

WHAT THE FACTS?!



Procurement law and the Miru JV: More to verify, validate, ascertain

By The Right to Know, Right Now! Coalition

TO acquire goods and services using public funds, all government agencies must abide by Republic Act No. 9184 or the Government Procurement Reform Act and its Implementing Rules and Regulations.

Competitive bidding is the default mode in state procurement. This means that any and all interested parties may participate in the bidding, provided they meet the required technical and financial requirements defined in law and specified in the Invitation to Bid issued by the agency and its Bid and Awards Committee.

But the competition factor was lost when the Miru Systems Joint Venture won the PhP 18-billion contract from the Commission on Elections (COMELEC) for the automated election system in the May 2025 national and local polls.

This is because, despite COMELEC's open invitation bid, the Miru JV wound up as the one and only bidder deemed qualified as the "Single Calculated Bid" considered for the contract award.

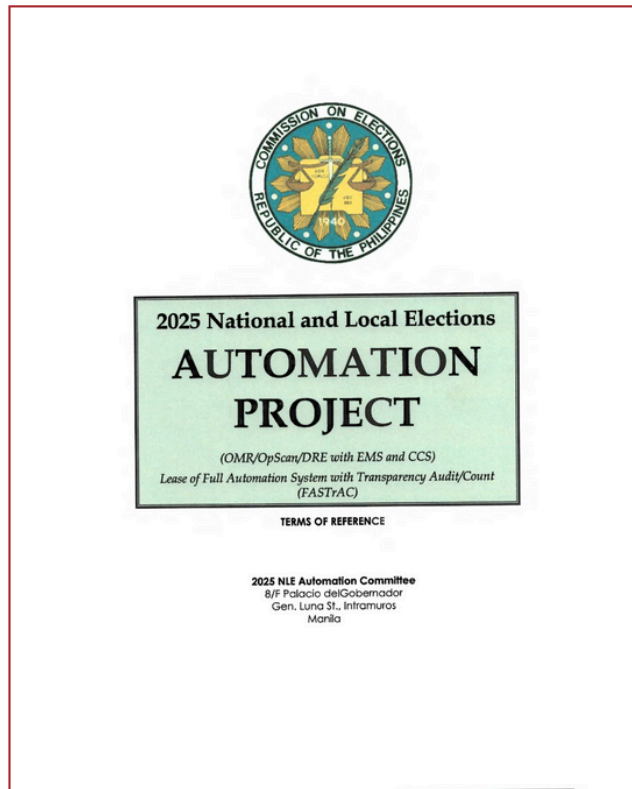
Ousted, backed out?

COMELEC issued an invitation to bid for the FASTrAC project on Oct 27, 2023, scheduling the deadline for both submission and opening of bids on the same day, November 20, 2023. Later, however, the deadline for submission of bids and the bid opening was extended to December 12, 2023, and finally to December 14, 2023, through bid bulletins.

Several prospective bidders expressed interest in the bid along with Miru: Smartmatic-Total Information Management 2016 Inc., Pivot International, Dominion Voting, Electiotech Consultant and Management Corporation, and Emperor Technology.

On November 29, 2023, COMELEC issued a resolution disqualifying Smartmatic from participating in any public bidding process for elections. It cited as reason information it received regarding an ongoing criminal investigation in the United States in relation to procurement activities for the 2016 Philippine national elections.

The other prospective bidders, meanwhile, decided not to proceed in submitting a bid. That left Miru JV as the project's lone bidder. At the bid opening on



December 14, 2023, however, Miru was declared ineligible for these defects in its submitted documents:

- The foreign documents supporting its Statement of Single Largest Completed Contract had no English translation; and,
- Its undertaking to enter into a joint venture stated only "joint" liability, and not "joint and several" so as to be treated as a single bidder.

With the failed bidding, COMELEC issued a new invitation to bid on December 15, 2023, setting the deadline for submission of bids on January 4, 2024, later reset to January 8, 2024 through a bid bulletin.

Several prospective bidders again expressed interest, submitting requests for clarification on the bid terms and specifications.

Aside from the Miru JV, there were Dominion Voting Systems, AMA Group Holdings Corp., and Prosoft Global Pte. Ltd. But similar to the first bidding, only the Miru JV proceeded to submit a bid. This time, it was found to be eligible at bid opening and was declared as the Single Calculated Bid.

Upon completion of post-qualification process, the Special Bids and Awards Committee (SBAC) for the project recommended on

on February 13, 2024 the award of the contract to the Miru JV.

On February 21, 2024, the COMELEC approved the SBAC resolution and declared the Miru JV as the bidder with the Single Calculated and Responsive Bid, and forthwith issued the Notice of Award to the Miru JV.

But there are indications that the COMELEC SBAC might have missed to exert full measure of diligence on post-qualification to “verify, validate, and ascertain” all the documents of the Miru JV.

In an interview with R2KRN, a senior COMELEC official said the poll body “could have done better.” What happened could be explained by one worry, however: “We wanted so much to avoid getting into a negotiated procurement because that would be more costly.”

Four stages

Broadly, the bidding process consists of four stages: the issuance of the Invitation to Bid; the Receipt and Opening of Bids; the Bid Evaluation; and the Post-Qualification and Award of Contract.

All four are indispensable and important stages, but it is the Post-Qualification stage that is highly critical. This is where the bidder with the Lowest Calculated Bid (or in the case of the Miru JV, the Single Calculated Bid) undergoes verification and validation that it has indeed passed all the requirements and conditions specified in the bidding documents.

At the Opening and Evaluation of Bid stages, the documents only undergo preliminary examination using a non-discretionary pass or fail criteria.

In contrast, it is at the Post-Qualification stage where the procuring agency must be strict and thorough, as well as exercise due diligence, to make sure that the representations of the bidder are true, valid, and accurate. At this stage, the procuring agency must “verify, validate, and ascertain” that the bidder meets all the requirements and project specifications to give the highest probability that the contract will be satisfactorily delivered.

The quality of Post-Qualification work by the COMELEC SBAC in this particular project is far more serious, critical, and grave in light of the myriad stakes involved.

Not only is the cost enormous, the PhP18-billion project is by far the single biggest contract by value that COMELEC has awarded in its 83-year history, or since it was created as a constitutional agency on June 21, 1941 under Commonwealth Act No. 657. The contract with the Miru JV will also constitute the backbone of the conduct of automated elections in May 2025.

COMELEC is no stranger to the magnitude of the responsibility. In the case of Information Technology Foundation of The Philippines, et al. v. COMELEC, et al. (G.R. No. 159139, January 13, 2004) ruling on the validity of a previous contract for election automation, the Supreme Court emphasized the need for COMELEC to measure up to the task, ability, and capacity to properly, legally, and

prudently perform its legal mandate to implement automated elections.

To be clear, COMELEC, observing the people's right to information, generously provided R2KRN with the post-qualification documents covering the contract.

Yet still, R2KRN has several observations, and concerns, about the application of various aspects of post-qualification standards under the procurement law. COMELEC may wish to further respond to these observations to assure the public that it followed a legal, valid, and aboveboard process for the evaluation of the bid.

MIRU's incorporation documents

All bidders are required to upload and maintain in the Philippine Government Electronic Procurement System (PhilGEPS) what is called the Class "A" legal documents, consisting of the Registration Certificate, Mayor's/Business Permit, Tax Clearance, Philippine Contractors Accreditation Board license and registration in the case of construction corporations, and Audited Financial Statements.

For foreign bidders, these documents may be substituted by the equivalent foreign documents in English. If a document is not issued in English, it must be accompanied by an English translation issued by the relevant foreign government agency, or the foreign agency authorized to translate documents, or a registered translator in the foreign bidder's country, and authenticated by the appropriate Philippine foreign service or through an apostille for countries that are contracting parties to the Apostille Convention.

At the opening and evaluation of the bids stage, a Certificate of Registration with PhilGEPS substitutes for the Class "A" eligibility documents, upon the premise that such documents have been duly submitted as required in the PhilGEPS registration process.

Miru participated in the bid as a foreign corporation that is a member of a joint venture with three domestic companies. As stated in the agreement to enter into joint venture that was submitted as part of the eligibility requirements, it identified itself as Miru Systems Co. Ltd., a corporation organized under the laws of the Republic of Korea.

In the post-qualification report, however, what appears to have been validated by the COMELEC SBAC was not the foreign registration of Miru itself, but the SEC registration of Miru's Branch Office.

Two COMELEC post-qualification memorandums show the disparity. In a post-qualification report dated February 1, 2024, it appears that what was validated was the PhilGEPS platinum registration, which was done through the PhilGEPS website. Miru Systems Co., Ltd. was indicated in the registration as a foreign company organization, issued with a PhilGEPS Platinum certification on September 11, 2023. Indicated as well was a Mayor's permit #1298127964.

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A second post-qualification report dated February 2, 2024 made further validation of the corporations through Securities and Exchange Commission (SEC) online portal. This time, it reported for Miru an SEC registration as Miru Systems Co., Ltd. Branch Office with SEC Registration Number 2023100122778-04.

The incorporation or registration document of a bidder is important to establish the bidder's identity and legal personality.

We believe that it would have been prudent for the SBAC Technical Working Group (TWG), at the post-qualification stage, to access and examine the very same foreign-registration documents that were required to be submitted by a foreign corporation to PhilGEPS.

While the PhilGEPS certificate of registration is accepted in lieu of the Class "A" eligibility documents, the rules also provide that the PhilGEPS certificate is neither a guaranty that the named registrant will be declared eligible without first being determined to be such for



that particular bidding, nor is it evidence that the same has passed the post-qualification stage.

The bid documents themselves expressly required that the bidder notified of being the Single/Lowest Calculated Bid shall submit within a non-extendible period of five days its eligibility documents as listed in the PhilGEPS certificate of registration. The post-qualification reports cited did not disclose that this was done.

When asked whether COMELEC has had any dealings with the Miru Branch Office or its representative, the COMELEC SBAC members said they never did, and maintained that it was the foreign corporation that participated in the bidding.

R2KRN showed the SBAC members a photocopy the SEC registration documents of the Miru Branch Office, which the team had not seen by then, but which appears to be the document referred to in the February 2, 2024 post-qualification report.

Joint Venture Agreement

To be able to participate in the bidding for the supply of goods, the bidder must be any of the following: a Filipino sole proprietor; a domestic partnership with at least 60 percent of interest belonging to citizens of the Philippines; domestic corporations of which at least 60 percent of outstanding capital stock belongs to citizens of the Philippines; domestic cooperatives; or persons/entities forming themselves into a joint venture or intending to form themselves into a joint venture to be jointly and severally responsible or liable for a particular contract, "provided that Filipino ownership or interest shall be at least 60 percent."

Miru participated in the bid as part of the latter category, among entities intending to form a joint venture for the project. As such it was required to submit a notarized statement or undertaking to form a joint venture. It was this required statement or undertaking that was found to be defective at the bid opening stage of the first failed bidding, for having stated only "jointly" and not "jointly and severally" in terms of liability.

While the submitted statement for the second bidding already stipulated the agreement to be bound jointly and severally under the intended Joint Venture Agreement (JVA), we believe that the statement should have also expressly stipulated the undertaking to comply with the Filipino ownership restriction of at least 60 percent.

Similar to the need for joint and several liability, such requirement cannot be taken for granted and should be expressly stated in the undertaking. This should already be checked

at the bid opening stage, or certainly at the post-qualification stage. This is especially so since the submission of the actual JVA is required only after receipt by the winning bidder of the Notice of Award.

In the JVA that the Miru JV later submitted to COMELEC, Article IV provides only a general clause for the contribution and other arrangements.

Section 1 states that "each joint venturer is entitled to its prorated share in the JV's items of income, gain, loss, deduction, credit and cash available for distribution pursuant to his interest in the following proportion: Miru, 40%; ICS, STCC, and CPSTI, 60%."

Yet Section 2 on profit-sharing seems to be casting ambiguity to Section 1. It provides that "the share of the parties to the JV from any profit derived or obtained from the implementation and execution of the Project shall be distributed in accordance with the actual resources each has provided to the JV."

Can actual resources provided then override what is stated in Section 1?

What if the actual contribution of the foreign corporation exceeds 40 percent?

Under the rules, Filipino ownership or interest shall be based on the contributions of each of the members of the joint venture as specified in their JVA.

The matter, we believe, can be addressed by COMELEC by requiring a supplemental statement from the joint venture clarifying and specifying each member's contributions.

The Commission should also adopt a mechanism to verify the actual contribution of each member, so that the substantive requirement on ownership is not rendered pro forma and not evaded in practice.

In fact, COMELEC should require the submission of a more detailed JVA.

The submitted JVA does not disclose any information on the respective roles and undertakings of the JV members. The Supreme Court, in the case of Information Technology Foundation of The Philippines, et al. vs. COMELEC, et al., pointed out why a JVA must provide more detailed information.

“Absent any clear-cut statement as to the exact nature and scope of the parties' respective undertakings, commitments, deliverables and covenants,” the Court said, “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,” continued the Court, “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’.”

In other words, COMELEC must not content itself with the warranty of joint and solidary liability that it may rely on in case of contract failure or breach. It must acquaint itself of the “specifics or details as to the exact nature and scope of the parties' respective undertakings, performances and deliverables” because these are integral to the project’s successful implementation.

Slippages in ongoing contracts

Also among the Technical Documents required to be submitted is the statement of the bidder’s Single Largest Completed Contract (SLCC) similar to the contract to be bid.

In the bid instructions, the SLCC may either be a single contract whose value must be at least 50 percent of the ABC, or at least two similar contracts the aggregate amount of which should be equivalent to at least 50 percent of the ABC, provided that the larger contract must be equivalent to at least 25 percent of the ABC.

The bid instructions also provided that as proof of the SLCC, the bidder shall submit the end-user’s acceptance or official receipt/s or Sales Invoice for the contract.

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The SLCC was submitted by Miru. It stated a contract for the supply of voting machines, consumables and ancillary services with the Independent National Elections Commission of the Democratic Republic of Congo. It provided two contract amounts: US\$797,080 and US\$172,469,506, for an aggregate total in peso terms of PhP 9,636,914,246,734.00.

It appears that as proof of the SLCC, what was submitted was a Certificate of Satisfactory Execution issued by Corneille Nangaa Yobelou, president of the electoral commission of Congo, dated January 2, 2019. To validate the certificate, as its post-qualification measure, COMELEC mailed an inquiry letter to Congo's electoral commission.

The response from the commission's Permanent Secretary, Andre Kambeya, confirmed the authenticity of the January 2, 2019 certification issued by Nangaa.

COMELEC also received certificate of satisfactory execution dated January 10, 2024 and issued by Denis Kadima, present chairman of the electoral commission, for a later contract with a total amount of US\$ 133,689,581.95.

The January 2, 2019 certification that pertained to contract submitted as SLCC did not indicate a contract amount, however. Confirmation of the contract amount is important since the value of the contract is material to compliance with the minimum amount required for the SLCC. Kambeya's reply indicated readiness to provide any needed further detail, but it does not appear that the TWG sought any further validation.

Just as important, the procurement law's IRR requires procuring agencies to check delays in delivery of ongoing government and private contracts.

This was not done by the COMELEC SBAC. Miru's track record in contract delivery – certainly another important matter – went unverified as well. The COMELEC SBAC could have checked for any ongoing contracts of Miru to validate performance concerns, including project delays or other contract failures.

The COMELEC SBAC did check on allegations of malfunctioning voting machines supplied by Miru in Iraq and Congo.

For Congo, it appreciated the satisfactory execution certificates from the Congo elections commission.

For Iraq, it cited a response by the legal officer in the United Nations Assistance Mission for Iraq (UNAMI), as quoted in a news report. A perusal of UNAMI's response yielded only an apparent press release issued by UNAMI that said the elections were held in a generally calm and stable environment.

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Need for citizen monitoring

The satisfactory delivery by Miru JV of its contract obligations in the FASTrAC project is of utmost importance to the orderly and credible conduct of the 2025 elections. Thus, it is in the public interest that the FASTrAC contract implementation is closely monitored, especially considering our observations of lax post-qualification scrutiny in certain aspects of the bid requirements.

There is a tight delivery schedule for the contract. Based on the delivery schedule in the bid documents, the base source codes were for immediate delivery after contract signing.

Delivery of the machines, peripherals and consumables start by August 2024 and are to be completed by December 2024.

Delivery of the final system must be completed between August to September 2024, and field test conducted in October 2024. There are many other key items for ongoing delivery, until all systems are finally certified by a Technical Evaluation Committee in February 2025.

COMELEC has been very transparent in R2KRN's conduct of the FASTrAC procurement



review as part of its Freedom of Information (FOI) Practice. To R2KRN, FOI practice involves engaging in standardized, member-led, and needs-based active exercise of the right to information.

We trust that that COMELEC will continue to provide timely and responsive information on the FASTrAC contract implementation, and the 2025 elections itself. We will request updates on contract performance, and share our observations to the COMELEC and the public.

In this connection, we request COMELEC to provide information on the two recent visits to Miru's offices in Korea by some of its officials, supposedly in relation to the contract.

There is a thin line between what is necessary and what may be violative of the Code of Conduct and Ethical Standards for Public Officials and Employees or Republic Act No. 6713.

It is incumbent upon COMELEC to inform the public about the nature of, and the compelling need for, these visits, as well as who paid for the expenses incurred. **– With research, reporting, and review by Nepo Malaluan, Malou Mangahas, Eirene Jhone Aguila, and Jenina Joy Chavez, Right to Know Right Now Coalition, June 2024**

RELATED DOCUMENTS