

8/17/22

**CONTRACT BETWEEN
COUNTY OF GLOUCESTER
AND
ELECTION SYSTEMS & SOFTWARE, LLC**

THIS CONTRACT is made effective the 7th day of September, 2022, by and between the **COUNTY OF GLOUCESTER**, a body politic and corporate, with offices in Woodbury, New Jersey, hereinafter referred to as "**County**," and **Election Systems & Software, LLC** of 11208 John Galt Boulevard, Omaha, Nebraska 68137, hereinafter referred to as "**Vendor**".

RECITALS

WHEREAS, there exists a need for the County to purchase Ballot on Demand Hardware, including software, installation, and a one (1) year Hardware and Software Warranty election set up fees, consumables, and post-warranty licenses, maintenance, and support fees; and

WHEREAS, the contract has been awarded consistent with the fair and open provisions of the Gloucester County Administrative Code and with N.J.S.A. 19:44A-20.4 et seq., which exempt this contract from competition because vendor has certified that it has not made or will not make during the term of the contract a disqualifying contribution; and

WHEREAS, the services to be performed as to this contract are relative to election expenses and therefore is an exception to the Local Public Contracts Law as described and provided by N.J.S.A. 40A:11-5(1); and

WHEREAS, Vendor represents that he is qualified to perform said services and desires to so perform pursuant to the terms and provisions of this contract.

NOW, THEREFORE, in consideration of the mutual promises, agreements and other considerations made by and between the parties, the County and the Vendor do hereby agree as follows:

TERMS OF AGREEMENT

1. **TERM.** The term of the contract is from September 7, 2022 to September 6, 2023.
2. **COMPENSATION.** Vendor shall be compensated in an amount not to exceed \$38,865.00, of which the Ballot on Demand Hardware, including software, installation, and a one (1) year Hardware and Software Warranty is \$25,895.00, Post-Warranty License and Maintenance and Support Fees is \$990.00 per year for three years, totaling \$2,970.00, and consumables (cartridges and drum kits) is for an amount not to exceed \$10,000.00.

Vendor shall be paid in accordance with this contract document upon receipt of an invoice and a properly executed voucher. After approval by County, the payment voucher shall be placed in line for prompt payment.

Each invoice shall contain an itemized, detailed description of all work performed during

the billing period. Failure to provide sufficient specificity shall be cause for rejection of the invoice until the necessary details are provided.

It is also agreed and understood that the acceptance of the final payment by Vendor shall be considered a release in full of all claims against the County arising out of, or by reason of, the work done and materials furnished under this contract.

3. DUTIES OF VENDOR. Vendor shall in an amount not to exceed \$38,865.00, as per Vendor's Purchase Proposal Quote, dated August 17, 2022, attached hereto as Attachment A and made a part of this contract; and abide by the terms of the Ballot on Demand, Processing and Services Agreement, Sales Quotation # S1532, attached hereto as Attachment B and made a part of this contract.

Vendor agrees that it has or will comply with, and where applicable shall continue throughout the period of this contract to comply with, all of the requirements of any specifications, which may have been issued by the County of Gloucester in connection with the work to be performed.

Vendor shall be paid in accordance with this Contract document upon date of an invoice and a properly executed voucher. After approval by County, the payment voucher shall be placed in line for prompt payment.

4. FURTHER OBLIGATIONS OF THE PARTIES. During the performance of this contract, the Vendor agrees as follows:

The Vendor or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality, sex, veteran status or military service. The Vendor will ensure that equal employment opportunity is afforded to such applicants in recruitment and employment, and that employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality, sex, veteran status or military service. Such equal employment opportunity shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Vendor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Public Agency Compliance Officer setting forth provisions of this nondiscrimination clause.

The Vendor or subcontractor, where applicable will, in all solicitations or advertisements for employees placed by or on behalf of the Vendor, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality, sex, veteran status or military service.

The Vendor or subcontractor will send to each labor union, with which it has a collective bargaining agreement, a notice, to be provided by the agency contracting officer, advising the

labor union of the Vendor's commitments under this chapter and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

The Vendor or subcontractor, where applicable, agrees to comply with any regulations promulgated by the Treasurer pursuant to N.J.S.A. 10:5-31 et seq., as amended and supplemented from time to time and the Americans with Disabilities Act.

The Vendor or subcontractor agrees to make good faith efforts to meet targeted county employment goals established in accordance with N.J.A.C. 17:27-5.2.

5. LICENSING AND PERMITTING. If the Vendor or any of its agents is required to maintain a license, or to maintain in force and effect any permits issued by any governmental or quasi-governmental entity in order to perform the services which are the subject of this Contract, then prior to the effective date of this Contract, and as a condition precedent to its taking effect, Vendor shall provide to the County a copy of all current license and permits to operate in the State of New Jersey, which license and permits shall be in good standing and shall not be subject to any current action to revoke or suspend, and shall remain so throughout the term of this Contract.

Vendor shall notify the County immediately in the event of suspension, revocation or any change in status (or in the event of the initiation of any action to accomplish such suspension, revocation and/or change in status) of license or certification held by Vendor or its agents.

6. TERMINATION. This Contract may be terminated as follows:

A. Pursuant to the termination provisions set forth in the Bid Specifications or in the Request for Proposals, if any, as the case may be, which are specifically referred to and incorporated herein by reference.

B. If Vendor is required to be licensed in order to perform the services which are the subject of this Contract, then this Contract may be terminated by County in the event that the appropriate governmental entity with jurisdiction has instituted an action to have the Vendor's license suspended, or in the event that such entity has revoked or suspended said license. Notice of termination pursuant to this subparagraph shall be effective immediately upon the giving of said notice.

C. If, through any cause, the Vendor or Subcontractor, where applicable, shall fail to fulfill in timely and proper manner his obligations under this Contract, or if the Vendor shall violate any of the covenants, agreements, or stipulations of this Contract, the County shall thereupon have the right to terminate this Contract by giving written notice to the Vendor of such termination and specifying the effective date thereof. In such event, all finished or unfinished documents, data, studies, and reports prepared by the Vendor under this Contract, shall be forthwith delivered to the County.

D. The County may terminate this Contract for public convenience at any time by a notice in writing from the County to the Vendor. If the Contract is terminated by the County as provided herein, the Vendor will be paid for the services rendered to the time of termination.

E. Notwithstanding the above, the Vendor or Subcontractor, where applicable, shall not be relieved of liability to the County for damages sustained by the County by virtue of any breach of the Contract by the Vendor, and the County may withhold any payments to the Vendor for the purpose of set off until such time as the exact amount of damages due the County from the Vendor is determined.

F. Termination shall not operate to affect the validity of the indemnification provisions of this Contract, nor to prevent the County from pursuing any other relief or damages to which it may be entitled, either at law or in equity.

7. **PROPERTY OF THE COUNTY.** All materials developed, prepared, completer, or acquired by Vendor during the performance of the services specified by this Contract, including, but not limited to, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, and reports, shall become the property of the County, except as may otherwise be stipulated in a written statement by the County.

8. **NO ASSIGNMENT OR SUBCONTRACT.** This Contract may not be assigned nor subcontracted by the Vendor, except as otherwise agreed in writing by both parties. Any attempted assignment or subcontract without such written consent shall be void with respect to the County and no obligation on the County's part to the assignee shall arise, unless the County shall elect to accept and to consent to such assignment or subcontract.

9. **INDEMNIFICATION.** The Vendor or Subcontractor, where applicable, shall be responsible for, shall keep, save and hold the County of Gloucester harmless from, shall indemnify and shall defend the County of Gloucester against any claim, loss, liability, expense (specifically including but not limited to costs, counsel fees and/or experts' fees), or damage resulting from all mental or physical injuries or disabilities, including death, to employees or recipients of the Vendor's services or to any other persons, or from any damage to any property sustained in connection with this contract which results from any acts or omissions, including negligence or malpractice, of any of its officers, directors, employees, agents, servants or independent Vendors, or from the Vendor's failure to provide for the safety and protection of its employees, or from Vendor's performance or failure to perform pursuant to the terms and provisions of this Contract. The Vendor's liability under this agreement shall continue after the termination of this agreement with respect to any liability, loss, expense or damage resulting from acts occurring prior to termination.

10. **POLITICAL CONTRIBUTION DISCLOSURE AND PROHIBITION.** This contract has been awarded to Vendor based on the merits and abilities of Vendor to provide the goods or services described in this Contract. This contract was awarded through a non-competitive process pursuant to N.J.S.A. 19:44A-20.4 et seq. The signer of this Contract does hereby certify that Vendor, its subsidiaries, assigns or principals controlling in excess of 10% of the Vendor will not make a reportable contribution during the term of the contract to any political party committee in Gloucester County if a member of that political party is serving in an elective public office of Gloucester County when the contract is awarded, or to any candidate committee of any person serving in an elective public office of Gloucester County when the contract is awarded.

11. **INSURANCE.** Vendor shall, if applicable to the services to be provided, maintain general liability, automobile liability, business operations, builder's insurance and Workers' Compensation insurance in amounts, for the coverages, and with companies deemed satisfactory by County, and which shall be in compliance with any applicable requirements of the State of New Jersey. Vendor shall, simultaneously with the execution of this Contract, deliver certifications of said insurance to County, naming County as an additional insured.

If Vendor is a member of a profession that is subject to suit for professional malpractice, then Vendor shall maintain and continue in full force and effect an insurance policy for professional liability/malpractice with limits of liability acceptable to the County. Vendor shall, simultaneously with the execution of this Contract, and as a condition precedent to its taking effect, provide to County a copy of a certificate of insurance, verifying that said insurance is and will be in effect during the term of this Contract. The County shall review the certificate for sufficiency and compliance with this paragraph, and approval of said certificate and policy shall be necessary prior to this Contract taking effect. Vendor also hereby agrees to continue said policy in force and effect for the period of the applicable statute of limitations following the termination of this Contract and shall provide the County with copies of certificates of insurance as the certificates may be renewed during that period of time.

12. **SET-OFF.** Should Vendor either refuse or neglect to perform the service that Vendor is required to perform in accordance with the terms of this Contract, and if expense is incurred by County by reason of Vendor's failure to perform, then and in that event, such expense shall be deducted from any payment due to Vendor. Exercise of such set-off shall not operate to prevent County from pursuing any other remedy to which it may be entitled.

13. **PREVENTION OF PERFORMANCE BY COUNTY.** In the event that the County is prevented from performing this Contract by circumstances beyond its control, then any obligations owing by the County to the Vendor shall be suspended without liability for the period during which the County is so prevented.

14. **METHODS OF WORK.** Vendor agrees that in performing its work, it shall employ such methods or means as will not cause any interruption or interference with the operations of County or infringe on the rights of the public.

15. **NON-WAIVER.** The failure by the County to enforce any particular provision of this Contract, or to act upon a breach of this Contract by Vendor, shall not operate as or be construed as a waiver of any subsequent breach, nor a bar to any subsequent enforcement.

16. **PARTIAL INVALIDITY.** In the event that any provision of this Contract shall be or become invalid under any law or applicable regulation, such invalidity shall not affect the validity or enforceability of any other provision of this Contract.

17. **CHANGES.** This Contract may be modified by approved change orders, consistent with applicable laws, rules and regulations. The County, without invalidating this Contract, may order changes consisting of additions, deletions, and/or modifications, and the contract sum shall be adjusted accordingly. This Contract and the contract terms may be changed only by change order. The cost or credit to the County from change in this Contract shall be determined by

mutual agreement before executing the change involved.

18. NOTICES. Notices required by this Contract shall be effective upon mailing of notice by regular and certified mail to the addresses set forth above, or by personal service, or if such notice cannot be delivered or personally served, then by any procedure for notice pursuant to the Rules of Court of the State of New Jersey.

19. GOVERNING LAW, JURISDICTION AND VENUE. This agreement and all questions relating to its validity, interpretation, performance or enforcement shall be governed by and construed in accordance with the laws of the State of New Jersey. The parties each irrevocably agree that any dispute arising under, relating to, or in connection with, directly or indirectly, this agreement or related to any matter which is the subject of or incidental to this agreement (whether or not such claim is based upon breach of contract or tort) shall be subject to the exclusive jurisdiction and venue of the state and/or federal courts located in Gloucester County, New Jersey or the United States District Court, District of New Jersey, Camden, New Jersey. This provision is intended to be a "mandatory" forum selection clause and governed by and interpreted consistent with New Jersey law and each waives any objection based on forum non conveniens.

20. INDEPENDENT VENDOR STATUS. The parties acknowledge that Vendor is an independent Vendor and is not an agent of the County.

21. CONFLICT OF INTEREST. Vendor covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services pursuant to this Contract. The Company further covenants that in the performance of this Contract, no person having any such interest shall be employed.

22. CONFIDENTIALITY. Vendor agrees not to divulge or release any information, reports, or recommendations developed or obtained in connection with the performance of this Contract, during the term of this Contract, except to authorized County personnel or upon prior approval of the County.

23. BINDING EFFECT. This Contract shall be binding on the undersigned and their successors and assigns.

24. CONTRACT PARTS. This contract shall consist of this document and Vendor's Purchase Proposal Quote, dated August 17, 2022, attached hereto as Attachment A Ballot on Demand, Processing and Services Agreement, Sales Quotation # S1532, attached hereto as Attachment B. If there is a conflict between this Contract and the Vendor's Proposal and/or Ballot on Demand, Processing and Services Agreement, Sales Quotation # S1532, then this Contract shall control.

THIS CONTRACT shall be effective the 7th day of September, 2022.

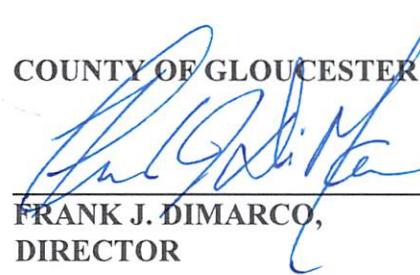
IN WITNESS WHEREOF, the County has caused this instrument to be signed by its Director and attested by the Board Clerk pursuant to a Resolution passed for that purpose, and

Vendor has caused this instrument to be signed by its properly authorized representative and its corporate seal affixed the day and year first above written.

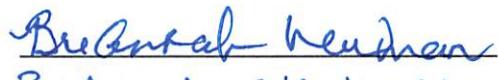
ATTEST:


LAURIE J. BURNS,
CLERK OF THE BOARD

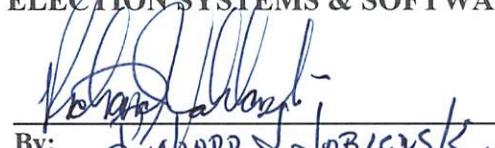
COUNTY OF GLOUCESTER


FRANK J. DIMARCO,
DIRECTOR

ATTEST:


BreAnnah Newman
Paralegal

ELECTION SYSTEMS & SOFTWARE, LLC


By: RICHARD Jabolcik
Title: VP of FINANCE

ATTACHMENT A

**ELECTION SYSTEMS & SOFTWARE, LLC
BALLOT ON DEMAND SYSTEM, PROCESSING AND SERVICES AGREEMENT
SALES QUOTATION #: S1532**

This Agreement is made as of the date it is executed by the last of the parties named below on the signature page (the "Effective Date").

BETWEEN: ELECTION SYSTEMS & SOFTWARE, LLC, a Delaware Limited Liability Company ("ES&S")

AND: GLOUCESTER COUNTY, NEW JERSEY ("Customer").

RECITALS:

A. ES&S is the owner of certain ballot printing equipment and software as set forth herein and Customer has agreed to purchase and license the ballot printing equipment and related software and services from ES&S for use in **Gloucester, New Jersey** (the "Jurisdiction"). The terms and conditions under which such equipment, software and services shall be provided are set forth in the **GENERAL TERMS** attached hereto and incorporated herein by reference.

B. The following Exhibits are incorporated into, and constitute an integral part of, this Agreement (check all that apply):

X Exhibit A (Pricing Summary)

X Exhibit B (Ballot on Demand Equipment, ES&S Software, and Services Description, Pricing and Fees)

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, each of the parties hereto:

- Agrees to the **GENERAL TERMS** and the terms and conditions set forth in each Exhibit attached hereto and incorporated herein.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the **State of New Jersey**, without regard to conflicts of law principles that would require the application of the laws of any other state.
- Represents and warrants to the other party that as of its signature below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, LLC
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: 402-970-1291

Signature

Name (Printed or Typed)

Title

Date

GLOUCESTER COUNTY, NEW JERSEY
1 N. Broad Street
Woodbury, NJ 08096
Fax No.: N/A

Signature

Frank J. DiMarco
Commission Director

Date

GENERAL TERMS
ARTICLE 1
DEFINITIONS

All capitalized terms used, but not otherwise defined, in these General Terms or in an Exhibit shall have the following meanings:

- a. "Documentation" means the operating instructions, user manuals or training materials for the ES&S Equipment and ES&S Software.
- b. "ES&S Software" means ES&S' proprietary Ballot on Demand software and all Updates delivered to Customer under this Agreement, unless licensed pursuant to a separate written agreement.
- c. "Ballot on Demand Equipment" means hardware and software manufactured and developed by parties other than ES&S. Ballot on Demand Equipment shall include, but not be limited to, any printers and laptop computers provided under this Agreement.

ARTICLE 2
SALE OF ES&S EQUIPMENT AND LICENSE OF ES&S SOFTWARE AND PAYMENT OF FEES

2.1 **Purchase Terms; Use.** Subject to the terms and conditions of this Agreement, ES&S agrees to sell, and Customer agrees to purchase, the Ballot on Demand Equipment and licenses to the ES&S Software described on Exhibit B. The payment terms are set forth on Exhibit A. Title to the Ballot on Demand Equipment shall pass to Customer when Customer has paid ES&S the total amount set forth on Exhibit A for the Ballot on Demand Equipment.

2.2 a. **Grant of Licenses.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer nonexclusive, nontransferable licenses for its bona fide full time, part time and temporary employees to use the ES&S Software described on Exhibit B and related Documentation supplied by ES&S. The licenses allow Customer to use (but not copy) the ES&S Software and the Documentation in the course of operating the ES&S Equipment and solely for the purposes of managing the printing of ballots in the Jurisdiction. The licenses granted in this Section 2.2 do not permit Customer to use the source code for the ES&S Software.

b. **Prohibited Uses.** Customer shall not take any of the following actions with respect to the ES&S Software or the Documentation:

i. Reverse engineer, decompile, disassemble, re-engineer or otherwise create, attempt to create, or permit, allow or assist others to create, the source code or the structural framework for part or all of the ES&S Software;

ii. Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software or Documentation, in whole or in part, to or by any third party, including, but not limited to, any transfer of possession to, or use of the ES&S Software or Documentation by any third party to perform any services for Customer (including, but not limited to, any ballot printing, coding, programming or ballot layout services) without ES&S's prior written consent; or

iii. Cause or permit any change to be made to the ES&S Software without ES&S' prior written consent; or

iv. Allow a third party to cause or permit any copying, reproduction or printing of any output generated by the Software (except ballots by ballot printers selected by Customer) in which ES&S owns or claims any proprietary intellectual property rights (e.g.,

copyright, trademark, patent pending or patent), including, but not limited to, any ballot shells or ballot code stock.

2.3 Term of Licenses. The licenses granted in Section 2.2 shall commence upon the delivery of the ES&S Software described in Section 2.2 and shall continue for the Initial Term of the Agreement (the "Initial License Term"). Upon expiration of the Initial License Term, the licenses shall automatically renew for an unlimited number of successive one-year periods (each a "License Renewal Term") upon the payment by Customer of the annual software license and software maintenance and support fee as set forth on Exhibit A. ES&S may terminate the license if Customer fails to pay the consideration due for, or breaches Sections 2.2, 2.5, or 3.6 with respect to, such license. Upon the termination of either of the licenses granted in Section 2.2 for ES&S Software or upon Customer's discontinuance of the use of any ES&S Software, Customer shall immediately return such ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

2.4 Updates. During the Initial License Term or any License Renewal Term, ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software, together with appropriate Documentation ("Updates"), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of Third-Party Items required to operate the Updates as well as the cost of any replacements, retrofits or modifications to the Ballot on Demand Equipment which may be necessary in order to operate the Updates. All Updates shall be deemed to be ES&S Software for purposes of this Agreement upon delivery. Customer may install the Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S will charge Customer at its then-current rates to (i) install the Updates to the Customer, (ii) train Customer on Updates, if such training is requested by Customer; or (iii) provide maintenance and support on the ES&S Software that is required as a result of Customer's failure to timely or properly install an Update. Notwithstanding the foregoing, Customer shall pay ES&S to install all election management software Updates. If applicable, Customer shall be responsible for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee which is caused by Customer's failure to install and use the most recent Update provided to it by ES&S. If Customer proposes changes in the ES&S Software to ES&S, such proposals will become ES&S' property. ES&S may, in its sole discretion, elect to make or not to make such changes without reference or compensation to Customer or any third party. ES&S represents to Customer that the Updates will comply with all applicable state law requirements at the time of delivery. Customer shall pay ES&S for any Update which is required due to a change in state or local law.

2.5 Fees

- a. Equipment Sale and Software License Fees.** The fees for the purchase of Ballot on Demand Equipment and License of ES&S Software are set forth on Exhibit A
- b. Election Set-Up Fee.** The per election fee for election set-up is set forth on Exhibit B.
- c. Pre-Election Services.** The fees for the optional Pre-Election Services are set forth on Exhibit B.

ARTICLE 3 MISCELLANEOUS

3.1 Term; Termination. This Agreement shall be effective for a **One (1) Year Period beginning on the Effective Date** (the "Initial Term"). The Initial Term shall automatically renew for an unlimited number of successive one-year period unless otherwise agreed to, in writing, by the parties (each a "Renewal Period"). The Initial Term and all Renewal Periods shall be collectively referred to herein as the "Term". The Term shall continue until this Agreement is terminated by the first to occur of (i) either party's election to terminate it upon the expiration of the Initial Term or any Renewal Period thereof, written notice of such election shall be given to the other party at least sixty (60) calendar days prior to the expiration

of the Initial Term or any Renewal Period; (ii) the date that is thirty (30) days after either party notifies the other that the other has materially breached this Agreement, and the breaching party fails to cure such breach within such thirty (30) day period, (except a breach as provided in (iv) below which will require no notice); (iii) the date which is thirty (30) days after ES&S notifies the Customer of ES&S intent to terminate the Agreement as a result of the Customer no longer utilizing ES&S' voter tabulation system with the Ballot On Demand printer purchased and licensed hereunder, or (iv) Customer's failure to make any payment due hereunder within thirty (30) days after it is due. In the event of early termination by ES&S due to (a) a breach of this Agreement by Customer, (b) Customer's failure to pay any amounts owed under this Agreement or (c) the failure of Customer to appropriate funds to make the payments due under this Agreement, Customer shall pay ES&S for all products delivered and services performed up through the effective date of termination. Upon termination of this Agreement, Customer shall immediately return all ES&S Software and Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

3.2 Delivery; Risk of Loss; Insurance. ES&S anticipates shipping the Ballot on Demand Equipment and ES&S Software identified on Exhibit B to Customer on or before the "Estimated Delivery Dates" listed on Exhibit A. The Estimated Delivery Dates are estimates and may only be established or revised, as applicable, by the parties, because of delays in executing this Agreement, changes requested by Customer, product availability and other events outside of ES&S's control. ES&S will notify Customer of such revisions as soon as ES&S becomes aware of such revisions. Risk of loss for the Ballot on Demand Equipment and ES&S Software shall pass to Customer when such items are delivered to Customer's designated location. Upon transfer of risk of loss to Customer, Customer shall be responsible for obtaining and maintaining sufficient casualty insurance on the Ballot on Demand Equipment and shall name ES&S as an additional insured thereunder and, at ES&S' request, shall deliver written evidence thereof to ES&S until all amounts payable to ES&S under this Agreement for Ballot on Demand Equipment and Software have been paid by Customer.

3.3 Warranty

a. ES&S Software. ES&S warrants for a one (1) year period for the ES&S Software (the "Warranty Period") it will repair any component of the ES&S Software which, while under normal use and service: fails to perform in accordance with its Documentation in all material respects. The Warranty Period will commence upon installation. If a defect or malfunction occurs in the ES&S Software while it is under normal use and service, Customer shall promptly notify ES&S, and ES&S or its authorized representatives shall use reasonable efforts to restore the Software to perform in accordance with its Documentation as soon as practicable. ES&S or its authorized representatives shall restore ES&S Software at a location as determined by ES&S in its sole discretion. If a defect or malfunction occurs in any ES&S Software as a result of (1) repairs, changes, modifications or alterations not authorized or approved by ES&S, (2) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S or (3) causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, floods riots, acts of war, terrorism or insurrection, government acts or orders; epidemics, pandemics or outbreak of communicable disease; quarantines; national or regional emergencies, labor disputes, transportation delays, governmental regulations, rodent infestation, and utility or communication interruptions, Customer shall pay ES&S for any maintenance services at ES&S' then-current rates, as well as for the cost of all parts used in connection with the performance of such maintenance services. Customer shall have access to ES&S Help Desk Support during the Warranty Periods. ES&S reserves the right to use third parties approved by ES&S to perform the warranty services hereunder.

b. Ballot on Demand Equipment.

i. Ballot on Demand Printer. ES&S shall provide a warranty to the Customer for the Ballot on Demand Printer ("Printer") in coordination with the manufacturer of the Printer that shall commence upon delivery and terminate upon the earlier of: (1) three

(3) years from the date of delivery (the "Maximum Coverage Period"), or (2) the end of the life of the fuser unit in the Printer. In the event that Customer desires to make a warranty claim prior to expiration of the Maximum Coverage Period, the parties shall determine if the warranty has expired by printing a printer settings sheet which displays the remaining life of the Printer's fuser unit. ES&S warrants during the Warranty Period it, in coordination with the manufacturer of the Printer, will replace a Printer which, while under normal use and service: (i) fails to perform in accordance with its Documentation in all material respects, or (ii) is defective in material or workmanship. The Warranty shall not include the repair or replacement of any Consumables as defined in Section 3.5 below. Any replaced Printer shall be warranted only for the unexpired term of the Warranty Period.

aa. Warranty Procedures. In the event of a potential warranty claim, Customer shall contact the ES&S Helpdesk to assess and diagnose Printer performance issues. In the event the Customer and ES&S Helpdesk are unable to resolve the issue, ES&S shall arrange for Customer to be provided with a replacement Printer. Upon receipt of the replacement Printer, Customer shall have seven (7) business days within which to return the malfunctioning Printer to the manufacturer. Customer shall be responsible for shipping and handling costs incurred in order to return the malfunctioning Printer to the manufacturer. If Customer fails to return the malfunctioning Printer within the specified timeframe, Customer shall be responsible for the cost of the replacement Printer and all shipping and handling costs for the replacement Printer. This warranty is effective provided that, (I) Customer cooperates with the ES&S Helpdesk to fully troubleshoot any defects related to the Printer, and (II) the Printer to be replaced is not damaged as a result of accident, theft, vandalism, neglect, abuse, use which is not in accordance with instructions or specifications furnished by ES&S or the manufacturer of the Printer or causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, floods, riots, acts of war, terrorism or insurrection, government acts or orders; epidemics, pandemics or outbreak of communicable disease; quarantines; national or regional emergencies, labor disputes, transportation delays, governmental regulations and utility or communication interruptions. This warranty is void for any units of equipment which: (i) have not been stored or operated in a temperature range according their specifications, (ii) have been severely handled so as to cause mechanical damage to the unit, or (iii) have been operated or handled in a manner inconsistent with reasonable treatment of an electronic product.

ii. Ballot on Demand Laptop Computer. ES&S shall provide a three (3) year warranty to the Customer in coordination with the manufacturer of the Ballot on Demand Laptop Computer ("Laptop") that shall commence upon delivery (the "Warranty Period"). ES&S warrants during the Warranty Period it, in coordination with the manufacturer, will repair or replace any component of the Laptop which, while under normal use and service: (i) fails to perform in accordance with its Documentation in all material respects, or (ii) is defective in material or workmanship. Any repaired or replaced item of Laptop shall be warranted only for the unexpired term of the Warranty Period. All replaced components of the Laptop become the property of ES&S. In the event that the Laptop fails to perform in accordance with its Documentation, Customer shall contact the ES&S Helpdesk to assess and diagnose any material defects. In the event the ES&S Helpdesk is unable to resolve the issue, ES&S will work with the Customer to return the item to ES&S, and ES&S will work in coordination with the Laptop manufacturer to repair and/or replace the Laptop. This warranty is effective provided that (I) Customer cooperates with the ES&S Helpdesk to fully troubleshoot any defects related to the Laptop, and (II) the Laptop to be replaced is not damaged as a result of accident, theft, vandalism, neglect, abuse, use

which is not in accordance with instructions or specifications furnished by ES&S or the manufacturer of the Laptop or causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, floods, riots, acts of war, terrorism or insurrection, government acts or orders; epidemics, pandemics or outbreak of communicable disease; quarantines; national or regional emergencies, labor disputes, transportation delays, governmental regulations and utility or communication interruptions. This warranty is void for any units of equipment which: (i) have not been stored or operated in a temperature range according to their specifications, (ii) have been severely handled so as to cause mechanical damage to the unit, or (iii) have been operated or handled in a manner inconsistent with reasonable treatment of an electronic product.

c. Exclusive Remedies/Disclaimer. IN THE EVENT OF A BREACH OF SUBSECTION 3.3(a), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

3.4 Consumables. Customer shall be responsible for the purchase, shipping and installation of all components that are consumed in the normal course of operating the Ballot on Demand Equipment, including, but not limited to, toner, drums, transfer belts, fusers, and ballot stock (collectively, "Consumables"). All Consumables shall meet ES&S' specifications and may be purchased directly from ES&S or from authorized dealers. In the event the Customer purchases Consumables which do not meet ES&S specifications, Customer shall be solely responsible for any and all costs, expenses, liabilities, losses and damages resulting from the Customer's failure to purchase Consumables which meet ES&S' specifications.

3.5 Limitation Of Liability. Neither party shall be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or relating to this Agreement. Neither party shall be liable for the other party's negligent or willful misconduct. ES&S' total liability to Customer arising out of or relating to this Agreement shall not exceed the aggregate amount to be paid to ES&S hereunder. By entering into this Agreement, Customer agrees to accept responsibility for (a) the selection of, use of and results obtained from any equipment, software or services not provided by ES&S and used with the Ballot on Demand Equipment or ES&S Software; or (b) errors that arise from mechanical or electronic component failures that are not covered under warranty or not subject to maintenance efforts or cure under this Agreement; or (c) user errors, voter errors or problems encountered by any individual in voting that are not otherwise a result of the failure of ES&S to perform its obligations under this Agreement.

3.6 Taxes; Interest. Customer shall provide ES&S with proof of its tax-exempt status. If Customer does not provide such proof, it shall pay, or shall reimburse ES&S for, all sales and use, excise or other similar taxes imposed on the transactions contemplated by this Agreement; provided, however, Customer shall in no event be liable for taxes imposed on or measured by ES&S' income. If Customer disputes the applicability of any tax to be paid pursuant to this Section 3.6, it shall pay the tax and may thereafter seek a refund. Any disputed or undisputed payment not paid by Customer to ES&S when due shall bear interest from the due date at a rate equal to the lesser of one and one-half percent (1.5%) per month or the maximum amount permitted by applicable law for each month or portion thereof during which it remains unpaid.

3.7 Proprietary Rights. Customer acknowledges and agrees as follows:

a. ES&S owns the ES&S Software, all Documentation and training materials provided by ES&S, and the format, layout, measurements, design and all other technical information associated with the ballots to be used with the Ballot on Demand Equipment. Customer has the

right to use the aforementioned items to the extent specified in this Agreement. ES&S also owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned items. The aforementioned items also contain confidential and proprietary trade secrets of ES&S that are protected by law and are of substantial value to ES&S.

b. Customer shall not cause or permit the adaptation, conversion, reverse engineering, disassembly or decompilation of any of the Ballot on Demand Equipment or ES&S Software.

c. Customer shall keep the ES&S Software and related Documentation free and clear of all claims, liens and encumbrances and shall maintain all copyright, trademark, patent or other intellectual or proprietary rights notices that are set forth on the Ballot on Demand Equipment, the ES&S Software, the Documentation, training materials and ballots that are provided, and all permitted copies of the foregoing.

3.8 Excusable Nonperformance. Except for obligations to make payments hereunder, if either party is delayed or prevented from performing its obligations under this Agreement as a result of any cause beyond its reasonable control, including acts of God, fire, floods, riots, acts of war, terrorism or insurrection, government acts or orders; epidemics, pandemics or outbreak of communicable disease; quarantines; national or regional emergencies, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent necessary to allow performance after the cause of delay has been removed. ES&S agrees to work with Customer, at Customer's request, to develop mutually agreeable alternatives in order to minimize the negative impact of any such delay.

3.9 Non-Appropriation of Funds. Customer represents, warrants, and covenants that it has appropriated, and will have appropriated, funds available necessary to pay the amounts due herein through the end of the Customer's current fiscal year, and that Customer shall use its best efforts to obtain and appropriate funds in order to pay all payments which shall be due in each year of this Agreement. In the event that funds are not appropriated or otherwise made available to support the continuation of performance by Customer hereunder in any subsequent fiscal period, this Agreement may be terminated by either party; provided, however, that this Section 3.9 shall not be construed so as to permit Customer to terminate this Agreement in order to acquire a ballot on demand system and/or related services from a third party. Either party may notify the other of the termination, which may occur no later than the beginning of the subsequent fiscal period. Upon termination, Customer shall pay ES&S for all services performed pursuant to this Agreement up to the date of termination and reasonable exit costs incurred by ES&S. The amount of such payment may be paid from any appropriations available for such purposes, and Customer's highest-ranking officer or official shall use his/her best efforts to timely and sufficiently request the appropriation necessary to pay such amount.

3.10 Assignment. Except in the case of a reorganization of the assets or operation of ES&S with one or more affiliates of ES&S or the sale, transfer or assignment of all or substantially all of the assets of ES&S to a successor who has asserted its intent to continue the business of ES&S, neither party may assign or transfer this Agreement or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld or conditioned, nor unduly delayed.

3.11 Notice. Any notice or other communication required or permitted hereunder shall be in writing, and will be deemed given when (a) delivered personally, (b) sent by confirmed email, (c) sent by confirmed fax, (d) sent by commercial overnight courier (with written verification of receipt) or (e) sent by registered or certified mail, return receipt requested, postage prepaid, when the return receipt is received. All communications shall be sent to the attention of the persons listed on the signature page to this Agreement and at the addresses, email address or fax numbers set forth on such signature page unless other names, addresses or fax numbers are provided by either or both parties in accordance herewith.

3.12 **Disputes.**

a. **Payment of Undisputed Amounts.** In the event of a dispute between the parties regarding (1) a product or service for which payment has not yet been made to ES&S, (2) the amount due ES&S for any product or service, or (3) the due date of any payment, Customer shall nevertheless pay to ES&S when due all undisputed amounts. Such payment shall not constitute a waiver by Customer or ES&S of any of its rights and remedies against the other party.

b. **Remedies for Past Due Undisputed Payments.** If any undisputed payment to ES&S is past due more than thirty (30) days, ES&S may suspend performance under this Agreement until such amount is paid.

3.14 **Entire Agreement.** This Agreement, including all exhibits hereto, shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and assigns. This Agreement, including all Exhibits hereto, contains the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior or contemporaneous discussions, negotiations, agreements or understandings between the parties, whether written or oral, regarding the subject matter hereof. Any provision of any purchase order, form or other agreement which conflicts with or is in addition to the provisions of this Agreement shall be of no force or effect. In the event of any conflict between a provision contained in an Exhibit to this Agreement and these General Terms, the provision contained in the Exhibit shall control. No waiver, amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No consent by either party to, or waiver of, a breach by either party shall constitute a consent to or waiver of any other different or subsequent breach by either party. ES&S is providing Ballot on Demand Equipment, ES&S Software and services to Customer as an independent contractor, and shall not be deemed to be a "state actor" for purposes of 42 U.S.C. § 1983. ES&S may engage subcontractors to provide certain of the Ballot on Demand Equipment, ES&S Software or services, but shall remain fully responsible for such performance. The provisions of Article 2 and Sections 3.6-3.14 of these General Terms shall survive the termination of this Agreement, to the extent applicable.

[END OF GENERAL TERMS]

EXHIBIT A
PRICING SUMMARY

<u>Sale Summary:</u>		
Description	Refer to	Amount
Ballot on Demand Equipment, ES&S Software, and Services	Exhibit B	\$24,920.00
Shipping & Handling		\$975.00
Total Sale:		\$25,895.00
Election Set Up Fees and Optional Pre-Election Services are not included in Total Sale. Please see <u>Exhibit B</u> for Election Set-Up Fees and Optional Pre-Election Services Fees and Payment Terms.		
<u>Terms & Conditions:</u>		
<p>Note 1: Pursuant to Section 3.6, any applicable state and local taxes are not included, and are the responsibility of Customer. Premium or rush transportation services incurred in connection with deliverables included in the Total Sale are additive and will be billed as incurred.</p> <p>Note 2: Invoicing and Payment Terms are as Follows:</p> <p>\$25,895.00 to be invoiced upon delivery of the Ballot on Demand Printing System. Invoice is due net 30 from invoice date.</p> <p>All other Service Fees are set forth on <u>Exhibit B</u> and are due within thirty (30) days of Customer's receipt of ES&S' invoice.</p>		
<u>Ongoing Services:</u>		
Description	Annual Fee – First Renewal Period	
Software License, Maintenance & Support Services:		
- Ballot On Demand Software Fees (See <u>Exhibit B</u> for descriptions). Fees for any License Renewal Term will be increased at a rate not to exceed more than 10% of the previously paid fee.	\$2,970.00	
<p>Fees reflect a one-year term.</p> <p>Payment is due as set forth above and at the start of each Renewal Period.</p>		

EXHIBIT B
**BALLOT ON DEMAND EQUIPMENT, ES&S SOFTWARE, AND SERVICES DESCRIPTION,
 PRICING AND FEES**

QUANTITY	DESCRIPTION	TOTAL PRICE
Ballot on Demand Hardware		
3	Compact Color Printer with Firmware	\$3,390.00
3	Laptop Computer with Router	\$4,440.00
Software		
X	Ballot on Demand 1-Year Software Licenses Including the Following Features:	
3	- Single and Multiple Request Capability	\$13,500.00
Election Services		
X	Ballot on Demand Installation	\$1,795.00
1	Ballot on Demand Training Day	\$1,795.00
	TOTAL PURCHASE:	\$24,920.00

ELECTION SET-UP FEES
(Subject to change after the Initial Term)

Initial Election Set-Up Fee per Election Event	
Black and White Ballot Set-Up:	
\$450.00 per election set-up + \$1.00 per unique PDF for first Computer	
\$75.00 for each additional Computer set-up	
Color Ballot Set-Up:	
\$550.00 per election set-up + \$1.00 per unique PDF for first Computer	
\$75.00 for each additional Computer set-up	
Rework of Set-Up due to Customer Changes After Initial Set-Up is Complete:	
\$175.00 per change event for first Computer set-up	
\$75.00 for each additional Computer set-up	
Other:	
\$350.00 fee for L&A Test Deck Creation	
On-Site Set-Up: \$1,795.00 per person, per day	

Election Set-Up Fees are due within thirty (30) days of receipt of ES&S invoice.

OPTIONAL PRE-ELECTION SERVICES FEES

Upon request by the Customer and the payment of the associated fees, ES&S shall provide the following services to the Customer ("Pre-Election Services")

DESCRIPTION	SERVICE FEE PER DAY
Printer Cleaning, Pre-Election Testing, Roller Replacement, Parts Inspection, Ballot-Folder Adjustment/Testing and Onsite Assistance with Print-Alignment, Clearing Jams and other Hardware Adjustments.	\$1,795.00 Per Person Per Day for the Initial Term

Optional Pre-Election Services Fees are due within thirty (30) days of receipt of ES&S invoice.

ES&S reserves the right to increase the fees set forth herein at the beginning of each Renewal Period.