[G.R. No. 159139. January 13, 2004]

INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES, MA. CORAZON M. AKOL, MIGUEL UY, EDUARDO H. LOPEZ, AUGUSTO C. LAGMAN, REX C. DRILON, MIGUEL HILADO, LEY SALCEDO, and MANUEL ALCUAZ JR., *petitioners, vs.* ; COMELEC CHAIRMAN BENJAMIN ABALOS SR.; COMELEC BIDDING and AWARD COMMITTEE CHAIRMAN EDUARDO D. MEJOS and MEMBERS GIDEON DE GUZMAN, JOSE F. BALBUENA, LAMBERTO P. LLAMAS, and BARTOLOME SINOCRUZ JR.; MEGA PACIFIC eSOLUTIONS, INC.; and MEGA PACIFIC CONSORTIUM, *respondents*.

D E C I S I O N

PANGANIBAN, *J.*:

There is grave abuse of discretion (1) when an act is done contrary to the Constitution, the law or jurisprudence;[1[1]] or (2) when it is executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias.[2[2]] In the present case, the Commission on Elections approved the assailed Resolution and awarded the subject Contract not only in clear violation of law and jurisprudence, but also in reckless disregard of its own bidding rules and procedure. For the automation of the counting and canvassing of the ballots in the 2004 elections, Comelec awarded the Contract to "Mega Pacific Consortium" an entity that had not participated in the bidding. Despite this grant, the poll body signed the actual automation Contract with "Mega Pacific eSolutions, Inc.," a company that joined the bidding but had not met the eligibility requirements.

Comelec awarded this billion-peso undertaking with inexplicable haste, without adequately checking and observing mandatory financial, technical and legal requirements. It also accepted the proferred computer hardware and software even if, at the time of the award, they had undeniably failed to pass eight critical requirements designed to safeguard the integrity of elections, especially the following three items:

- They failed to achieve the accuracy rating criteria of 99.9995 percent set-up by the Comelec itself
- They were not able to detect previously downloaded results at various canvassing or consolidation levels and to prevent these from being inputted again
- They were unable to print the statutorily required audit trails of the count/canvass at different levels without any loss of data

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1[1] Republic *v.* Cocofed, 372 SCRA 462, 493, December 14, 2001.

2[2] Tañada *v.* Angara, 272 SCRA 18, 79, May 2, 1997.

Because of the foregoing violations of law and the glaring grave abuse of discretion committed by Comelec, the Court has no choice but to exercise its solemn "constitutional duty"[3] to void the assailed Resolution and the subject Contract. The illegal, imprudent and hasty actions of the Commission have not only desecrated legal and jurisprudential norms, but have also cast serious doubts upon the poll body's ability and capacity to conduct automated elections. Truly, the pith and soul of democracy -- credible, orderly, and peaceful elections -- has been put in jeopardy by the illegal and gravely abusive acts of Comelec.

The Case

Before us is a Petition[4] under Rule 65 of the Rules of Court, seeking (1) to declare null and void Resolution No. 6074 of the Commission on Elections (Comelec), which awarded "Phase II of the Modernization Project of the Commission to Mega Pacific Consortium (MPC);" (2) to enjoin the implementation of any further contract that may have been entered into by Comelec "either with Mega Pacific Consortium and/or Mega Pacific eSolutions, Inc. (MPEI);" and (3) to compel Comelec to conduct a re-bidding of the project.

The Facts

The following facts are not disputed. They were culled from official documents, the parties' pleadings, as well as from admissions during the Oral Argument on October 7, 2003.

On June 7, 1995, Congress passed Republic Act 8046,[5] which authorized Comelec to conduct a nationwide demonstration of a computerized election system and allowed the poll body to pilot-test the system in the March 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM).

On December 22, 1997, Congress enacted Republic Act 8436[6] authorizing Comelec to use an automated election system (AES) for the process of voting, counting votes and canvassing/consolidating the results of the national and local elections. It also mandated the poll body to acquire automated counting machines (ACMs), computer equipment, devices and

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[3] Francisco *v.* House of Representatives, GR No. 160261 and consolidated cases, November 10, 2003, per Morales, *J.*

[4] *Rollo*, Vol. I, pp. 3-48. While petitioners labeled their pleading as one for prohibition and mandamus, its allegations qualify it also as one for certiorari.

[5] An act authorizing the Commission on Elections to conduct a nationwide demonstration of a computerized election system and pilot-test it in the March 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM) and for other purposes.

[6] An act authorizing the Commission on Elections to use an automated election system in the May 11, 1998 national or local elections and in subsequent national and local electoral exercises, providing funds therefor and for other purposes.

materials; and to adopt new electoral forms and printing materials.

Initially intending to implement the automation during the May 11, 1998 presidential elections, Comelec -- in its Resolution No. 2985 dated February 9, 1998[7[7]] -- eventually decided against full national implementation and limited the automation to the Autonomous Region in Muslim Mindanao (ARMM). However, due to the failure of the machines to read correctly some automated ballots in one town, the poll body later ordered their manual count for the entire Province of Sulu.[8[8]]

In the May 2001 elections, the counting and canvassing of votes for both national and local positions were also done manually, as no additional ACMs had been acquired for that electoral exercise allegedly because of time constraints.

On October 29, 2002, Comelec adopted in its Resolution 02-0170 a modernization program for the 2004 elections. It resolved to conduct biddings for the three (3) phases of its Automated Election System; namely, Phase I - Voter Registration and Validation System; Phase II - Automated Counting and Canvassing System; and Phase III - Electronic Transmission.

On January 24, 2003, President Gloria Macapagal-Arroyo issued Executive Order No. 172, which allocated the sum of ₱2.5 billion to fund the AES for the May 10, 2004 elections. Upon the request of Comelec, she authorized the release of an additional ₱500 million.

On January 28, 2003, the Commission issued an "Invitation to Apply for Eligibility and to Bid," which we quote as follows:

> "INVITATION TO APPLY FOR ELIGIBILITY AND TO BID
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> The Commission on Elections (COMELEC), pursuant to the mandate of Republic Act Nos. 8189 and 8436, invites interested offerors, vendors, suppliers or lessors to apply for eligibility and to bid for the procurement by purchase, lease, lease with option to purchase, or otherwise, supplies, equipment, materials and services needed for a comprehensive Automated Election System, consisting of three (3) phases: (a) registration/verification of voters, (b) automated counting and consolidation of votes, and (c) electronic transmission of election results, with an approved budget of TWO BILLION FIVE HUNDRED MILLION (Php2,500,000,000) Pesos.
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> Only bids from the following entities shall be entertained:
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> a. Duly licensed Filipino citizens/proprietorships;
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> b. Partnerships duly organized under the laws of the Philippines and of which

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[7[7]] Section 6 of RA 8436 provides "[i]f in spite of its diligent efforts to implement this mandate in the exercise of this authority, it becomes evident by February 9, 1998 that the Commission cannot fully implement the automated election system for national positions in the May 11, 1998 elections, the elections for both national and local positions shall be done manually except in the Autonomous Region in Muslim Mindanao (ARMM) where the automated election system shall be used for all positions."

[8[8]] Loong *v.* Comelec, 365 Phil. 386, April 14, 1999; see also Panganiban, Leadership by Example, 1999 ed., pp. 201-249.

at least sixty percent (60%) of the interest belongs to citizens of the Philippines;

c. Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;

d. Manufacturers, suppliers and/or distributors forming themselves into a joint venture, i.e., a group of two (2) or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract, provided that Filipino ownership thereof shall be at least sixty percent (60%); and

e. Cooperatives duly registered with the Cooperatives Development Authority.

Bid documents for the three (3) phases may be obtained starting 10 February 2003, during office hours from the Bids and Awards Committee (BAC) Secretariat/Office of Commissioner Resurreccion Z. Borra, 7th Floor, Palacio del Governador, Intramuros, Manila, upon payment at the Cash Division, Commission on Elections, in cash or cashier's check, payable to the Commission on Elections, of a non-refundable amount of FIFTEEN THOUSAND PESOS (Php15,000.00) for each phase. For this purpose, interested offerors, vendors, suppliers or lessors have the option to participate in any or all of the three (3) phases of the comprehensive Automated Election System.

A Pre-Bid Conference is scheduled on 13 February 2003, at 9:00 a.m. at the Session Hall, Commission on Elections, Postigo Street, Intramuros, Manila. Should there be questions on the bid documents, bidders are required to submit their queries in writing to the BAC Secretariat prior to the scheduled Pre-Bid Conference.

Deadline for submission to the BAC of applications for eligibility and bid envelopes for the supply of the comprehensive Automated Election System shall be at the Session Hall, Commission on Elections, Postigo Street, Intramuros, Manila on 28 February 2003 at 9:00 a.m.

The COMELEC reserves the right to review the qualifications of the bidders after the bidding and before the contract is executed. Should such review uncover any misrepresentation made in the eligibility statements, or any changes in the situation of the bidder to materially downgrade the substance of such statements, the COMELEC shall disqualify the bidder upon due notice without any obligation whatsoever for any expenses or losses that may be incurred by it in the preparation of its bid."[9[9]]

On February 11, 2003, Comelec issued Resolution No. 5929 clarifying certain eligibility criteria for bidders and the schedule of activities for the project bidding, as follows:

"1.) Open to Filipino and foreign corporation duly registered and licensed to do

[9[9]] Annex "7" of the Comment of Private Respondents MPC and MPEI, *rollo*, Vol. II, p. 638.

business and is actually doing business in the Philippines, subject to Sec. 43 of RA 9184 (An Act providing In the Modernization Standardization and Regulation of the Procurement Activities of the Government and for other purposes etc.)

2.) Track Record:

a) For counting machines – should have been used in at least one (1) political exercise with no less than Twenty Million Voters;

b) For verification of voters – the reference site of an existing data base installation using Automated Fingerprint Identification System (AFIS) with at least Twenty Million.

3.) Ten percent (10%) equity requirement shall be based on the total project cost; and

4.) Performance bond shall be twenty percent (20%) of the bid offer.

RESOLVED moreover, that:

1) A. Due to the decision that the eligibility requirements and the rest of the Bid documents shall be released at the same time, and the memorandum of Comm. Resurreccion Z. Borra dated February 7, 2003, the documents to be released on Friday, February 14, 2003 at 2:00 o'clock p.m. shall be the eligibility criteria, Terms of Reference (TOR) and other pertinent documents;

B. Pre-Bid conference shall be on February 18, 2003; and

C. Deadline for the submission and receipt of the Bids shall be on March 5, 2003.

2) The aforementioned documents will be available at the following offices:

a) Voters Validation: Office of Comm. Javier
b) Automated Counting Machines: Office of Comm. Borra
c) Electronic Transmission: Office of Comm. Tancangco"[10[10]]

On February 17, 2003, the poll body released the Request for Proposal (RFP) to procure the election automation machines. The Bids and Awards Committee (BAC) of Comelec convened a pre-bid conference on February 18, 2003 and gave prospective bidders until March 10, 2003 to submit their respective bids.

Among others, the RFP provided that bids from manufacturers, suppliers and/or distributors forming themselves into a joint venture may be entertained, provided that the Philippine ownership thereof shall be at least 60 percent. *Joint venture* is defined in the RFP as "a group of two or more manufacturers, suppliers and/or distributors that intend to be jointly

[10[10]] Annex "8" of the Comment of Private Respondents MPC and MPEI, *rollo*, Vol. II, pp. 641-642.

and severally responsible or liable for a particular contract."[11][11]

Basically, the public bidding was to be conducted under a *two-envelope/two stage system.* The bidder's first envelope or the Eligibility Envelope should establish the bidder's eligibility to bid and its qualifications to perform the acts if accepted. On the other hand, the second envelope would be the Bid Envelope itself. The RFP outlines the bidding procedures as follows:

> "25. Determination of Eligibility of Prospective Bidders
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> "25.1 The eligibility envelopes of prospective Bidders shall be opened first to determine their eligibility. In case any of the requirements specified in Clause 20 is missing from the first bid envelope, the BAC shall declare said prospective Bidder as ineligible to bid. Bid envelopes of ineligible Bidders shall be immediately returned unopened.
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> "25.2 The eligibility of prospective Bidders shall be determined using simple 'pass/fail' criteria and shall be determined as either eligible or ineligible. If the prospective Bidder is rated 'passed' for all the legal, technical and financial requirements, he shall be considered eligible. If the prospective Bidder is rated 'failed' in any of the requirements, he shall be considered ineligible.
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> *"26. Bid Examination/Evaluation*
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> "26.1 The BAC will examine the Bids to determine whether they are complete, whether any computational errors have been made, whether required securities have been furnished, whether the documents have been properly signed, and whether the Bids are generally in order.
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> "26.2 The BAC shall check the submitted documents of each Bidder against the required documents enumerated under Clause 20, to ascertain if they are all present in the Second bid envelope (Technical Envelope). In case one (1) or more of the required documents is missing, the BAC shall rate the Bid concerned as 'failed' and immediately return to the Bidder its Third bid envelope (Financial Envelope) unopened. Otherwise, the BAC shall rate the first bid envelope as 'passed'.
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> "26.3 The BAC shall immediately open the Financial Envelopes of the Bidders whose Technical Envelopes were passed or rated on or above the passing score. Only Bids that are determined to contain all the bid requirements for both components shall be rated 'passed' and shall immediately be considered for evaluation and comparison.
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> "26.4 In the opening and examination of the Financial Envelope, the BAC shall announce and tabulate the Total Bid Price as calculated. Arithmetical errors will be rectified on the following basis: If there is a discrepancy between words and figures, the amount in words will prevail. If there is a discrepancy between the

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[11][11] Annex "G" of the Petition, Request for Proposal, p. 12; *rollo*, Vol. I, p. 71.

unit price and the total price that is obtained by multiplying the unit price and the quantity, the unit price shall prevail and the total price shall be corrected accordingly. If there is a discrepancy between the Total Bid Price and the sum of the total prices, the sum of the total prices prevail and the Total Bid Price shall be corrected accordingly.

"26.5 Financial Proposals which do not clearly state the Total Bid Price shall be rejected. Also, Total Bid Price as calculated that exceeds the approved budget for the contract shall also be rejected.

27. *Comparison of Bids*

27.1 The bid price shall be deemed to embrace all costs, charges and fees associated with carrying out all the elements of the proposed Contract, including but not limited to, license fees, freight charges and taxes.

27.2 The BAC shall establish the calculated prices of all Bids rated 'passed' and rank the same in ascending order.

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"29. *Postqualification*

"29.1 The BAC will determine to its satisfaction whether the Bidder selected as having submitted the lowest calculated bid is qualified to satisfactorily perform the Contract.

"29.2 The determination will take into account the Bidder's financial, technical and production capabilities/resources. It will be based upon an examination of the documentary evidence of the Bidder's qualification submitted by the Bidder as well as such other information as the BAC deems necessary and appropriate.

"29.3 A bid determined as not substantially responsive will be rejected by the BAC and may not subsequently be made responsive by the Bidder by correction of the non-conformity.

"29.4 The BAC may waive any informality or non-conformity or irregularity in a bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any Bidder.

"29.5 Should the BAC find that the Bidder complies with the legal, financial and technical requirements, it shall make an affirmative determination which shall be a prerequisite for award of the Contract to the Bidder. Otherwise, it will make a negative determination which will result in rejection of the Bidder's bid, in which event the BAC will proceed to the next lowest calculated bid to make a similar determination of that Bidder's capabilities to perform satisfactorily."[12[12]]

[12[12]] *Id.*, pp. 21-23 & 80-82.

Out of the 57 bidders,[13] the BAC found MPC and the Total Information Management Corporation (TIMC) eligible. For technical evaluation, they were referred to the BAC's Technical Working Group (TWG) and the Department of Science and Technology (DOST).

In its Report on the Evaluation of the Technical Proposals on Phase II, DOST said that both MPC and TIMC had obtained a number of failed marks in the technical evaluation. Notwithstanding these failures, Comelec en banc, on April 15, 2003, promulgated Resolution No. 6074 awarding the project to MPC. The Commission publicized this Resolution and the award of the project to MPC on May 16, 2003.

On May 29, 2003, five individuals and entities (including the herein Petitioners Information Technology Foundation of the Philippines, represented by its president, Alfredo M. Torres; and Ma. Corazon Akol) wrote a letter[14] to Comelec Chairman Benjamin Abalos Sr. They protested the award of the Contract to Respondent MPC "due to glaring irregularities in the manner in which the bidding process had been conducted." Citing therein the noncompliance with eligibility as well as technical and procedural requirements (many of which have been discussed at length in the Petition), they sought a re-bidding.

In a letter-reply dated June 6, 2003,[15] the Comelec chairman -- speaking through Atty. Jaime Paz, his head executive assistant -- rejected the protest and declared that the award "would stand up to the strictest scrutiny."

Hence, the present Petition.[16]

The Issues

In their Memorandum, petitioners raise the following issues for our consideration:

"1. The COMELEC awarded and contracted with a non-eligible entity; x x x

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[13] According to Public Respondent Comelec's Memorandum prepared by the OSG, p. 8; *rollo*, Vol. IV, p. 2413.

[14] Photocopy appended as Annex "B" of the Petition; *rollo*, Vol. I, pp. 52-53.

[15] Photocopy appended as Annex "C" of the Petition; *rollo*, Vol. I, pp. 54-55.

[16] The case was deemed submitted for decision on November 5, 2003, upon this Court's receipt of Private Respondent MPC/MPEI's Memorandum, which was signed by Attys. Alfredo *V.* Lazaro Jr., Juanito I. Velasco Jr. and Ma. Concepcion *V.* Murillo of the Lazaro Law Firm. On October 27, 2003, the Court received petitioners' Memorandum, which was signed by Atty. Alvin Jose B. Felizardo of Pastelero Law Office, and Public Respondent Comelec's Memorandum, signed by Comelec Comm. Florentino A. Tuason Jr. Apart from these, the Office of the Solicitor General (OSG) filed another Memorandum on behalf of Comelec, also on October 27, 2003, signed by Asst. Sol. Gen. Carlos N. Ortega, Asst. Sol. Gen. Renan E. Ramos, Sol. Jane E. Yu and Asso. Sol. Catherine Joy R. Mallari, with a note that Sol. Gen. Alfredo L. Benipayo "inhibited himself." The writing of the Decision in this case was initially raffled to Justice Dante O. Tinga. However, during the Court's deliberations, the present ponente's then "Dissenting Opinion" to the draft report of Justice Tinga was upheld by the majority. Hence, the erstwhile Dissent was rewritten into this full ponencia.

"2. Private respondents failed to pass the Technical Test as required in the RFP. Notwithstanding, such failure was ignored. In effect, the COMELEC changed the rules after the bidding in effect changing the nature of the contract bidded upon.

"3. Petitioners have *locus standi*.

"4. Instant Petition is not premature. Direct resort to the Supreme Court is justified."[17][17]

In the main, the *substantive* issue is whether the Commission on Elections, the agency vested with the exclusive constitutional mandate to oversee elections, gravely abused its discretion when, in the exercise of its administrative functions, it awarded to MPC the contract for the second phase of the comprehensive Automated Election System.

Before discussing the validity of the award to MPC, however, we deem it proper to first pass upon the *procedural* issues: the legal standing of petitioners and the alleged prematurity of the Petition.

This Court's Ruling

The Petition is meritorious.

First Procedural Issue: Locus Standi *of Petitioners*

Respondents chorus that petitioners do not possess *locus standi*, inasmuch as they are not challenging the validity or constitutionality of RA 8436. Moreover, petitioners supposedly admitted during the Oral Argument that no law had been violated by the award of the Contract. Furthermore, they allegedly have no actual and material interest in the Contract and, hence, do not stand to be injured or prejudiced on account of the award.

On the other hand, petitioners -- suing in their capacities as taxpayers, registered voters and concerned citizens -- respond that the issues central to this case are "of transcendental importance and of national interest." Allegedly, Comelec's flawed bidding and questionable award of the Contract to an unqualified entity would impact directly on the success or the failure of the electoral process. Thus, any taint on the sanctity of the ballot as the expression of the will of the people would inevitably affect their faith in the democratic system of government. Petitioners further argue that the award of any contract for automation involves

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[17][17] Page 11; *rollo*, Vol. IV, p. 2390. During the Oral Argument on October 7, 2003, the Court limited the issues to the following: (1) *locus standi* of petitioners; (2) prematurity of the Petition because of non-exhaustion of administrative remedies for failure to avail of protest mechanisms; and (3) validity of the award and the Contract being challenged in the Petition.

disbursement of public funds in gargantuan amounts; therefore, public interest requires that the laws governing the transaction must be followed strictly.

We agree with petitioners. Our nation's political and economic future virtually hangs in the balance, pending the outcome of the 2004 elections. Hence, there can be no serious doubt that the subject matter of this case is "a matter of public concern and imbued with public interest";[18][18] in other words, it is of "paramount public interest"[19][19] and "transcendental importance."[20][20] This fact alone would justify relaxing the rule on legal standing, following the liberal policy of this Court whenever a case involves "an issue of overarching significance to our society."[21][21] Petitioners' legal standing should therefore be recognized and upheld.

Moreover, this Court has held that taxpayers are allowed to sue when there is a claim of "illegal disbursement of public funds,"[22][22] or if public money is being "deflected to any improper purpose";[23][23] or when petitioners seek to restrain respondent from "wasting public funds through the enforcement of an invalid or unconstitutional law."[24][24] In the instant case, individual petitioners, suing as taxpayers, assert a material interest in seeing to it that public funds are properly and lawfully used. In the Petition, they claim that the bidding was defective, the winning bidder not a qualified entity, and the award of the Contract contrary to law and regulation. Accordingly, they seek to restrain respondents from implementing the Contract and, *necessarily, from making any unwarranted expenditure of public funds pursuant thereto*. Thus, we hold that petitioners possess *locus standi.*

Second Procedural Issue:
Alleged Prematurity Due to Non-Exhaustion of Administrative Remedies

Respondents claim that petitioners acted prematurely, since they had not first utilized the protest mechanism available to them under RA 9184, the Government Procurement Reform Act, for the settlement of disputes pertaining to procurement contracts.

Section 55 of RA 9184 states that protests against decisions of the Bidding and Awards Committee in all stages of procurement may be lodged with the head of the procuring entity by

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18[18] Chavez *v.* Presidential Commission on Good Government, 360 Phil. 133, December 9, 1998, per Panganiban, *J.*

19[19] Kilosbayan, Inc. *v.* Morato, 320 Phil. 171, November 16, 1995, per Mendoza, *J.*

20[20] Tatad *v.* Secretary of the Department of Energy, 346 Phil. 321, November 5, 1997, per Puno, *J.*

21[21] Del Mar *v.* Philippine Amusement and Gaming Corporation, 346 SCRA 485, November 29, 2000, per Puno, *J.*

22[22] Kilosbayan, Inc. *v.* Morato, *supra*.

23[23] Dumlao *v.* Comelec, 95 SCRA 392, January 22, 1980, per Melencio-Herrera, *J.*

24[24] Philconsa *v.* Mathay, 124 Phil. 890, October 4, 1966, per Reyes *J.*B.L., *J.*

filing a verified position paper and paying a protest fee. Section 57 of the same law mandates that in no case shall any such protest stay or delay the bidding process, but it must first be resolved before any award is made.

On the other hand, Section 58 provides that court action may be resorted to only after the protests contemplated by the statute shall have been completed. Cases filed in violation of this process are to be dismissed for lack of jurisdiction. Regional trial courts shall have jurisdiction over final decisions of the head of the procuring entity, and court actions shall be instituted pursuant to Rule 65 of the 1997 Rules of Civil Procedure.

Respondents assert that throughout the bidding process, petitioners never questioned the BAC Report finding MPC eligible to bid and recommending the award of the Contract to it (MPC). According to respondents, the Report should have been appealed to the Comelec en banc, pursuant to the aforementioned sections of RA 9184. In the absence of such appeal, the determination and recommendation of the BAC had become final.

The Court is not persuaded.

Respondent Comelec came out with its en banc Resolution No. 6074 dated April 15, 2003, awarding the project to Respondent MPC even before the BAC managed to issue its written report and recommendation on April 21, 2003. Thus, how could petitioners have appealed the BAC's recommendation or report to the head of the procuring entity (the chairman of Comelec), when the Comelec en banc had already approved the award of the contract to MPC even before petitioners learned of the BAC recommendation?

It is claimed[25[25]] by Comelec that during its April 15, 2003 session, it received and approved the *verbal* report and recommendation of the BAC for the award of the Contract to MPC, and that the BAC subsequently re-affirmed its verbal report and recommendation by submitting it in writing on April 21, 2003. Respondents insist that the law does not require that the BAC Report be in writing before Comelec can act thereon; therefore, there is allegedly nothing irregular about the Report as well as the en banc Resolution.

However, it is obvious that petitioners could have appealed the BAC's report and recommendation to the head of the procuring entity (the Comelec chair) *only* upon their *discovery* thereof, which at the very earliest would have been on April 21, 2003, when the BAC actually put its report in writing and finally released it. Even then, what would have been the use of protesting/appealing the report to the Comelec chair, when by that time the Commission en banc (*including the chairman himself*) had already approved the BAC Report and awarded the Contract to MPC?

And even assuming *arguendo* that petitioners had somehow gotten wind of the verbal BAC report on April 15, 2003 (immediately after the en banc session), at that point the Commission en banc had already given its approval to the BAC Report along with the award to MPC. *To put it bluntly*, *the Comelec en banc itself made it legally impossible for petitioners to avail themselves of the administrative remedy that the Commission is so impiously harping on.* There

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[25[25]] Respondent Comelec's Memorandum, pp. 50-51.

is no doubt that they had not been accorded the opportunity to avail themselves of the process provided under Section 55 of RA 9184, according to which a protest against a decision of the BAC may be filed *with the head of the procuring entity*. *Nemo tenetur ad impossible,*[26[26]] to borrow private respondents' favorite Latin excuse.[27[27]]

Some Observations on the BAC Report to the Comelec

We shall return to this issue of alleged prematurity shortly, but at this interstice, we would just want to put forward a few observations regarding the BAC Report and the Comelec en banc's approval thereof.

First, Comelec contends that there was nothing unusual about the fact that the Report submitted by the BAC came only after the former had already awarded the Contract, because the latter had been asked to render its report and recommendation orally during the Commission's en banc session on April 15, 2003. Accordingly, Comelec supposedly acted upon such oral recommendation and approved the award to MPC on the same day, following which the recommendation was subsequently reduced into writing on April 21, 2003. While not entirely outside the realm of the possible, this interesting and unique spiel does not speak well of the process that Comelec supposedly went through in making a critical decision with respect to a multi-billion-peso contract.

We can imagine that anyone else standing in the shoes of the Honorable Commissioners would have been extremely conscious of the overarching need for utter transparency. They would have scrupulously avoided the slightest hint of impropriety, preferring to maintain an exacting regularity in the performance of their duties, instead of trying to break a speed record in the award of multi-billion-peso contracts. After all, between April 15 and April 21 were a mere six (6) days. Could Comelec not have waited out six more days for the written report of the BAC, instead of rushing pell-mell into the arms of MPC? Certainly, respondents never cared to explain the nature of the Commission's dire need to act immediately without awaiting the formal, written BAC Report.

In short, the Court finds it difficult to reconcile the uncommon dispatch with which Comelec acted to approve the multi-billion-peso deal, with its claim of having been impelled by only the purest and most noble of motives.

At any rate, as will be discussed later on, several other factors combine to lend *negative* credence to Comelec's tale.

Second, without necessarily ascribing any premature malice or premeditation on the part of the Comelec officials involved, it should nevertheless be conceded that this cart-before-the-

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[26[26]] The law obliges no one to perform the impossible.

[27[27]] See private respondents' Memorandum, p. 60.

horse maneuver (awarding of the Contract ahead of the BAC's written report) would definitely serve as a clever and effective way of averting and frustrating any impending protest under Section 55.

Having made the foregoing observations, we now go back to the question of exhausting administrative remedies. Respondents may not have realized it, but the letter addressed to Chairman Benjamin Abalos Sr. dated May 29, 2003[28[28]] serves to eliminate the prematurity issue as it was an actual written protest against the decision of the poll body to award the Contract. The letter was signed by/for, *inter alia,* two of herein petitioners: the Information Technology Foundation of the Philippines, represented by its president, Alfredo M. Torres; and Ma. Corazon Akol.

Such letter-protest is *sufficient compliance* with the requirement to exhaust administrative remedies particularly because it hews closely to the procedure outlined in Section 55 of RA 9184.

And even without that May 29, 2003 letter-protest, the Court still holds that petitioners need not exhaust administrative remedies in the light of *Paat v. Court of Appeals.*[29[29]] *Paat* enumerates the instances when the rule on exhaustion of administrative remedies may be disregarded, as follows:

> "(1) when there is a violation of due process,
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> (2) when the issue involved is purely a legal question,
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> (3) when the administrative action is patently illegal amounting to lack or excess of jurisdiction,
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> (4) when there is estoppel on the part of the administrative agency concerned,
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> (5) when there is irreparable injury,
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> (6) when the respondent is a department secretary whose acts as an *alter ego* of the President bears the implied and assumed approval of the latter,
>
> (7) when to require exhaustion of administrative remedies would be unreasonable,
>
> (8) when it would amount to a nullification of a claim,
>
> (9) when the subject matter is a private land in land case proceedings,
>
> (10) when the rule does not provide a plain, speedy and adequate remedy, and
>
> (11) when there are circumstances indicating the urgency of judicial intervention."[30[30]]

[28[28]] Photocopy appended as Annex "B" of the petition.

[29[29]] 334 Phil. 146, January 10, 1997.

[30[30]] *Id.*, p. 153, per Torres Jr., *J.*

The present controversy *precisely* falls within the exceptions listed as Nos. 7, 10 and 11: "*(7) when to require exhaustion of administrative remedies would be unreasonable; (10) when the rule does not provide a plain, speedy and adequate remedy, and (11) when there are circumstances indicating the urgency of judicial intervention*." As already stated, Comelec itself made the exhaustion of administrative remedies legally impossible or, at the very least, "unreasonable."

In any event, the peculiar circumstances surrounding the unconventional rendition of the BAC Report and the precipitate awarding of the Contract by the Comelec en banc -- plus the fact that it was racing to have its Contract with MPC implemented in time for the elections in May 2004 (barely four months away) -- have combined to bring about the urgent need for judicial intervention, thus prompting this Court to dispense with the procedural exhaustion of administrative remedies in this case.

Main Substantive Issue:
Validity of the Award to MPC

We come now to the meat of the controversy. Petitioners contend that the award is *invalid*, since Comelec gravely abused its discretion when it did the following:

1. Awarded the Contract to MPC though it did not even participate in the bidding

2. Allowed MPEI to participate in the bidding despite its failure to meet the mandatory eligibility requirements

3. Issued its Resolution of April 15, 2003 awarding the Contract to MPC despite the issuance by the BAC of its Report, which formed the basis of the assailed Resolution, only on April 21, 2003[31][31]

4. Awarded the Contract, notwithstanding the fact that during the bidding process, there were violations of the mandatory requirements of RA 8436 as well as those set forth in Comelec's own Request for Proposal on the automated election system

5. Refused to declare a failed bidding and to conduct a re-bidding despite the failure of the bidders to pass the technical tests conducted by the Department of Science and Technology

6. Failed to follow strictly the provisions of RA 8436 in the conduct of the bidding for the automated counting machines

After reviewing the slew of pleadings as well as the matters raised during the Oral Argument, the Court deems it sufficient to focus discussion on the following *major areas of concern* that impinge on the issue of grave abuse of discretion:

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[31][31] Although by its Resolution 6074, Comelec awarded the bid to MPC, the actual Contract was entered into by Comelec with MPEI. The Contract did not indicate an exact date of execution (except that it was allegedly done on the "____ day of May,") but it was apparently notarized on June 30, 2003.

A. Matters pertaining to the identity, existence and eligibility of MPC as a bidder

B. Failure of the automated counting machines (ACMs) to pass the DOST technical tests

C. Remedial measures and re-testings undertaken by Comelec and DOST after the award, and their effect on the present controversy

A.
Failure to Establish the Identity, Existence and Eligibility of the Alleged Consortium as a Bidder

On the question of the identity and the existence of the real bidder, respondents insist that, contrary to petitioners' allegations, the bidder was not Mega Pacific eSolutions, Inc. (MPEI), which was incorporated only on February 27, 2003, or 11 days prior to the bidding itself. Rather, the bidder was Mega Pacific Consortium (MPC), of which MPEI was but a part. As proof thereof, they point to the March 7, 2003 letter of intent to bid, signed by the president of MPEI allegedly for and on behalf of MPC. They also call attention to the official receipt issued to MPC, acknowledging payment for the bidding documents, as proof that it was the "consortium" that participated in the bidding process.

We do not agree. The March 7, 2003 letter, signed by only one signatory -- "Willy U. Yu, President, Mega Pacific eSolutions, Inc., (Lead Company/ Proponent) For: Mega Pacific Consortium" -- and without any further proof, does not by itself prove the existence of the consortium. It does not show that MPEI or its president have been duly pre-authorized by the other members of the putative consortium to represent them, to bid on their collective behalf and, more important, to commit them jointly and severally to the bid undertakings. The letter is purely self-serving and uncorroborated.

Neither does an official receipt issued to MPC, acknowledging payment for the bidding documents, constitute proof that it was the purported consortium that participated in the bidding. Such receipts are issued by cashiers without any legally sufficient inquiry as to the real identity or existence of the supposed payor.

To assure itself properly of the due existence (as well as eligibility and qualification) of the putative consortium, Comelec's BAC should have examined the bidding documents submitted on behalf of MPC. They would have easily discovered the following fatal flaws.

Two-Envelope, Two-Stage System

As stated earlier in our factual presentation, the public bidding system designed by Comelec under its RFP (Request for Proposal for the Automation of the 2004 Election) mandated the use of a two-envelope, two-stage system. A bidder's *first envelope* (Eligibility Envelope) was meant to establish its eligibility to bid and its qualifications and capacity to perform the contract if its bid was accepted, while the *second envelope* would be the Bid Envelope itself.

The Eligibility Envelope was to contain *legal documents* such as articles of incorporation, business registrations, licenses and permits, mayor's permit, VAT certification, and so forth; *technical documents* containing documentary evidence to establish the track record of the bidder and its technical and production capabilities to perform the contract; and *financial documents*, including audited financial statements for the last three years, to establish the bidder's financial capacity.

In the case of a consortium or joint venture desirous of participating in the bidding, it goes without saying that the Eligibility Envelope would necessarily have to include a copy of the joint venture agreement, the consortium agreement or memorandum of agreement -- or a business plan or some other instrument of similar import -- establishing the due existence, composition and scope of such aggrupation. *Otherwise, how would Comelec know who it was dealing with, and whether these parties are qualified and capable of delivering the products and services being offered for bidding*?[32[32]]

In the instant case, no such instrument was submitted to Comelec during the bidding process. This fact can be conclusively ascertained by scrutinizing the two-inch thick "Eligibility Requirements" file submitted by Comelec last October 9, 2003, in partial compliance with this Court's instructions given during the Oral Argument. This file purports to replicate the eligibility documents originally submitted to Comelec by MPEI allegedly on behalf of MPC, in connection with the bidding conducted in March 2003. Included in the file are the incorporation papers and financial statements of the members of the supposed consortium and certain certificates, licenses and permits issued to them.

[32[32]] In connection with this, public respondents, in their Memorandum made reference to the Implementing Rules and Regulations of RA 6957 as amended by RA 7718 (the Build-Operate-Transfer Law), and considered said IRR as being applicable to the instant case on a suppletory basis, pending the promulgation of implementing rules for RA 9184 (the Government Procurement Act). For our purposes, it is well worth noting that Sec. 5.4 of the IRR for RA 6957 as amended, speaks of prequalification requirements for project proponents, and in sub-section (b)(i), it provides that, for purposes of evaluating a joint venture or consortium, it shall submit as part of its prequalification statement a business plan which shall among others identify its members and its contractor(s), and the description of the respective roles said members and contractors shall play or undertake in the project. If undecided on a specific contractor, the proponent may submit a short list of contractors from among which it will select the final contractor. Short listed contractors are required to submit a statement indicating willingness to participate in the project and capacity to undertake the requirements of the project. The business plan shall disclose which of the members of the joint venture/consortium shall be the lead member, the financing arm, and/or facility operator(s), and the contractor(s). In other words, since public respondents argue that the IRR of RA 6957 as amended would be suppletorily applicable to this bidding, they could not have been unaware of the requirement under Sec. 5.4 (b)(i) thereof, in respect of submission of the requisite business plan by a joint venture or consortium participating in a bidding.

However, there is no sign whatsoever of any joint venture agreement, consortium agreement, memorandum of agreement, or business plan executed among the members of the purported consortium.

The only logical conclusion is that no such agreement was ever submitted to the Comelec for its consideration, *as part of the bidding process.*

It thus follows that, prior the award of the Contract, there was no documentary or other basis for Comelec to conclude that a consortium had actually been formed amongst MPEI, SK C&C and WeSolv, along with Election.com and ePLDT.[33][33] Neither was there anything to indicate the exact relationships between and among these firms; their diverse roles, undertakings and prestations, if any, relative to the prosecution of the project, the extent of their respective investments (if any) in the supposed consortium or in the project; and the precise nature and extent of their respective liabilities with respect to the contract being offered for bidding. And apart from the self-serving letter of March 7, 2003, there was not even any indication that MPEI was the lead company duly authorized to act on behalf of the others.

So, it necessarily follows that, during the bidding process, Comelec had no basis at all for determining that the alleged consortium really existed and was eligible and qualified; and that the arrangements among the members were satisfactory and sufficient to ensure delivery on the Contract and to protect the government's interest.

Notwithstanding such deficiencies, Comelec still deemed the "consortium" eligible to participate in the bidding, proceeded to open its Second Envelope, and eventually awarded the bid to it, even though -- per the Comelec's own RFP -- the BAC should have declared the MPC ineligible to bid and returned the Second (Bid) Envelope unopened.

Inasmuch as Comelec should not have considered MPEI et al. as comprising a consortium or joint venture, it should not have allowed them to avail themselves of the provision in Section 5.4 (b) (i) of the IRR for RA 6957 (the Build-Operate-Transfer Law), as amended by RA 7718. This provision states in part that a joint venture/consortium proponent shall be evaluated based on the individual or *collective experience of the member-firms* of the joint venture or consortium and of the contractor(s) that it has engaged for the project. Parenthetically, respondents have uniformly argued that the said IRR of RA 6957, as amended, have suppletory application to the instant case.

Hence, had the proponent MPEI been evaluated based solely on its own experience, financial and operational track record or lack thereof, it would surely not have qualified and would have been immediately considered ineligible to bid, as respondents readily admit.

At any rate, it is clear that *Comelec gravely abused its discretion* in arbitrarily failing to

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[33][33] Now, what would prevent an enterprising individual from obtaining copies of the Articles of Incorporation and financial statements of, let us say, San Miguel Corporation and Ayala Corporation from the SEC, and using these to support one's claim that these two giant conglomerates have formed a consortium with one's own penny-ante company for the purpose of bidding for a multi-billion peso contract? As far as Comelec is concerned, the answer seems to be: Nothing.

observe its own rules, policies and guidelines with respect to the bidding process, thereby negating a fair, honest and competitive bidding.

Commissioners Not Aware of Consortium

In this regard, the Court is beguiled by the statements of Commissioner Florentino Tuason Jr., given in open court during the Oral Argument last October 7, 2003. The good commissioner affirmed that he was aware, *of his own personal knowledge*, that there had indeed been a written agreement among the "consortium" members,[34[34]] although it was an internal matter among them,[35[35]] and of the fact that it would be presented by counsel for private respondent.[36[36]]

However, under questioning by Chief Justice Hilario G. Davide Jr. and Justice Jose C. Vitug, Commissioner Tuason in effect admitted that, while he was the commissioner-in-charge of Comelec's Legal Department, *he had never seen, even up to that late date, the agreement he spoke of*.[37[37]] Under further questioning, he was likewise unable to provide any information regarding the amounts invested into the project by several members of the claimed consortium.[38[38]] A short while later, he admitted that *the Commission had not taken a look at the agreement* (if any).[39[39]]

He tried to justify his position by claiming that he was not a member of the BAC. Neither was he the commissioner-in-charge of the Phase II Modernization project (the automated election system); but that, in any case, the BAC and the Phase II Modernization Project Team did look into the aspect of the composition of the consortium.

It seems to the Court, though, that even if the BAC or the Phase II Team had taken charge of evaluating the eligibility, qualifications and credentials of the consortium-bidder, still, in all probability, the former would have referred the task to Commissioner Tuason, head of Comelec's Legal Department. That task was the appreciation and evaluation of the legal effects and consequences of the terms, conditions, stipulations and covenants contained in any joint venture agreement, consortium agreement or a similar document -- assuming of course that any of these was available at the time. The fact that Commissioner Tuason was barely aware of the situation bespeaks the complete absence of such document, or the utter failure or neglect of the Comelec to examine it -- assuming it was available at all -- at the time the award was

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34[34] TSN, October 7, 2003, p. 104.

35[35] *Ibid.*

36[36] *Id.*, pp. 104-105.

37[37] *Id.*, pp. 103-108.

38[38] *Id.*, pp. 108-114.

39[39] *Id.*, pp. 142-145.

made on April 15, 2003.

In any event, the Court notes for the record that Commissioner Tuason basically contradicted his statements in open court about there being one written agreement among all the consortium members, when he subsequently referred[40][40] to the four (4) Memoranda of Agreement (MOAs) executed by them.[41][41]

At this juncture, one might ask: What, then, if there are four MOAs instead of one or none at all? Isn't it enough that there are these corporations coming together to carry out the automation project? Isn't it true, as respondent aver, that nowhere in the RFP issued by Comelec is it required that the members of the joint venture execute a single written agreement to prove the existence of a joint venture. Indeed, the intention to be jointly and severally liable may be evidenced not only by a single joint venture agreement, but also by supplementary documents executed by the parties signifying such intention. What then is the big deal?

The problem is not that there are four agreements instead of only one. The problem is that *Comelec never bothered to check*. It never based its decision on documents or other proof that would concretely establish the existence of the claimed consortium or joint venture or agglomeration. It relied merely on the self-serving representation in an uncorroborated letter signed by only one individual, claiming that his company represented a "consortium" of several different corporations. It concluded forthwith that a consortium indeed existed, composed of such and such members, and thereafter declared that the entity was eligible to bid.

True, copies of financial statements and incorporation papers of the alleged "consortium" members were submitted. But these papers did not establish the existence of a consortium, as they could have been provided by the companies concerned for purposes other than to prove that they were part of a consortium or joint venture. For instance, the papers may have been intended to show that those companies were each qualified to be a sub-contractor (and nothing more) in a major project. Those documents did not by themselves support the assumption that a consortium or joint venture existed among the companies.

In brief, despite the *absence* of competent proof as to the existence and eligibility of the alleged consortium (MPC), its capacity to deliver on the Contract, and the members' joint and several liability therefor, Comelec nevertheless *assumed* that such consortium existed and was eligible. It then went ahead and considered the bid of MPC, to which the Contract was eventually awarded, in gross violation of the former's own bidding rules and procedures contained in its RFP. Therein lies Comelec's grave abuse of discretion.

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[40][40] On pp. 42-43 of the Memorandum of public respondents, filed with this Court on October 27, 2003, Comm. Tuason himself signed this pleading in his capacity as counsel of all the public respondents.

[41][41] Copies of these four agreements were belatedly submitted to this Court by MPEI through a Manifestation with Profuse Apologies filed on October 9, 2003.

Sufficiency of the Four Agreements

Instead of one multilateral agreement executed by, and effective and binding on, all the five "consortium members" -- as earlier claimed by Commissioner Tuason in open court -- it turns out that what was actually executed were four (4) *separate and distinct bilateral Agreements*.[42][42] Obviously, Comelec was furnished copies of these Agreements only *after* the bidding process had been terminated, as these were not included in the Eligibility Documents. These Agreements are as follows:

- A Memorandum of Agreement between MPEI and SK C&C
- A Memorandum of Agreement between MPEI and WeSolv
- A "Teaming Agreement" between MPEI and Election.com Ltd.
- A "Teaming Agreement" between MPEI and ePLDT.

In sum, each of the four different and separate bilateral Agreements is valid and binding only between MPEI and the other contracting party, leaving the other "consortium" members total strangers thereto. Under this setup, MPEI dealt *separately* with each of the "members," and the latter (WeSolv, SK C&C, Election.com, and ePLDT) in turn had nothing to do with one another, each dealing only with MPEI.

Respondents assert that these four Agreements were sufficient for the purpose of enabling the corporations to still qualify (even at that late stage) as a consortium or joint venture, since the first two Agreements had allegedly *set forth the joint and several undertakings among the parties,* whereas the latter two *clarified the parties' respective roles with regard to the Project, with MPEI being the independent contractor and Election.com and ePLDT the subcontractors.*

Additionally, the use of the phrase "particular contract" in the Comelec's Request for Proposal (RFP), in connection with the joint and several liabilities of companies in a joint venture, is taken by them to mean that all the members of the joint venture need not be solidarily liable for the entire project or joint venture, because it is sufficient that the lead company and the member in charge of a particular contract or aspect of the joint venture agree to be solidarily liable.

At this point, it must be stressed most vigorously that the submission of the four bilateral Agreements to Comelec *after the end of the bidding process* did nothing to eliminate the grave abuse of discretion it had *already* committed on April 15, 2003.

Deficiencies Have Not Been "Cured"

[42][42] Copies of the four separate bilateral agreements were submitted to the Court last October 9, 2003.

In any event, it is also claimed that the automation Contract awarded by Comelec incorporates all documents executed by the "consortium" members, even if these documents are not referred to therein. The basis of this assertion appears to be the passages from Section 1.4 of the Contract, which is reproduced as follows:

> "All Contract Documents shall form part of the Contract even if they or any one of them is not referred to or mentioned in the Contract as forming a part thereof. Each of the Contract Documents shall be mutually complementary and explanatory of each other such that what is noted in one although not shown in the other shall be considered contained in all, and what is required by any one shall be as binding as if required by all, unless one item is a correction of the other.
>
> "The intent of the Contract Documents is the proper, satisfactory and timely execution and completion of the Project, in accordance with the Contract Documents. Consequently, all items necessary for the proper and timely execution and completion of the Project shall be deemed included in the Contract."

Thus, it is argued that whatever perceived deficiencies there were in the supplementary contracts -- those entered into by MPEI and the other members of the "consortium" as regards their joint and several undertakings -- have been cured. Better still, such deficiencies have supposedly been prevented from arising as a result of the above-quoted provisions, from which it can be immediately established that each of the members of MPC assumes the same joint and several liability as the other members.

The foregoing argument is unpersuasive. *First*, the contract being referred to, entitled "The Automated Counting and Canvassing Project Contract," is between Comelec and *MPEI*, not the alleged consortium, MPC. To repeat, it is MPEI -- not MPC -- that is a party to the Contract. *Nowhere in that Contract is there any mention of a consortium or joint venture, of members thereof, much less of joint and several liability*. Supposedly executed sometime in May 2003,[43][43] the Contract bears a notarization date of June 30, 2003, and contains the signature of Willy U. Yu signing as president of MPEI (not for and on behalf of MPC), along with that of the Comelec chair. It provides in Section 3.2 that MPEI (not MPC) is to supply the Equipment and perform the Services under the Contract, in accordance with the appendices thereof; nothing whatsoever is said about any consortium or joint venture or partnership.

Second, the portions of Section 1.4 of the Contract reproduced above do *not* have the effect of curing (much less preventing) deficiencies in the bilateral agreements entered into by MPEI with the other members of the "consortium," with respect to their joint and several liabilities. The term "Contract Documents," as used in the quoted passages of Section 1.4, has a well-defined meaning and actually refers only to the following documents:

- The Contract itself along with its appendices
- The Request for Proposal (also known as "Terms of Reference") issued by the Comelec, including the Tender Inquiries and Bid Bulletins

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[43][43] The date was carelessly stated as "____ May, 2003."

- The Tender Proposal submitted by MPEI

In other words, the term "Contract Documents" cannot be understood as referring to or including the MOAs and the Teaming Agreements entered into by MPEI with SK C&C, WeSolv, Election.com and ePLDT. This much is very clear and admits of no debate. The attempt to use the provisions of Section 1.4 to shore up the MOAs and the Teaming Agreements is simply unwarranted.

Third and last, we fail to see how respondents can arrive at the conclusion that, from the above-quoted provisions, it can be immediately established that each of the members of MPC assumes the same joint and several liability as the other members. Earlier, respondents claimed exactly the opposite -- that the two MOAs (between MPEI and SK C&C, and between MPEI and WeSolv) had *set forth the joint and several undertakings among the parties;* whereas the two Teaming Agreements *clarified the parties' respective roles with regard to the Project, with MPEI being the independent contractor and Election.com and ePLDT the subcontractors.*

Obviously, given the differences in their relationships, their respective liabilities cannot be the same. Precisely, the very clear terms and stipulations contained in the MOAs and the Teaming Agreements -- entered into by MPEI with SK C&C, WeSolv, Election.com and ePLDT -- negate the idea that these "members" are on a par with one another and are, as such, assuming the same joint and several liability.

Moreover, respondents have earlier seized upon the use of the term "particular contract" in the Comelec's Request for Proposal (RFP), in order to argue that all the members of the joint venture did not *need to be solidarily liable for the entire project* or joint venture. It was sufficient that the lead company and the member in charge of a particular contract or aspect of the joint venture would agree to be solidarily liable. The glaring lack of consistency leaves us at a loss. Are respondents trying to establish the same joint and solidary liability among all the "members" or not?

Enforcement of Liabilities Problematic

Next, it is also maintained that the automation Contract between Comelec and the MPEI *confirms the solidary undertaking of the lead company and the consortium member concerned* for each particular Contract, inasmuch as the position of MPEI and anyone else performing the services contemplated under the Contract is described therein as *that of an independent contractor*.

The Court does not see, however, how this conclusion was arrived at. In the first place, the contractual provision being relied upon by respondents is Article 14, "Independent Contractors," which states: *"Nothing contained herein shall be construed as establishing or creating between the COMELEC and MEGA the relationship of employee and employer or principal and agent, it being understood that the position of MEGA and of anyone performing the Services contemplated under this Contract, is that of an independent contractor."*

Obviously, the intent behind the provision was simply to avoid the creation of an employer-employee or a principal-agent relationship and the complications that it would produce. Hence, the Article states that the role or position of MPEI, or anyone else performing on its behalf, is that of an independent contractor. It is obvious to the Court that respondents are *stretching matters too far* when they claim that, because of this provision, the Contract in effect confirms the *solidary undertaking* of the lead company and the consortium member concerned for the particular phase of the project. This assertion is an absolute *non sequitur*.

Enforcement of Liabilities
Under the Civil Code Not Possible

In any event, it is claimed that Comelec may still enforce the liability of the "consortium" members under the Civil Code provisions on *partnership*, reasoning that MPEI et al. *represented themselves as partners and members of MPC for purposes of bidding for the Project. They are, therefore, liable to the Comelec to the extent that the latter relied upon such representation. Their liability as partners is solidary with respect to everything chargeable to the partnership under certain conditions.*

The Court has two points to make with respect to this argument. *First*, it must be recalled that SK C&C, WeSolv, Election.com and ePLDT **never** represented themselves as partners and members of MPC, whether for purposes of bidding or for something else. It was MPEI *alone* that represented them to be members of a "consortium" it supposedly headed. Thus, its acts may not necessarily be held against the other "members."

Second, this argument of the OSG in its Memorandum[44][44] might possibly apply *in the absence of a joint venture agreement or some other writing* that discloses the relationship of the "members" with one another. But precisely, this case does not deal with a situation in which there is nothing in writing to serve as reference, leaving Comelec to rely on mere representations and therefore justifying a falling back on the rules on partnership. For, again, the terms and stipulations of the MOAs entered into by MPEI with SK C&C and WeSolv, as well as the Teaming Agreements of MPEI with Election.com and ePLDT (copies of which have been furnished the Comelec) are very clear with respect to the extent and the limitations of the firms' respective liabilities.

In the case of WeSolv and SK C&C, their MOAs state that their liabilities, while joint and several with MPEI, are *limited only to the particular areas of work wherein their services are engaged or their products utilized*. As for Election.com and ePLDT, their separate "Teaming Agreements" specifically ascribe to them the role of subcontractor vis-à-vis MPEI as contractor and, based on the terms of their particular agreements, *neither Election.com nor ePLDT is, with MPEI, jointly and severally liable to Comelec*.[45][45] It follows then that in the instant case, there is

[44][44] At p. 38.

[45][45] During the Oral Argument, counsel for public respondents admitted that Comelec was aware that not all the members of the "consortium" had agreed to be jointly and solidarily liable with MPEI.

no justification for anyone, much less Comelec, to resort to the rules on partnership and partners' liabilities.

Eligibility of a Consortium Based on the Collective Qualifications of Its Members

Respondents declare that, for purposes of assessing the eligibility of the bidder, the members of MPC should be evaluated on a collective basis. Therefore, they contend, the failure of MPEI to submit financial statements (on account of its recent incorporation) should not by itself disqualify MPC, since the other members of the "consortium" could meet the criteria set out in the RFP.

Thus, according to respondents, the collective nature of the undertaking of the members of MPC, their contribution of assets and sharing of risks, and the community of their interest in the performance of the Contract lead to these reasonable conclusions: (1) that their *collective qualifications* should be the basis for evaluating their eligibility; (2) that the sheer enormity of the project renders it improbable to expect any single entity to be able to comply with all the eligibility requirements and undertake the project by itself; and (3) that, as argued by the OSG, the RFP allows bids from manufacturers, suppliers and/or distributors that have formed themselves into a joint venture, in recognition of the virtual impossibility of a single entity's ability to respond to the Invitation to Bid.

Additionally, argues the Comelec, the Implementing Rules and Regulations of RA 6957 (the Build-Operate-Transfer Law) as amended by RA 7718 would be applicable, as proponents of BOT projects usually form joint ventures or consortiums. Under the IRR, a joint venture/consortium proponent shall be evaluated based on the individual or the collective experience of the member-firms of the joint venture/consortium and of the contractors the proponent has engaged for the project.

Unfortunately, this argument seems to assume that the "collective" nature of the undertaking of the members of MPC, their contribution of assets and sharing of risks, and the "community" of their interest in the performance of the Contract entitle MPC to be treated as a joint venture or consortium; and to be evaluated accordingly on the basis of the members' collective qualifications when, in fact, the evidence before the Court suggest otherwise.

This Court in *Kilosbayan v. Guingona*[46[46]] defined *joint venture* as "an association of persons or companies jointly undertaking some commercial enterprise; generally, all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and [a] duty, which may be altered by agreement to share both in profit and losses."

Going back to the instant case, it should be recalled that the automation Contract with

[46[46]] 232 SCRA 110, 144, May 5, 1994, per Davide Jr., *J.* (now CJ).

Comelec was not executed by the "consortium" MPC -- or by MPEI for and on behalf of MPC -- but by MPEI, *period*. The said Contract contains *no mention whatsoever* of any consortium or members thereof. This fact alone seems to contradict all the suppositions about a joint undertaking that would normally apply to a joint venture or consortium: that it is a commercial enterprise involving a community of interest, a sharing of risks, profits and losses, and so on.

Now let us consider the four bilateral Agreements, starting with the Memorandum of Agreement between MPEI and WeSolv Open Computing, Inc., dated March 5, 2003. The body of the MOA consists of just seven (7) short paragraphs that would easily fit in one page. It reads as follows:

> "1. The parties agree to cooperate in successfully implementing the Project in the substance and form as may be most beneficial to both parties and other subcontractors involved in the Project.
>
> "2. Mega Pacific shall be responsible for any contract negotiations and signing with the COMELEC and, subject to the latter's approval, agrees to give WeSolv an opportunity to be present at meetings with the COMELEC concerning WeSolv's portion of the Project.
>
> "3. <u>WeSolv shall be jointly and severally liable with Mega Pacific only for the particular products and/or services supplied by the former for the Project</u>.
>
> "4. <u>Each party shall bear its own costs and expenses relative to this agreement unless otherwise agreed upon by the parties</u>.
>
> "5. The parties undertake to do all acts and such other things incidental to, necessary or desirable or the attainment of the objectives and purposes of this Agreement.
>
> "6. In the event that the parties fail to agree on the terms and conditions of the supply of the products and services including but not limited to the scope of the products and services to be supplied and payment terms, WeSolv shall cease to be bound by its obligations stated in the aforementioned paragraphs.
>
> "7. Any dispute arising from this Agreement shall be settled amicably by the parties whenever possible. Should the parties be unable to do so, the parties hereby agree to settle their dispute through arbitration in accordance with the existing laws of the Republic of the Philippines." (Underscoring supplied.)

Even shorter is the Memorandum of Agreement between MPEI and SK C&C Co. Ltd., dated March 9, 2003, the body of which consists of only six (6) paragraphs, which we quote:

> "1. All parties agree to cooperate in achieving the Consortium's objective of successfully implementing the Project in the substance and form as may be most beneficial to the Consortium members and in accordance w/ the demand of the RFP.
>
> "2. Mega Pacific shall have full powers and authority to represent the Consortium with the Comelec, and to enter and sign, for and in behalf of its members

any and all agreement/s which maybe required in the implementation of the Project.

"3. Each of the individual members of the Consortium shall be jointly and severally liable with the Lead Firm for the particular products and/or services supplied by such individual member for the project, in accordance with their respective undertaking or sphere of responsibility.

"4. Each party shall bear its own costs and expenses relative to this agreement unless otherwise agreed upon by the parties.

"5. The parties undertake to do all acts and such other things incidental to, necessary or desirable for the attainment of the objectives and purposes of this Agreement.

"6. Any dispute arising from this Agreement shall be settled amicably by the parties whenever possible. Should the parties be unable to do so, the parties hereby agree to settle their dispute through arbitration in accordance with the existing laws of the Republic of the Philippines." (Underscoring supplied.)

It will be noted that the two Agreements quoted above are very similar in wording. Neither of them contains any specifics or details as to the exact nature and scope of the parties' respective undertakings, performances and deliverables under the Agreement with respect to the automation project. Likewise, the two Agreements are quite bereft of pesos-and-centavos data as to the amount of investments each party contributes, its respective share in the revenues and/or profit from the Contract with Comelec, and so forth -- all of which are normal for agreements of this nature. Yet, according to public and private respondents, the participation of MPEI, WeSolv and SK C&C comprises fully 90 percent of the entire undertaking with respect to the election automation project, which is worth about ₱1.3 billion.

As for Election.com and ePLDT, the separate "Teaming Agreements" they entered into with MPEI for the remaining 10 percent of the entire project undertaking are ironically much longer and more detailed than the MOAs discussed earlier. Although specifically ascribing to them the role of *subcontractor* vis-à-vis MPEI as contractor, these Agreements are, however, completely devoid of any pricing data or payment terms. Even the appended Schedules supposedly containing prices of goods and services are shorn of any price data. Again, as mentioned earlier, based on the terms of their particular Agreements, neither Election.com nor ePLDT -- with MPEI -- is jointly and severally liable to Comelec.

It is difficult to imagine how these bare Agreements -- especially the first two -- could be implemented in practice; and how a dispute between the parties or a claim by Comelec against them, for instance, could be resolved without lengthy and debilitating litigations. Absent any clear-cut statement as to the exact nature and scope of the parties' respective undertakings, commitments, deliverables and covenants, one party or another can easily dodge its obligation and deny or contest its liability under the Agreement; or claim that it is the other party that should have delivered but failed to.

Likewise, in the absence of definite indicators as to the amount of investments to be contributed by each party, disbursements for expenses, the parties' respective shares in the

profits and the like, it seems to the Court that this situation could readily give rise to all kinds of misunderstandings and disagreements over money matters.

Under such a scenario, it will be extremely difficult for Comelec to enforce the supposed joint and several liabilities of the members of the "consortium." The Court is not even mentioning the possibility of a situation arising from a failure of WeSolv and MPEI to agree on the scope, the terms and the conditions for the supply of the products and services under the Agreement. In that situation, by virtue of paragraph 6 of its MOA, WeSolv would perforce cease to be bound by its obligations -- including its joint and solidary liability with MPEI under the MOA -- and could forthwith disengage from the project. Effectively, WeSolv could at any time unilaterally exit from its MOA with MPEI by simply failing to agree. Where would that outcome leave MPEI and Comelec?

To the Court, this strange and beguiling arrangement of MPEI with the other companies does not qualify them to be treated as a consortium or joint venture, at least of the type that government agencies like the Comelec should be dealing with. With more reason is it unable to agree to the proposal to evaluate the members of MPC on a collective basis.

In any event, the MPC members claim to be a joint venture/consortium; and respondents have consistently been arguing that the IRR for RA 6957, as amended, should be applied to the instant case in order to allow a collective evaluation of consortium members. Surprisingly, considering these facts, respondents have not deemed it necessary for MPC members to comply with Section 5.4 (a) (iii) of the IRR for RA 6957 as amended.

According to the aforementioned provision, if the project proponent is a joint venture or consortium, *the members or participants thereof are required to submit a sworn statement that, if awarded the contract, they shall bind themselves to be jointly, severally and solidarily liable for the project proponent's obligations thereunder.* This provision was supposed to mirror Section 5 of RA 6957, as amended, which states: *"In all cases, a consortium that participates in a bid must present proof that the members of the consortium have bound themselves jointly and severally to assume responsibility for any project. The withdrawal of any member of the consortium prior to the implementation of the project could be a ground for the cancellation of the contract."*

The Court has certainly not seen any joint and several undertaking by the MPC members that even approximates the tenor of that which is described above. We fail to see why respondents should invoke the IRR if it is for their benefit, but refuse to comply with it otherwise.

B.
DOST Technical Tests Flunked by the Automated Counting Machines

Let us now move to the second subtopic, which deals with the substantive issue: the ACM's failure to pass the tests of the Department of Science and Technology (DOST).

After respondent "consortium" and the other bidder, TIM, had submitted their respective bids on March 10, 2003, the Comelec's BAC -- through its Technical Working Group (TWG) and the DOST -- evaluated their technical proposals. Requirements that were highly technical in nature and that required the use of certain equipment in the evaluation process were referred to the DOST for testing. The Department reported thus:

TEST RESULTS MATRIX[47[47]]
[Technical Evaluation of Automated Counting Machine]

KEY REQUIREMENTS [QUESTIONS]	**MEGA-PACIFIC CONSORTIUM**		**TOTAL INFORMATION MANAGEMENT**	
	YES	NO	YES	NO
1. 1. Does the machine have an accuracy rating of at least 99.995 percent				
At COLD environmental condition	√		√	
At NORMAL environmental conditions		√		√
At HARSH environmental conditions		√	√	
2. 2. Accurately records and reports the date and time of the start and end of counting of ballots per precinct?	√		√	
3. 3. Prints election returns without any loss of date during	√		√	

[47[47]] Culled from table 6, DOST Report; *rollo*, Vol. II, pp. 1059-1072.

generation of such reports?				
4. 4. Uninterruptible back-up power system, that will engage immediately to allow operation of at least 10 minutes after outage, power surge or abnormal electrical occurrences?	√			√
5. 5. Machine reads two-sided ballots in one pass?	√			√ Note: This particular requirement needs further verification
6. 6. Machine can detect previously counted ballots and prevent previously counted ballots from being counted more than once?	√			√
7. 7. Stores results of counted votes by precinct in external (removable) storage device?	√			√ Note: This particular requirement needs further verification
8. 8. Data stored in external media is encrypted?	√			√ Note: This particular requirement needs

				further verification
9. 9. Physical key or similar device allows, limits, or restricts operation of the machine?	√		√	
10. 10. CPU speed is at least 400mHz?	√			√ Note: This particular requirement needs further verification
11. 11. Port to allow use of dot-matrix printers?	√		√	
12. 12. Generates printouts of the election returns in a format specified by the COMELEC? Generates printouts In format specified by COMELEC	√	√	√	√
13. 13. Prints election returns without any loss of data during generation of such report?	√		√	
14. 14. Generates an audit trail of the counting machine, both hard copy and soft copy?	√ √		√	

Hard copy Soft copy				√ Note: This particular requirement needs further verification
15. 15. Does the City/Municipal Canvassing System consolidate results from all precincts within it using the encrypted soft copy of the data generated by the counting machine and stored on the removable data storage device?	√			√ Note: This particular requirement needs further verification
16. 16. Does the City/Municipal Canvassing System consolidate results from all precincts within it using the encrypted soft copy of the data generated by the counting machine and transmitted through an electronic transmission media?		√ Note: This particular requirement needs further verification		√ Note: This particular requirement needs further verification
17. 17. Does the system output a Zero City/Municipal Canvass Report, which is printed on election	√			√ Note: This particular requirement needs

day prior to the conduct of the actual canvass operation, that shows that all totals for all the votes for all the candidates and other information, are indeed zero or null?				further verification
18. 18. Does the system consolidate results from all precincts in the city/municipality using the data storage device coming from the counting machine?	√			√ Note: This particular requirement needs further verification
19. 19. Is the machine 100% accurate?	√			√ Note: This particular requirement needs further verification
20. 20. Is the Program able to detect previously downloaded precinct results and prevent these from being inputted again into the System?		√		√ Note: This particular requirement needs further verification
21. 21. The System is able to print the specified reports and the audit trail without any loss of data during generation of the above-mentioned	√	√		√

reports? Prints specified reports Audit Trail				√ Note: This particular requirement needs further verification
22. 22. Can the result of the city/municipal consolidation be stored in a data storage device?	√			√ Note: This particular requirement needs further verification
23. 23. Does the system consolidate results from all precincts in the provincial/district/ national using the data storage device from different levels of consolidation?	√			√ Note: This particular requirement needs further verification
24. 24. Is the system 100% accurate?	√			√ Note: This particular requirement needs further verification
25. 25. Is the Program able to detect previously downloaded precinct		√		√ Note: This particular

results and prevent these from being inputted again into the System?				requirement needs further verification
26. 26. The System is able to print the specified reports and the audit trail without any loss of data during generation of the abovementioned reports? Prints specified reports Audit Trail	√	√		√ √ Note: This particular requirement needs further verification
27. 27. Can the results of the provincial/district/national consolidation be stored in a data storage device?	√			√ Note: This particular requirement needs further verification

According to respondents, it was only after the TWG and the DOST had conducted their separate tests and submitted their respective reports that the BAC, on the basis of these reports formulated its comments/recommendations on the bids of the consortium and TIM.

The BAC, in its Report dated April 21, 2003, recommended that the Phase II project involving the acquisition of automated counting machines be awarded to MPEI. It said:

"After incisive analysis of the technical reports of the DOST and the Technical Working Group for Phase II – Automated Counting Machine, the BAC considers adaptability to

advances in modern technology to ensure an effective and efficient method, as well as the security and integrity of the system.

"The results of the evaluation conducted by the TWG and that of the DOST (14 April 2003 report), would show the apparent advantage of Mega-Pacific over the other competitor, TIM.

"The BAC further noted that both Mega-Pacific and TIM obtained some 'failed marks' in the technical evaluation. In general, the 'failed marks' of Total Information Management as enumerated above affect the counting machine itself which are material in nature, constituting non-compliance to the RFP. On the other hand, the 'failed marks' of Mega-Pacific are mere formalities on certain documentary requirements which the BAC may waive as clearly indicated in the Invitation to Bid.

"In the DOST test, TIM obtained 12 failed marks and mostly attributed to the counting machine itself as stated earlier. These are requirements of the RFP and therefore the BAC cannot disregard the same.

"Mega-Pacific failed in 8 items however these are mostly on the software which can be corrected by reprogramming the software and therefore can be readily corrected.

"The BAC verbally inquired from DOST on the status of the retest of the counting machines of the TIM and was informed that the report will be forthcoming after the holy week. The BAC was informed that the retest is on a different parameters they're being two different machines being tested. One purposely to test if previously read ballots will be read again and the other for the other features such as two sided ballots.

"The said machine and the software therefore may not be considered the same machine and program as submitted in the Technical proposal and therefore may be considered an enhancement of the original proposal.

"Advance information relayed to the BAC as of 1:40 PM of 15 April 2003 by Executive Director Ronaldo T. Viloria of DOST is that the result of the test in the two counting machines of TIM contains substantial errors that may lead to the failure of these machines based on the specific items of the RFP that DOST has to certify.

OPENING OF FINANCIAL BIDS

"The BAC on 15 April 2003, after notifying the concerned bidders opened the financial bids in their presence and the results were as follows:

Mega-Pacific:

Option 1 – Outright purchase: Bid Price of Php1,248,949,088.00
Option 2 – Lease option:
70% Down payment of cost of hardware or Php642,755,757.07

Remainder payable over 50 months or a total of Php642,755,757.07
Discount rate of 15% p.a. or 1.2532% per month.

Total Number of Automated Counting Machine – 1,769 ACMs (Nationwide)

TIM:

Total Bid Price – Php1,297,860,560.00

Total Number of Automated Counting Machine – 2,272 ACMs (Mindanao and NCR only)

"Premises considered, it appears that the bid of Mega Pacific is the lowest calculated responsive bid, and therefore, the Bids and Awards Committee (BAC) recommends that the Phase II project re Automated Counting Machine be awarded to Mega Pacific eSolutions, Inc."[48[48]]

The BAC, however, also stated on page 4 of its Report: *"Based on the 14 April 2003 report (Table 6) of the DOST, it appears that both Mega-Pacific and TIM (Total Information Management Corporation) failed to meet some of the requirements. Below is a comparative presentation of the requirements wherein Mega-Pacific or TIM or both of them failed: x x x."* What followed was a list of "key requirements," referring to technical requirements, and an indication of which of the two bidders had failed to meet them.

Failure to Meet the
Required Accuracy Rating

The first of the key requirements was that the counting machines were to have an **accuracy rating of at least 99.9995 percent**. The BAC Report indicates that both Mega Pacific and TIM failed to meet this standard.

The key requirement of accuracy rating happens to be part and parcel of the Comelec's Request for Proposal (RFP). The RFP, on page 26, even states that the ballot counting machines and ballot counting software *"must have an accuracy rating of 99.9995%* (not merely 99.995%) *or better as certified by a reliable independent testing agency."*

When questioned on this matter during the Oral Argument, Commissioner Borra tried to wash his hands by claiming that the required accuracy rating of 99.9995 percent had been set by a private sector group in tandem with Comelec. He added that the Commission had merely adopted the accuracy rating as part of the group's recommended bid requirements, which it had not bothered to amend even after being advised by DOST that such standard was unachievable. This excuse, however, does not in any way lessen Comelec's responsibility to adhere to its own published bidding rules, as well as to see to it that the consortium indeed meets the accuracy standard. *Whichever accuracy rating is the right standard -- whether*

[48[48]] Annex "I" of the Petition, Vol. I, pp. 116-118.

99.995 or 99.9995 percent -- the fact remains that the machines of the so-called "consortium" failed to even reach the lesser of the two. On this basis alone, it ought to have been disqualified and its bid rejected outright.

At this point, the Court stresses that the essence of public bidding is violated by the practice of requiring very high standards or unrealistic specifications that cannot be met -- like the 99.9995 percent accuracy rating in this case -- only to water them down *after* the bid has been award. Such scheme, which discourages the entry of prospective *bona fide* bidders, is in fact a sure indication of fraud in the bidding, designed to eliminate fair competition. Certainly, if no bidder meets the mandatory requirements, standards or specifications, then no award should be made and a failed bidding declared.

Failure of Software to Detect
Previously Downloaded Data

Furthermore, on page 6 of the BAC Report, it appears that the "consortium" as well as TIM failed to meet another key requirement -- for the counting machine's software program to be **able to detect previously downloaded precinct results and to prevent these from being entered again into the counting machine**. This same deficiency on the part of both bidders reappears on page 7 of the BAC Report, as a result of the recurrence of their failure to meet the said key requirement.

That the ability to detect previously downloaded data at different canvassing or consolidation levels is deemed of utmost importance can be seen from the fact that it is repeated three times in the RFP. On page 30 thereof, we find the requirement that the *city/municipal* canvassing system software must be able to detect previously downloaded precinct results and prevent these from being "inputted" again into the system. Again, on page 32 of the RFP, we read that the *provincial/district* canvassing system software must be able to detect previously downloaded city/municipal results and prevent these from being "inputted" again into the system. And once more, on page 35 of the RFP, we find the requirement that the *national* canvassing system software must be able to detect previously downloaded provincial/district results and prevent these from being "inputted" again into the system.

Once again, though, Comelec chose to ignore this crucial deficiency, which should have been a cause for the gravest concern. Come May 2004, unscrupulous persons may take advantage of and exploit such deficiency by repeatedly downloading and feeding into the computers results favorable to a particular candidate or candidates. ***We are thus confronted with the grim prospect of election fraud on a massive scale by means of just a few key strokes. The marvels and woes of the electronic age!***

Inability to Print
the Audit Trail

But that grim prospect is not all. The BAC Report, on pages 6 and 7, indicate that the ACMs of both bidders were **unable to print the audit trail** without any loss of data. In the case of MPC, the audit trail system was "not yet incorporated" into its ACMs.

This particular deficiency is significant, not only to this bidding but to the cause of free and credible elections. The purpose of requiring audit trails is to enable Comelec to trace and verify the identities of the ACM operators responsible for data entry and downloading, as well as the times when the various data were downloaded into the canvassing system, in order to forestall fraud and to identify the perpetrators.

Thus, the RFP on page 27 states that the *ballot counting machines and ballot counting software* must print an audit trail of all machine operations for documentation and verification purposes. Furthermore, the audit trail must be stored on the internal storage device and be available on demand for future printing and verifying. On pages 30-31, the RFP also requires that the *city/municipal* canvassing system *software* be able to print an audit trail of the canvassing operations, including therein such data as the date and time the canvassing program was started, the log-in of the authorized users (the identity of the machine operators), the date and time the canvass data were downloaded into the canvassing system, and so on and so forth. On page 33 of the RFP, we find the same audit trail requirement with respect to the *provincial/district* canvassing system *software*; and again on pages 35-36 thereof, the same audit trail requirement with respect to the *national* canvassing system *software*.

That this requirement for printing audit trails is not to be lightly brushed aside by the BAC or Comelec itself as a mere formality or technicality can be readily gleaned from the provisions of Section 7 of RA 8436, which authorizes the Commission to use an automated system for elections.

The said provision which respondents have quoted several times, provides that ACMs are to possess certain features divided into two classes: those that the statute itself considers *mandatory* and other features or capabilities that the law deems optional. Among those considered mandatory are "provisions for audit trails"! Section 7 reads as follows: *"The System **shall** contain the following features: (a) use of appropriate ballots; (b) stand-alone machine which can count votes and an automated system which can consolidate the results immediately; (c) **with provisions for audit trails**; (d) minimum human intervention; and (e) adequate safeguard/security measures."* (Italics and emphases supplied.)

In brief, respondents cannot deny that the provision requiring audit trails is indeed mandatory, considering the wording of Section 7 of RA 8436. Neither can Respondent Comelec deny that it has relied on the BAC Report, which indicates that the machines or the software was deficient in that respect. And yet, the Commission simply disregarded this shortcoming and awarded the Contract to private respondent, thereby violating the very law it was supposed to implement.

C.

Inadequacy of Post Facto Remedial Measures

Respondents argue that the deficiencies relating to the detection of previously downloaded data, as well as provisions for audit trails, are mere shortcomings or minor deficiencies in software or programming, which can be rectified. Perhaps Comelec simply relied upon the BAC Report, which states on page 8 thereof that *"Mega Pacific failed in 8 items[;] however these are mostly on the software which can be corrected by re-programming x x x and therefore can be readily corrected."*

The undersigned *ponente's* questions, some of which were addressed to Commissioner Borra during the Oral Argument, remain unanswered to this day. First of all, who made the determination that the eight "fail" marks of Mega Pacific were on account of the software -- was it DOST or TWG? How can we be sure these failures were not the results of machine defects? How was it determined that the software could actually be re-programmed and thereby rectified? Did a qualified technical expert read and analyze the *source code*[49[49]] for the programs and conclude that these could be saved and remedied? (Such determination cannot be done by any other means save by the examination and analysis of the source code.)

Who was this qualified technical expert? When did he carry out the study? Did he prepare a written report on his findings? Or did the Comelec just make a wild guess? It does not follow that all defects in software programs can be rectified, and the programs saved. In the information technology sector, it is common knowledge that there are many badly written programs, with significant programming errors written into them; hence it does not make economic sense to try to correct the programs; instead, programmers simply abandon them and just start from scratch. There's no telling if any of these programs is unrectifiable, unless a qualified programmer reads the source code.

And if indeed a qualified expert reviewed the source code, did he also determine how much work would be needed to rectify the programs? And how much time and money would be spent for that effort? Who would carry out the work? After the rectification process, who would ascertain and how would it be ascertained that the programs have indeed been properly rectified, and that they would work properly thereafter? And of course, the most important question to ask: could the rectification be done in time for the elections in 2004?

Clearly, none of the respondents bothered to think the matter through. Comelec simply

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[49[49]] Source code is the program instructions in their original form. Initially, a programmer writes a computer program in a particular programming language. This form of the program is called the source program, or more generically, source code. To execute the program, however, the programmer must translate it into machine language, the language that the computer understands. Source code is the only format that is readable by humans. When you purchase programs, you usually receive them in their machine-language format. This means that you can execute them directly, but you cannot read or modify them. Some software manufacturers provide source code, but this is useful only if you are an experienced programmer.

took the word of the BAC as gospel truth, without even bothering to inquire from DOST whether it was true that the deficiencies noted could possibly be remedied by re-programming the software. Apparently, Comelec did not care about the software, but focused only on purchasing the machines.

What really adds to the Court's dismay is the admission made by Commissioner Borra during the Oral Argument that the software currently being used by Comelec was merely the "demo" version, inasmuch as the final version that would actually be used in the elections was still being developed and had not yet been finalized.

It is not clear when the final version of the software would be ready for testing and deployment. It seems to the Court that Comelec is just keeping its fingers crossed and hoping the final product would work. Is there a "Plan B" in case it does not? Who knows? But all these software programs are part and parcel of the bidding and the Contract awarded to the Consortium. *Why is it that the machines are already being brought in and paid for, when there is as yet no way of knowing if the final version of the software would be able to run them properly, as well as canvass and consolidate the results in the manner required?*

The counting machines, as well as the canvassing system, will never work properly *without the correct software programs*. There is an old adage that is still valid to this day: "Garbage in, garbage out." No matter how powerful, advanced and sophisticated the computers and the servers are, if the software being utilized is defective or has been compromised, the results will be no better than garbage. And to think that what is at stake here is the 2004 national elections -- the very basis of our democratic life.

Correction of Defects?

To their Memorandum, public respondents proudly appended 19 Certifications issued by DOST declaring that some 285 counting machines had been tested and had passed the acceptance testing conducted by the Department on October 8-18, 2003. Among those tested were some machines that had failed previous tests, but had undergone adjustments and thus passed re-testing.

Unfortunately, the Certifications from DOST fail to divulge in what manner and by what standards or criteria the condition, performance and/or readiness of the machines were re-evaluated and re-appraised and thereafter given the passing mark. Apart from that fact, the remedial efforts of respondents were, not surprisingly, apparently focused again on the machines -- the hardware. Nothing was said or done about the *software* -- the deficiencies as to detection and prevention of downloading and entering previously downloaded data, as well as the capability to print an audit trail. *No matter how many times the machines were tested and re-tested, if nothing was done about the programming defects and deficiencies, the same danger of massive electoral fraud remains.* As anyone who has a modicum of knowledge of computers would say, "That's elementary!"

And only last December 5, 2003, an Inq7.net news report quoted the Comelec chair as

saying that the new automated poll system would be used nationwide in May 2004, *even as the software for the system remained unfinished*. It also reported that a certain Titus Manuel of the Philippine Computer Society, which was helping Comelec test the hardware and software*, said that the software for the counting still had to be submitted on December 15, while the software for the canvassing was due in early January.*

Even as Comelec continues making payments for the ACMs, we keep asking ourselves: who is going to ensure that the software would be tested and would work properly?

At any rate, the re-testing of the machines and/or the 100 percent testing of all machines (testing of every single unit) would not serve to eradicate the grave abuse of discretion already committed by Comelec when it awarded the Contract on April 15, 2003, despite the obvious and admitted flaws in the bidding process, the failure of the "winning bidder" to qualify, and the inability of the ACMs and the intended software to meet the bid requirements and rules.

Comelec's Latest "Assurances" Are Unpersuasive

Even the latest pleadings filed by Comelec do not serve to allay our apprehensions. They merely affirm and compound the serious violations of law and gravely abusive acts it has committed. Let us examine them.

The Resolution issued by this Court on December 9, 2003 required respondents to inform it as to the number of ACMs delivered and paid for, as well as the total payment made to date for the purchase thereof. They were likewise instructed to submit a certification from the DOST attesting to the number of ACMs tested, the number found to be defective; and *"whether the reprogrammed software has been tested and found to have complied with the requirements under Republic Act No. 8436."*[50[50]]

In its "Partial Compliance and Manifestation" dated December 29, 2003, Comelec informed the Court that 1,991 ACMs had already been delivered to the Commission as of that date. It further certified that it had already paid the supplier the sum of ₱849,167,697.41, which corresponded to 1,973 ACM units that had passed the acceptance testing procedures conducted by the MIRDC-DOST[51[51]] and which had therefore been accepted by the poll body.

In the same submission, *for the very first time,* Comelec also disclosed to the Court the following:

"The Automated Counting and Canvassing Project involves not only the

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50[50] The key passages of the Court's Resolution of December 9, 2003 were cited and reproduced verbatim in the Comelec's Partial Compliance and Manifestation.

51[51] Metals Industry Research and Development Center (MIRDC) of the Department of Science & Technology (DOST).

manufacturing of the ACM hardware but also the development of three (3) types of software, which are intended for use in the following:

1. Evaluation of Technical Bids
2. Testing and Acceptance Procedures
3. Election Day Use."

Purchase of the First Type of Software Without Evaluation

In other words, the first type of software was to be developed solely for the purpose of enabling the evaluation of the bidder's technical bid. Comelec explained thus: *"In addition to the presentation of the ACM hardware, the bidders were required to develop a 'base' software program that will enable the ACM to function properly. Since the software program utilized during the evaluation of bids is not the actual software program to be employed on election day, there being two (2) other types of software program that will still have to be developed and thoroughly tested prior to actual election day use, defects in the 'base' software that can be readily corrected by reprogramming are considered minor in nature, and may therefore be waived."*

In short, Comelec claims that it evaluated the bids and made the decision to award the Contract to the "winning" bidder partly on the basis of the operation of the ACMs running a "base" software. That software was therefore nothing but a sample or "demo" software, which would not be the actual one that would be used on election day. Keeping in mind that the Contract involves the acquisition of not just the ACMs or the hardware, but also the software that would run them, it is now even clearer that the Contract was awarded without Comelec having seen, much less evaluated, the *final* product -- the software that would finally be utilized come election day. (Not even the "near-final" product, for that matter).

What then was the point of conducting the bidding, when the software that was the subject of the Contract was *still to be created* and could conceivably undergo innumerable changes before being considered as being in final form? And that is not all!

No Explanation for Lapses in the Second Type of Software

The second phase, allegedly involving the second type of software, is simply denominated "Testing and Acceptance Procedures." As best as we can construe, Comelec is claiming that this second type of software is also *to be developed* and delivered by the supplier in connection with the "testing and acceptance" phase of the acquisition process. The previous pleadings, though -- including the DOST reports submitted to this Court -- have not heretofore mentioned

any statement, allegation or representation to the effect that a particular set of software was to be developed and/or delivered by the supplier in connection with the testing and acceptance of delivered ACMs.

What the records do show is that the imported ACMs were subjected to the testing and acceptance process conducted by the DOST. Since the initial batch delivered included a high percentage of machines that had failed the tests, Comelec asked the DOST to conduct a 100 percent testing; that is, to test every single one of the ACMs delivered. Among the machines tested on October 8 to 18, 2003, were some units that had failed previous tests but had subsequently been re-tested and had passed. To repeat, however, until now, there has never been any mention of a second set or type of software pertaining to the testing and acceptance process.

In any event, apart from making that misplaced and uncorroborated claim, Comelec in the same submission also professes (in response to the concerns expressed by this Court) that **the reprogrammed software has been tested and found to have complied with the requirements of RA 8436**. It reasoned thus: *"Since the software program is an inherent element in the automated counting system, the certification issued by the MIRDC-DOST that one thousand nine hundred seventy-three (1,973) units passed the acceptance test procedures is an official recognition by the MIRDC-DOST that the software component of the automated election system, which has been reprogrammed to comply with the provisions of Republic Act No. 8436 as prescribed in the Ad Hoc Technical Evaluation Committee's ACM Testing and Acceptance Manual, has passed the MIRDC-DOST tests."*

The facts do not support this sweeping statement of Comelec. A scrutiny of the MIRDC-DOST letter dated December 15, 2003,[52[52]] which it relied upon, does not justify its grand conclusion. For clarity's sake, we quote in full the letter-certification, as follows:

> "15 December 2003
> "HON. RESURRECCION Z. BORRA
> Commissioner-in-Charge
> Phase II, Modernization Project
> Commission on Elections
> Intramuros, Manila
>
> Attention: Atty. Jose M. Tolentino, Jr.
> Project Director
>
> "Dear Commissioner Borra:
>
> "We are pleased to submit 11 DOST Test Certifications representing 11 lots and covering 158 units of automated counting machines (ACMs) that we have tested from 02-12 December 2003.

[52[52]] Photocopy of the MIRDC-DOST letter of Dec. 15, 2003 is attached as Annex "A" to Respondent Comelec's Partial Compliance and Manifestation. However, the 11 Test Certifications of the DOST (covering 11 lots or 158 ACMs) which were purportedly attached to this letter, have not been reproduced and submitted to the Court, for reasons known only to respondents.

"To date, we have tested all the 1,991 units of ACMs, broken down as follow: (sic)

1st batch - 30 units	4th batch - 438 units
2nd batch - 288 units	5th batch - 438 units
3rd batch - 414 units	6th batch - 383 units

"It should be noted that a total of 18 units have failed the test. Out of these 18 units, only one (1) unit has failed the retest.

"Thank you and we hope you will find everything in order.

"Very truly yours,

"ROLANDO T. VILORIA, CESO III
Executive Director cum
Chairman, DOST-Technical Evaluation Committee"

Even a cursory glance at the foregoing letter shows that it is completely bereft of anything that would remotely support Comelec's contention that the "software component of the automated election system x x x has been reprogrammed to comply with" RA 8436, and "has passed the MIRDC-DOST tests." There is no mention at all of any software reprogramming. If the MIRDC-DOST had indeed undertaken the supposed reprogramming and the process turned out to be successful, that agency would have proudly trumpeted its singular achievement.

How Comelec came to believe that such reprogramming had been undertaken is unclear. In any event, the Commission is not forthright and candid with the factual details. If reprogramming has been done, who performed it and when? What exactly did the process involve? How can we be assured that it was properly performed? Since the facts attendant to the alleged reprogramming are still shrouded in mystery, the Court cannot give any weight to Comelec's bare allegations.

The fact that a total of 1,973 of the machines has ultimately passed the MIRDC-DOST tests does not by itself serve as an endorsement of the soundness of the software program, much less as a proof that it has been reprogrammed. In the first place, nothing on record shows that the tests and re-tests conducted on the machines were intended to address the serious deficiencies noted earlier. As a matter of fact, the MIRDC-DOST letter does not even indicate what kinds of tests or re-tests were conducted, their exact nature and scope, and the specific objectives thereof.[53][53] The absence of relevant supporting documents, combined with the utter vagueness of the letter, certainly fails to inspire belief or to justify the expansive confidence displayed by Comelec. *In any event, it goes without saying that remedial measures such as the alleged reprogramming cannot in any way mitigate the grave abuse of discretion already committed as early as April 15, 2003.*

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[53][53] For example, one can conduct tests to see if certain machines will tip over and fall on their sides when accidentally bumped, or if they have a tendency to collapse under their own weight. A less frivolous example might be that of conducting the same tests, but lowering the bar or passing mark.

Rationale of Public Bidding Negated
by the Third Type of Software

Respondent Comelec tries to assuage this Court's anxiety in these words: "The reprogrammed software that has already passed the requirements of Republic Act No. 8436 during the MIRDC-DOST testing and acceptance procedures will require further customization since the following additional elements, among other things, will have to be considered before the final software can be used on election day: *1*. Final Certified List of Candidates x x x *2*. Project of Precincts x x x *3*. Official Ballot Design and Security Features x x x *4*. Encryption, digital certificates and digital signatures x x x. *The certified list of candidates for national elective positions will be finalized on or before 23 January 2004 while the final list of projects of precincts will be prepared also on the same date. Once all the above elements are incorporated in the software program, the Test Certification Group created by the Ad Hoc Technical Evaluation Committee will conduct meticulous testing of the final software before the same can be used on election day. In addition to the testing to be conducted by said Test Certification Group, the Comelec will conduct mock elections in selected areas nationwide not only for purposes of public information but also to further test the final election day program. Public respondent Comelec, therefore, requests that it be given up to 16 February 2004 to comply with this requirement."*

The foregoing passage shows the imprudent approach adopted by Comelec in the bidding and acquisition process. The Commission says that before the software can be utilized on election day, it will require "customization" through addition of data -- like the list of candidates, project of precincts, and so on. And inasmuch as such data will become available only in January 2004 anyway, there is therefore no perceived need on Comelec's part to rush the supplier into producing the final (or near-final) version of the software before that time. In any case, Comelec argues that the software needed for the electoral exercise can be continuously developed, tested, adjusted and perfected, practically all the way up to election day, at the same time that the Commission is undertaking all the other distinct and diverse activities pertinent to the elections.

Given such a frame of mind, it is no wonder that Comelec paid little attention to the counting and canvassing software during the entire bidding process, which took place in February-March 2003. Granted that the software was defective, could not detect and prevent the re-use of previously downloaded data or produce the audit trail -- aside from its other shortcomings -- nevertheless, all those deficiencies could still be corrected down the road. At any rate, the software used for bidding purposes would not be the same one that will be used on election day, so why pay any attention to its defects? Or to the Comelec's own bidding rules for that matter?

Clearly, such jumbled ratiocinations completely negate the rationale underlying the bidding process mandated by law.

At the very outset, the Court has explained that Comelec flagrantly violated the public policy on public biddings (1) by allowing MPC/MPEI to participate in the bidding even though it was not qualified to do so; and (2) by eventually awarding the Contract to MPC/MPEI. Now,

with the latest explanation given by Comelec, it is clear that the Commission further desecrated the law on public bidding by permitting the winning bidder to change and alter the subject of the Contract (the software), in effect allowing a substantive amendment without public bidding.

This stance is contrary to settled jurisprudence requiring the strict application of pertinent rules, regulations and guidelines for public bidding for the purpose of *placing each bidder, actual or potential, on the same footing*. The essence of public bidding is, after all, an opportunity for fair competition, and a fair basis for the precise comparison of bids. In common parlance, public bidding aims to "level the playing field." That means each bidder must bid under the same conditions; and be subject to the same guidelines, requirements and limitations, so that the best offer or lowest bid may be determined, *all other things being equal*.

Thus, it is contrary to the very concept of public bidding to permit a variance between the conditions under which bids are invited and those under which proposals are submitted and approved; or, as in this case, the conditions under which the bid is won and those under which the awarded Contract will be complied with. The substantive amendment of the contract bidded out, without any public bidding -- *after* the bidding process had been concluded -- is violative of the public policy on public biddings, as well as the spirit and intent of RA 8436. *The whole point in going through the public bidding exercise was completely lost. The very rationale of public bidding was totally subverted by the Commission.*

From another perspective, the Comelec approach also fails to make sense. Granted that, before election day, the software would still have to be customized to each precinct, municipality, city, district, and so on, there still was nothing at all to prevent Comelec from requiring prospective suppliers/bidders to produce, *at the very start of the bidding process,* the "next-to-final" versions of the software (the best software the suppliers had) -- pre-tested and ready to be customized to the final list of candidates and project of precincts, among others, and ready to be deployed thereafter. The satisfaction of such requirement would probably have provided far better bases for evaluation and selection, as between suppliers, than the so-called demo software.

Respondents contend that the bidding suppliers' counting machines were previously used in at least one political exercise with no less than 20 million voters. If so, it stands to reason that the software used in that past electoral exercise would probably still be available and, in all likelihood, could have been adopted for use in this instance. Paying for machines and software of that category (already tried and proven in actual elections and ready to be adopted for use) would definitely make more sense than paying the same hundreds of millions of pesos for demo software and empty promises of usable programs in the future.

But there is still another gut-level reason why the approach taken by Comelec is reprehensible. It rides on the perilous assumption that nothing would go wrong; and that, come election day, the Commission and the supplier would have developed, adjusted and "re-programmed" the software to the point where the automated system could function as envisioned. But what if such optimistic projection does not materialize? What if, despite all their herculean efforts, the software now being hurriedly developed and tested for the automated system performs dismally and inaccurately or, worse, is hacked and/or

manipulated?[54][54] What then will we do with all the machines and defective software *already paid for* in the amount of ₱849 million of our tax money? Even more important, *what will happen to our country in case of failure of the automation?*

The Court cannot grant the plea of Comelec that it be given until February 16, 2004 to be able to submit a "certification relative to the additional elements of the software that will be customized," because for us to do so would unnecessarily delay the resolution of this case and would just give the poll body an unwarranted excuse to postpone the 2004 elections. On the other hand, because such certification will not cure the gravely abusive actions complained of by petitioners, it will be utterly useless.

Is this Court being overly pessimistic and perhaps even engaging in speculation? Hardly. Rather, the Court holds that Comelec should not have gambled on the unrealistic optimism that the supplier's software development efforts would turn out well. The Commission should have adopted a much more prudent and judicious approach to ensure the delivery of tried and tested software, and readied alternative courses of action in case of failure. Considering that the nation's future is at stake here, it should have done no less.

Epilogue

Once again, the Court finds itself at the crossroads of our nation's history. At stake in this controversy is not just the business of a computer supplier, or a questionable proclamation by Comelec of one or more public officials. Neither is it about whether this country should switch from the manual to the automated system of counting and canvassing votes. At its core is the ability and capacity of the Commission on Elections to perform properly, legally and prudently its legal mandate to implement the transition from manual to automated elections.

Unfortunately, Comelec has failed to measure up to this historic task. As stated at the start of this Decision, Comelec has not merely gravely abused its discretion in awarding the Contract for the automation of the counting and canvassing of the ballots. It has also put at grave risk

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[54][54] In the December 15, 2003 issue of the Philippine Daily Inquirer is an item titled "Digital 'dagdag-bawas': a nonpartisan issue" by Dean Jorge Bocobo, from which the following passages appear:

"The Commission on Elections will use automated counting machines to tally paper ballots in the May elections, and a telecommunications network to transmit the results to headquarters, along with CDs of the data. Yet, with only five months to go, the application software packages for that crucial democratic exercise--several hundred thousand lines of obscure and opaque code--has not yet even been delivered in its final form, Comelec Chairman Benjamin Abalos admitted last week.

"My jaw dropped in amazement. Having built software for General Electric Co.'s medical systems business and military aircraft engines division (in another lifetime), I have learned the hard and painful way that 90 percent of unintended fatal problems with complex software lies in the last 10 percent of the code produced. From experience, I can assure you now with metaphysical certainty that not even the people furiously writing that software know whether it will actually work as intended on May 10, much less guarantee it. Simply put, the proposed software-hardware combination has neither been tested completely nor verified to comply with specifications."

the holding of credible and peaceful elections by shoddily accepting electronic hardware and software that admittedly failed to pass legally mandated technical requirements. Inadequate as they are, the remedies it proffers post facto do not cure the grave abuse of discretion it already committed (1) on April 15, 2003, when it illegally made the award; and (2) "sometime" in May 2003 when it executed the Contract for the purchase of defective machines and non-existent software from a non-eligible bidder.

For these reasons, the Court finds it totally unacceptable and unconscionable to place its imprimatur on this void and illegal transaction that seriously endangers the breakdown of our electoral system. For this Court to cop-out and to close its eyes to these illegal transactions, while convenient, would be to abandon its constitutional duty of safeguarding public interest.

As a necessary consequence of such nullity and illegality, the purchase of the machines and all appurtenances thereto including the still-to-be-produced (or in Comelec's words, to be "reprogrammed") software, as well as all the payments made therefor, have no basis whatsoever in law. The public funds expended pursuant to the void Resolution and Contract must therefore be recovered from the payees and/or from the persons who made possible the illegal disbursements, without prejudice to possible criminal prosecutions against them.

Furthermore, Comelec and its officials concerned must bear full responsibility for the failed bidding and award, and held accountable for the electoral mess wrought by their grave abuse of discretion in the performance of their functions. The State, of course, is not bound by the mistakes and illegalities of its agents and servants.

True, our country needs to transcend our slow, manual and archaic electoral process. But before it can do so, it must first have a diligent and competent electoral agency that can properly and prudently implement a well-conceived automated election system.

At bottom, before the country can hope to have a speedy and fraud-free automated election, it must first be able to procure the proper computerized hardware and software legally, based on a transparent and valid system of public bidding. As in any democratic system, the ultimate *goal* of automating elections must be achieved by a legal, valid and above-board *process* of acquiring the necessary tools and skills therefor. Though the Philippines needs an automated electoral process, it cannot accept just any system shoved into its bosom through improper and illegal methods. As the saying goes, the end never justifies the means. Penumbral contracting will not produce enlightened results.

WHEREFORE, the Petition is *GRANTED*. The Court hereby declares *NULL* and *VOID* Comelec Resolution No. 6074 awarding the contract for Phase II of the CAES to Mega Pacific Consortium (MPC). Also declared null and void is the subject Contract executed between Comelec and Mega Pacific eSolutions (MPEI).[55][55] Comelec is further *ORDERED* to refrain from implementing any other contract or agreement entered into with regard to this project.

Let a copy of this Decision be furnished the Office of the Ombudsman which shall determine the criminal liability, if any, of the public officials (and conspiring private individuals,

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[55][55] Dated " ____ May, 2003" but notarized on June 30, 2003.

if any) involved in the subject Resolution and Contract. Let the Office of the Solicitor General also take measures to protect the government and vindicate public interest from the ill effects of the illegal disbursements of public funds made by reason of the void Resolution and Contract.

SO ORDERED.

Carpio, Austria-Martinez, Carpio-Morales, and *Callejo, Sr., JJ.,* concur.
Davide, Jr., C.J., Vitug, and *Ynares-Santiago, JJ.,* see separate opinion.
Puno, J., concur, and also joins the opinion of *J.* Ynares-Santiago.
Quisumbing, J., in the result.
Sandoval-Gutierrez, J., see concurring opinion.
Corona, and *Azcuna, JJ.,* joins the dissent of *J*. Tinga.
Tinga, J., pls. see dissenting opinion.