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Republic of the Philippines
COMMISSION ON ELECTIONS
Intramuros, Manila

The Special Bids & Awards Committee

MEMORANDUM

FOR : **THE COMMISSION EN BANC**

THRU : **HON. JOSE A.R. MELO**
Chairman

FROM : **The Special Bids and Awards Committee**

SUBJECT : **Report/ Recommendation on the 2010 Automation Elections Project Procurement**

DATE : **03 June 2009**

The *ponente* of **ITFP vs COMELEC and Mega Pacific** (2004), former Chief Justice Artemio V. Panganiban wrote in his article, published in the Philippine Daily Inquirer on 24 May 2009, as follows:

"The Commission on Elections has been quite strict in procuring, via public bidding, the machines to computerize the elections. Given its unenviable automation track record, the present Comelec - led by its Chair, Justice Jose A.R. Melo - has all the reasons to be extra careful and to 'make haste slowly'."

On 26 May 2009, the Committee, thru SBAC Resolution No. 09-008, declared Smartmatic International Corporation/Total Information Management (Smartmatic/TIM) as the bidder that submitted the single complying calculated bid. It directed said bidder to immediately undergo post-qualification proceedings and have its machines tested under the twenty-six (26) criteria set in the Request for Proposal (RFP). The Technical Working Group (TWG) administered the tests from 27 May to 30 May 2009 and subsequently submitted its report on 03 June 2009, indicating that the machines passed all the criteria. The TWG also

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submitted its report on the post-qualification proceedings, showing that as of today, it has verified the documents submitted by Smartmatic/TIM from Philippine sources and only the following documents from other countries remain to be validated:

Name of Agency/Office	Item/s to be verified
Corporate Affairs and Intellectual Property Office (Office address: Clarence Greenidge House Keith Bourne Complex, Melbourne Belmont Road, Saint Michael Bridgetwon, Barbados)	<ul style="list-style-type: none"> - By-Laws - General Information Sheet - Original/Amended Article of Incorporation
Inland Revenue Department (address: Treasury Buiding, Bridge Street Bridgetown, Government of Barbados)	<ul style="list-style-type: none"> - Tax Identification No. - 2007 and 2008 Income Tax Returns - Business Tax Return
National Electoral Council-Consejo Nacional Electoral (address: Centro Simón Bolívar-Frente Plaza Cáracas Venezuela)	<ul style="list-style-type: none"> - Single Largest Contract
State Board of Elections (address: 40 Steuben St., Albany, New York) Electoral Event Services (address: Ontario, Canada) Elections New Brunswick (address: Brunswick, Canada)	<p>Written Certification from the election authority of the client country / state/ province that the system has demonstrated capability and has been successfully used in prior electoral exercise here or abroad (6.14 of Checklist for Technical Evaluation)</p> <p>Note: as of 03 June 2009, only the State Board of Elections confirmed the certification issued on 20 April, 2009 to Mr. John Poulos of Dominion Voting Systems.</p>
Inland Revenue Department (address: Treasury Buiding, Bridge Street Bridgetown, Government of Barbados)	Audited financial Statements

Considering that these documents are issued by governments of other countries and they are duly authenticated by officials of the Philippine government in the Philippine embassy in those countries, they are legally admissible, and the SBAC admits them pursuant to Rule 132 of the Rules of Court which provides as follows:

"Sec. 19. Classes of Documents. — For the purpose of their presentation as evidence, documents are either public or private.

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Public documents are:

- (a) **The written official acts, or records of the official acts of the sovereign authority, official bodies and tribunals, and public officers, whether of the Philippines, or of a foreign country;**
- (b) Documents acknowledge before a notary public except last wills and testaments; and
- (c) Public records, kept in the Philippines, of private documents required by law to be entered therein.

All other writings are private."

"Sec. 24. Proof of official record. — The record of public documents referred to in paragraph (a) of Section 19, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody. If the office in which the record is kept is in foreign country, the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office."

"Sec. 25. What attestation of copy must state. — Whenever a copy of a document or record is attested for the purpose of evidence, the attestation must state, in substance, that the copy is a correct copy of the original, or a specific part thereof, as the case may be. The attestation must be under the official seal of the attesting officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court."

While awaiting the replies of the concerned foreign government agencies to the queries of the TWG, we admit said documents.

SMARTMATIC

As per its brochure, Smartmatic has successfully organized multiple national and regional elections using its electronic voting solutions, implementing voter-verified paper audit trails in Latin America (eight nationwide electoral events), the Caribbean, the United States and Asia. Some statistics: 150 million tabulated votes, each with a voter verified paper audit trail, hundreds of audits, more than 45,000 voting machines installed in more than 11,000 polling centers operating in a single electoral event.

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Smartmatic is a Venezuelan corporation, whose shareholders are the following:

Shareholders	Extent of Ownership
Antonio Mugica Roger Pinate Jorge Massa	
Total:	82.51%
Other Employees of the Smartmatic Group and other related parties (totaling to 113 individuals) with no individual owning more than 3%,	17.49%

Some of the issues raised against Smartmatic are the following:

1. Jarltech International of Taiwan which will manufacture the PCOS machines is allegedly not its subsidiary. However, during its post-qualification proceedings, we received a letter from the President of Jarltech International in response to our query, to the effect that Smartmatic owns the majority of the shareholdings of Jarltech. Therefore, it is truly a subsidiary.
2. Another issue was that Dominion Voting Company of Canada is the owner of the PCOS Technology. However, we verified from the bid documents submitted that there is a licensing agreement between Smartmatic and Dominion, a portion of which provides, thus:

"6. Ownership: During the Term, all hardware manufactured by Smartmatic, using the Licensed Technology shall be owned by Smartmatic and all software and firmware, including the Democracy Suite EMS and Democracy Suite Image Cast PCOS are hereby licensed to Smartmatic with the right to sublicense the right to use such software to the Commission on Elections for the Republic of the Philippines ("COMELEC") Smartmatic shall offer said Democracy Suite EMS and Democracy Suite Image Cast PCOS to the Commission on Elections of the Republic of the Philippines for the 2010 Synchronized National and Local Elections as part of Smartmatic's SAES 1800."

3. Another issue against Smartmatic is that after entering into a contract with Jarltech International, its subsidiary, the latter would also enter into a contract with Kenmec Mechanical Engineering Company for the production of the PCOS machines.

Upon verification, we found that said contract is denominated as

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"Outsourcing Manufacturing Contract" and it has been argued that it is not a subcontract but a modern way of doing business. We quote hereunder a portion of Smartmatic's "Motion for Reconsideration" dated 08 May 2009:

"As mentioned by our counsel during the open session held on 5 May 2009, the Smartmatic Subsidiary has a manufacturing facility of its own. However, to manufacture the 82,000 PCOS voting machines within the tight deadline of the SBAC, Smartmatic will need to install its manufacturing process and equipment on a large facility or building owned by Kenmec."

*"Smartmatic, through the Smartmatic Subsidiary, has an outsourcing contract dated 5 March 2008 (the "Outsourcing Contract") with Kenmec for the provision of space in Kenmec's facility. For the information of the Honorable SBAC, **Kenmec is not a subcontractor. Kenmec will only be providing the "space" where Smartmatic, through the Smartmatic Subsidiary, will assemble the PCOS voting machines.** Kenmec has been providing other manufacturers, such as LG Electronics, Philips and ASUS, the space required for the manufacture of their respective products. In view of the number of said clients, the Outsourcing Contract provides the scheduling of the manufacturing of Smartmatic in Kenmec's facility, as follows:*

"B. Party B (Kenmec) is required to present to Party A (Jarltech) production schedules and arrangements for each three upcoming months, as well as provide production services and regular progress reports, as agreed by parties, to be Party A's guidelines for delivery schedule control."

"Kenmec will not perform the manufacturing of the PCOS machines. The assembly and manufacturing will be done by Smartmatic, through the Smartmatic Subsidiary."

4. Another major issue against Smartmatic is that up to now, it has not shown a copy of its single largest contract on the ground that it has a non-disclosure agreement with the election body of Venezuela. We have not received a reply from the Venezuelan government to our query. Smartmatic requested but failed to obtain any permission from said government to disclose the contract. However, there is a duly authenticated certification from the Consejo Nacional Electoral (CNE) of the Venezuelan government, included among the bid documents, indicating the amount of the contract as **One Hundred Forty-One Million Three**

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Hundred Fifty-Six Thousand Six Hundred Four Dollars and Fifty-Four Cents (\$141,356,604.54), (equivalent to Php 6,345,502,017.90) which is well above the eligibility requirement of at least 50% of the Approved Budget for the Contract (ABC) of Php 5,611,809,200.50.

Other contents of said certification are: (1) the name of the vendor-Smartmatic Group, (2) the name of procuring entity – CNE, (3) the period of the contract - between 01 June 2008 to 28 February 2009, and (4) the description of goods and services provided – to provide voting machines and supplies for the elections in the Bolivarian Republic of Venezuela.

**JOINT VENTURE WITH
TOTAL INFORMATION MANAGEMENT CORPORATION (TIM)**

Smartmatic entered into a joint venture agreement with TIM on 23 April 2009 in Makati City, Philippines with the following provisions:

"2.1 In the event that COMELEC declares the bid tendered by TIM and SMARTMATIC to be the winning bid for the Automation Project, the parties hereto shall incorporate, or cause to be incorporated, the JVC which shall be named "TIM SMARTMATIC CORPORATION", or any other name acceptable to the parties which may be allowed by the SEC."

"2.2 The JVC shall be the corporate vehicle through which the joint venture of TIM and SMARTMATIC shall be carried out for the purpose set forth in Article 2.3 hereunder. The JVC shall be the entity which shall enter into a contract with the COMELEC for the Automation Project of the 2010 National Elections."

"2.3 The purpose of the JVC shall be to carry out and perform jointly, severally and solidarily the obligations of TIM and SMARTMATIC arising from being declared the winning bidder in the public bidding for the Automation Project, which obligations are spelled out in the Request for Proposal released by the COMELEC. It is understood that any expansion or modification of the purpose of the JVC, as set forth above, shall be subject to the mutual agreement of the parties."

"2.4 The authorized capital stock of the JVC is initially fixed herein at Philippine Pesos: One Billion and Three Hundred Million (PHP 1,300,000,000.00) divided into One Billion and Three Hundred Million (1,300,000,000) common shares with a par value of One Peso (PHP 1.00) per share, Provided, that the authorized capital stock of the JVC initially fixed herein may be increased; at the instance of the Board of Directors of the JVC, when so warranted

under the circumstances and in accordance with the financial requirements of the Automation Project."

"2.5 The capital contributions of the parties hereto to the JVC shall be as follows:

- a) TIM, either by itself or through its subsidiary – sixty percent (60%) of the shares to be issued by the JVC; and*
- b) SMARTMATIC, either by itself or through its Philippine subsidiary – forty percent (40%) of the shares to be issued by the JVC.*

The shares to be held by the nominee directors of TIM and SMARTMATIC shall be considered as part of the ratios provided above."

"2.6 In case of any subsequent issuance of shares by the JVC, the parties hereto hereby agree that the ratios provided above shall be observed."

TIM is a domestic corporation registered with the Securities and Exchange Commission (SEC) in January 1981. Initially, it was named Total Interiors Manufacturing Corporation, whose purpose was to make doors and cabinets, among others but later, through various amendments duly approved by the SEC, the purposes now include the business of dealers of computer hardware, software and telecommunications. Its name also changed into "Total Information Management Corporation."

The exhaustive reports of the SBAC Secretariat consisting of two (2) folders of incidents and an overall summary report dated 03 June 2009, form part and parcel of this Memorandum. Also forming part hereof is the Report of the TWG dated 03 June 2009 consisting of post-qualification results and systems evaluation.

RECOMMENDATION

Considering that the joint venture of TIM-Smartmatic has passed all the eligibility, technical and financial requirements and the same have been substantially verified, validated and ascertained during the post-qualification proceedings, the SBAC hereby confirms said joint venture as the **"Lowest Calculated Responsive Bidder"** (LCRB) with the bid of Php 7,191,484,739.48. Taking into account further that its machines passed all the tests and systems evaluation with an accuracy rating of

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Financial Referee
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100%, the SBAC hereby respectfully recommends to the Honorable Commission *En Banc*, that a **Notice of Award** be given to the said joint venture followed by signing of the contract and **Notice to Proceed** for the purpose of automating the 10 May 2010 Philippine elections.

Respectfully submitted for Your Honors' approval.


ATTY. FERDINAND T. RAFANAN
Chairman



ATTY. ADOLFO A. IBANEZ
Vice Chairman


ATTY. DIVINA E. BLAS-PEREZ
Member


ATTY. REY D. DOMA
Member


MRS. AIDA C. FERNANDEZ
Member

OFFICIAL ADVISERS AND OBSERVERS


DR. ARWIN A. SERRANO
PPCAV

PEARLITO D. JARA SETHO
NBA FREE (NOT for customization)

