

RESOLUTION

Approving Contract No. CE0800541-01 on RQ12233 by and between the Board of County Commissioners of Cuyahoga County, Ohio and Election Systems & Software, Inc. in the amount not-to-exceed \$13,417,315.00 for lease and purchase of precinct optical and digital scan voting machines, related equipment and services for Board of Elections for the period July 10, 2008 through July 9, 2013; authorizing Peter Lawson Jones to sign said contract on behalf of the Board of County Commissioners.

BE IT RESOLVED by the Board of County Commissioners of Cuyahoga County, Ohio, that Contract No. CE0800541-01 on RQ12233 by and between said Board and Election Systems & Software, Inc. in the amount not-to-exceed \$13,417,315.00 for lease and purchase of precinct optical and digital scan voting machines, related equipment and services for Board of Elections for the period July 10, 2008 through July 9, 2013 be, and the same is, hereby approved.

BE IT FURTHER RESOLVED that Peter Lawson Jones be, and he is, hereby authorized to sign said contract on behalf of the Board of County Commissioners.

BE IT FURTHER RESOLVED that the Clerk of the Board be, and she is, hereby instructed to transmit a copy of this resolution together with the executed contract to the Deputy County Auditor; one copy of each to Cheryl Kinzig, Senior Contract Coordinator, Office of the Clerk of the Board; two copies of each to Jane Platten, Director, Board of Elections, with instructions to forward one complete set to Election Systems & Software, Inc. and one copy of this resolution to Michael Kochan, Purchasing Manager, Office of Procurement & Diversity.

On Motion of Commissioner Hagan, seconded by Commissioner Dimora, the foregoing resolution was duly adopted.

Ayes: Hagan, Dimora.

Nays: Jones.

Resolution Adopted.

Jeanne M. Schmotzer,
Clerk of the Board

Journal 299
July 10, 2008
083160
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CONTRACT
ENCLOSURE NO. 101-0101



COMMISSIONERS

James G. Baker
Theresa E. Patten
Patsy Lawson Jones

CONTRACT
101-0101

FOR

Lease and purchase of precinct optical and
digital scanning machines, related equipment and services

TIME PERIOD: 7/10/2008-7/9/2013

CONTRACTOR: Election Systems & Software, Inc.

FEDERAL ID: 47-0617567

ADDRESS: 11203 John Galt Boulevard,
Owasso, NE 68437

CONTRACT
PRICE: \$13,417,315.00

**CUYAHOGA COUNTY
VOTER SYSTEM AND SERVICES AGREEMENT**

This Agreement is made as of the date it is executed by the last of the parties named below (the "Effective Date"), between Election Systems & Software, Inc., a Delaware corporation with its principal place of business at 11208 John Galt Boulevard, Omaha, NE 68137 ("Vendor") and Cuyahoga County Board of Commissioners ("County").

RECITALS:

Whereas, County wishes to obtain voter tabulation equipment and related software, documentation and services from Vendor for use in Cuyahoga County, Ohio (the "Jurisdiction"),

Whereas, Vendor has agreed to provide such equipment, software and service to County for use in the Jurisdiction,

Whereas, this Agreement sets forth the terms and conditions under which Vendor will provide such equipment, software and services to County,

Whereas, the following Exhibits are incorporated into, and constitute an integral part of, this Agreement:

Exhibit A-1 (Pricing Summary)

Exhibit A-2 (Performance Guarantee)

Exhibit B (Vendor Equipment Description)

Exhibit C (Vendor Software Description)

Exhibit D (Third Party Items)

Exhibit E (Vendor Services)

Exhibit F (Vendor Maintenance and Support)

Exhibit G (Acceptance Testing)

Exhibit H (Certificate of Acceptance)

Exhibit I (Request for Proposal and Addendums Thereto)

Exhibit J (November 4, 2008 General Election Ballot Profile)

Whereas, Vendor and County acknowledge that they have read this Agreement, understand it and intend to be bound by it,

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Vendor and County agree to the following terms and conditions:

1. **Definitions.** All capitalized terms used, but not otherwise defined, in this Agreement or in an Exhibit to this Agreement shall have the following meanings:
 - 1.1 "Acceptance Testing" means the testing described in Exhibit G.
 - 1.2 "Performance Guaranty" means Vendor's guaranty of delivery and performance of Vendor System and in the payment terms contained in Exhibit A-2.
 - 1.3 "Request for Proposal" means the Request for Proposal released by the County on May 6, 2008, and all Addenda to the Request for Proposal, attached hereto as Exhibit I.
 - 1.4 "Term of the Agreement" means the term commencing upon the Effective Date and continuing for a period of five (5) years from the Effective Date, or until the Agreement is terminated, whichever is sooner, except as provided in Section 8.8 of this Agreement.
 - 1.5 "Third Party Items" means the items described on Exhibit D.
 - 1.6 "Vendor Documentation" means any technical specifications, descriptions of functionality, operating instructions, user manuals or training materials provided by Vendor in the Vendor's Response to Request for Proposal, and as delivered to the County at the time of delivery of the Vendor System.
 - 1.7 "Vendor Equipment" means the items described in Exhibit B, including as repaired or replaced over time.
 - 1.8 "Vendor Maintenance and Support" means the services described on Exhibit F.
 - 1.9 "Vendor's Response to Request for Proposal" means Vendor's response and/or any supplemental or amended response(s) to the Request for Proposal, as well as any response by Vendor to any request by County for additional information.
 - 1.10 "Vendor Software" means the items described in Exhibit C and any Updates, Add-Ons and New Products.
 - 1.11 "Vendor Services" means the services described on Exhibit E.
 - 1.12 "Vendor System" means collectively, the Vendor Equipment and Vendor Software, as may be augmented and modified by the Vendor Services and Vendor Maintenance and Support.

2. **Vendor Equipment.** Subject to the terms and conditions of this Agreement, Vendor will provide to County the Vendor Equipment described on Exhibit B. The fees, payment terms and Performance Guarantees associated with the Vendor Equipment are set forth on Exhibit A-1 and Exhibit A-2.

3. **Vendor Software and Vendor Software Documentation.**

3.1 **Grant of License.**

3.1 (a) **In General.** Subject to the terms and conditions of this Agreement, Vendor grants to County a nonexclusive, nontransferable, perpetual, irrevocable license to use the Vendor Software and Vendor Documentation in connection with the Vendor Equipment for purposes, *inter alia*, of defining and conducting elections, tabulating and reporting election results and undertaking all other activities (including, e.g., testing, training, security assessments and the like) that the County deems necessary to support same. The licenses granted in this Section 3.1(a) permit County to use the source code for the Vendor Software as provided in Section 3.3 of this Agreement.

3.1 (b) **Definition of Use.** For purposes of this Agreement, the term “Use” shall include the right to display, copy or utilize all or any portion of the Vendor Software and the right to retain and consult the Vendor Documentation. The Vendor Documentation shall be adequate to allow County to Use the Vendor Software to the fullest extent permitted by this Agreement. Except as otherwise contemplated herein, County’s right to Use the Vendor Software and the Vendor Documentation shall not include the right to do any of the following:

3.1 (b)(i) Copy, in whole or in part, any Vendor Software, any Tangible Media or any Vendor Documentation, except for backup and archive purposes, training of County’s employees, agents, and representatives and for purposes of allowing review, evaluation, and audit of the Vendor System, subject to such third party’s execution of a confidentiality agreement approved by the Vendor;

3.1 (b)(ii) Reverse engineer, decompile, disassemble, re-engineer or otherwise create or attempt to create or permit, allow or assist others to create the source code for the Vendor Software;

3.1 (b)(iii) Transfer of possession or sublicense or other dissemination of the Vendor Software or the Vendor Documentation to any third party, without Vendor’s consent, with the exception that use, display, publication and copying of Vendor Documentation shall be permitted with regard to training of

County's employees, agents, and representatives in connection with any election, and for purposes of allowing review, evaluation, and audit of the Vendor System in connection with any election by third party governmental agencies, universities, and advocacy groups; subject to such third party's execution of a confidentiality agreement approved by the Vendor; or

3.1 (b)(iv) Modify or change the Vendor Software without Vendor's consent.

3.2 **Fees.** The fees and Performance Guarantees for the Vendor Software and Vendor Documentation are set forth on Exhibit A-1 and Exhibit A-2.

3.3 **Source Code.** Vendor has placed the source code for the Vendor Software in escrow with its independent third party escrow agent and will likewise place in escrow the source code for all Updates, Add-Ons and New Products (as defined in Section 3.4 below) provided to County. Vendor represents and warrants to County that the source code deposited with the escrow agent is and for the Term of the Agreement will be the source code version of the current release of Vendor Software being used by County. Should Vendor cease operations and become unable or unwilling to maintain and support any of the Vendor Software, Updates, Add-Ons or New Products provided to County while under an obligation to do so, County may obtain the source code for same for the purpose of enabling its continued use of same. As a condition precedent to the payment by County of the Invoicing Milestone for Delivery of the Leased M100 Voting Units and Additional Hardware, Vendor shall either 1) enter into a separate third party escrow agreement with County, in form satisfactory to County, or 2) register County as a licensee and express third party beneficiary of the existing escrow agreement dated August 16, 2002 ("Escrow Agreement") with the third party escrow agent Iron Mountain, and cause said third party escrow agent to provide written confirmation of said registration to County. Notwithstanding any term in the Escrow Agreement to the contrary: (i) any dispute arising between ES&S and County regarding the right of County to the Source Code under the Escrow Agreement shall be subject to the laws of the State of Ohio, not the laws of the State of California as contained in section 7.4 of the Escrow Agreement; (ii) ES&S will pay all costs of copying charged by Iron Mountain for providing copies of the Source Code to County; (iii) ES&S will update the Source Code pertaining to this Agreement deposited with Iron Mountain within thirty (30) days of a release of a new version of the product instead of sixty (60) days as set forth in section 1.7 of the Escrow Agreement; (iv) ES&S shall make all payments to Iron Mountain in a timely manner pursuant to the terms of the Escrow Agreement, the failure of which may be deemed a material breach of this Agreement by County, subject to termination of this Agreement by the County; and (v) ES&S shall indemnify, defend, and hold County harmless from any liability to Iron Mountain pursuant to section 7.2 ("Indemnification"), 8.6 ("Regulations"), and 8.7 ("Attorneys Fees") of the Escrow Agreement.

3.4 **Updates, Add-Ons and New Products.**

3.4 (a) **Updates.** During the first year following the Effective Date, Vendor shall provide at no cost to County, new releases, upgrades or maintenance patches to the Vendor Software, together with appropriate Vendor Documentation ("Updates"), on a schedule defined by Vendor. Thereafter, Updates shall be provided subject to the terms set forth in Exhibit F. All Updates shall be deemed to be Vendor Software for purposes of this Agreement upon delivery. County may install the Updates in accordance with Vendor's recommended instructions or may request that Vendor install the Updates. If County proposes changes in the Vendor Software to Vendor, Vendor may, in its sole discretion, elect to make or not to make such changes.

3.4 (b) **Add-Ons and New Products.** From time to time, Vendor may offer to County new features that can be added on to the Vendor Software ("Add-Ons") or new software products ("New Products"). County may elect to license an Add-On or New Product upon mutually acceptable terms. Unless any such license is effectuated pursuant to a separate license agreement, the Add-On or New Product shall be deemed to be part of the Vendor Software. Except as otherwise provided, each Add-On or New Product that is deemed to be part of the Vendor Software will be covered by the warranties set forth in this Agreement.

4. **Certification.** All Vendor Equipment and Vendor Software provided hereunder will be and will remain properly certified (under applicable federal, state and county certification or approval standards) during the Term of the Agreement. Vendor will bear any expenses or costs of re-certification. The parties agree that any changes to the Vendor Software shall be only those that are technologically feasible and commercially reasonable.

County shall be responsible for the cost of any replacements, retrofits or modifications to the Vendor Equipment contracted for herein as well as the cost of any third party items that Vendor notifies County are hereinafter required in order for the Vendor Equipment and/or Vendor Software to remain compliant and certified.

5. **Shipment; Acceptance Testing and Risk of Loss.** Vendor will ship the Vendor Equipment and Vendor Software to County on or before a date mutually agreed upon by Vendor and County (see Exhibit A-2), and risk of loss with respect to the Vendor Equipment and Vendor Software shall pass to County when such items are delivered to County's designated location and accepted as outlined in Exhibit G. County shall conduct and complete the Acceptance Testing in accordance with the Acceptance Testing Criteria set forth on Exhibit G when and as prescribed in Exhibit G promptly in order to assist Vendor in meeting the October 1, 2008 deadline set forth in Exhibit A-2. County shall be permitted to oversee and/or observe the Acceptance Testing. Upon satisfactory completion

of the Acceptance Testing, representatives of both parties will execute the "Certificate of Acceptance" included as Exhibit H and County shall thereafter deliver such executed Certificates of Acceptance to Vendor's project manager.

6. **Services.** Subject to the terms and conditions of this Agreement, Vendor agrees to provide to County the Vendor Services described in Exhibit E. The fees for the Vendor Services are set forth on Exhibit A-1.

7. **Maintenance.** Subject to the terms and conditions of this Agreement, the parties agree that in the event the County elects to subscribe to Vendor-provided Maintenance and Support Services, the contract for Vendor Maintenance and Support Services contained in Exhibit F shall serve as the contract governing the provision of Vendor Maintenance and Support Services by Vendor for Vendor Equipment and Vendor Software, (including Vendor firmware), and shall be entered into one year after the delivery and acceptance of the applicable Vendor Equipment and Vendor Software purchased by the County. The fees for the Vendor Maintenance and Support Services are as set forth in Section 4 of Exhibit E, and in the table to be attached to Exhibit F which shall be created by agreement of the parties, and which shall set forth the applicable maintenance contract commencement dates, terms, and fees with regard to each category of Vendor Equipment delivered and accepted. The fees for Vendor Maintenance and Support Services shall reflect a credit to the County in the amount of \$122,500 for each of the first four (4) one-year terms of the maintenance contract. Vendor agrees that if the County elects to renew the contract for Maintenance and Support Services, it will continue to maintain and support Vendor Equipment and Vendor Software for a minimum of ten (10) years following the Effective Date so long as the County is subscribing and paying for Maintenance and Support Services. Maintenance and Support services shall supplement and be addition to the provisions of the Warranties contained in Paragraph 8 of this Agreement.

8. **Warranties.**

8.1 Vendor hereby acknowledges and agrees that Vendor is aware of the election process in the Jurisdiction, including its size, locations, ballot requirements, complexity, and the like. Without limitation to the foregoing, Vendor further acknowledges and agrees that it is aware of the information set forth in the Request for Proposal, attached as Exhibit I.

8.2 Further, Vendor acknowledges and agrees that County is relying on Vendor's expertise in election voting systems and on its express warranties regarding the Vendor System.

8.3 Accordingly, Vendor warrants that Vendor System: i) is fit for the County's purposes as set forth in the Request for Proposal; ii) will accurately, properly and timely perform the reading and tabulation of ballots, and perform all other functions referenced in the Request for Proposal; (iii) The Vendor's System, as of

the Effective Date of the Agreement, is in compliance with all federal and state laws and applicable regulations, orders and other directives issued by the Ohio Secretary of State; (iv) will perform at or above the standards of the industry and in accordance with all Vendor Documentation and in accordance with the specifications described in Vendor's Response to the Request for Proposal; (v) will not contain viruses or other malicious code or pre-programmed devices which will cause any software, equipment or data possessed or utilized by the County to become inoperable or compromised or be erased, nor permit access to any such software, equipment or data by any unauthorized party; and (vi) will be free from defects in material and workmanship under use and service as contemplated by the Request for Proposal.

8.4 Vendor also warrants that the Vendor System will operate satisfactorily in conjunction with the Third Party Items set forth on Exhibit D and County's existing voter registration equipment and software, provided that Vendor is not responsible for any non-conformance with such warranty to the extent caused by (i) County's unreasonable failure to follow Vendor's written express instructions to install and use an authorized software update or patch in order to avoid such non-conformance, (ii) County's material change to County's voter registration equipment, except by or in accordance with instructions from or following acknowledgement by Vendor or its contractors, or (iii) the failure of Third Party Items and County's existing voter registration equipment and software to perform in accordance with their own specifications and documentation in all material respects.

8.5 Vendor further warrants that all Vendor Services and Vendor Maintenance and Support will be provided by properly trained and qualified personnel in a timely and professional manner and in accordance with the standards of the industry and with the Vendor's Documentation, including without limitation, as set forth in Vendor's Response to the Request for Proposal.

8.6 Vendor further warrants: i) that Vendor possesses all right and authority necessary to enter into this Agreement; ii) that it owns the Vendor Equipment, Vendor Documentation and Vendor Software and all proprietary rights therein or has the right to provide the Vendor Equipment, Vendor Documentation and Vendor Software to County; iii) that none of the representations, warranties and obligations herein conflict with or violate any legal or contractual right of any third party; and iv) that to the best of Vendor's knowledge, the Vendor Equipment, Vendor Documentation and Vendor Software and County's use thereof does not and will not misappropriate, infringe or result in infringement of any patent, copyright, trademark, trade secret or other proprietary right of any third party.

8.7 In the event of any breach of any of the warranties under this Agreement, and in addition to any other remedy or relief to which County may be entitled in law or in equity (including indemnification), Vendor shall, in a timely manner, so as to permit appropriate training, deployment and use in testing activities and all elections, at County's sole option and at Vendor's sole expense: (i) repair or

replace the Vendor Equipment or the Vendor Software; or (ii) refund to County all amounts paid to Vendor on a pro-rated, straight-line basis based on a ten (10) year straight-line depreciation period and reimburse all of County's expenses resulting therefrom. All replaced Vendor Equipment or parts thereof will become the property of Vendor on an exchange basis.

8.8 The warranties set forth herein shall apply for a minimum of five years from the Effective Date and thereafter for so long as County obtains Vendor Maintenance and Support; provided the County obtains and pays for such Vendor Maintenance and Support Services for each of the four (4) ensuing years beginning one year after the delivery and acceptance of the applicable Vendor Equipment and Vendor Software.

8.9 The warranties set forth herein are expressly made applicable to the November 4, 2008 General Election and all other elections during period set forth in Section 8.8. Vendor hereby acknowledges and agrees that it is aware of the ballot requirements set forth in the November 4, 2008 General Election Ballot Profile attached as Exhibit J hereto.

9. **Remedies.** County's remedies under this Agreement shall be cumulative and non-exclusive of each other, and County shall be entitled to seek any other rights to which it may be entitled at law or in equity, and such remedies may be pursued by County separately or concurrently as County determines.
10. **Reimbursement.** Notwithstanding any other provision of this Agreement but subject to the limitation of liability provision contained in Section 13 hereof, Vendor will reimburse County for any loss, damage, cost or expense arising from any negligent, reckless or willful act or omission of Vendor or any act or omission which constitutes a breach of this Agreement or violation of any applicable law.
11. **Indemnity by Vendor.**

11.1 Vendor shall indemnify and hold harmless and, at County's option, defend or pay for an attorney selected by County to defend, County, its employees, officers, servants, and agents, from and against any and all damage, liability, claims, losses, actions, judgments, expenditures and expenses, based upon or arising out of injuries, to include death resulting therefrom, or damages to persons or property (including loss of data) caused by or sustained in connection with the performance of this Agreement arising from the acts, errors or omissions of Vendor, its employees, agents, servants, or officers. The provisions of this Section shall survive the termination or expiration of this Agreement. To the extent considered necessary by the County, any sums due Vendor under this Agreement may be retained by County until all of County's claims for indemnification pursuant to this Agreement have been settled or otherwise resolved.

11.2 County shall notify Vendor as soon as reasonably possible if it becomes aware of any claim for which it may be entitled to indemnification under this Section 11, and if County chooses to have Vendor defend, County hereby gives Vendor the necessary authority, and shall provide such information and assistance as is reasonably necessary (at Vendor's expense with respect to reasonable out-of-pocket costs and reasonable attorney's fees) to enable Vendor to defend, compromise or settle such claim; provided that, Vendor will consult and share all relevant information with County in connection with all stages of such defense, compromise or settlement.

11.3 Vendor will indemnify, defend, and hold County, its employees, officers, servants, and agents, harmless from and against any and all damages, amounts paid in settlement and reasonable fees and costs (including reasonable attorneys' fees) (collectively "Adverse Consequences") arising out of or relating to a claim that any part of the Vendor System or Vendor Documentation infringes upon any third party's copyright, trademark, service mark, trade secret, patent, or other claimed third party proprietary rights, existing as of the date hereof (a "Third Party Infringement Claim"). Vendor represents that no Third Party Infringement Claims, other than those previously disclosed to County, are outstanding or have been threatened as of the Effective Date of this Agreement. County shall notify Vendor promptly if it becomes aware of any Third Party Infringement Claim. County hereby gives Vendor the necessary authority, and shall provide such information and assistance as is necessary (at Vendor's expense with respect to reasonable out-of-pocket costs), to enable Vendor to defend, compromise or settle a Third Party Infringement Claim; provided that, Vendor will consult and share all relevant information with County in connection with all stages of such defense, compromise or settlement. In addition, if County is prevented by a Third Party Infringement Claim from using any part of the Vendor System or Vendor Documentation in substantially the manner contemplated by this Agreement, Vendor, at County's sole option and Vendor's sole expense, shall procure for County the right to continue such use or shall replace or modify the infringing item. If neither option is commercially reasonable, Vendor may direct County to cease use of the infringing item, and County shall cease and desist from any further use thereof and return the infringing item to Vendor at Vendor's expense; provided, however, that if loss of the infringing item results in any breach of Vendor's warranties herein, or causes the Vendor System to fail to (i) perform in accordance with any applicable Vendor Documentation, (ii) be compliant with all applicable federal and state election laws and regulations, or (iii) remain certified by the appropriate state and federal authorities for use in the Jurisdiction, and Vendor is unable, despite its best efforts, to modify the Vendor System to resolve such failures, then County may terminate the Agreement and, in addition to any other remedies available to County, Vendor shall refund on a pro-rated straight line basis based on a ten (10) year depreciation period for the full amount paid by County to Vendor under this Agreement as set forth on the Invoicing Milestone Table on Exhibit A-1.

12. Indemnification by County. INTENTIONALLY OMITTED.

13. **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. Except for such liability as may arise for personal injury, property damage or liability which may arise under Section 11.3, and provided that nothing herein shall serve as a waiver of governmental immunity by County for acts or omissions to which sovereign immunity applies or shall be construed as consent by County to be sued by third parties in any matter arising out of any contract or this Agreement, the total liability of either party under this Agreement shall not exceed two (2) times the total amount of fees payable under this Agreement by County to Vendor.
14. **Annual or Recurring Fees.** Any annual or recurring fee due by County under this Agreement shall not increase from one year to the next by more than the lesser of (i) three percent (3%) and (ii) the previous year's Consumer Price Index (for the Cleveland-Akron, Ohio CMSA).
15. **Most Favored County Status.** With regard to pricing, Vendor will provide the Vendor Equipment, Vendor Software, Vendor Services and Vendor Maintenance and Support to County as a most favored County ("MFC") as provided in Exhibit A-1. **MFC** means a County of Vendor who receives pricing that is at least as favorable as those received by any other County(s) of Vendor. Vendor will provide MFC status to County with respect to pricing for the twenty-four (24) month period prior to the Effective Date and the twelve (12) month period after the Effective Date. Vendor agrees it will certify annually County's MFC status. For the purposes of MFC pricing, the Vendor's price shall be the gross unit price net of applicable discounts; such discount being pro-rated over all goods and services provided under the Agreement for the period. In the event Vendor offers to another party a more favorable price than those contained in this Agreement and Exhibits, Vendor will notify County and propose an appropriate adjustment to the terms of this Agreement in order to preserve County's MFC status. Such adjustment will be subject to good faith negotiation by County and Vendor.
16. **Performance Bond.** The Performance Bond amount for the first year of the Agreement shall be equal to the face amount of 6 million dollars. The amount of the Performance Bond shall be reduced to a face amount of 2.5 million dollars for the second, third, fourth, and fifth years of this Agreement.
17. **Taxes; Interest.** County shall provide Vendor with proof of its tax-exempt status. If County is not tax-exempt or loses its tax-exempt status, it shall pay, or shall reimburse Vendor for, all sales and use, excise or other similar taxes imposed on the transactions contemplated by this Agreement; provided, however, County shall in no event be liable for taxes imposed on or measured by Vendor's income. Vendor shall be responsible for asserting County's tax-exempt status when possible to avoid tax liability chargeable to County.

18. Proprietary Rights.

18.1 Vendor owns the Vendor Software and Vendor Documentation. County has the right to use the aforementioned items as provided in this Agreement. Vendor also owns all patents, trade secrets, trademarks, copyrights, trade names and other proprietary rights or intellectual property in, or used in connection with the Vendor System and Vendor Documentation. Notwithstanding the foregoing, County shall be permitted to release the Vendor Software, Vendor Documentation and information to the extent necessary for training of County's employees, agents, and representatives in connection with any election, and for purposes of allowing review, evaluation, and audit of the Vendor System in connection with any election by third party governmental agencies, universities, and advocacy groups.

18.2 County shall not knowingly cause or permit the adaptation, conversion, reverse engineering, disassembly or decompilation of any of the Vendor Equipment or Vendor Software.

18.3 County shall employ commercially reasonable efforts to keep the Vendor Software and Vendor 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 Vendor Equipment, Vendor Software, and Vendor Documentation, and all permitted copies of the foregoing.

19. Excusable Nonperformance.

19.1 If either party is delayed or prevented from performing its obligations under this Agreement as a result of God, fire, riots, acts of war, terrorism or insurrection, the delay shall be excused during the continuance of, but solely 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. Vendor agrees to employ its best efforts, at County's request, to identify or develop alternative solutions in order to minimize the negative impact of any such delay.

19.2 In the event that a court of competent jurisdiction enters an order prohibiting or otherwise delaying the performance of this Agreement by either party, such party shall be excused from performing during the period of enforcement thereof until such order is no longer in effect, whether through expiration, cancellation, rescission or is otherwise overturned by an appellate court of competent jurisdiction.

20. Termination.

20.1 This Agreement may be terminated by County:

- 20.1 (a) If Vendor breaches a material provision hereof and does not cure such breach within 30 days after it receives notification thereof from County;
- 20.1 (b) If Vendor is in breach of any material provision hereof at a time and in a matter reasonably determined by the County to threaten the successful completion of any election, provided that County has first given Vendor notification of the breach and Vendor does not cure the breach within seven (7) business days after it receives such notification; or
- 20.1 (c) For convenience, any time after July 1, 2009, upon 30 days' written notice to Vendor.
21. **Assignment.** 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 shall not be unreasonably withheld, conditioned, nor unduly delayed. Vendor may assign its right to receive payments under this Agreement to such third party(ies) as Vendor may desire without the prior consent of County, provided that Vendor provides written notice (including evidence of such assignment) to County at least sixty (60) days in advance of any payment(s) so assigned.
22. **Entire Agreement.** This Agreement, including all Exhibits hereto (all of which are incorporated herein by this reference), 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. In the event of any conflict between a provision contained in an Exhibit to this Agreement and a provision contained in this Agreement, the provision contained in the Agreement 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.
23. **Severability.** If any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, the remaining provisions of this Agreement shall remain in full force and effect. The unenforceable or invalid provision shall be changed and interpreted so as to best accomplish the objectives of such provision within the limits of applicable law or applicable court decisions.
24. **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 fax, (c) sent by commercial overnight courier (with written verification of receipt) or (d) 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 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.

25. **Counterparts; Execution By Facsimile.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument. The parties may execute this Agreement and exchange counterparts of the signature pages by means of facsimile transmission, and the receipt of such executed counterparts by facsimile transmission shall be binding on the parties. Following such exchange, the parties shall promptly exchange original versions of such signature pages.
26. **Authority and Enforceability.** Each party represents and warrants to the other party that as of the Effective Date of this Agreement, it has full power and all necessary legal authority to enter into and perform this Agreement in accordance with its terms; that it has obtained all requisite approvals by any governing boards, commissions or other necessary bodies; and that the individual signing this Agreement on its behalf has been properly authorized and has the full legal authority to execute and deliver this Agreement.
27. **Choice of Law and Forum.** At all times, this Agreement shall be governed by and construed in accordance with the laws of the State of Ohio, without regard to conflicts of law principles that would require the application of the laws of any other state. The parties agree that any legal action based upon this Agreement or the subject matter hereof may be brought only in the state or federal courts sitting in Cuyahoga County, Ohio and expressly consent to the personal jurisdiction of such courts and waive any objection based upon inconvenient forum.
28. **Independent Contractor.** Vendor is providing the Vendor System to County as an independent contractor.
29. **Survival.** The provisions of Sections 1, 3.1(a), 3.3, 7, 9, 10, 11, 13, 20.2, 23, 27 and 30 shall survive the expiration or termination of this Agreement, to the extent applicable.
30. **Audit Right and Retention of Records.** Vendor grants County and governmental agencies the right to audit the books, records, and accounts of Vendor that are related to this Agreement. Vendor shall keep such books, records, and accounts as may be necessary in order to document all finances and actions taken related to this Agreement. Vendor shall preserve and make available, at reasonable times for examination and audit by County or governmental agencies, all financial records, supporting documents, statistical records and any other documents pertinent to this Agreement, for a minimum period of three (3) years after termination of this Agreement. If any audit has been initiated and audit findings have not been resolved at the end of the

retention period or three (3) years, whichever is longer, the books, records and accounts shall be retained until resolution of the audit findings.

31. **Priority.** In the event of any conflict between the terms and conditions of this Agreement and any exhibit or schedule hereto, the terms of this Agreement shall prevail.

ELECTION SYSTEMS & SOFTWARE, INC.

11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1291

Aldo Tesi
Signature

Aldo Tesi
Name (Printed or Typed)

President + CEO
Title

July 10, 2008
Date

CUYAHOGA COUNTY BOARD OF COMMISSIONERS

1219 Ontario
Cleveland, OH 44114
Fax No.: (970) 244-1639

Peter Lawson Jones
Signature

PETER LAWSON JONES, PRESIDENT
Name (Printed or Typed)

PRESIDENT
Title

7/10/2008
Date

**EXHIBIT A-1
PRICING SUMMARY
(ES&S DS200 Option)**

Vendor pricing for purchase or rent/purchase of Vendor System will be as set forth in Vendor's latest pricing proposal, subject to the following conditions:

1. Vendor agrees that it will provide the prescribed performance bond at no cost to County.
2. Vendor will provide MFC status to County with respect to pricing for the twenty-four (24) month period prior to the Effective Date and the twelve (12) month period after the Effective Date, all as set forth in Section 15 of the Voter System and Services Agreement.
3. If County leases M100's for November 4, 2008 General Election, with the intention of purchasing new DS200's in 2009, and if the DS200's are not certified by the Election Assistance Commission (if required by Ohio law or the Ohio Secretary of State) and the Ohio Secretary of State by January 1, 2010, then Vendor shall refund the County the sum of \$1,425,000 and, in addition, Vendor shall lease to the County, free of charge, up to 1,500 M100's for each election occurring in 2009 prior to the date which Vendor is able to provide the County with DS200's that are certified by the Election Assistance Commission (if required by Ohio law or the Ohio Secretary of State) and the Ohio Secretary of State. The foregoing refund of \$1,425,000 shall not be due the County, however, in the event the Ohio Secretary of State rules before January 1, 2010 that the DS200's must be certified in accordance with standards and requirements that deviate from the 2002 Voluntary Voting System Guidelines and/or in accordance with any or all of the 2005 Voluntary Voting System Guidelines such that the deviation would require recertification by the Election Assistance Commission or the Secretary of State. Equipment must be certified by the Election Assistance Commission (if required by Ohio law or the Ohio Secretary of State) and the Ohio Secretary of State and delivered to the CCBOE Warehouse sixty (60) days prior to any Election.
4. In the event that County elects to purchase new DS200's in 2009, the accompanying ballot boxes purchased with such DS200's shall be the actual DS200 ballot boxes leased to County under the Voting System and Services Agreement.

Vendor acknowledges that the Two Year Pricing Proposal with three year optional purchase items, attached as Schedule A-1-1 hereto and incorporated herein by reference, accurately reflects the foregoing conditions and Vendor's latest pricing proposal; provided however, that certain quantities within this Pricing Proposal have been supplied by the County and not Vendor. County shall have the option, but not the obligation, to purchase the components of the Vendor System shown on Schedule A-1-1 at the prices shown on Schedule A-1-1. For the sake of clarity, pricing for Vendor Maintenance shall be as set forth in Section 4 of Exhibit F.

Invoicing Terms shall be as follows. For those invoices with defined deliverables or services to be performed by Vendor such invoices shall include an itemization and documentation of costs and completed services. Payment of Vendor's invoices shall be made no later than sixty (60) days from receipt of invoice for work properly performed, as applicable.

Invoicing Milestone	Invoice Amount
Execution of the Agreement	\$550,000
Delivery of the Leased M100 Voting Units and Additional Hardware	\$1,425,750
Delivery of the ES&S AutoMARK Units	\$1,500,000
Certification of the November 2008 Election	\$2,201,475
Delivery of DS200 Voting Units and Additional Hardware	\$3,400,000
Completion of DS200 Acceptance Testing	\$4,340,090
Total	\$13,417,315

CUYAHOGA COUNTY VOTER SYSTEM AND SERVICES AGREEMENT
SCHEDULE A-1-1 FOR ES&S DS200 OPTION

2 Year Projected Costs Summary*

Election Systems & Software - Rent used M100s for November and Purchase new DS200s for 2009

	2008	2009	Total
Precinct-based Ballot Units	\$1,425,000	\$9,375,000	\$10,800,000
ADA Voting Units	\$3,302,000	-	\$3,302,000
Vote-By-Mail Ballot Units	\$405,000	-	\$405,000
Additional Hardware	\$750	-	\$750
Software Fees	\$145,500	-	\$145,500
Professional Services	\$564,075	\$567,000	\$1,131,075
Consumables (Election Supplies)	\$7,400	\$110,590	\$117,990
Warranty on Hardware	-	-	\$0
Credits	-	(\$2,485,000)	(\$2,485,000)
Total	\$5,849,725	\$7,567,590	\$13,417,315

*The following are optional purchase items including hardware and maintenance costs for 2010 through 2012. Attached is the detailed pricing for each year and not to exceed the listed price.

	2009	2010	2011	2012	Total
Precinct-based Ballot Units	-	-	-	-	-
ADA Voting Units	-	-	-	-	-
Vote-By-Mail Ballot Units	-	-	-	-	-
Additional Hardware	-	-	-	-	-
Software Fees	\$44,549	\$44,549	\$44,549	\$44,549	\$178,196
Professional Services	-	\$327,000	\$327,000	\$327,000	\$981,000
Consumables (Election Supplies)	-	\$545,590	\$545,590	\$110,590	\$1,201,770
Hardware Maintenance	\$272,390	\$647,390	\$647,390	\$647,390	\$2,214,560
Credits	(\$122,500)	(\$122,500)	(\$122,500)	(\$122,500)	(\$490,000)
Total	\$194,439	\$1,442,029	\$1,442,029	\$1,007,029	\$4,085,526

Model M100 Optical Scan Units	1,500	\$950.00	\$1,425,000
ADA Voting Units			
AutoMarks Voting Units	635	\$5,200.00	\$3,302,000
Vote-By-Mail Ballot Units			
Model M650 High-Speed Scanners	15	\$27,000.00	\$405,000
Additional Hardware			
Omni Drives for the Model M100 Optical Scan Units	10	\$75.00	\$750
Software & Maintenance Fees			
Unity Management Software (5 Users Fee)	1	\$145,500.00	\$145,500
Professional Services			
Project Management & Training (187 Days @ \$187.50/hr)	1	\$280,500.00	\$280,500
Installation & Acceptance Testing of M100 Optical Scan Units	0	\$115.00	\$0
Shipping & Insurance of M100 Optical Scan Units	1,500	\$170.00	\$255,000
Installation & Acceptance Testing of AutoMark Units	0	\$105.00	\$0
Shipping & Insurance of AutoMark Units	635	\$45.00	\$28,575
Performance Bond	0	\$79,513.00	\$0
			<u>\$564,075</u>
Consumables			
Pick Belts for the M650 Scanners (November Election)	300	\$3.00	\$900
Paper Rolls (November Election)	2,500	\$2.00	\$5,000
AutoMARK Ink Cartridge	50	\$38.00	\$1,900
			<u>\$7,400</u>
Other consumable items may be required (ex: ballot marking pens, air cans, seals, etc.) but do not necessarily need to be purchased through ES&S.			
Total for 2008			\$5,849,725

Consumable items pricing is subject to change without notice.

2009

	Quantity	Per Unit Amount	Total	VENDOR COMMENTS
Precinct-based Ballot Units				
Digital Precinct Scanner DS200 Units*	1,500	\$6,250.00	\$9,375,000	
Annual Software & Maintenance Fees				
Unity Software	1	\$44,549.00	\$44,549	
Maintenance on M650	15	\$3,131.00	\$46,965	
Maintenance on AutoMarks	635	\$355.00	\$225,425	
			<u>\$316,939</u>	
Professional Services				
Project Management & Training (175 Days @ \$187.50/hr) (May Election)	1	\$262,500.00	\$262,500	
Installation & Acceptance Testing of DS200 Units	0	\$115.00	\$0	
Shipping & Insurance of DS200 Units	1,500	\$85.00	\$127,500	
Performance Bond	0	\$275,600.00	\$0	
Project Management & Training (18 Days @ \$187.50/hr) (August Election)	1	\$27,000.00	\$27,000	
Project Management & Training (100 Days @ \$187.50/hr) (November Election)	1	\$150,000.00	\$150,000	
			<u>\$567,000</u>	
Consumables				
Pick Belts for the M650 Scanners (May Election)	300	\$3.00	\$900	
Paper Rolls (May Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Pick Belts for the M650 Scanners (August Election)	30	\$3.00	\$90	
Paper Rolls (August Election)	250	\$2.00	\$500	
AutoMARK Ink Cartridge	70	\$30.00	\$2,100	
Pick Belts for the M650 Scanners (November Election)	300	\$3.00	\$900	
Paper Rolls (November Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Additional Thumb Drives for DS200	200	\$250.00	\$50,000	
Additional Flash Drives for AutoMark	100	\$50.00	\$5,000	
			<u>\$110,590</u>	
Other consumable items may be required (ex: ballot marking pens, air cans, seals, etc.) but do not necessarily need to be purchased through ES&S.				
Credits				
County Discount	1	(\$2,485,000.00)	(\$2,485,000)	
Additional County Discount	1	(\$122,500.00)	(\$122,500)	
			<u>(\$2,607,500)</u>	
Total for 2009			\$7,762,029	

*Currently Not Certified In the State of Ohio

2010

	Quantity	Per Unit Amount	Total	VENDOR COMMENTS
Annual Software & Maintenance Fees				
Unity Software	1	\$44,549.00	\$44,549	
Maintenance on DS200	1,500	\$250.00	\$375,000	
Maintenance on M650	15	\$3,131.00	\$46,965	
Maintenance on AutoMarks	635	\$355.00	\$225,425	
			<u>\$691,939</u>	
Professional Services				
Project Management & Training (100 Days @ \$187.50/hr) (May Election)	1	\$150,000.00	\$150,000	
Project Management & Training (18 Days @ \$187.50/hr) (August Election)	1	\$27,000.00	\$27,000	
Project Management & Training (100 Days @ \$187.50/hr) (November Election)	1	\$150,000.00	\$150,000	
			<u>\$327,000</u>	
Consumables				
Pick Belts for the M650 Scanners (May Election)	300	\$3.00	\$900	
Paper Rolls (May Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Pick Belts for the M650 Scanners (August Election)	30	\$3.00	\$90	
Paper Rolls (August Election)	250	\$2.00	\$500	
AutoMARK Ink Cartridge	70	\$30.00	\$2,100	
Pick Belts for the M650 Scanners (November Election)	300	\$3.00	\$900	
Paper Rolls (November Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Additional Thumb Drives for DS200	200	\$250.00	\$50,000	
Additional Flash Drives for AutoMark	100	\$50.00	\$5,000	
Additional Thumb Drives for DS200 (Federal Election - November)	1,600	\$250.00	\$400,000	
Additional Flash Drives for AutoMark (Federal Election - November)	700	\$50.00	\$35,000	
			<u>\$645,590</u>	
Other consumable items may be required (ex. ballot marking pens, air cans, seals, etc.) but do not necessarily need to be purchased through ES&S				
Credits				
Additional County Discount	1	(\$122,500.00)	<u>(\$122,500)</u>	
			<u>(\$122,500)</u>	
Total for 2010			\$1,442,029	

2011

	Quantity	Per Unit Amount	Total	VENDOR COMMENTS
Annual Software & Maintenance Fees				
Unity Software	1	\$44,549.00	\$44,549	
Maintenance on DS200	1,500	\$250.00	\$375,000	
Maintenance on M650	15	\$3,131.00	\$46,965	
Maintenance on AutoMarks	635	\$355.00	\$225,425	
			<u>\$691,939</u>	
Professional Services				
Project Management & Training (100 Days @ \$187.50/hr) (May Election)	1	\$150,000.00	\$150,000	
Project Management & Training (18 Days @ \$187.50/hr) (August Election)	1	\$27,000.00	\$27,000	
Project Management & Training (100 Days @ \$187.50/hr) (November Election)	1	\$150,000.00	\$150,000	
			<u>\$327,000</u>	
Consumables				
Pick Belts for the M650 Scanners (May Election)	300	\$3.00	\$900	
Paper Rolls (May Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Pick Belts for the M650 Scanners (August Election)	30	\$3.00	\$90	
Paper Rolls (August Election)	250	\$2.00	\$500	
AutoMARK Ink Cartridge	70	\$30.00	\$2,100	
Pick Belts for the M650 Scanners (November Election)	300	\$3.00	\$900	
Paper Rolls (November Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Additional Thumb Drives for DS200	200	\$250.00	\$50,000	
Additional Flash Drives for AutoMark	100	\$50.00	\$5,000	
Additional Thumb Drives for DS200 (Federal Election in 2010)	1,600	\$250.00	\$400,000	
Additional Flash Drives for AutoMark (Federal Election in 2010)	700	\$50.00	\$35,000	
			<u>\$546,590</u>	
Other consumable items may be required (ex. ballot marking pens, air pens, seals, etc.) but do not necessarily need to be purchased through ES&S.				
Credits				
Additional County Discount	1	(\$122,500.00)	<u>(\$122,500)</u>	
			<u>(\$122,500)</u>	
Total for 2011			\$1,442,029	

2012

	Quantity	Per Unit Amount	Total	VENDOR COMMENTS
Annual Software & Maintenance Fees				
Unity Software	1	\$44,549.00	\$44,549	
Maintenance on DS200	1,500	\$250.00	\$375,000	
Maintenance on M650	15	\$3,131.00	\$46,965	
Maintenance on AutoMarks	635	\$355.00	\$225,425	
			<u>\$691,939</u>	

Professional Services

Project Management & Training (100 Days @ \$187.50/hr) (May Election)	1	\$150,000.00	\$150,000	
Project Management & Training (18 Days @ \$187.50/hr) (August Election)	1	\$27,000.00	\$27,000	
Project Management & Training (100 Days @ \$187.50/hr) (November Election)	1	\$150,000.00	\$150,000	
			<u>\$327,000</u>	

Consumables

Pick Belts for the M650 Scanners (March Election)	300	\$3.00	\$900	
Paper Rolls (March Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Pick Belts for the M650 Scanners (August Election)	30	\$3.00	\$90	
Paper Rolls (August Election)	250	\$2.00	\$500	
AutoMARK Ink Cartridge	70	\$30.00	\$2,100	
Pick Belts for the M650 Scanners (November Election)	300	\$3.00	\$900	
Paper Rolls (November Election)	2,500	\$2.00	\$5,000	
AutoMARK Ink Cartridge	685	\$30.00	\$20,550	
Additional Thumb Drives for DS200	200	\$250.00	\$50,000	
Additional Flash Drives for AutoMark	100	\$50.00	\$5,000	
			<u>\$110,590</u>	

Other consumable items may be required (ex. ballot marking pens, air cans, seals, etc.) but do not necessarily need to be purchased through ES&S.

Credits

Additional County Discount	1	(\$122,500.00)	<u>(\$122,500)</u>	
			(\$122,500)	

Total for 2012

\$1,007,029

Other Potential Replacement Items On An As

Needed Basis

DS200 Battery	Each	\$100.00	
DS200 Lithium Coin Battery	Each	\$5.00	
Model 650 Retard Pad	Each	\$4.00	
ES&S AutoMARK™ Replacement Backup Battery	Each	\$120.00	
Hygienic Ear Piece Cover	Each	\$0.15	

Note: We have included prices for those items ES&S and the County have deemed necessary to provide for the ongoing operation of the voting system(s) offered and believe, to the best of our knowledge, that the price list is complete. There may be other items and services that the County wants to subscribe to in support of future elections that may not be included in this list. Should the County decide to order any product or service not listed, ES&S will invoice the County at the then current rates.

EXHIBIT A-2
PERFORMANCE GUARANTEE
(ES&S DS200 Option)

Vendor agrees to meet each of the following Performance Milestones on or before the specified date. In addition to any other right or remedy County may have, Vendor will incur the following penalty(-ies) for each Performance Milestone it fails to meet, *provided*, however, that for each of the years 2009, 2010, 2011, and 2012, Vendor shall not be required to pay County the first \$122,500 of any penalties assessed against Vendor pursuant to the aggregate of sections 1 and 2 below :

1. Delivery and Acceptance

Delivery and Acceptance of the Model 100 voting units must be completed by October 1, 2008 for the November 2008 election. The penalty for Vendor's failure to meet this Performance Milestone is set forth below:

- 0-25 units - \$0 per day penalty
- 26-50 units - \$5,000 per day penalty
- 51-200 units - \$10,000 per day penalty
- 201+ units - \$20,000 per day penalty

In regard to the May 5, 2009 election, delivery and Acceptance of the DS200 Voting Units or the Model 100 voting units, as the case may be, must be completed by March 1, 2009. The penalty for Vendor's failure to meet this Performance Milestone is:

- 0-25 units - \$0 per day penalty
- 26-50 units - \$5,000 per day penalty
- 51-200 units - \$10,000 per day penalty
- 201+ units - \$20,000 per day penalty

In the event the DS200 is not certified in time to permit delivery and Acceptance of the DS200 voting units by March 1, 2009 or any other election occurring in 2009, Vendor shall furnish up to 1,500 M100 voting units, and delivery and Acceptance of such M100 voting units must be completed by March 1, 2009. Vendor shall provide up to 1,500 M100 voting units for each election occurring before certification of the DS200 Voting Units in time to permit delivery and Acceptance at least two (2) months prior to the date of election.

2. Election Day Performance

The penalty for failure of any of the following components of Vendor System to perform satisfactorily on any election day, provided that the County is subscribing to, and paying for, maintenance and support services shall be as follows:

Precinct Based Ballot Units - If, for any reason not caused by an individual, action, or activity outside of Vendor's control, more than 3% of the precinct-based scanners at the polling locations are completely removed from service on election day due to a malfunction (including any ancillary devices such as batteries and memory cards), the penalty is \$1,000 per unit for each unit in excess of the 3% threshold.

ADA Voting Units - If, for any reason not caused by an individual, action, or activity outside of Vendor's control, more than 3% of the ADA voting units at the polling locations are completely removed from service on election day due to a malfunction (including any ancillary devices such as batteries and memory cards), the penalty is \$3,000 per unit for each unit in excess of the 3% threshold.

Vote by Mail Units – If, for any reason not caused by an individual, action, or activity outside of Vendor's control, a vote-by-mail scanner is not operable for more than two hours during the three-day scanning period, the penalty is \$10,000 per unit.

**EXHIBIT B
VENDOR EQUIPMENT DESCRIPTION
(ES&S DS200 Option)**

The Vendor Equipment Description shall include the equipment listed or described below, and in Vendor's response and/or any supplemental or amended written response(s) to the Request for Proposal, written responses by Vendor to any request by County for additional information, as well as described in statements or representations made by Vendor's representatives at the Cuyahoga County Board of Elections meeting held on June 12, 2008, as set forth in the certified transcript of that meeting.

<u>Description</u>
Rental Equipment
Model M100 (Includes Scanner, Ballot Box, Start-Up Kit and PCMCIA Card) (1,500 units)
Omni Drive (10 units)
Tabulation Equipment Purchase
Model M650 (Includes Scanner, Table, Start-Up Kit and Dust Cover) (15 units)
Model DS200 (Includes Scanner, Plastic Ballot Box w/o diverter, Start-Up Kit and Jump Drive) (1,500 units)
Ballot Marking Equipment Purchase
AutoMark (Includes Terminal, Ink Cartridge and Flashcard) (635 units)

**EXHIBIT C
VENDOR SOFTWARE DESCRIPTION
(ES&S DS200 Option)**

The Vendor Software Description shall include Vendor firmware included with the Vendor Equipment set forth on Exhibit B and the Vendor Software listed or described below, and in Vendor's response and/or any supplemental or amended written response(s) to the Request for Proposal, any written responses by Vendor to any request by County for additional information, as well as in statements or representations made by Vendor's representatives at the Cuyahoga County Board of Elections meeting held on June 12, 2008, as set forth in the certified transcript of that meeting.

<u>Description</u>
Unity AutoMARK Information Management Software (AIMS)
Unity Ballot Image Manager (BIM)
Unity Digital Image Manager (DSIM) – To be provided with delivery of the DS200 voting units.
Unity Ballot On Demand (BOD)
Unity Election Data Manager (EDM)
Unity Election Reporting Manager (ERM), 5-User License
Unity Hardware Programming Manager (HPM), 5-User License

**EXHIBIT D
THIRD PARTY ITEMS
(ES&S DS200 Option)**

The Third Party Items are those existing third party software, hardware and other merchandise and items listed or described below

EXISTING THIRD PARTY ITEMS

DESCRIPTION	QTY
File Server - Dell PowerEdge 2900 (Primary Server)	1
Dual Core Intel® Xeon® 5130; 4MB Cache, 2.0GHz, 1333MHZ - 1st Processor	1
Dual Core Intel® Xeon® 5130; 4MB Cache, 2.0GHz, 1333MHZ - 2nd Processor	1
Microsoft® Server 2003 R2, Standard Edition with SP2 (Includes 5 CALs)	1
5-pack of Windows® Server 2003 User CALs	1
4GB 667MHz (4X1GB), Dual Ranked Fully Buffered DIMMs	1
Add-in PERC 5i (SAS Controller) which supports 4 Hard Drives - RAID 5	1
PERC 5/i integrated Controller Card - Integrated SAS/SATA RAID 5, PERC5/i Integrated	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, Primary	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, 2nd Drive	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, 3rd Drive	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, 4th Drive	1
Tower Chasis Orientation / Tower Bezel	1
Redundant Power Supply with Dual Cords	1
No Floppy Drive	1
48X IDE CD-ROM Drive	1
Intel PRO 1000PT Dual Port Server Adapter, Gigabit NIC	1
Broadcom TCP/IP Offload Engine Not Enabled	1
Dell 2200VA Uninterruptible Power Supply, Stand Alone, 120v	1
Symantec AntiVirus 10.2 Protection - 5 User (AntiVirus/Spyware)	1
Electronic Documentation and OpenManage CD Kit	1
Keyboard, USB, Black	1
PERC 5i Hard Copy Documentation, English DOCS	1
Mechanical Two-Button Mouse, USB, Black	1
Dell 17 Inch Analog Flat Panel 17LCD	1
3Yr Silver Enterprise Support: 7x24 Tech HW/SW Support, NBD	1
PowerVault 110T, Lto-3 Tape Backup, 200/400GB, w/Controller, Internal	1
LTO2, Tape media cartridge, 200/400GB, 5PK	1
Symantec backup Exec v11d Server Suite	1
Electronic Documentation and OpenManage CD Kit	1
PERC 5 English Documentation	1
Symantec Antivirus - 10 User License (1st year cost only)	1
File Server - Dell PowerEdge 2900 (Backup Server)	1
Dual Core Intel® Xeon® 5130; 4MB Cache, 2.0GHz, 1333MHZ - 1st Processor	1
Dual Core Intel® Xeon® 5130; 4MB Cache, 2.0GHz, 1333MHZ - 2nd Processor	1
Microsoft® Server 2003 R2, Standard Edition with SP2 (Includes 5 CALs)	1

DESCRIPTION	QTY
5-pack of Windows® Server 2003 User CALs	1
4GB 667MHz (4X1GB), Dual Ranked Fully Buffered DIMMs	1
Add-in PERC 5i (SAS Controller) which supports 4 Hard Drives - RAID 5	1
PERC 5/i integrated Controller Card - Integrated SAS/SATA RAID 5, PERC5/i Integrated	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, Primary	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, 2nd Drive	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, 3rd Drive	1
160GB 7.2K RPM Serial ATA 3Gbps 3.5-in HotPlug Hard Drive, 4th Drive	1
Tower Chassis Orientation / Tower Bezel	1
Redundant Power Supply with Dual Cords	1
No Floppy Drive	1
48X IDE CD-ROM Drive	1
Intel PRO 1000PT Dual Port Server Adapter, Gigabit NIC	1
Broadcom TCP/IP Offload Engine Not Enabled	1
Dell 2200VA Uninterruptible Power Supply, Stand Alone, 120v	1
Symantec AntiVirus 10.2 Protection - 5 User (AntiVirus/Spyware)	1
Electronic Documentation and OpenManage CD Kit	1
Keyboard, USB, Black	1
PERC 5i Hard Copy Documentation, English DOCS	1
Mechanical Two-Button Mouse, USB, Black	1
Dell 17 Inch Analog Flat Panel 17LCD	1
3Yr Silver Enterprise Support: 7x24 Tech HW/SW Support, NBD	1
PowerVault 110T, Lto-3 Tape Backup, 200/400GB, w/Controller, Internal	1
LTO2, Tape media cartridge, 200/400GB, 5PK	1
Symantec backup Exec v11d Server Suite	1
Electronic Documentation and OpenManage CD Kit	1
PERC 5 English Documentation	1
Symantec Antivirus - 10 User License (1st year cost only)	1
CENTRAL SITE PC WORKSTATIONS - Election Coding and Reporting	
Dell OptiPlex GX745 MiniTower - Intel Core 2 Dup Processor - 1.86 GHz - 1066 MHz	7
Windows XP Pro using NTFS	7
2GB ECC SDRAM (2 DIMMS)	7
Dell USB Enhanced Multimedia Keyboard	7
Dell PS/2 2-Button Mouse w/Scroll	7
160GB SATA 3.0Gb/s and 8MB Data Burst Cache Hard Drive	7
48X/32X/48X Max, CD-RW	7
3.5" 1.44MB Floppy Drive	7
19" Dell UltraSharp 1940FPV Flat Panel Adjustable Stand VGA/DVI	7
Internal Audio Speaker	7
Energy Star Label	7
PS2 Serial Port Adapter - Full Height	7
Integrated Sound Blaster Compatible	7
3Yr Parts + Onsite Labor (Next Business Day)	7
APC SurgeArrest 11-Outlet w/Tel2/Splitter Coax and Ethernet Protect	7
APC 725 Backup - UPS	7

DESCRIPTION	QTY
NETWORKING HARDWARE	
Dell Powerconnect 2216 16 Port Unmanaged Switch	1
Cat. 5 Ethernet Cables - 50 ft.	12
NETWORK PRINTERS:	
General Purpose Laser Printer	
Okidata B6300DN Laser Report Printer (w/Duplex Unit and Printer Cable)	3
6.5 USB 2.0 A-B Printer Cable	3
Ballot-On-Demand Color Laser Printer	
Okidata C9600hdn BOD Printer - Part # BOD-91631001	2
Ballot Registration Guide & Firmware Chip	2
Required Hardware to Support ES&S Tabulators	
Iomega 250 MB Zip Drive / Starter Kit (includes 3 ZIP disks) Iomega #31653 (for M-650)	7
Total Results Accumulation Network (Third Party Items)	\$55,781.00

EXHIBIT E
VENDOR SERVICES
(ES&S DS200 Option)

The Vendor Services shall include the services listed or described below, and in Schedule A-1-1 of Exhibit A-1, Vendor's response and/or any supplemental or amended written response(s) to the Request for Proposal, any written responses by Vendor to any request by County for additional information, as well as in statements or representations made by Vendor's representatives at the Cuyahoga County Board of Elections meeting held on June 12, 2008, as set forth in the certified transcript of that meeting.

<u>Description of Service</u>
Services for the November 2008 General Election
Project Management, including on-site ballot layout, coding and voice file assistance for the November 2008 General Election
Equipment Operations Training
Poll Worker Train-the-Trainer
Unity Software Training
Election Day On-Site Support – November 2008 Election
Oversight of Acceptance Testing of Model 100 Units for the November 2008 Election ¹

Shipping, Handling and Insurance related to the Model 100 Units for the November 2008 Election
Oversight of Acceptance Testing of ES&S AutoMARK Units for the November 2008 Election ¹
Shipping, Handling and Insurance related to the ES&S AutoMARK for the November 2008 Election
Services Provided After the November 2008 General Election
Oversight of Acceptance Testing of DS200 Units ¹
Shipping, Handling and Insurance related to the DS200 Units

¹Oversight of Acceptance Testing shall mean services provided by Vendor of at least one on-site project manager who is dedicated exclusively to the oversight and training of acceptance testing to be performed by County personnel, and services of such additional technicians as are necessary to repair any Vendor Equipment required in order for County personnel to timely complete acceptance testing.

EXHIBIT F
VENDOR MAINTENANCE AND SUPPORT
(ES&S DS200 Option)

CONTRACT FOR MAINTENANCE AND SUPPORT SERVICES BY AND
BETWEEN
ELECTION SYSTEMS & SOFTWARE, INC.,
AND CUYAHOGA COUNTY, OHIO

THIS AGREEMENT (the "Contract"), is made and entered into by and between The BOARD OF COUNTY COMMISSIONERS OF CUYAHOGA COUNTY, Ohio (the "County"), and ELECTION SYSTEMS & SOFTWARE, INC, a Delaware corporation with its principal place of business at 11208 John Galt Boulevard, Omaha, NE 68137 ("Vendor"), and shall become binding upon its signing by the President of the Cuyahoga County Board of County Commissioners (the "Effective Date").

WHEREAS, the County has purchased certain voting equipment and software from the Vendor;

WHEREAS, the County desires to obtain software and hardware maintenance services from the Vendor, and the Vendor is willing to provide such services to the County upon the terms and conditions set forth in this Contract;

NOW THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Vendor and the County agree as follows:

ARTICLE I
GENERAL

1. **Definitions**: Any term not otherwise defined in this Contract shall have the same meaning as the term is defined in the Cuyahoga County Voter System and Services Agreement, hereinafter referred to as "Voter System Agreement") entered into by and between the County and Vendor on July 10, 2008, a copy of which is attached hereto and incorporated herein as EXHIBIT "A".

2. **Services**: Vendor shall provide maintenance and support services as described herein for Vendor Software, and maintenance and repair services as described herein for Vendor Hardware.

3. **Term**. Vendor shall provide maintenance and support services for Vendor Software ("Software Maintenance and Support") commencing on the first anniversary after the date of delivery of the Vendor Software licensed pursuant to the term as set forth in the Voter System Agreement. Vendor shall also provide maintenance and repair services for the Vendor Equipment ("Hardware Maintenance") commencing on the first anniversary after the date of delivery and acceptance of the Vendor Equipment purchased by the County as set forth in the Certificate of Acceptance attached as Exhibit H to the Voter System Agreement. The one-year anniversary of dates of delivery and acceptance of Vendor

Software and Vendor Equipment shall be referred hereto in this Contract as the "Commencement Date".

The "Term" of this Contract shall be in effect for a period of one (1) year from the Commencement Date, and shall be renewable for an unlimited number of successive one-year Terms at County's election upon receipt by Vendor of written notice from the County at least sixty (60) days prior to the expiration of the then current Term. Should a material breach occur, this Contract may be terminated by either party effective thirty (30) days after either party notifies the other in writing that the other has materially breached this Contract, and the breaching party fails to cure such breach within such 30-day period. The termination by the County of this Contract shall not relieve County of its liability to pay any amounts due to Vendor for work that was performed in accordance with the Voter System Agreement and this Contract up through the effective date of termination. In the event the County terminates this Contract as a result of Vendor's material breach, Vendor shall refund a pro-rata portion of the fee set forth in paragraph 4 below Services for which the County has already paid and Vendor has not yet performed.

4. **Fees.** County shall pay to Vendor the fees for Hardware Maintenance and Software Maintenance and Support set forth in Schedule A-1-1 to the Voter System Agreement (the "Fees"). The Fees for the initial Term are due thirty (30) days after the Commencement Date. The Fees for the first and second renewal periods shall be the amount set forth in Exhibit A-1-1 to the Voter System Agreement, due and payable no later than thirty (30) days after the beginning of such renewal Term. Thereafter, the Fees for any renewal Term shall be an amount agreed upon by the parties, not to exceed 3% of the original Fee amount and shall be due and payable no later than thirty (30) days after the beginning of such renewal Term. The Software Maintenance Fee includes the cost of Software Maintenance and Support provided for the Vendor firmware and all other Vendor Software. If County elects to receive Software Maintenance and Support for an Add-On or New Product during the Term or any renewal thereof, except to the extent covered by the warranties set forth in the Voter System Agreement, County shall pay Vendor an incremental Software Maintenance Fee for such services, subject to prior approval by County of the amount of the incremental fee.

ARTICLE II HARDWARE

1. **Maintenance and Repair Services.** The Hardware Maintenance Services to be provided to County under this Contract for the purchased Vendor Equipment listed on Exhibit B to the Voter System Agreement (the "Products") shall be subject to the following terms and conditions. All services to be provided hereunder shall be provided at a location designated by the County unless otherwise agreed upon by the parties.

a. **Routine Maintenance Services.** Vendor shall provide "Routine Maintenance Services" (defined herein) as may be necessary to keep the Products fit for the ordinary purposes for which they are to be used as described in Section 8 of the Voter System Agreement, normal wear and tear excepted ("Normal Working Condition"). Vendor shall provide Routine Maintenance Services pursuant to a documented schedule acceptable to the County once during each 12-month Term or any renewal thereof. Routine Maintenance Services shall include cleaning, lubrication and calibration services. Vendor shall provide a reasonably detailed record of all Routine Maintenance Services performed with respect to the Products, including product type, serial number, dates and times when the Products were serviced. In addition to Routine Maintenance, Vendor shall provide the County telephone assistance and support from qualified technicians Monday through Friday from 8:00 a.m. to 5:00 p.m. (CST) during any Term of this Contract. The County may request Vendor to provide additional telephone assistance and support and shall make all reasonable efforts to request such additional telephone assistance and support one-week prior to such requested support. Vendor shall notify County, in writing, if it will provide the requested additional telephone support and shall detail the timeframe the additional telephone support will be provided by Vendor.

County may request additional Routine Maintenance Services during any 12-month Term. Any such request shall be made at least thirty (30) days before the additional Routine Maintenance Services are desired. Upon receipt of the County's request, Vendor shall notify the County of the per-unit not-to-exceed fee for such additional Routine Maintenance Services which fee must be approved by the County prior to services being rendered. Payment shall be due after services are performed and within sixty (60) days after invoice.

b. **Repair Services.** Upon request of the County, Vendor shall provide the following services which shall be referred to hereinafter as "Repair Services":

i. **Malfunctions Under Normal Use and Service.** If a malfunction occurs in any Product while it is under normal use and service, County shall promptly notify Vendor, and Vendor shall repair and restore the Product to Normal Working Condition as soon as practicable at no cost to the County. If an identical malfunction (which shall be defined as an error not caused by operator or voter error) which prevents the same Product from reading and/or tabulating ballots reoccurs with the same Product three (3) times within a one-year Term, the Product shall be replaced with a new identical Product at no cost to the County.

ii. **Malfunctions Due to County Misuse or Omissions.** If a malfunction occurs in any Product as a result of (a) repairs,

changes, modifications or alterations made by the County not authorized or approved by Vendor or an authorized representative of Vendor, (b) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications delivered by Vendor to the County, or (c) causes beyond the reasonable control of Vendor or County, including acts of God, fire, floods, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations, and utility or communication interruptions, or (d) if County's use of the Product is otherwise not in compliance with its Vendor Documentation or storage instructions, Vendor, upon County's request, shall provide Repair Services. County shall pay Vendor for the Repair Services at Vendor's then-current standard rates, as well as for the cost of all parts used in connection with such Repair Services. Vendor shall notify the County of the not-to-exceed fee for such Repair Services which fee must be approved by the County prior to services being rendered.

iii. **Timing; Emergency.** The date(s) on which any nonemergency Repair Services shall be provided shall be mutually agreed upon by Vendor and County. Vendor shall provide the County "emergency" Repair Services (which shall be defined as Repair Services that are provided within 24 hours of County's notification of the need thereof at any time during the thirty (30) calendar day period immediately preceding and including a scheduled Election Day and the fifteen (15) calendar days following such scheduled Election Day). If emergency Repair Services are required as a result of a malfunction occurring under normal use and services, Vendor shall repair and restore the Product to Normal Working Condition at no cost to the County. If such emergency Repair Services are not required as a result of a malfunction occurring under normal use and service, County shall pay Vendor for the emergency Repair Services at Vendor's then-current standard rates, as well as for the cost of all parts used in connection with such Repair Services. Vendor shall notify the County of the not-to-exceed fee for such emergency Repair Services which fee must be approved by the County prior to services being rendered.

iv. **Loaner Unit.** At County's request, Vendor shall make available to County as soon as practicable a product that is the same as, or substantially similar to, the Product for which Repair Services are being performed (a "Loaner Unit"). If the Repair Services are being performed pursuant to Subsection 2(b)(ii) above, County shall pay Vendor for the use of the Loaner Unit at Vendor's then-current standard rates including the cost of round trip shipping. Vendor shall notify the County of the not-to-exceed

fee for the Loaner Unit which fee must be approved by the County prior to the Vendor providing the Loaner Unit.

c. **Exclusions.** Vendor has no obligation under this Contract to (i) assume the obligations under any existing or expired warranty for a Third Party Item; (ii) repair or replace Product components that are consumed in the normal course of operating the Product, including printer ribbons, removable memory packs (including but not limited to, USB thumb drives and PCMCIA cards), paper rolls, batteries, cancellation stamps, ink pads or marking devices, or (iii) repair any Product from which the serial number has been removed or altered.

d. **Reinstatement; Inspection.** If the Term or any renewal thereof expires without being renewed, County may thereafter resume receiving Hardware Maintenance Services under this Contract upon (a) notification to Vendor, and (b) the granting to Vendor of access to inspect the Products for inspection. The purpose of such inspection shall be to determine whether or not the Products are in Normal Working Condition. After inspection, Vendor shall provide a detailed report to the County describing the results of its inspection, its recommendation and alternatives, and an itemization of direct costs incurred in performing the inspection. The cost of such inspection will be at the current standard Vendor rates plus Vendor's reasonable out-of-pocket expenses, and shall be due from County within sixty (60) days of its receipt of Vendor's invoice. If any of the Products is not in Normal Working Condition, Vendor, at the option of County, (i) shall provide such repairs and replacements as Vendor deems reasonable and necessary to restore such Product(s) to Normal Working Condition, at County's expense with respect to the cost of labor, out of pocket expenses and any parts used in such repairs or replacements, or (ii) shall not provide any Hardware Maintenance Services with respect to such Product(s). For purposes of this Contract, "Out-Of-Pocket Expenses" shall mean all reasonable travel, meal and lodging expenses incurred by Vendor employees or authorized representatives ("Vendor Representatives") who are required to travel to County's Designated Location to provide services. County's "Designated Location" shall mean County's facility at which County desires Vendor to perform the Hardware Maintenance Services.

e. **Sole Provider; Access.** County shall not permit any individual other than a Vendor Representative or other person authorized in writing by the Vendor to provide maintenance or repairs with respect to the Products for so long as a Hardware Maintenance Term is in effect. County shall provide Vendor Representatives with all information necessary to enable them to provide Hardware Maintenance Services. County shall likewise provide full access to the Products and adequate working space for all Hardware Maintenance Services performed at its Designated Location, including sufficient HVAC, lights, electric current and outlets.

f. **Storage.** When not in use, County shall properly store the Products in accordance with the storage requirements established in the Vendor Documentation.

ARTICLE III **SOFTWARE**

1. **Services Provided.** Vendor shall provide maintenance and support services for the Vendor Software and Vendor firmware ("Software Maintenance and Support"), to enable it to perform in accordance with its Vendor Documentation in all material respects, and to cure any defect in material or workmanship. Vendor shall provide the County emergency Software Maintenance and Support Services (which shall be defined as Software Maintenance and Support Services that are provided within 24 hours of County's notification of the need thereof at any time during the thirty (30) calendar day period immediately preceding and including a scheduled Election Day and the thirty (30) calendar days following such scheduled Election Day). If emergency Software Maintenance and Support is necessary as a result of a malfunction occurring under normal use and services, Vendor shall cure the defect at no cost to the County. If emergency Software Maintenance and Support is not necessary as a result of a malfunction occurring under normal use and service, County shall pay Vendor for such services at Vendor's then-current standard rates. Vendor shall notify the County of the not-to-exceed fee for such emergency services which fee must be approved by the County prior to services being rendered.

2. **Updates.** During the Software Maintenance Term and any renewals thereof, Vendor shall continue to provide Updates in accordance with an Update schedule to be provided by Vendor, at no cost to the County. Installation of Updates shall be coordinated with the County and shall not interfere with election preparation, operation, or ballot tabulation. County shall be responsible for all shipping and handling charges incurred in order to deliver any Updates to County.

3. **Reinstatement of Software Maintenance and Support.** If the Software Maintenance Term or any renewal thereof expires without being renewed, County may thereafter resume receiving Software Maintenance and Support under this Contract upon (a) notification to Vendor, (b) payment of all fees which would have been due to Vendor has the Software Maintenance Term not expired, together with a reinstatement charge equal to five percent (5%) of the foregoing amount, and (c) the granting to Vendor of access to the Vendor Software, so that Vendor may analyze it and perform such maintenance as may be necessary before resuming the Software Maintenance and Support.

4. **Malfunctions Due to County Misuse or Omissions.** If a malfunction occurs as a result of (a) repairs, changes, modifications or alterations not authorized or approved by Vendor or an authorized representative of Vendor,

(b) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications as delivered to the County by Vendor, (c) causes beyond the reasonable control of Vendor or County, including acts of God, fire, floods, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, (d) County's failure to timely and properly install and use the most recent Update, or the second most recent Update, provided to it by Vendor or (e) if County is otherwise not in compliance with Vendor Documentation, Vendor, upon County's request, shall provide Software Maintenance and Support services. County shall pay Vendor for the services at Vendor's then-current standard rates. Vendor shall notify the County of the not-to-exceed fee for such services which fee must be approved by the County prior to services being rendered.

ARTICLE IV MISCELLANEOUS

1. **Assignment.** Except as otherwise stated elsewhere in this Contract, Vendor shall not assign or transfer this Contract or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the County. Such consent shall not be unreasonably withheld, conditioned, nor unduly delayed. Vendor may assign its right to receive payments under this Agreement to such third party(ies) as Vendor may desire without the prior consent of County, provided that Vendor provides written notice (including evidence of such assignment) to County at least sixty (60) days in advance of any payment(s) so assigned.

2. **Certification.** All Vendor Equipment and Vendor Software provided hereunder will be and will remain properly certified (under applicable federal, state and county certification or approval standards) during the Term of the Contract. Vendor will bear any expenses or costs of re-certification. The parties agree that any changes to the Vendor Software shall be only those that are technologically feasible and commercially reasonable.

County shall be responsible for the cost of any replacements, retrofits or modifications to the Vendor Equipment contracted for herein as well as the cost of any third party items that Vendor notifies County are hereinafter required in order for the Vendor Equipment and/or Vendor Software to remain compliant and certified.

3. **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 Contract. Neither party shall be liable for the other party's negligent or willful misconduct. Except for such liability as may arise for personal injury, property damage or intellectual property infringement, and provided that nothing herein shall serve as a waiver of governmental immunity by County for acts or omissions to which sovereign immunity applies or shall be construed as consent by County to be sued by third

parties in any matter arising out of any contract or this Contract, the total liability of either party under this Contract shall not exceed two (2) times the total amount of fees payable solely for Vendor Maintenance and Support Services under this Contract by County to Vendor.

4. **Entire Agreement.** This Contract, including the Exhibit hereto (all of which are incorporated herein by this reference), shall make up the entire agreement of the parties with respect to the subject matter hereof. In the event of any conflict between a provision contained in an Exhibit to this Contract and a provision contained in this Contract, the provision contained in the Contract shall control. No waiver, amendment or modification of any provision of this Contract 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.

5. **Severability.** If any provision of this Contract shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, the remaining provisions of this Contract shall remain in full force and effect. The unenforceable or invalid provision shall be changed and interpreted so as to best accomplish the objectives of such provision within the limits of applicable law or applicable court decisions.

6. **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 fax, (c) sent by commercial overnight courier (with written verification of receipt) or (d) 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 Contract and at the addresses 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.

7. **Counterparts; Execution By Facsimile.** This Contract may be executed in two or more counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument. The parties may execute this Contract and exchange counterparts of the signature pages by means of facsimile transmission, and the receipt of such executed counterparts by facsimile transmission shall be binding on the parties. Following such exchange, the parties shall promptly exchange original versions of such signature pages.

8. **Authority and Enforceability.** Each party represents and warrants to the other party that as of the Effective Date of this Contract, it has full power and all necessary legal authority to enter into and perform this Contract in accordance with its terms; that it has obtained all requisite approvals by any governing boards, commissions or other necessary bodies; and that the individual signing

this Contract on its behalf has been properly authorized and has the full legal authority to execute and deliver this Contract.

9. **Choice of Law and Forum.** At all times, this Contract shall be governed by and construed in accordance with the laws of the State of Ohio, without regard to conflicts of law principles that would require the application of the laws of any other state. The parties agree that any legal action based upon this Contract or the subject matter hereof may be brought only in the state or federal courts sitting in Cuyahoga County, Ohio and expressly consent to the personal jurisdiction of such courts and waive any objection based upon inconvenient forum.

10. **Independent Contractor.** Vendor is providing the Vendor System to County as an independent contractor.

11. **Audit Right and Retention of Records.** Vendor grants County and governmental agencies the right to audit the books, records, and accounts of Vendor that are related to this Contract. Vendor shall keep such books, records, and accounts as may be necessary in order to document all finances and actions taken related to this Contract. Vendor shall preserve and make available, at reasonable times for examination and audit by County or governmental agencies, all financial records, supporting documents, statistical records and any other documents pertinent to this Contract, for a minimum period of three (3) years after termination of this Contract, If any audit has been initiated and audit findings have not been resolved at the end of the retention period or three (3) years, whichever is longer, the books, records and accounts shall be retained until resolution of the audit findings.

ELECTION SYSTEMS & SOFTWARE, INC.

11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1291

CUYAHOGA COUNTY BOARD
OF COMMISSIONERS

1219 Ontario
Cleveland, OH 44114
Fax No.: (970) 244-1639

Signature

Signature

Name (Printed or Typed)

Name (Printed or Typed)

Title

Title

Date

Date

**EXHIBIT G
ACCEPTANCE TESTING
(ES&S DS200 Option)**

The Acceptance Testing shall include all acceptance testing listed or described below, and in Vendor's response and/or any supplemental or amended written response(s) to the Request for Proposal, any written responses by Vendor to any request by County for additional information, as well as in statements or representations made by Vendor's representatives at the Cuyahoga County Board of Elections meeting held on June 12, 2008, as set forth in the certified transcript of that meeting.

DS200 and M100 Acceptance Testing Criteria

Date: _____ **Machine SN:** _____ **Certified Firmware:** _____

Visual Inspection (applicable to DS200 and M100):

- Ensure that there are no scratches or gouges on any part of the unit
- Verify that all labels are placed in their appropriate place and in their correct orientation
- Ensure the Printer paper roll is installed in the Printer.
- Verify all latches, hinges, buttons, doors bolts, and like items are working properly and are installed correctly.
- Provide packing list for each unit shipped.
- Provide Vendor Documentation, including startup and system documentation.

Physical Inspection (applicable to DS200 only):

- Apply AC to Wall Power Adapter. Connect Wall Power Adapter to the back of the unit and press the "POWER" button.
- Observe the rear LED, located next to the Wall Power Adapter Cord Connector, if the LED is amber and blinking slowly this indicates that the Battery Pack is charging. If the LED is a solid green, the Battery Pack is completely charged.
 - o Verify AC Plug Icon is present and does not have an "X" located in upper right corner of the screen.
- Enter the Touch Screen Calibration by pressing the "Close Polls" button for two seconds when prompted to do so at the Startup screen.
 - o Touch the two circles (one in the Upper Left Corner and one in the Lower Right Corner of the screen) and then touch the "Save & Exit" button.
- Verify the **DS200 Firmware Version is 1.1.0.0; PMB is 0.8.0.0; Scanner is 2.6.0.0.0** on Startup Printout.
- Insert the 512MB Flash Drive containing the BMW Demo Election in USB port B.
 - o When the unit recognizes the 512MB Flash Drive w/ Demo Election, the Election Icon will go from having an "X" to a green ✓ mark on it.

- Check the date and time on the top portion of the display to ensure the date and time is correct.
 - If a change is needed, press the lower right arrow on the display screen then press the "go to admin button" and on the next screen enter the password.
 - Go to "systems settings", "date and time" and then press date or time and a keyboard will come up so you can make changes. Press the "enter key". You will go back to the original screen where you will press previous and here you will "accept new time."
- Press the "OPEN POLLS" button on the screen to scan the BMW Demo Ballots.
- Ensure that the test ballots scan in all four orientations.
- Insert the 2 Demo Ballots to check the Multi-Sheet Sensor. Two sheets should be rejected.
- Press and hold the "CLOSE POLLS" button for two seconds to close the polls.
- Verify that the Precinct Report Printout should read 4 ballots cast.
- Disconnect the Wall Power Adapter cord from unit.
 - Unit should continue to operate, and the X should appear over the AC icon.
- Re-connect Wall Power Supply cord
 - The X should disappear from the AC icon.
- Check Modem Operation. (If Unit is equipped with a Modem)
- Power down the unit by touching the "Shutdown" button on the Touch Screen.
- Verify that the Display switch operates correctly by completing the following:
 - With the Wall Power Adapter still connected to the unit, lower the Display to the closed position.
 - Raise the Display back to the opened position.
 - The unit should power back up.

Note: The Display switch will not operate if the Wall Power Supply cord has been removed.

- Verify all Locks and Doors have a smooth function and are locked.

M100 - SYSTEM ACCEPTANCE TESTING

Inspector: _____

Serial Number: _____

Date: _____

- Plug in unit and insert Demo Card
- Turn Key to Open/Close Polls
- When the question 'Election Card Inserted Open Polls Now?' appears DO NOT press Yes. Press the 1 & 3 keys simultaneously.
- Select System Settings
- Select Date Time
- Select Set Date. Verify the date and change accordingly using the select and plus or minus keys.
- Press Previous to return to the Date Time Menu
- Select Set Time. Verify the date and change accordingly using the select and plus or minus keys.
- Press Previous to return to the Date Time Menu
- Select Set Zone. Verify the zone and change accordingly using the select and plus or minus keys.
- Press Previous to return to the Date Time Menu
- When the Date Time function is complete – select Previous Menu
- Select Calibrate DACs
- Select Set DACs
- Run Ballots in all 4 orientations. Verify that the DAC Values are all accounted for and do not exceed 5. Make adjustments accordingly.
- When the ballot has been run in all 4 orientations and the DACs are set correctly select Previous.

M100 - SYSTEM ACCEPTANCE TESTING cont.

- Select Previous again
- Select Factory Defaults
- Select Save Factory Defaults
- Select Yes
- Select OK
- Select Previous Menu
- Select Previous Menu again
- Question appears 'Mode lock out calibration menu?' Answer NO
- Select Previous
- Question appears 'Mode lock out system settings?' Answer NO
- Select Diags
- Select Ballot Diags
- Select Feed Ballots
- Insert 2 Ballots – should receive error (127) Multiple Ballots detected
- Remove ballots and select OK
- Select Previous Menu
- Select Recycle Set
- Set Cycles for 5 using the Select Digit & Plus/Minus Key
- Select Previous Menu
- Select Feed Ballots
- Insert the Blank Ballot in all 4 orientations, 5 times each orientation.
- Insert the ALL FILL Ballot in all 4 orientations, 5 times each orientation.
- When ballots are at 40 Select Marks Table. All marks should be 020.
- If okay, select Previous Menu

M100 - SYSTEM ACCEPTANCE TESTING cont.

- Select Previous Menu again
- Select Previous Menu again
- When you get back to Open Polls Now? Turn Key of off – remove card and unplug.

ACCEPTANCE CRITERIA
AutoMARK Voter Assist Terminal

Inspector: _____

Serial Number: _____ Date: _____

Acceptance Q.C. Testing:

Setup

- Place AutoMARK on firm surface
- Connect AC chord to machine and wall outlet
- Connect headphones
- Insert key

Visual Inspection

- Verify sample ballot compact flashcard installed
- Verify battery installed
- Verify top and rear clean-out trays installed
- Verify print cartridge installed
- Inspect all fasteners and plastic parts

Print Testing

- Turn key switch to Test
- Wait for machine to boot
- Wait for Power On Self-Test to be completed with no errors displayed
- Press Test Ballot Print on Test Mode screen
- Insert sample ballot and wait to print
- Repeat procedure in all orientations
- Press Done
- Calibrate as required

Keypad/Audio Testing

- Turn key switch to On
- Verify "Insert Ballot" audio prompt
- Cycle Display Screen (diamond button)
- Verify Repeat Key functionality
- Verify Tempo rocker key functionality
- Verify Volume rocker key functionality

Voting Process

- Insert sample ballot
- Complete voting process using touch screen
- Print Ballot

- Insert sample ballot
- Complete voting process using key pad
- Print Ballot

- Insert previously printed ballot
- Verify that AutoMARK correctly identifies votes

**EXHIBIT H
CERTIFICATE OF ACCEPTANCE
(ES&S DS200 Option)**

CERTIFICATE OF ACCEPTANCE

The undersigned do hereby certify that the Equipment listed below has been tested and accepted under the criteria specified in the Agreement. A list of Serial Numbers and pass/fail status (including system error codes if failed),— of the respective Vendor Equipment is attached.

<u>Type of Unit</u>
<u>Number of Units Delivered</u>

County:
Representative: _____
(Printed Name & Title)

(Signature)

Date: _____ / _____ / _____

Vendor:
Representative: _____
(Printed Name)

(Signature)

Date: _____ / _____ / _____

Tester: _____
(Printed Name)

(Signature)

Date Tested: _____ / _____ / _____

**EXHIBIT I
REQUEST FOR PROPOSAL**

**REQUEST FOR PROPOSALS
FOR THE ADOPTION OF VOTING MACHINES, MARKING DEVICES AND/OR
AUTOMATIC TABULATION EQUIPMENT BY THE CUYAHOGA COUNTY
BOARD OF ELECTIONS PURSUANT TO R.C. SECTION 3506.02, AND FOR
POSSIBLE ACQUISITION BY THE CUYAHOGA COUNTY BOARD OF COUNTY
COMMISSIONERS IN COMPLIANCE WITH R.C. SECTION 3506.03**

ISSUED BY: CUYAHOGA COUNTY BOARD OF ELECTIONS (CCBOE)

2925 EUCLID AVENUE
CLEVELAND, OH 44115-2497
RELEASED: May 6, 2008

PROPOSALS DUE TO THE CUYAHOGA COUNTY BOARD OF ELECTIONS NO
LATER THAN 11:00 AM, May 14, 2008.

PROPOSALS WILL BE OPENED AT 11:05 AM on May 14, 2008 in the Board Room.

Each proposal for lease, lease with purchase, and/or a full purchase of the precinct-based optical scan devices, compatible scanning equipment to tabulate vote- by- mail ballots, software, project management, and ancillary materials (hereinafter sometimes referred to collectively as "voting equipment and services") must comply with the specifications more fully described in this Request for Proposal ("Request"), and the successful proposer will be required to enter into a contract containing, among other provisions, the terms and conditions set forth in this Request and which are satisfactory to the Cuyahoga County Board of County Commissioners ("CCBOCC").

ALL VOTING EQUIPMENT MUST BE CERTIFIED BY THE STATE OF OHIO OR AUTHORIZED BY THE OHIO SECRETARY OF STATE FOR USE ON ELECTION DAY.

PROPOSERS WILL PRESENT PROPOSALS AT A BOARD OF ELECTIONS MEETING TO BE HELD AT 9:30 AM ON May 23, 2008 IN THE BOARD ROOM (FOURTH FLOOR). EACH PERSON/ENTITY PRESENTING A PROPOSAL WILL BE ALLOWED 30 MINUTES TO PRESENT AND ANSWER ANY RELEVANT QUESTIONS.

**THE CCBOE AND CCBOCC RESERVE THE RIGHT TO REJECT ANY OR ALL
PROPOSALS**

BY ORDER OF THE:
CUYAHOGA COUNTY BOARD OF ELECTIONS

Jeff Hastings, Chairman
Members: Inajo Davis Chappell
Robert S. Frost
Eben O.(Sandy) McNair, IV

Jane M. Platten, Director
Pat McDonald, Deputy Director
2925 Euclid Avenue
Cleveland, Ohio 44115-2497
Telephone- 216-443-3200

I. PROPOSAL REQUIREMENTS

A. PROCEDURE

1. This document is a request for proposals issued by the Cuyahoga County Board of Elections ("CCBOE") for the provision of voting equipment and all other additional items and services required for the system based on the needs of the CCBOE and the following background information.
2. All proposals shall be submitted on Board of Elections forms and sealed in the enclosed Board of Elections' proposal envelope properly identified as a proposal for precinct-based scanners, compatible scanning equipment and ancillary items and services. Proposals must be accompanied by all supporting forms that accompanied this proposal document. All proposals must be submitted to the attention of the Director.
3. All Proposals will be presented to the CCBOE at the public board meeting to be held on May 23, 2008 at 9:30 AM. The CCBOE may or may not adopt any proposal at the mentioned board meeting. Only those proposals received by the published proposal deadline shall be considered.
4. The adopted proposal shall be recommended to the Board of Cuyahoga County Commissioners for acquisition pursuant to R.C. 3506.03. Work shall not commence until the Board of Cuyahoga County Commissioners and the successful proposer have entered into a final contract, and a notice to proceed has been issued by the Director or Deputy Director of the CCBOE.
5. Any proposal which is incomplete, conditional, obscure, or which contains additions not called for, or irregularities of any kind, may be cause for rejection of the proposal. The Board of Elections reserves the right to waive any informality, irregularity, deviation in any proposal received.

II. CUYAHOGA COUNTY ELECTION INFORMATION AND REQUIREMENTS

The following information is a general description of the operations and scale of the election process in Cuyahoga County, but is not intended to be a comprehensive recitation of all facts and details concerning the same, and the CCBOE disclaims any warranties that said description is guaranteed absolute and complete.

November 4, 2008 Presidential General Election Background Information

Optical scan paper ballots will be issued at all polling locations for all voters, to be scanned in the precincts using precinct optical scanners and scanners for ADA compliance. The uploading or tabulation of votes shall occur principally, if not exclusively, after the polls close. Polls open at 6:30 A.M and close at 7:30 P.M. Results from the precinct scanners will not be collected and delivered to the Board of Elections central tabulation location until after the polls close at 7:30 P.M.

The projected voter turnout for the November 4, 2008 Presidential General Election is between 60% and 70% of the registered voters of Cuyahoga County, or, approximately 700,000 to 750,000 voters resulting in the management of over 1.4 million to 1.5 million ballot pages.

Currently, it is projected that almost all precincts will be voting on a ballot consisting of two, double-sided, 8½ inch by 17 inch pages. Assuming approximately 200,000 to 250,000 voters will utilize vote by mail, which will be opened and scanned the weekend before the election, it is likely that approximately 500,000 to 550,000 voters will be utilizing paper ballots and the precinct scanners on Election Day.

The Cuyahoga County Board of Elections is required to report to the Ohio Secretary of State the final, unofficial vote count of all voting results by 12:00 noon, on Wednesday, November 5, 2008.

Size of Jurisdiction

Cuyahoga County is the largest election jurisdiction in Ohio. Its current population is approximately 1,314,241.

Cuyahoga County is approximately the 15th largest election jurisdiction in the United States.

As of March 3, 2008, there are 1,052,622 Registered Voters in Cuyahoga County.

There are 1,436 Voting Precincts in Cuyahoga County.

There are 576 Voting Locations in Cuyahoga County.

Voting Locations range from 1 precinct to 7 precincts.

Complexity of Ballot

Cuyahoga County is comprised of 59 separate political subdivisions – 38 Cities, 19 Villages and 2 Townships.

There are 5 State Senate Districts in Cuyahoga County: part of District 18, all of Districts 21, 23, 24, and 25.

There are 13 State House Districts in Cuyahoga County: Districts 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and part of District 98.

There are 2 State School Board Districts in Cuyahoga County.

There are 31 City/Local School Board Districts in Cuyahoga County.

There are 9 Library Districts in Cuyahoga County.

III. SPECIFICATIONS OF REQUIRED SERVICES, EQUIPMENT, SOFTWARE, AND ANCILLARY MATERIALS

1. The person/entity whose proposal is adopted shall be required to furnish necessary voting equipment optical scanners, equipment to tabulate vote- by -mail ballots, and all other ancillary equipment. In addition, the person/entity whose proposal is adopted shall be required to provide project management and training services by the required date in the final contract.
2. Such voting equipment and services shall be for the purpose of conducting precinct-based scanning of ballots on Election Day as well as to tabulate vote- by- mail ballots.
3. Sufficient precinct-based optical scanners and compatible scanning equipment to tabulate vote- by- mail ballots with stated quantities shall be provided according to the stated specifications.
4. No substitutions for the equipment described in these specifications will be accepted.
5. The Proposal shall specify the type and quantity of voting equipment, software, and ancillary materials necessary to meet the

County's requirements based upon the background information and requirements provided in this request.

6. The person/entity whose proposal is adopted must be able to meet and work with our pre-designated vote-by-mail ballot and election day ballot vendor(s). The vendor(s) will provide samples with multiple test decks to work with the voting equipment.

7. At least one sample of the optical scanner and the compatible scanning equipment to tabulate vote- by- mail ballots shall be made available to the CCBOE for demonstration and testing prior to any proposal being adopted. Any item that does not meet the approval of the CCBOE may result in the rejection of the proposal. Manufacturing shall not commence until the same is approved by the CCBOE.

8. The Proposer must be able to deliver all the required voting equipment and materials on or before the required date in the final contract to the CCBOE Election Support Department, 1890 East 40th Street, Suite 200, Cleveland, Ohio in time for the November 2008 general election.

9. The Proposal shall include a list and description of all software, hardware, system tabulation equipment, project management, training, and all other ancillary items and services required to perform a large scale election in accordance with the background information and requirements in this Request.

10. Price of all equipment and materials shall be itemized by deliverable on a per unit basis, in addition to a total final cost. **All proposals shall be presented in a lease option, a lease with purchase option.**

11. Cost of all services to be provided shall be itemized on an hourly basis.

12. Delivery and pick up charges for the duration of any anticipated contract period shall be reflected in the grand total of this proposal and listed as part of the proposal

13. The Proposal shall indicate for what period of time pricing shall remain fixed.

IV. EVALUATION AND SELECTION CRITERIA

A. The Proposal adopted shall be made to the “lowest” and “best” proposal. A determination of which Proposal is “best” will be evaluated based upon satisfactory evidence of:

- 1). the Proposer’s ability and resources to provide the necessary equipment and services and materials to completed the work to be performed in a satisfactory manner in accordance with these specifications in the time period;
- 2). experience, reputation, references, and reliability of the Proposer entity and the equipment, services, and materials;
- 3). demonstrated voting equipment performance;
- 4). present and future compliance of voting equipment with State of Ohio Certification requirements;
- 5). litigation history, including judgments, claims, arbitrations proceedings or suits pending against your organization or its officers ;
- 6). the financial status and responsibility of the Proposer; the type of Proposer entity and the number of years the Proposer entity has been in business;
- 7). the willingness of the Proposer to agree to material contract terms as set forth in these specifications.

The Board of Elections shall make a recommendation to the County Commissioners, which shall exercise its independent judgment as to the lowest and best Proposal, and the Board of County Commissioners shall negotiate the final contract with the successful Proposer.

B. The Proposal must include a list of at least three (3) references for past counties that have used the precinct-based optical scan machines and their compatible scanning equipment used to tabulate vote- by- mail ballots, as well as all other voting equipment and services.

C. The Proposal must supply and outline a list of all certified voting equipment with the State of Ohio as well as the purchasing price for potential “next generation” technology.

V. GENERAL TERMS AND CONDITIONS (The following terms and conditions shall apply to any and all proposals submitted)

1. The Board of Elections, or any other entity involved in this project, assumes no liability for any costs incurred by the person/entity submitting the proposal in the preparation of the proposal or during the proposal evaluation process.
2. All prices shall be in exact amounts with no estimates or contingencies. Pricing shall be given in the form of prices per unit and hourly rate, and the grand total for lease, lease with purchase, and a full purchase.
3. All proposals containing erasures or errors corrected with any type of correction fluid shall be deemed null and void and shall not be accepted.
4. Any faxed proposals received by the Board of Elections shall not be evaluated and shall be returned to the person/entity submitting the proposal without consideration.
5. The Board of Elections shall not be required to adopt a proposal for the provision of the voting equipment and services defined in the proposal specifications in violation of Section 3517.13 of the Ohio Revised Code.
6. Should a person/entity submitting a proposal find any discrepancy in or omission from the specifications, said person/entity shall at once notify the Director of the Board of Elections, who will send written instructions to all those submitting proposals. The Board will not be responsible for any oral instructions. If any person/entity submitting a proposal is in doubt as to any of the written instructions or specifications, said person/entity should contact the Director of the Board of Elections.

VI. CONTRACTING REQUIREMENTS FOR ADOPTED PROPOSALS

A. Contract Terms and Conditions. The successful proposer shall be required to enter into a contract with the Cuyahoga County Board of County Commissioners prior to the commencement of services or the provision of equipment, which contract shall be prepared by the Cuyahoga County Prosecuting Attorney. The contract between the successful proposer and the CCBOC shall contain the following terms and conditions, and those terms and conditions stated elsewhere in the proposal to the extent

applicable. The Cuyahoga County Board of County Commissioners reserves the right to modify these terms and conditions, and to require that additional terms and conditions be included in the contract:

1. The selected proposer shall begin work on the project prior to each election on a date as determined by the Director of the Board of Elections.
2. These specifications and the selected proposal shall be considered part of the contract.
3. The contract shall be subject to interpretation under the laws of the State of Ohio and shall be subject to the review of the Cuyahoga County Prosecutor's Office as to legal form and correctness.
4. The selected proposer shall agree to indemnify and hold harmless the Board of Elections and the Cuyahoga County Commissioners in the project represented by this proposal from suits and actions brought against the Cuyahoga County Board of Elections or the Cuyahoga County Commissioners, their officers and employees, for or on account of any injuries or damages received or sustained by a party or parties or from any acts of the contractor, his servants or agents, for breach of representations and warranties, and for third party claims against the County for intellectual property violations.
5. No part of the work described in the proposal specifications shall be assigned, transferred, conveyed, sublet, or otherwise disposed of without the prior written consent, knowledge, and approval of the Board of Elections.
6. The proposer shall provide a performance bond in form acceptable to the County Commissioners, in the amount of the contract price, or a performance guarantee in form acceptable to the County Commissioners with financial consequences to the Proposer in the event of equipment or software failure on Election Day.
7. The proposer shall provide representations and warranties to the effect that equipment and software shall be fit for Cuyahoga County's purposes and requirements as set forth in these specifications, and that the Proposer will provide continued State of Ohio certification of the all equipment during term of the contract.

8. The proposer shall provide a grant of irrevocable license in software and document in event of purchase.
9. The proposer shall agree to place software source code into escrow upon terms and conditions satisfactory to the County.
10. The proposer will provide upgrades and new releases of equipment and software.
11. The proposer will provide credit toward the future purchase of equipment in the event the County leases equipment.
12. The proposer agrees that governmental agencies and universities shall have the right to audit performance of equipment and software.
13. The proposer shall agree that the Board of Elections shall determine with finality the satisfactory quality of the services and/or equipment and materials furnished under any anticipated contract. Failure to meet the Board's performance requirements is a reason for the termination of the agreement.
14. The Proposal shall provide that the optical scanners and all other items be packaged, whether in their set case or other case, in such a way as to prevent damage during transit or set-up, under customary shipping processes; each item shall be clearly labeled with the name of the item and its quantity. Damaged or mishandled software or hardware will not be accepted and will not count towards fulfillment of the contract obligations. All equipment must meet testing criteria to be determined by the CCBOE as a condition to acceptance.
15. To receive payment, the contractor shall submit a detailed invoice to the Board of Elections accompanied by itemization and documents of costs and verification of completed services. After evaluation of services rendered, an invoice shall be approved for payment. Payment shall be made only for work properly performed.

ADDENDUM 1 TO REQUEST FOR PROPOSAL

Date: May 6, 2008
Due Date: May 14, 2008
Time: 11:00 A.M. EST

TO: Potential Proposers

FROM: Cuyahoga County Board of Elections
2925 Euclid Avenue
Cleveland, Ohio 44115-2497

RE: Request for Proposals for Precinct Based Optical Scanners released April 14, 2008

Pursuant to this Addendum No. 1, the following changes are made to the Request for Proposal for Precinct Based Scanners released on April 21, 2008, which changes are incorporated into the Request for Proposal:

1. The Bid Specifications included in the April 21, 2008 Request for Proposals are replaced in their entirety by the revised and updated Bid Specifications included with this Addendum No. 1.
2. The forms included with the April 21, 2008 Request for Proposals are replaced in their entirety by the forms included with this Addendum No. 1.

All remaining terms and conditions of the Request for Proposal remain in effect and this Addendum No. 1 is hereby made a part of the Request for Proposal.

BY ORDER OF THE CUYAHOGA COUNTY BOARD OF ELECTIONS

Jeff Hastings, Chairman
Members: Inajo Davis Chappelle
Robert S. Frost
Eben O. (Sandy) McNair, IV

ADDENDUM 2 TO REQUEST FOR PROPOSAL

Date: May 7, 2008
Due Date: May 14, 2008
Time: 11:00 A.M. EST

TO: Potential Proposers

FROM: Cuyahoga County Board of Elections
2925 Euclid Avenue
Cleveland, Ohio 44115-2497

RE: Request for Proposals for Precinct Based Optical Scanners released April 21, 2008

Pursuant to this Addendum No. 2, the following changes in italics are made to the Request for Proposal for Precinct Based Scanners released on April 21, 2008:

1. Item III. 10. amended as follows:

Price of all equipment and materials shall itemized by deliverable on a per unit basis, in addition to a total final cost. **All proposals shall be presented in a lease option, a lease with purchase option, and a full purchase option of the precinct-based optical scan devices.**

2. Item I. A. 2. amended as follows:

All proposals shall be submitted on Board of Elections forms and sealed in the enclosed Board of Elections' proposal envelope, *or permanently affix the sealed Board of Elections' proposal envelope onto the materials*, properly identified as a proposal for precinct-based scanners, compatible scanning equipment and ancillary items and services. Proposals must be accompanied by all supporting forms that accompanied this proposal document. All proposals must be submitted to the attention of the Director.

All remaining terms and conditions of the Request for Proposal remain in effect and this Addendum No. 2 is hereby made a part of the Request for Proposal.

BY ORDER OF THE CUYAHOGA COUNTY BOARD OF ELECTIONS

Jeff Hastings, Chairman
Members: Inajo Davis Chappelle
Robert S. Frost
Eben O. (Sandy) McNair, IV

EXHIBIT J
NOVEMBER 4, 2008 GENERAL ELECTION BALLOT PROFILE

November 4, 2008 Election Ballot Profile

The November 4, 2008 Election Ballot Profile will be consistent with the November 4, 2008 Presidential Election Background Information section of the May 6, 2008 Request for Proposal.

**Request for Taxpayer
 Identification Number and Certification**

Give form to the requester. Do not send to the IRS.

Name (as shown on your income tax return)
Election Systems and Software

Business name, if different from above

Check appropriate box: Individual/Sole proprietor Corporation Partnership
 Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ▶ Exempt payee
 Other (see instructions) ▶

Address (number, street, and apt. or suite no.)
11208 John Galt Blvd.

City, state, and ZIP code
Omaha NE 68137

Requester's name and address (optional)

List account number(s) here (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Social security number

or

Employer identification number
47-0617567

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Part II Certification

Under penalties of perjury, I certify that:

- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
- I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
- I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here Signature of U.S. person ▶ *Oldeo Jim* Date ▶ *July 10, 2008*

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

- Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
- Certify that you are not subject to backup withholding, or
- Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,

Unresolved Findings for Recovery

CERTIFICATION

I, Aldo Tesi President + CEO
(Name of person signing affidavit) (Title)

do hereby certify that ES+S does not have an outstanding
(Company or Individual Name)
unresolved finding for recovery issued by the Auditor of the State of Ohio as defined by

Ohio Revised Code (ORC) Section 9.24 as of July 10, 2008.
(Current date)

Aldo Tesi
Signature of Officer or Agent

Aldo Tesi
Name (Print)

Sworn to and subscribed in my presence this 10th day of
July, 2008.

Joyce M. Dorrill
(Notary Public)

JOYCE M. DORRILL, Attorney
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.



GOVERNMENT BUSINESS AND FUNDING CONTRACTS

In accordance with section 2909.33 of the Ohio Revised Code

DECLARATION REGARDING MATERIAL ASSISTANCE/NONASSISTANCE TO A TERRORIST ORGANIZATION

This form serves as a declaration of the provision of material assistance to a terrorist organization or organization that supports terrorism as identified by the U.S. Department of State Terrorist Exclusion List (see the Ohio Homeland Security Division website for a reference copy of the Terrorist Exclusion List).

Any answer of "yes" to any question, or the failure to answer "no" to any question on this declaration shall serve as a disclosure that material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List has been provided. Failure to disclose the provision of material assistance to such an organization or knowingly making false statements regarding material assistance to such an organization is a felony of the fifth degree.

For the purposes of this declaration, "material support or resources" means currency, payment instruments, other financial securities, funds, transfer of funds, and financial services that are in excess of one hundred dollars, as well as communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

LAST NAME		FIRST NAME		MIDDLE INITIAL
HOME ADDRESS				
CITY	STATE	ZIP	COUNTY	
HOME PHONE		WORK PHONE		

COMPLETE THIS SECTION ONLY IF YOU ARE A COMPANY, BUSINESS OR ORGANIZATION

BUSINESS/ORGANIZATION NAME <i>ELECTION SYSTEMS AND SOFTWARE</i>				
BUSINESS ADDRESS <i>11208 JOHN GALT BLVD.</i>				
CITY <i>OMAHA</i>	STATE <i>NE</i>	ZIP <i>68137</i>	COUNTY <i>DOUGLAS</i>	
PHONE NUMBER <i>402-593-0101</i>				

DECLARATION

In accordance with division (A)(2)(b) of section 2909.32 of the Ohio Revised Code

For each question, indicate either "yes," or "no" in the space provided. Responses must be truthful to the best of your knowledge.

- Are you a member of an organization on the U.S. Department of State Terrorist Exclusion List?
 Yes No
- Have you used any position of prominence you have with any country to persuade others to support an organization on the U.S. Department of State Terrorist Exclusion List?
 Yes No

GOVERNMENT BUSINESS AND FUNDING CONTRACTS - CONTINUED

- 3. Have you knowingly solicited funds or other things of value for an organization on the U.S. Department of State Terrorist Exclusion List?
 Yes No
- 4. Have you solicited any individual for membership in an organization on the U.S. Department of State Terrorist Exclusion List?
 Yes No
- 5. Have you committed an act that you know, or reasonably should have known, affords "material support or resources" to an organization on the U.S. Department of State Terrorist Exclusion List?
 Yes No
- 6. Have you hired or compensated a person you knew to be a member of an organization on the U.S. Department of State Terrorist Exclusion List, or a person you knew to be engaged in planning, assisting, or carrying out an act of terrorism?
 Yes No

In the event of a denial of a government contract or government funding due to a positive indication that material assistance has been provided to a terrorist organization, or an organization that supports terrorism as identified by the U.S. Department of State Terrorist Exclusion List, a review of the denial may be requested. The request must be sent to the Ohio Department of Public Safety's Division of Homeland Security. The request forms and instructions for filing can be found on the Ohio Homeland Security Division website.

CERTIFICATION

I hereby certify that the answers I have made to all of the questions on this declaration are true to the best of my knowledge. I understand that if this declaration is not completed in its entirety, it will not be processed and I will be automatically disqualified. I understand that I am responsible for the correctness of this declaration. I understand that failure to disclose the provision of material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List, or knowingly making false statements regarding material assistance to such an organization is a felony of the fifth degree. I understand that any answer of "yes" to any question, or the failure to answer "no" to any question on this declaration shall serve as a disclosure that material assistance to an organization identified on the U.S. Department of State Terrorist Exclusion List has been provided by myself or my organization. If I am signing this on behalf of a company, business or organization, I hereby acknowledge that I have the authority to make this certification on behalf of the company, business or organization referenced on page 1 of this declaration.

x *Aldeo Jim*
Signature

 7/10/08
Date

CERTIFICATION OF COMPLIANCE WITH SECTION 3517.13 OF THE O.R.C.

Check all applicable boxes.

BUSINESS NAME: Election Systems & Software, Inc.

CONTRACTS AWARDED TO INDIVIDUAL, PARTNERSHIP, OTHER UNINCORPORATED BUSINESS, ASSOCIATION (INCLUDING A PROFESSIONAL ASSOCIATION ORGANIZED UNDER CHAPTER 1785), ESTATE, OR TRUST MUST CONTAIN THE FOLLOWING CERTIFICATION:

Any contract for goods or services costing more than five hundred dollars must contain a certification by the contracting entity (vendor) that all of the following persons are in compliance with 3517.13(I)(1), limiting campaign contributions to the holder of the public office having the ultimate responsibility for the award of the contract:

- THE INDIVIDUAL
- EACH PARTNER OR OWNER OF THE PARTNERSHIP OR UNINCORPORATED BUSINESS
- EACH SHAREHOLDER OF THE ASSOCIATION
- EACH ADMINISTRATOR OF THE ESTATE
- EACH EXECUTOR OF THE ESTATE
- EACH TRUSTEE OF THE TRUST
- EACH SPOUSE OF ANY OF THE PRECEDING PERSONS
- EACH CHILD SEVEN YEARS TO SEVENTEEN YEARS OF AGE OF ANY OF THE PRECEDING PERSONS
- ANY COMBINATION OF THE PERSONS LISTED ABOVE

CONTRACTS AWARDED TO A CORPORATION OR BUSINESS TRUST (EXCEPT A PROFESSIONAL ASSOCIATION ORGANIZED UNDER CHAPTER 1785) MUST CONTAIN THE FOLLOWING CERTIFICATION:

Any contract for goods or services costing more than five hundred dollars must contain a certification by the contracting entity (vendor) that all of the following persons are in compliance with 3517.13(J)(1), limiting campaign contributions to the holder of the public office having the ultimate responsibility for the award of the contract:

- EACH OWNER OF MORE THAN TWENTY PER CENT OF THE CORPORATION OR BUSINESS TRUST
- EACH SPOUSE OF AN OWNER OF MORE THAN TWENTY PER CENT OF THE CORPORATION OR BUSINESS TRUST
- EACH CHILD SEVEN YEARS TO SEVENTEEN YEARS OF AGE OF AN OWNER OF MORE THAN TWENTY PER CENT OF THE CORPORATION OR BUSINESS TRUST
- ANY COMBINATION OF THE PERSONS LISTED ABOVE

It is hereby certified that all of the persons listed above are in compliance with section 3517.13(I)(1) or 3517.13(J)(1) of the Ohio Revised Code, or

IF CONTRACTING ENTITY IS A NONPROFIT CORPORATION ESTABLISHED UNDER ORC CHAPTER 1702, THE UNDERSIGNED CERTIFIES THAT SECTIONS 3517.13(I)(1) AND 3517.13(J)(1) ARE NOT APPLICABLE TO THE CONTRACTING ENTITY.

Aldo J. Tesi
PRINTED NAME

President & CEO
TITLE


SIGNATURE

July 11, 2008
DATE

CONTRACT
ENCUMBRANCE NO. CE 0800541-01

INDEX
CODE BE475095
OBJECT
CODE 0720
COST
ACCOUNT
PROJECT/WORK
PHASE

2008- 5,849,725.00
2009- 1,507,590.00

BY
**THE BOARD OF
COUNTY COMMISSIONERS**

WITH
Election Systems & Software, Inc.

FOR
Lease and purchase of precinct optical and
digital scan voting machines, related
equipment and services

Time
Period: 7/10/2008-7/9/2013

Contact Person: Craig Seibert
Telephone: 402-558-5400

I hereby certify that the money
required for the County's proportion of
this Contract in the sum of
\$5,849,725.00 is in the Treasury to the
credit of the fund from which it is to be
drawn, or has been levied and placed
on the duplicate, and in process of
collection and not appropriated for any
other purpose.

Frank Russo
County Auditor

Date 7-10-08 [Signature]

I hereby approve of the legal form and
correctness of the within contract
[Signature]
Asst. Prosecuting Attorney

Approved by the Board,
Date JUL 10 2008

[Signature]
Clerk