. Much has already been said of the "compelling significance and the transcending public importance" of the primordial issue underpinning petitions that assail election automation contracts: the success––and the far-reaching grim implications of the failure—of the nationwide automation project.[77] So it is that the Court, in the growing number of cases concerning government procurement of election paraphernalia and services, has consistently exhibited leniency and dispensed of procedural requirements for petitioners to successfully lodge certiorari petitions.[78] Technicalities should not stand in the way of resolving the substantive issues petitioners raised herein. On this same ground of transcendental importance, the Court may opt to treat the instant petition as one for certiorari under, not merely in relation to, Rule 65.

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[74] *Macapagal v. People*, G.R. No. 193217, February 26, 2014.
[75] Id.
[76] G.R. No. 205728, January 21, 2015.
[77] *Roque v. COMELEC*, supra note 66; citing *Marabur v. Comelec*, G.R. No. 169513, February 26, 2007, 516 SCRA 696.
[78] Id.; *Pabillo v. COMELEC*, G.R. Nos. 216098 & 216562, April 21, 2015; *Capalla v. COMELEC*, G.R. No. 201112, June 13, 2012.

As regards the fifth ground, the time element, it is sufficient to state that with the 2016 polls visible in the horizon, the post-haste resolution of this case becomes all the more imperative. It would be the height of absurdity to require petitioners to undergo scrutiny through the lens of the RTC first, considering that the acquisition of 23,000 OMRs would, at the minimum, affect the clustering of precincts. Without the finalized list of clustered precincts, the polling place for the registered voters could not yet be ascertained. Needless to state, this would impede the preparations for the conduct of the polls and its unmitigated effects could very well lead to mass disenfranchisement of voters.

Lastly, the sixth ground is indubitably applicable. The rulings of the COMELEC, as a constitutional body, can immediately be reviewed by the Court on proper petition. As quoted in *The Diocese of Bacolod v. COMELEC*,[79] citing *Albano v. Arranz*,[80] "**it is easy to realize the chaos that would ensue if the Court of First Instance of each and every province were [to] arrogate itself the power to disregard, suspend, or contradict any order of the Commission on Elections: that constitutional body would be speedily reduced to impotence.**"

In sum, there exist ample compelling reasons to justify the direct resort to the Court as a departure from the doctrine of hierarchy of courts not in relation to but under Rule 65 of the Rules of Court on certiorari and prohibition, and to brush aside the procedural issues in this case to focus on the substantive issues surrounding the procurement of the 23,000 additional OMRs for the 2016 elections.

The submission of an AOI is not an eligibility criterion

It bears stressing on the outset that no issue has been brought forth questioning the technical capability of Smartmatic JV's OMR+. Instead, the pivotal point to be resolved herein is whether or not the COMELEC acted with grave abuse of discretion in declaring Smartmatic JV eligible in spite of the alleged nullity of, or defect in, SMTC's AOI.

Petitioner would first insist that the submission of an AOI is an eligibility requirement that Smartmatic JV cannot be deemed to have complied with. In addressing this assertion, a discussion of the qualification process is apropos.

a. The submission of an AOI was not a pre-qualification requirement

It is a basic tenet that except only in cases in which alternative methods of procurement are allowed, all government procurement shall be

[79] G.R. No. 205728, January 21, 2015.
[80] No. L-19260, January 31, 1962, 4 SCRA 386.

done by competitive bidding. This is initiated by the BAC, which publishes an Invitation to Bid for contracts under competitive bidding in order to ensure the widest possible dissemination thereof.[81]

Answering the invitation, interested participants submit their bids using the forms specified in the bidding documents in two (2) separate sealed bid envelopes submitted simultaneously. The first contains the technical component of the bid, including the eligibility requirements under Section 23.1 of GPRA IRR, while the second contains the financial component of the bid.[82]

The BAC then sets out to determine the eligibility of the prospective bidders based on their compliance with the eligibility requirements set forth in the Invitation to Bid and their submission of the legal, technical and financial documents required under RA 9184 and the GPRA IRR.[83] The first screening is done via the pre-qualification stage as governed by Sec. 30.1 of RA 9184's IRR, which pertinently reads:

> Section 30. Preliminary Examination of Bids
>
> 30.1. The BAC shall open the first bid envelopes of prospective bidders in public to determine each bidder's compliance with the documents required to be submitted for eligibility and for the technical requirements, as prescribed in this IRR. For this purpose, **the BAC shall check the submitted documents of each bidder against a checklist of required documents** to ascertain if they are all present, using a **nondiscretionary "pass/fail" criterion**, as stated in the Instructions to Bidders. If a bidder submits the required document, it shall be rated "passed" for that particular requirement. In this regard, bids that fail to include any requirement or are incomplete or patently insufficient shall be considered as "failed". Otherwise, the BAC shall rate the said first bid envelope as "passed." (emphasis added)

For the procurement of highly technical goods wherein the two-stage bidding process is employed, such as the subject of procurement in this case, the same procedure for pre-qualification outlined above is followed in the first stage, except that the technical specifications are only in the form of performance criteria, and that the technical proposals will not yet include price tenders.[84]

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[81] *Commission on Audit v. Linkworth International*, G.R. No. 182559, March 13, 2009, 518 SCRA 501.

[82] Sec. 25.1, RA 9184 IRR.

[83] *Commission on Audit v. Linkworth International*, supra note 81.

[84] Revised Implementing Rules and Regulations, RA 9184, Sec. 30.3. — For the procurement of goods where, due to the nature of the requirements of the project, the required technical specifications/requirements of the contract cannot be precisely defined in advance of bidding, or where the problem of technically unequal bids is likely to occur, a two (2)-stage bidding procedure may be employed. In these cases, the procuring entity concerned shall prepare the Bidding Documents, including the technical specification in the form of performance criteria only. Under this procedure, prospective bidders shall be requested at the first stage to submit their respective eligibility requirements if needed, and initial technical proposals only (no price tenders). The concerned BAC shall then evaluate the technical merits of the proposals received from eligible bidders vis-à-vis the required performance standards. A meeting/discussion shall then be held by the BAC with those eligible bidders whose technical tenders meet the minimum required standards stipulated in the Bidding Documents for purposes of drawing up the final

Based on the rule, the BAC's function in determining the eligibility of a bidder during pre-qualification is ministerial in the sense that it only needs to countercheck the completeness and sufficiency of the documents submitted by a bidder against a checklist of requirements. It cannot, therefore, declare a bidder ineligible for failure to submit a document which, in the first place, is not even required in the bid documents.

Citing Sec. 23.1 (b) of the GPRA IRR, petitioners contend that an AOI is one of such mandatory documentary requirements and that the failure of a bidder to furnish the BAC a valid one would automatically render the bidder ineligible.

We are not convinced.

Sec. 23 of the adverted GPRA IRR reads:

> **Section 23. Eligibility Requirements for the Procurement of Goods and Infrastructure Projects**
>
> 23.1. For purposes of determining the eligibility of bidders using the criteria stated in Section 23.5 of this IRR, only the following documents shall be required by the BAC, using the forms prescribed in the Bidding Documents:
>
> a) Class "A" Documents
>
> *Legal Documents*
>
> **i) Registration certificate from SEC, Department of Trade and Industry (DTI) for sole proprietorship, or CDA for cooperatives, or any proof of such registration as stated in the Bidding Documents.**
>
> ii) Mayor's permit issued by the city or municipality where the principal place of business of the prospective bidder is located.
>
> iii) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.
>
> Technical Documents
>
> iv) Statement of the prospective bidder of all its ongoing government and private contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid; and Statement identifying the bidder's single largest completed contract similar to the contract to be bid, except under conditions provided for in Section 23.5.1.3 of this IRR, within the relevant period as provided in the Bidding

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revised technical specifications/requirements of the contract. Once the final revised technical specifications are completed and duly approved by the concerned BAC, copies of the same shall be issued to all the bidders identified in the first stage who shall then be required to submit their revised technical tenders, including their price proposals in two (2) separate sealed envelopes in accordance with this IRR, at a specified deadline, after which time no more bids shall be received. The concerned BAC shall then proceed in accordance with the procedure prescribed in this IRR.

> Documents in the case of goods. All of the above statements shall include all information required in the PBDs prescribed by the GPPB.
>
> v) In the case of procurement of infrastructure projects, a valid Philippine Contractors Accreditation Board (PCAB) license and registration for the type and cost of the contract to be bid. Financial Documents
>
> vi) The prospective bidder's audited financial statements, showing, among others, the prospective bidder's total and current assets and liabilities, stamped "received" by the BIR or its duly accredited and authorized institutions, for the preceding calendar year which should not be earlier than two (2) years from the date of bid submission.
>
> vii) The prospective bidder's computation for its Net Financial Contracting Capacity (NFCC).

b) Class "B" Document

> **Valid joint venture agreement (JVA), in case the joint venture is already in existence. In the absence of a JVA, duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful shall be included in the bid.** Failure to enter into a joint venture in the event of a contract award shall be ground for the forfeiture of the bid security. **Each partner of the joint venture shall submit the legal eligibility documents.** The submission of technical and financial eligibility documents by any of the joint venture partners constitutes compliance. (emphasis added)

Clearly, the quoted provisions, as couched, do not require the submission of an AOI in order for a bidder to be declared eligible. The requirement that bears the most resemblance is the submission by each partner to the venture of a registration certificate issued by the Securities and Exchange Commission, but compliance therewith was never disputed by the petitioners. Moreover, it was never alleged that Smartmatic JV was remiss in submitting a copy of its joint venture agreement pursuant to Sec. 23.1(b), which petitioners specifically invoked.

It may be that the procuring entity has the option to additionally require the submission of the bidders' respective AOIs in order to substantiate the latter's claim of due registration with the government entities concerned. However, a perusal of the bidding documents would readily reveal that the procuring entity, the COMELEC in this case, did not impose such a requirement. As can be gleaned in the Instruction to Bidders,[85] only the following documents were required for purposes of determining a bidder's eligibility:

> **12. Documents Comprising the Bid: Eligibility and Technical Components**

[85] *Rollo*, pp. 231-233.

12.1. Unless otherwise indicated in the BDS, the first envelope shall contain the following eligibility and technical documents:

(a) Eligibility Documents –

Class "A" Documents:

(i) Registration certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorships, and Cooperative Development Authority (CDA) for cooperatives, or any proof of such registration as stated in the BDS;

(ii) Mayor's permit issued by the city or municipality where the principal place of business of the prospective bidder is located;

(iii) Statement of all its ongoing and completed government and private contracts within the period stated in the BDS, including contracts awarded but not yet started, if any. The statement shall include, for each contract, the following:

(iii.1) name of the contract;

(iii.2) date of the contract;

(iii.3) kinds of Goods;

(iii.4) amount of contract and value of outstanding contracts;

(iii.5) date of delivery; and

(iii.6) end user's acceptance or official receipt(s) issued for the contract, if completed.

(iv) Audited financial statements, stamped "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from the bid submission;

(v) NFCC computation or CLC in accordance with ITB Clause 5.5; and

(vi) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.(Updated pursuant to GPPB Resolution No. 21-2013 dated July 30, 2013)

Class "B" Document:

(vii) If applicable, the JVA in case the joint venture is already in existence, or duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful;

(viii) Social Security Clearance (SSS);

(ix) Department of Labor and Employment Clearance (DOLE);

(x) Court Clearance (Regional Trial Court) (emphasis omitted)

The non-requirement of an AOI is further made evident by the Bid Data Sheet (BDS)[86] which provides a "**complete list**"[87] of eligibility proposal documents to be submitted during the first stage of the bidding process. As outlined in the BDS:[88]

TAB	CLASS "A" DOCUMENTS
I.	**LEGAL DOCUMENTS:** (In case of a Joint Venture, each member of the JV shall submit the required Documents mentioned in Tabs "A", "B", "C" and "I")
A.	**Registration Certificate Form**
	Securities and Exchange Commission from the Securities and Exchange Commission (SEC) for Corporation or Partnership; or its equivalent documents in case of foreign bidder.
	Department of Trade and Industry (DTI) for sole proprietorship; or its equivalent documents in case of foreign bidder.
	Cooperative Development Authority, for Cooperatives or its equivalent documents in case of foreign bidder.
B.	Mayor's Permit issued by the city or municipality where the principal place of business of the prospective bidder is located or its equivalent document in case of a foreign corporation.
C.	Tax Clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.
II.	**TECHNICAL DOCUMENTS**
D.	Statement of all ongoing and completed government and private contracts, within the last six (6) years from the date of submission and receipt of bids, including contracts awarded but not yet started, if any, using the prescribed form. Please refer to Section VIII. Bidding Forms.
E.	Statement of at least one similar completed largest contract within six (6) years from the date of the opening bids equivalent to at least 50% of the ABC, using the prescribed form. Please refer to Section VIII. Bidding Forms.
F.	Bid security in the form, amount and validity in accordance with ITB Clause 18.
III.	**FINANCIAL DOCUMENTS**
G.	Audited financial statements, stamped received by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from bid submission; or equivalent documents in case of foreign bidder, provided that the same is in accordance with International Financial Reporting Standards.
H.	NFCC Computation in accordance with ITB clause 5.
TAB	**CLASS "B" ELIGIBILITY REQUIREMENTS**
I.	Valid Joint Venture Agreement (JVA), in case the Joint

[86] Id. at 254-264.
[87] Id. at 258.
[88] Id. at 258-259.

	Venture is already in existence at the time of the submission and opening of bids, OR duly notarized statements from all potential joint venture partners stating that they will enter into and abide by the provisions of the JVA if the bid is successful;
IV.	**OTHER DOCUMENTS**
J.	Conformity with the Schedule of Requirements and Initial Technical Proposal (approved TOR), as enumerated and specified in Sections VI and VII of the Bidding Documents, using the prescribed form.
K.	Certification from the Election Authority or Election Management Body that the system has demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.
L.	Omnibus Sworn Statement using the prescribed form in Section VIII.

Even the furnished Schedule of Requirements[89] does not mandate the submission of an AOI:[90]

REQUIREMENTS	CORPORATION/ SP/PARTNERSHIP		JOINT VENTURE	
	PASSED	FAILED	PASSED	FAILED
x x x				
ELIGIBILITY DOCUMENTS				
1. LEGAL DOCUMENTS				
I. Class "A" Documents				
a. Original/Certified true copy of Registration Certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorship, or Cooperative Development Authority (CDA) for Cooperatives or any proof of such registration as stated in the BDS; (In case of a JV, this requirement must be complied with by all the JV partners)				
b. Original/Certified true copy of valid and current Mayor's/Business Permit/License issued by the city or municipality where the principal place of business of the prospective bidder is located; (In case of a JV, this requirement must be complied with by all the JV partners)				
c. Original/Certified true copy of valid Tax Clearance per Executive Order 398, Series of 2005 (In case of a JV, this requirement must be complied with by all the JV partners)				
2. TECHNICAL DOCUMENTS				
d. Sworn Statement of all its on-going and completed government and				

[89] Id. at 325-329.
[90] Id. at 326-328.

private contracts within the last six (6) years prior to the deadline for the submission and opening of bids, including contracts awarded but not yet started, if any. The statement shall include, for each of the contract, the following: x x x				
e. Sworn Statement of the bidder's single largest contract completed within six (6) YEARS prior to the deadline for the submission and opening of bids, with a value of FIFTY (50%) per cent of the ABC.				
f. The bid security (Payable to COMELEC) shall be in the following amount: x x x				
3. FINANCIAL DOCUMENTS				
g. Audited Financial Statements (AFS), stamped "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year x x x				
h. NFCC computation which shall be based only on the current assets and current liabilities submitted to the BIR, through Electronic Filing and Payment System (EFPS)				
4. OTHERS				
i. Conformity with Section VI: Schedule of Requirements of the Bidding Documents				
j. Conformity with Section VII. Technical Specifications of the Bidding Documents. If proposal is the same with the initial technical requirements, just put "COMPLY"				
k. Certification from the Election Authority or Election management Body that the system has demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.				
l. OMNIBUS AFFIDAVIT in accordance with Section 25.2(a)(iv) of the IRR of RA 9184 and using the form prescribed in Section VIII of the Philippine bidding Documents. Shall include: x x x				

Verily, based on Sec. 23.1(b) of the GPRA IRR, the Instruction to Bidders, the BDS, and the Checklist of Requirements, the non-submission of an AOI is not fatal to a bidder's eligibility to contract the project at hand. Thus, it cannot be considered as a ground for declaring private respondents ineligible to participate in the bidding process. To hold otherwise would

mean allowing the BAC to consider documents beyond the checklist of requirements, in contravention of their non-discretionary duty under Sec. 30(1) of the GPRA IRR.

b. Neither is the AOI a post-qualification requirement

After the preliminary examination stage, the BAC opens, examines, evaluates and ranks all bids and prepares the Abstract of Bids which contains, among others, the names of the bidders and their corresponding calculated bid prices arranged from lowest to highest. The objective of the bid evaluation is to identify the bid with the lowest calculated price or the Lowest Calculated Bid. The Lowest Calculated Bid shall then be subject to post-qualification to determine its responsiveness to the eligibility and bid requirements.[91]

During post-qualification, the procuring entity verifies, validates, and ascertains all statements made and documents submitted by the bidder with the lowest calculated or highest rated bid using a non-discretionary criteria as stated in the bidding documents.[92]If, after post-qualification, the Lowest Calculated Bid is determined to be post-qualified, it shall be considered the Lowest Calculated Responsive Bid and the contract shall be awarded to the bidder.[93]

To recall, the BAC, on December 15, 2014, declared that only Smartmatic JV and Indra were eligible to participate in the second stage of the bidding process. Of the two, only Smartmatic JV submitted a complete and responsive Overall Summary of the Financial Proposal and was thus subjected to post-qualification evaluation. Initially, the BAC post-disqualified Smartmatic JV for allegedly failing to submit a valid AOI. It is this preliminary finding that petitioners want reinstated.

We disagree.

Even on post-qualification, the submission of an AOI was not included as an added requirement. The Instruction to Bidders pertinently provides:[94]

> 29. Post-Qualification
>
> 29.1. The Procuring Entity shall determine to its satisfaction whether the Bidder that is evaluated as having submitted the Lowest Calculated Bid (LCB) complies with and is responsive to all the requirements and conditions specified in ITB Clauses 5, 12 and 13.
>
> x x x x

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[91] *Commission on Audit v. Linkworth International*, supra note 81.
[92] Sec. 34.3, Revised Implementing Rules and Regulations, R.A. No. 9184.
[93] *Commission on Audit v. Linkworth International*, supra note 81.
[94] *Rollo*, pp. 247-248.

> 29.3. The determination shall be **based upon an examination of the documentary evidence of the Bidder's qualifications submitted pursuant to ITB Clauses 12 and 13, as well as other information as the Procuring Entity deems necessary and appropriate**, using a non-discretionary "pass/fail" criterion. (emphasis added)

Clauses 12 and 13 of the Instruction to Bidders pertain to the eligibility documents, technical documents, and the financial component of a participant's bid.[95] Meanwhile, the Clause 5 adverted to is an enumeration of persons or entities who may participate in the bidding.[96] Nowhere in these clauses does it appear that an AOI is a mandatory requirement even for post-qualification. Even the BAC's March 27, 2015 Notice addressed to Smartmatic JV supports this finding:[97]

> x x x [F]or purposes of post-qualification proceedings, please submit copies of the following documents to the Bid and Awards Committee (BAC), through the BAC Secretariat, as stated in Clause 29.2 (a) of Section III, Bid Data Sheet of the Bidding Documents, within three (3) calendar days from receipt of this Notice:
>
> a) Latest Income and Business Tax Returns. x x x
>
> b) Certificate of PhilGEPS Registration.
>
> c) ISO 9001:2008 Certification of the Optical Mark/reader or Optical Scan manufacturer for OMR.
>
> In addition, the following certifications must be submitted:
>
> a) That all system requirements for customization as stated in the Terms of Reference and RA 9369 shall be fully complied with, subject to the application of applicable penalties for non-compliance; and
>
> b) That it shall not demand for additional payment from COMELEC to procure additional OMR system requirements during Project Implementation for items that it may have overlooked in its Bid Proposal.
>
> The bidder is also required to submit the machines, including the software and hardware, back-up power supply and other equipment and peripherals necessary for the conduct of the testing during post-qualification, including the prototype sample of the ballot box based on what is required in the Terms of Reference (TOR) for the OMR on April 6, 2015 as per instruction from the Technical Working Group (TWG).

From the foregoing, the inescapable result is that mere failure to file an AOI cannot automatically result in the bidder concerned being declared ineligible, contrary to petitioners' claim.

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[95] Id. at 231-234.
[96] Id. at 225-226.
[97] Id. at 447-448.

Smartmatic JV may validly undertake the project sought to be procured

a. SMTC still has the authority to conduct business even after the conduct of the 2010 national and local elections

A thorough reading of petitioners' contention, however, would show that it is not only assailing Smartmatic JV's ineligibility based on the alleged incompleteness of its documentary requirements(i.e. for non-submission of a valid AOI), but also because they considered the subject of the procurement beyond the ambit of SMTCs corporate purpose. Petitioners postulate that SMTC's authority to conduct business ceased upon fulfillment of its primary purpose stated in its AOI– that of automating the 2010 National and Local Elections, and this allegedly rendered SMTC's subsequent involvement in the subject procurement project an *ultra vires* act.

Petitioners' myopic interpretation of SMTC's purpose is incorrect.

While it is true that SMTC's AOI made specific mention of the automation of the 2010 National and Local Elections as its primary purpose, it is erroneous to interpret this as meaning that the corporation's authority to transact business will cease thereafter. Indeed, the contractual relation between SMTC and the COMELEC has been the subject of prior controversies that have reached the Court, and We have on these occasions held that even beyond the 2010 election schedule, the parties remain to have subsisting rights and obligations relative to the products and services supplied by SMTC to the COMELEC for the conduct of the 2010 polls.

For instance, the Court, in the landmark case of *Capalla v. COMELEC (Capalla)*,[98] upheld the validity of the March 30, 2012 Deed of Sale by and between SMTC and COMELEC when the latter exercised the option to purchase (OTP) clause embodied in their 2009 Automated Election System Contract (AES Contract). Even though the original deadline for the option was only until December 31, 2010, We ruled that the parties to the AES Contract, pursuant to Art. 19 thereof,[99] can still validly extend the same by mutual agreement. The Court ratiocinated that Art. 19 of the AES Contract may still be invoked even after December 31, 2010, for the agreement subsisted in view of the COMELEC's failure to return SMTC's performance security, a condition for the contract's termination. As provided under Art. 2 of the AES Contract:[100]

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[98] G.R. Nos. 201112 etc., October 23, 2012.

[99] "This 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." As cited in *Capalla v. COMELEC*, id.

[100] Id.

Article 2
EFFECTIVITY

2.1. This Contract shall take effect upon the fulfillment of all of the following conditions:

(a) Submission by the PROVIDER of the Performance Security;
(b) Signing of this Contract in seven (7) copies by the parties; and
(c) Receipt by the PROVIDER of the Notice to Proceed.

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. (emphasis supplied)

Based on Our ruling in *Capalla*, the cessation of SMTC's business cannot be assumed just because the May 10, 2010 polls have already concluded. For clearly, SMTC's purpose—the "automation of the 2010 national and local elections"—is not limited to the conduct of the election proper, but extends further to the fulfillment of SMTC's contractual obligations that spring forth from the AES Contract during the lifetime of the agreement (i.e. until the release of the performance security), and even thereafter insofar as the surviving provisions of the contract are concerned. In other words, regardless of whether or not SMTC's performance security has already been released, establishing even just one surviving provision of the AES Contract would be sufficient to prove that SMTC has not yet completed its purpose under its AOI, toppling petitioners' argument like a house of cards.

Unfortunately for petitioners, one such surviving provision has already been duly noted by the Court in the recent case of *Pabillo v. COMELEC (Pabillo)*.[101] In *Pabillo*, the Court cited Art. 8.8 of the AES Contract, which significantly reads:

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. (emphasis added)

[101] Supra note 60.

Pertinently, We have interpreted the foregoing contractual provision in *Pabillo* in the following wise:[102]

> **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, 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. (emphasis added)

Indubitably, the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections' inevitable conclusion. Several contractual provisions contained in the 2009 AES Contract, as observed in a review of our jurisprudence, continue to subsist and remain enforceable up to this date. *Pabillo*, in effect, at least guaranteed that SMTC's purpose under its AOI will not be fulfilled until May 10, 2020. Therefore, petitioners' theory—that SMTC no longer has a valid purpose—is flawed. Otherwise, there would be no way of enforcing the subsisting provisions of the contract and of holding SMTC to its warranties after the conduct of the May 10, 2010 elections.

Having resolved the continuity of SMTC's business, We now proceed to determine whether its participation in the bidding process is an authorized or an *ultra vires* act.

b. *The issue is mooted by the subsequent approval of the amendment to SMTC's AOI*

Commissioner Guia, in his dissent, opines that a bidder should be authorized to participate in the bidding as early as the time the pre-qualification was conducted, which in this case was held on December 4, 2014. Thus, the December 10, 2014 approval of SMTC's amended AOI, to Commissioner Guia's mind, cannot cure the alleged vice attending SMTC's submission of its bid, as a partner in Smartmatic JV, for a project that it was, at that time, unauthorized to undertake.

The argument fails to persuade.

As earlier discussed, the function of the BAC, in making an initial assessment as to the eligibility of the bidders during pre-qualification, is ministerial and nondiscretionary. It merely counterchecks the documents submitted by the bidder against the checklist of requirements included in the

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[102] Id.

bid documents disseminated by the procuring agency. It cannot consider documents not listed in the checklist for purposes of ascertaining a bidder's eligibility during pre-qualification.

The only time the procuring agency can go beyond the checklist is during post-qualification wherein it is allowed to check to its satisfaction the veracity of the information submitted to it by the bidder. To recall, Sec. 29.3 of the Invitation to Bid provides that on post-qualification, the procuring entity may utilize any "**other information as [it] may deem necessary and appropriate**" in order to test the accuracy of the information provided in the bidder's eligibility documents and bid proposal. In the end, notwithstanding the dispensability of the AOI insofar as compliance with documentary requirements is concerned, the procuring entity may nevertheless consider the same in ultimately determining a bidder's eligibility.

Stated in the alternative, the procuring entity, for purposes of post-qualification, cannot be faulted for, as it is not precluded from, considering information volunteered by the bidder with the highest bid. Bearing in mind the non-discretionary function of the BAC during pre-qualification, it is then understandable that it is only on post-qualification, when it is allowed to consider other documents, during which an extensive inquiry will be made to detect any defect in the bidder's capacity to contract. Hence, even though the submission of an AOI was not required for either pre or post-qualification purposes, the COMELEC and BAC, on post-qualification, may still consider the same in determining whether or not the project is in line with the bidder's corporate purpose, and, ultimately, in ascertaining the bidder's eligibility.

In the case at bar, We take note that during the opening of the bids on December 4, 2014, Smartmatic JV already informed the BAC that SMTC was already in the process of amending its AOI. The contents of the AOI, at that time, were immaterial since the AOI is not an eligibility requirement that can be considered by the BAC on pre-qualification. By post-qualification, however, the time the BAC can validly consider extraneous documents, SMTC's AOI has already been duly amended, and the amendments approved by the SEC on December 10, 2014, for its updated primary purpose to read:[103]

> To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

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[103] *Rollo*, p. 549.

Hence, any doubt on SMTC's authorization to continue its business has already been dispelled by December 10, 2014. It matters not that the amendments to the AOI took effect only on that day[104] for as long as it preceded post-qualification.

c. *SMTC's participation in the bidding is not an ultra vires act but one that is incidental to its corporate purpose*

In any event, there is merit in private respondents' argument that SMTC's participation in the bidding is not beyond its declared corporate purpose; that, in the first place, there was no impediment in SMTC's AOI that could have prevented Smartmatic JV from participating in the project.

To elucidate, an *ultra vires* act is defined under BP 68 in the following wise:

> **Section 45.** *Ultra vires acts of corporations.* – No corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and **except such as are necessary or incidental to the exercise of the powers so conferred.** (emphasis added)

The language of the Code appears to confine the term *ultra vires* to an act outside or beyond express, implied and incidental corporate powers. Nevertheless, the concept can also include those acts that may ostensibly be within such powers but are, by general or special laws, either proscribed or declared illegal.[105] *Ultra vires* acts or acts which are clearly beyond the scope of one's authority are null and void and cannot be given any effect.[106]

In determining whether or not a corporation may perform an act, one considers the logical and necessary relation between the act assailed and the corporate purpose expressed by the law or in the charter, for if the act were one which is lawful in itself or not otherwise prohibited and done for the purpose of serving corporate ends or reasonably contributes to the promotion of those ends in a substantial and not merely in a remote and fanciful sense, it may be fairly considered within corporate powers.[107] **The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business**, fairly incident to the express

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[104] **Section 16.** *Amendment of Articles of Incorporation.* – x x x The amendments shall take effect upon their approval by the Securities and Exchange Commission or from the date of filing with the said Commission if not acted upon within six (6) months from the date of filing for a cause not attributable to the corporation.

[105] Concurring opinion of Justice Vitug <http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html>.

[106] *Gancayco v. City Government of Quezon City*, G.R. Nos. 177807 & 177933, October 11, 2011, 658 SCRA 853.

[107] <http://sc.judiciary.gov.ph/jurisprudence/2000/feb2000/137686_Concur.htm>.

powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not.[108]

In the case at bar, notwithstanding the specific mention of the 2010 National and Local Elections in SMTC's primary purpose, it is not, as earlier discussed, precluded from entering into contracts over succeeding ones. Here, SMTC cannot be deemed to be overstepping its limits by participating in the bidding for the 23,000 new optical mark readers for the 2016 polls since upgrading the machines that the company supplied the COMELEC for the automation of the 2010 elections and offering them for subsequent elections is but a logical consequence of SMTC's course of business, and should, therefore, be considered included in, if not incidental to, its corporate purpose. A restricted interpretation of its purpose would mean limiting SMTC's activity to that of waiting for the expiration of its warranties in 2020. How then can the company be expected to subsist and sustain itself until then if it cannot engage in any other project, even in those similar to what the company already performed?

In the final analysis, We see no defect in the AOI that needed to be cured before SMTC could have participated in the bidding as a partner in Smartmatic JV, the automation of the 2016 National and Local Elections being a logical inclusion of SMTC's corporate purpose.

Smartmatic JV cannot be declared ineligible for SMTC's nationality

In a desperate last ditch effort to have Smartmatic JV declared ineligible to participate in the procurement project, petitioners question the nationality of SMTC. They direct the Court's attention to the 2013 Annual Report and Consolidated Financial Statements[109] of Smartmatic Limited to prove that SMTC is 100% foreign owned. They then contend that SMTC is the biggest shareholder in the bidding joint venture at 46.5% share, making the joint venture less than 60% Filipino-owned and, hence, ineligible.

The argument is specious.

Clause 5 of the Instruction to Bidders provides that the following may participate in the bidding process:[110]

> 5.1. Unless otherwise provided in the BDS, the following persons shall be eligible to participate in the bidding:
>
> x x x x

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[108] Concurring opinion of Justice Vitug in <http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html>; *see also* <http://www.lawphil.net/judjuris/juri1962/may1962/gr_l-15092_1962.html>.

[109] *Rollo*, pp. 79-128.

[110] Id. at 225-226.

> (e) Unless otherwise provided in the BDS, persons/entities forming themselves into a JV, i.e., group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a peculiar contract: **Provided, however, that Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%).**

While petitioners are correct in asserting that Smartmatic JV ought to be at least 60% Filipino-owned to qualify, they did not adduce sufficient evidence to prove that the joint venture did not meet the requirement. Petitioners, having alleged non-compliance, have the correlative burden of proving that Smartmatic JV did not meet the requirement, but aside from their bare allegation that SMTC is 100% foreign-owned, they did not offer any relevant evidence to substantiate their claim. Even the 2013 financial statements submitted to Court fail to impress for they pertain to the financial standing of **Smartmatic Limited**,[111] which is a distinct and separate entity from **SMTC**. It goes without saying that Smarmatic Limited's nationality is irrelevant herein for it is not even a party to this case, and even to the joint venture.

Aside from the sheer weakness of petitioners' claim, SMTC satisfactorily refuted the challenge to its nationality and established that it is, indeed, a Filipino corporation as defined under our laws. As provided in Republic Act No. 7042 (RA 7042), otherwise known as the Foreign Investments Act, a Philippine corporation is defined in the following wise:

> **Section 3. *Definitions.*** - As used in this Act:
>
> a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; **or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines**; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national.

In *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*,[112] the Court held that the "control test" is the prevailing mode of determining whether or not a corporation is Filipino. Under the "control test," shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be

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[111] Smartmatic International's United Kingdom office.
[112] G.R. No. 195580, April 21, 2014.

considered as of Philippine nationality.[113] It is only when based on the attendant facts and circumstances of the case, there is, in the mind of the Court, doubt in the 60-40 Filipino-equity ownership in the corporation, that it may apply the "grandfather rule."[114]

Perusing SMTC's GIS[115] proves useful in applying the control test. Upon examination, SMTC's GIS reveals that it has an authorized capital stock of ₱226,000,000.00, comprised of 226,000,000 common stocks[116] at ₱1.00 par value, of which 100% is subscribed and paid.[117] The GIS further provides information on the stockholders as follows:[118]

NAME NATIONALITY AND CURRENT RESIDENTIAL ADDRESS	SHARES SUBSCRIBED				AMOUNT PAID
	TYPE	NUMBER	AMOUNT	% OF OWNERSHIP	
1920 Business Inc. Filipino King's Court 2, 2129 Don Chino Roces Ave., Makati, Metro Manila	Common	135,599,997	135,599,997.00	60%	677,999,997.00
	"A"				
	TOTAL	135,599,997	135,599,997.00		
Smartmatic International, Corp. Barbadian 4 Stafford House, Garisson St., Michael, Barbados	Common	90,399,998	90,399,998.00	40%	451,999,998.00
	"B"				
	TOTAL	90,399,998	90,399,998.00		
Juan C. Villa, Jr. Filipino No. 74, Jalan Setiabakti, Damansara Heights, Kuala Lumpur	Common	1	1.00	0%	1.00
	"B"				
	TOTAL	1	1.00		
Jacinto R. Perez, Jr. Filipino 1211 Consuelo St., Singalong, Manila	Common	1	1.00		1.00
	"A"				
	TOTAL	1	1.00		
Alastair Joseph James Wells British 1405 Spanish Bay, Bonifacio Ridge, 1st Avenue, Bonifacio Global City, Taguig	Common	1	1.00	0%	1.00
	"B"				
	TOTAL	1	1.00		
Marian Ivy F. Reyes-Fajardo Filipino 71-B Tindalo St., MonteVista, Subdivision, Marikina	Common	1	1.00	0%	1.00
	"A"				
	Total	1	1.00		
Salvador P. Aque Filipino 2250 P. Burgos, Pasay City	Common	1	1.00	0%	1.00
	"A"				
	Total	1	1.00		

Applying the control test, 60% of SMTC's 226,000,000 shares, that is 135,600,000 shares, must be Filipino-owned. From the above-table, it is clear that SMTC reached this threshold amount to qualify as a Filipino-owned corporation. To demonstrate, the following are SMTC's Filipino investors:

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[113] Id.; citing DOJ Opinion No. 20 s. 2005.
[114] Id.
[115] *Rollo*, pp. 567-573.
[116] Common stocks are voting shares.
[117] *Rollo*, p. 568.
[118] Id. at 570.

NAME OF SHAREHOLDER	TYPE OF SHARE	NUMBER OF SHARES
1920 Business Inc.	Common "A"	135,599,997
Juan C. Villa, Jr.	Common "B"	1
Jacinto R. Perez, Jr.	Common "A"	1
Marian Ivy F. Reyes-Fajardo	Common "A"	1
Salvador P. Aque	Common "A"	1
	TOTAL	135,600,001

Indeed, the application of the control test would yield the result that SMTC is a Filipino corporation. There is then no truth to petitioners' claim that SMTC is 100% foreign-owned. Consequently, it becomes unnecessary to confirm this finding through the grandfather rule[119] since the test is only employed when the 60% Filipino ownership in the corporation is in doubt.[120] In this case, not even the slightest doubt is cast since the petition is severely wanting in facts and circumstances that raise legitimate challenges to SMTC's 60-40 Filipino ownership. The petition rested solely on petitioners' vague assertions and baseless claims. On the other hand, SMTC countered by furnishing the Court a copy of its GIS providing its shareholders' stock ownership details, and by submitting a copy of its AOI, which reserved all of SMTC's 135,600,000 class A common shares to Filipinos[121] in a bid to guarantee that when all of its shares are outstanding, foreign ownership will not exceed 40%.

Anent the nationality of the other joint venture partners, the Court defers to the findings of the COMELEC and the BAC, and finds sufficient their declaration that Smartmatic JV is, indeed, eligible to participate in the bidding process, and is in fact the bidder with the lowest calculated responsive bid.[122] If petitioners would insist otherwise by reason of Smartmatic JV's nationality, it becomes incumbent upon them to prove that the aggregate Filipino equity of the joint venture partners—SMTC, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation—does not comply with the 60% Filipino equity requirement, following the oft-cited doctrine that he who alleges must prove.[123] Regrettably, one fatal flaw in petitioners' posture is that they challenged the nationality of SMTC alone, which, after utilizing the control test, turned out to be a Philippine corporation as defined under RA 7042. There was no iota of evidence presented or, at the very least, even a claim advanced that the remaining partners are foreign-owned. There are, in fact, no other submissions whence this Court can inquire as to the nationalities of the other joint venture partners. Hence, there is no other

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[119] Under the Strict Rule or Grandfather Rule Proper, the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., "grandfathered") to determine the total percentage of Filipino ownership; see *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*, supra note 112.

[120] Id. The Grandfather Rule applies only when the 60-40 Filipino-foreign equity ownership is in doubt (i.e., in cases where the joint venture corporation with Filipino and foreign stockholders with less than 60% Filipino stockholdings [or 59%] invests in other joint venture corporation which is either 60-40% Filipino-alien or the 59% less Filipino). Stated differently, where the 60-40 Filipino-foreign equity ownership is not in doubt, the Grandfather Rule will not apply.

[121] *Rollo*, p. 554. Seventh Article in SMTC's Articles of Incorporation.

[122] Id. at 26.

[123] *Lim v. Equitable PCI Bank*, G.R. No. 183918, January 15, 2014.

alternative for this Court other than to adopt the findings of the COMELEC and the BAC upholding Smartmatic JV's eligibility to participate in the bidding process, subsumed in which is the joint venture and its individual partners' compliance with the nationality requirement.

WHEREFORE, in view of the foregoing, the petition is hereby **DISMISSED** for lack of merit. The June 29, 2015 Decision of the COMELEC *en banc* is hereby **AFFIRMED**.

SO ORDERED.

PRESBITERO J. VELASCO, JR.
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice

ANTONIO T. CARPIO
Acting Chief Justice

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

(On Official Leave)
ARTURO D. BRION
Associate Justice

DIOSDADO M. PERALTA
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

JOSE CATRAL MENDOZA
Associate Justice

BIENVENIDO L. REYES
Associate Justice

I join the separate opinion of J. Leonen

ESTELA M. PERLAS-BERNABE
Associate Justice

See separate concurring and dissenting opinion

MARVIC M.V.F. LEONEN
Associate Justice

FRANCIS H. JARDELEZA
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court.

MARIA LOURDES P. A. SERENO
Chief Justice

EN BANC

G.R. 218787 – LEO Y. QUERUBIN, MARIA CORAZON M. AKOL, and AUGUSTO C. LAGMAN, Petitioners, **v. COMMISSION ON ELECTIONS EN BANC, represented by Chairperson J. ANDRES D. BAUTISTA, and JOINT VENTURE of SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V., and JARLTECH INTERNATIONAL CORPORATION, represented by partner with biggest equity share, SMARTMATIC-TIM CORPORATION, its General Manager ALASTAIR JOSEPH JAMES WELLS, Smartmatic Chairman LORD MALLOCH-BROWN, Smartmatic-Asia Pacific President CESAR FLORES, and any or all persons acting for and on behalf of the joint venture,** Respondents.

Promulgated:

December 8, 2015

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CONCURRING and DISSENTING OPINION

LEONEN, *J.*:

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

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

I

Petitioners Leo Y. Querubin, Maria Corazon M. Akol, and Augusto C. Lagman come to this court through a Petition[1] for certiorari or prohibition

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[1] *Rollo*, pp. 3–54.

under Rule 64 in relation to Rule 65 of the 1997 Rules of Civil Procedure,[2] with prayer for the issuance of a temporary restraining order or writ of preliminary injunction. This Petition assails the COMELEC En Banc's Decision[3] dated June 29, 2015.

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

II

On October 27, 2014, the bidding documents for the OMR Project were released by the COMELEC Bids and Awards Committee (BAC).[6] Under the OMR Project, the COMELEC would lease with option to purchase 23,000 new units[7] of precinct-based Optical Mark Reader or Optical Scan System for the May 9, 2016 elections.[8]

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

The deadline for submitting the Initial Technical Proposals and Eligibility Requirements was set on December 4, 2014.[11]

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2 Id. at 34.

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

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

5 Id. at 71, COMELEC En Banc Decision.

6 Ponencia, p. 2.

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

8 Id. at 588, COMELEC's Comment.

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

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

11 Id.

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

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

> To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management Corporation ("TIM") and Smartmatic International Corporation ("Smartmatic") arising under the Request for Proposal and the Notice of Award issued by the Commission on Elections ("COMELEC") ***for the automation of the 2010 national and local elections*** ("Project"), including the leasing, selling, importing, and/or assembling of automated voting machines, computer software and other computer services and/or otherwise deal in all kinds of services to be used, offered or provided to the COMELEC for the preparations and the conduct of the Project, including project management services.[14] (Emphasis supplied)

On November 12, 2014, SMTC adopted amendments to its Articles of Incorporation.[15] Among others, it changed its primary corporate purpose from operating solely for the automation of the 2010 elections[16] to doing the following acts:

> To sell, supply, lease, import, export, develop, assemble, repair and deal with the automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and/or to provide, render and deal in all kinds of services, including project management services, for the conduct of elections, whether regular or special, in the Philippine[s] and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.[17]

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

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

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12 Id.

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

14 Id. at 6, Petition.

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

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

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

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

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

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

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

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

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

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

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

The BAC then proceeded to the post-qualification evaluation to

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20 Id. at 621, Smartmatic Joint Venture's Comment/Opposition.
21 Id. at 629.
22 Id. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation. The deadline for submitting the bidding documents was on December 4, 2015.
23 Id. at 170, Smartmatic Joint Venture's Comment/Opposition.
24 Id.
25 Id. at 171.
26 Id. at 589, COMELEC's Comment.
27 Id. at 894, COMELEC Bids and Awards Committee Resolution No. 4.
28 Id. at 589, COMELEC's Comment.
29 Id.
30 Id.
31 Id. at 589–590.

determine whether Smartmatic Joint Venture followed the specifications in the Bidding Documents.[32] The BAC sought for additional documents as well as a model unit of Smartmatic Joint Venture's SAES 1800 plus Optical Mark Reader (OMR+).[33] It tested[34] the sample OMR+ to determine Smartmatic Joint Venture's compliance with the OMR Project's Terms of Reference.

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

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

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

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

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

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

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32 Id. at 590.
33 Id. at 447–448, COMELEC Bids and Awards Committee Notice dated March 27, 2015, and 605, COMELEC's Comment.
34 Id. at 624–625, Smartmatic Joint Venture's Comment/Opposition.
35 Id. at 62, COMELEC En Banc Decision.
36 Id. at 590, COMELEC's Comment.
37 Id. at 62, COMELEC En Banc Decision.
38 Id. COMELEC En Banc Decision contains a typographical error, stating the date as May 12, 2016 instead of May 12, 2015.
39 Id.
40 Id.

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

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

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

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

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

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

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41 Id. at 74, Commissioner Luie Tito F. Guia's Memorandum.
42 Id., *citing* COMELEC Bids and Awards Committee Resolution No. 10.
43 Id. at 62, COMELEC En Banc Decision.
44 Id.
45 Id. at 62–63.
46 COMELEC Bids and Awards Committee Bid Bulletin No. 5, Lease with Option to Purchase of Election Management System (EMS) and Precinct-based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System for the 2016 National and Local Elections, Reference No. BAC 01-2014-AES-OMR, June 16, 2015, Query No. 54. <http://www.comelec.gov.ph/?r=AboutCOMELEC/BidsandAwards/ProcurementProjects/BAC012014AESOMRSecondBidding/BAC012014AESOMRSecondBiddingBidBul5> (visited December 7, 2015).
47 COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.
48 COMELEC Bids and Awards Committee Bid Bulletin No. 5.
49 COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.
50 *Rollo*, p. 63, COMELEC En Banc Decision.
51 Id.
52 Id.

suggested further testing of the system.[53]

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

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

> **WHEREFORE,** the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated responsive bid in connection with the public bidding for the lease with option to purchase of [sic] 23,000 units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.[56] (Emphasis in the original)

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

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

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53 Id. at 63–64.
54 Id. at 64.
55 Id. at 64, 68–71.
56 Id. at 71.
57 Id. at 73, Commissioner J. Andres D. Bautista's Memorandum, emphasis supplied.
58 Id. at 76, Commissioner Luie Tito F. Guia's Memorandum.
59 Id. at 75.
60 Id. at 76.

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

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

III

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

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

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

The concept of real party in interest for private suits under Rule 3, Section 2[74] of the Rules of Court is different from *locus standi* for public suits under the Constitution.

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61 Id. at 51, Petition.
62 Id. at 52.
63 Id. at 51
64 Id.
65 Id.
66 Id.
67 Id.
68 Id. at 34.
69 Id.
70 Id. at 40.
71 Id. at 590, COMELEC's Comment.
72 Id.
73 Id. at 614.
74 RULES OF COURT, Rule 3, sec. 2 provides:

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

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

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

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

> SECTION 7 . . . *Unless otherwise provided* by this Constitution or *by law*, any decision, order, or ruling of each Commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof. (Emphasis supplied)

We interpreted this to refer to certiorari under Rule 65, and not appeal under Rule 45.[79] Rule 65 in relation to Rule 64 of the Rules of Court provides for resort to this court from the ruling of the COMELEC En Banc only when there is no other "plain, speedy, and adequate remedy in the ordinary course of law"[80] to assail the COMELEC's exercise of a quasi-judicial function.

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

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

76 Ponencia, p. 20.

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

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

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

80 RULES OF COURT, Rule 65, sec. 1 provides:
SECTION 1. Petition for Certiorari. — When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

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

> SECTION 52. Powers and functions of the Commission on Elections. – In addition to the powers and functions conferred upon it by the Constitution, the Commission shall have *exclusive* charge of the *enforcement and administration of all laws relative to the conduct of elections* for the purpose of ensuring free, orderly and honest elections . . . and shall:
>
> . . . .
>
> (h) *Procure any supplies, equipment, materials or services* needed for the holding of the election by public bidding . . .
>
> (i) Prescribe the use or adoption of the latest technological and electronic devices, taking into account the situation prevailing in the area and the funds available for the purpose[.] (Emphasis supplied)

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

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

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

82 Id.

83 Rep. Act No. 9184, Implementing Rules and Regulations Part A, sec. 55.1 provides:
Section 55. Protests on Decisions of the BAC
55.1. Decisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity: Provided, however, That a prior motion for reconsideration should have been filed by the party concerned within the reglementary periods specified in this IRR-A, and the same has been resolved. The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC denying its motion for reconsideration. A protest may be made by filing a verified position paper with the head of the procuring entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

The ponencia emphasizes that *Macabago v. Commission on Elections*[84] clarifies Rule 64.[85] He states that Rule 64 applies only to the judgments of the COMELEC in the exercise of its power to resolve controversies "involving the election, qualification, or the returns of an elective office[,]"[86] and not "in the exercise of its administrative functions."[87]

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

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

> SEC. 58. Report to Regular Courts; Certiorari. – Court action may be resorted to only after the protests contemplated in this Article shall have been completed. Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of jurisdiction. The regional trial court shall have jurisdiction over final decisions of the head of the procuring entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure.

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

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

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84 440 Phil. 683 (2002) [Per J. Callejo, Sr., En Banc].
85 Ponencia, pp. 11–12.
86 Id. at 12.
87 Id. at 11.
88 645 Phil. 309 (2010) [Per J. Peralta, Second Division].
89 Id. at 319.
90 596 Phil. 334 (2009) [Per J. Nachura, Third Division].
91 Id. at 342.
92 693 Phil. 399 (2012) [Per J. Bersamin, First Division].

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

IV

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

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

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

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

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93 Id. at 412.
94 *Rollo*, p. 44, Petition.
95 Id.
96 Id.
97 Id. at 48, Petition, and 75, Commissioner Luie Tito F. Guia's Memorandum.
98 Id. at 45.
99 Id. at 48, Petition, and 76, Commissioner Luie Tito F. Guia's Memorandum.
100 Id.
101 Id. at 36, Petition.
102 Id. at 46, *citing* Annual Report and Consolidated financial statements Registration number 07477910 dated 31 December 2013 of Smartmatic Limited.
103 Ponencia, pp. 21–30.
104 Id. at 33–34.
105 Id. at 35–36.

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

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

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

The COMELEC has the power to review a bidder's lack of eligibility at *any stage* of the procurement process. Section 23.7 (Eligibility Requirements for the Procurement of Goods and Infrastructure Projects) of the Revised Implementing Rules and Regulations of Republic Act No. 9184 and Section 30[108] of the bidding documents provide for this. Section 23.7 of

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

[107] Id.

[108] *Rollo*, p. 249, COMELEC Bids and Award Committee's Philippine Bidding Documents for the Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System, secs. 30.1 and 30.2(b), which provide:

[Section] 30. Reservation Clause

30.1. Notwithstanding the eligibility or post-qualification of a Bidder, the Procuring Entity concerned reserves the right to review its qualifications at any stage of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility

the Implementing Rules and Regulations states:

> Section 23. Eligibility Requirements for the Procurement of Goods and Infrastructure Projects
>
> . . . .
>
> 23.7. Notwithstanding the eligibility of a prospective bidder, the procuring entity concerned *reserves the right to review* the qualifications of the bidder at *any stage* of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility requirements, statements or documents, or any changes in the situation of the prospective bidder which will affect the capability of the bidder to undertake the project so that it fails the eligibility criteria, the procuring entity shall *consider the said prospective bidder as ineligible and shall disqualify it from obtaining an award or contract* . . . (Emphasis supplied)

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

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

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

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

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

. . . .

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

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

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

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

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

According to Section 45 of the Corporation Code, "[n]o corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such as are necessary or incidental to the exercise of the powers so conferred." It is clear from the provision that the necessary or incidental powers must relate to the express powers conferred by law or the Articles of Incorporation.

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

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

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

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

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111 SEC OGC Opinion No. 07-14.
112 Id.
113 *Rollo*, p. 6, Petition.
114 Id. at 534, Articles of Incorporation of Smartmatic-TIM Corporation.

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

I disagree.

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

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

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

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

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

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115 Ponencia, pp. 30–33.
116 Id. at 33.
117 687 Phil. 617 (2012) [Per J. Peralta, En Banc].
118 Id. at 663–664.
119 Id. at 665.
120 G.R. No. 216098, April 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/april2015/216098.pdf> [Per J. Perlas-Bernabe, En Banc].
121 Id. at 31.

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

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

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

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

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

V

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

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[122] *Rollo*, p. 242, COMELEC Bids and Award Committee's Philippine Bidding Documents for the Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System.

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

financial report[124] of Smartmatic Limited, which is not a party to this case. Only SMTC and Smartmatic International Holding B.V. are partners in the Smartmatic Joint Venture. Respondents, on the other hand, presented SMTC's General Information Sheet,[125] showing that Smartmatic Joint Venture is Filipino-owned, not foreign-owned. In any case, the law allows the COMELEC to procure from foreign sources. Thus:

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

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

MARVIC M.V.F. LEONEN
Associate Justice

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[124] *Rollo*, pp. 79–133.
[125] Id. at 1023.
[126] Rep. Act No. 8436 (1997), sec. 8, as amended by Rep. Act No. 9369, sec. 10.