

VOTING EQUIPMENT AGREEMENT

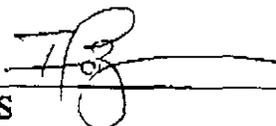
This Agreement is made as of the date it is executed by the last of the parties named below (the "Effective Date")

BETWEEN: Election Systems & Software, Inc., a Delaware corporation ("Contractor")

AND: Kansas Secretary of State ("KSOS").

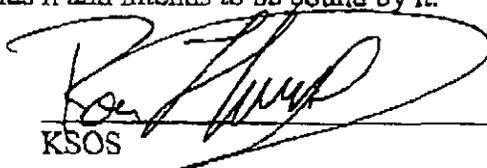
Contractor agrees to sell its voting equipment and related products and services listed in this agreement to any County that selects Contractor, and KSOS agrees to purchase voting equipment and related products and services from Contractor if Contractor is selected by a Kansas County to provide such in the State of Kansas. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, each of the parties hereto:

- Agrees to the terms and conditions set forth below.
- Represents and warrants to the other party that as of its signature date indicated below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.



ES&S

11-16-05
Date



KSOS

11-16-05
Date

DEFINITIONS:

The parties hereby define the following terms as used in this Agreement:

1. "Agreement" and "Contract" mean the agreement outlined in this document, including all attachments and exhibits.
2. "Contractor" means the party to this contract who agrees to sell and provide voting equipment and related products and services to the State of Kansas and Kansas counties.
3. "County" means a county within the state of Kansas who receives or purchases voting equipment and related products and services from Contractor.
4. "Customer" means either the Kansas Secretary of State or the Kansas County purchasing the voting equipment and related products and services from Contractor.
5. "Documentation" means the operating instructions, user manuals and training materials provided by Contractor for the voting equipment and software.
6. "HAVA-compliant voting equipment" means voting equipment and related products and services that comply with the "Help America Vote Act of 2002."
7. "KSOS" means the Kansas Secretary of State.
8. "Non-HAVA voting equipment" means voting equipment and related products and services for purchase from Contractor that is not required to comply with the "Help America Vote Act of 2002."

TERMS AND CONDITIONS

1. Contract Elements, Order of Precedent: The following exhibits are incorporated into, and constitute an integral part of, this Agreement. Any conflict in this Contract and the documents incorporated by reference shall be determined by the following priority order:

- | | |
|---|--|
| X | This Agreement executed on _____ |
| X | Kansas Voting Equipment Order Form |
| X | Exhibit A Best and Final Offer, including BAFO Price Summary |
| X | Exhibit B Source Code Escrow Agreement |
| X | Exhibit C Post-Warranty Maintenance Agreement |
| X | Exhibit D Acceptance Testing Criteria |
| X | Exhibit E Questions/Answers, 3 rd Series |
| X | Exhibit F Questions/Answers, 2 nd Series |
| X | Exhibit G Questions/Answers, 1 st Series |
| X | Exhibit H RFP Response |

- X Exhibit I RFP
- X Exhibit J Form DA-146a, Rev. 1-01

2. Term of Contract: The term of this Contract is from the Effective Date (as defined above) until five years from the Effective Date (the "Initial Term"), with five additional one-year renewal periods. At least ninety (90) calendar days prior to expiration of the Initial Term, the Kansas Secretary of State shall notify Contractor in writing of its desire to discuss renewing the Contract for one year. Upon mutual agreement between the parties, the Contract shall be renewed for one year from expiration of the Initial Term. If renewed, the Kansas Secretary of State shall notify Contractor in writing at least sixty (60) calendar days prior to the expiration of the then current one-year renewal period each year thereafter to determine future one-year renewals.

3. County Purchases: Kansas counties are permitted to use this state Contract to purchase HAVA-compliant voting equipment. The terms and conditions of this Contract shall apply to any county purchase of HAVA-compliant voting equipment pursuant to this Contract. Kansas counties may purchase additional non-HAVA voting equipment using this state Contract, and any such purchases using this Contract shall be subject to the terms and conditions of this Contract. However, use of this state Contract for county purchases of non-HAVA voting equipment is not required, and county contracts for non-HAVA voting equipment are subject to re-negotiation and modification by the counties and Contractor.

4. Quarterly Reports: The Contractor shall submit quarterly reports to KSOS listing all purchases of voting equipment, products and services made by the Counties, whether from this Contract or a separate contract. The report should include as a minimum the County name and the quantity, description (including software/firmware version, equipment serial numbers), and amount of purchase.

5. Termination for Cause: Either party may terminate this Contract, or any part of this Contract, for cause under any one of the following circumstances:

- a. Contractor may terminate this Contract with KSOS if KSOS breaches any material provision hereof and does not cure such breach within thirty (30) days after it receives notification thereof from Contractor. Contractor may terminate this Contract as it pertains to an individual County if the County breaches any material provision hereof and does not cure such breach within thirty (30) days after it receives notification thereof from Contractor; or
- b. KSOS may terminate this Contract if the Contractor fails to make delivery of equipment, goods or services as specified in this Contract; or
- c. KSOS may terminate this Contract if the Contractor fails to perform any of the provisions of this Contract, or so fails to make progress as to endanger performance of this Contract in accordance with its terms.

KSOS shall provide Contractor with written notice of the conditions endangering performance under subsections b and c above. If the Contractor fails to remedy the conditions within thirty (30) days from the receipt of the notice, or such longer period as KSOS may authorize in writing, the State Director of Purchases shall issue the Contractor an order to stop work immediately. Receipt of the notice shall be presumed to have occurred within three (3) days of the date of the notice.

In the event of termination under this section, the terms and conditions contained in sections 13, 14, 23,

25 and 33 of this Agreement shall survive in relation to voting equipment, products and services already installed.

6. Termination for Convenience: KSOS may terminate performance of work under this Contract in whole or in part whenever, for any reason, the KSOS and the Director of Purchases shall determine that the termination is in the best interest of the State of Kansas. In the event that the Contract is terminated pursuant to this provision, the KSOS shall provide the Contractor written notice at least thirty (30) days prior to the termination date. The termination shall be effective as of the date specified in the notice. The KSOS or County, as applicable, shall pay Contractor for all deliverables provided and work performed up through the effective date of such termination. The Contractor shall continue to perform any part of the work that may have not been terminated by the notice.

In the event of termination under this section, the terms and conditions contained in sections 13, 14, 23, 25 and 33 of this Agreement shall survive in relation to voting equipment, products and services already installed.

7. Governing Law: This Contract shall be governed by Kansas law and shall be deemed executed at Topeka, Shawnee County, Kansas. Contractor represents to Customer that the equipment, products, and services provided, and any updates, comply with all applicable requirements of state and federal law at the time of delivery, including the 2002 federal election standards and state certification (including testing by a qualified independent testing authority). Each party shall comply with all applicable federal, state and local laws, including statutes, regulations, ordinances and codes in connection with its performance under this Agreement. Contractor's staff shall perform their duties in accordance with Kansas state policies, procedures and requirements, using state specifications and standards.

8. Jurisdiction: The parties shall bring any and all legal proceedings arising hereunder against the State of Kansas in the State of Kansas, District Court of Shawnee County. The United States District Court for the State of Kansas sitting in Topeka, Shawnee County, Kansas, shall be the venue for any federal action or proceeding arising hereunder in which the State is a party. Any legal claim arising hereunder brought against the County shall be filed in the State of Kansas, District Court of that county.

9. Subcontractors: The Contractor is responsible for all actions and work performed by its subcontractors. All terms, conditions and requirements of the Contract shall apply without qualification to any equipment, products or services provided by any subcontractor. Contractor shall provide KSOS with a copy of any agreement(s) with its subcontractor(s). Upon request, Contractor shall provide KSOS with written evidence of its timely payments to subcontractors and shall indemnify Customer against any claims, suits or actions brought by any subcontractor for nonpayment of fees or expenses alleged to be owed by Contractor to such subcontractor(s).

10. Purchase Order Process: KSOS shall place County orders for HAVA-compliant voting equipment, products and services with Contractor through State Fiscal Year 2006 (June 30, 2006). Thereafter, Counties shall place all orders for voting equipment, products and services directly with Contractor. The purchase order process through FY 2006 shall be as follows:

- a. The purchasing County shall send its Purchase Order to KSOS for HAVA-compliant voting equipment, and KSOS will submit the County Purchase Orders to Contractor.
- b. All communications relating to the Purchase Orders for HAVA-compliant voting equipment shall occur between Contractor and KSOS. Contractor and KSOS shall each provide the name and contact information for its representative responsible for communications between the parties regarding purchase orders.

- c. The delivery due date shall be agreed upon by Contractor and KSOS at the time of acceptance of the Purchase Order.
- d. KSOS shall provide Contractor information necessary to allow Contractor to properly bill KSOS and the Counties for their appropriate portion of the costs.
- e. Contractor shall submit to KSOS a complete and detailed inventory list (including firmware/software versions and equipment serial numbers) of all equipment, products and services delivered to each County, including the price paid for each. The inventory list shall be delivered to KSOS at the time that the equipment, products and services are delivered to the County.

11. Staffing Requirements. Contractor shall designate a single customer representative ("Key Personnel") who shall be responsible for coordination of all orders, delivery, installation, training, and performance of all professional services. Contractor shall not reassign, terminate or add key personnel without prior written consent from Customer, which consent shall not be unreasonably withheld or conditioned, nor unduly delayed. In the event that, in Customer's reasonable determination, Contractor's key personnel is failing to satisfactorily perform the work required of him or her under this Agreement, Customer may request that Contractor replace such key personnel. If Customer makes such a determination, Customer shall meet with Contractor's project manager to review and discuss the alleged performance deficiencies. If the parties agree that it is necessary to replace such personnel, Contractor shall provide Customer with a staff-experience statement for such personnel for Customer's prior review and approval, which approval shall not be unreasonably withheld or conditioned, nor unduly delayed.

Contractor's employees assigned to perform this Agreement shall have adequate knowledge of systems operations and development environments, techniques, and tools. Contractor's employees assigned to perform this Agreement shall have broad knowledge of business operations, internal control concepts, and application processing controls. Contractor's supervisors assigned to perform this Agreement shall have adequate supervisory, communications, and project management skills.

Neither Contractor nor Contractor's employees shall be deemed to be employees of the State or County. Contractor is providing equipment, products and services as an independent contractor and shall not be deemed to be a "state actor" for purposes of 42 U.S.C. § 1983. Contractor shall take appropriate measures to ensure that its employees are adequately covered by any and all employer-related taxes and insurance in accordance with applicable law. Contractor shall at all times comply with applicable employment laws applicable to their employees.

12. Delivery and Installation of Equipment, Products and Services; Acceptance; and Updates.

a. Delivery. Contractor shall deliver and install at its expense the voting equipment, products and services purchased under this Agreement at the County premises, which shall be specified by the County. Delivery due dates shall be agreed to by the Contractor and Customer at the time of acceptance of the purchase order. Contractor shall either (a) deliver and install any updates at the County's premises, or (b) deliver such updates to the County via courier and/or install such updates remotely. Risk of loss with respect to the equipment, products and services, or any individual element thereof, shall pass to the County upon delivery. Title to the equipment shall pass to the County upon final payment by KSOS and/or the County, as applicable, for such equipment. Contractor shall submit to KSOS a complete and detailed inventory list (including firmware/software versions and equipment serial numbers) of all equipment, products and services delivered to each County (HAVA-compliant and non-HAVA), including the price paid for each. The inventory list shall be delivered to KSOS at the time that the equipment, products and services are delivered to the County.

b. Acceptance; Payment; Change Order Process. Contractor and the County shall jointly conduct and perform acceptance testing within thirty (30) days after delivery to the County to determine if the delivered equipment, products and services meet the requirements of this Agreement. Acceptance testing shall be conducted by Contractor and County in accordance with Acceptance Testing Criteria set forth on Exhibit "D".

c. Payment Terms. Contractor shall invoice KSOS for costs associated with equipment, products and services listed on the purchase order for "HAVA-compliant voting equipment" which is equal to or less than the County's spending authority for HAVA funds. Contractor shall invoice the County for costs associated with equipment, products and services listed on the purchase order for "HAVA-compliant voting equipment" that exceed the County's spending authority for HAVA funds, and any equipment, products and services listed on the purchase order for "Non-HAVA voting equipment." Contractor shall submit each invoice upon completion of acceptance testing of each deliverable in accordance with this Agreement. For products or services that do not require acceptance testing, Contractor shall submit each invoice upon delivery. Customer shall pay within thirty (30) calendar days all amounts due in United States dollars at Contractor's address set forth on the invoice, which shall be an address within the United States. If agreeable to both parties, payment by the KSOS may be made by electronic means through the State of Kansas STARS electronic deposit program. Any invoice remaining unpaid for more than thirty (30) days from receipt of said invoice(s) shall accrue interest at the rate set forth in the Kansas Prompt Payment Act (K.S.A. 75-6403).

d. Pricing: All charges shall be billed in accordance with the price summary incorporated into this Contract. Prices shall not change during the term of the award unless a written amendment to the award is negotiated between Contractor and Customer.

e. Change Order Process. Contractor or Customer may propose changes to the scope of the equipment, products or services described herein. Changes shall be made according to the procedures outlined below.

Process

(i) To propose a Change, Contractor's Project Manager or Customer's Project Manager shall deliver a written proposal (the "Change Order Proposal") to the Project Manager of the other party specifying the proposed Change specifically identifying the change in circumstances giving rise to a change order, and

(a) the objective or purpose of such Change;

(b) the requirements and specifications of the deliverables to be delivered pursuant to such Change; and

(c) the requested prioritization and schedule for such Change.

(ii) Customer and Contractor shall cooperate with each other in discussing the scope and nature of the Change Order Proposal, the availability of Contractor personnel, expertise and resources to provide such Change and the time period in which such change will be implemented. Within ten (10) business days, or another period of time as agreed by the parties, Contractor shall prepare a written assessment of the proposal (the "Change Assessment"):

(a) describing any changes in products, services, assignment of personnel and other resources that Contractor believes will be required;

- (b) estimating the increase or decrease in Contractor charges that would be required due to such Change;
- (c) specifying how the proposed Change would be implemented;
- (d) describing the effect, if any, such Change would have on this Contract, including, but not limited to, time for performance;
- (e) estimating all resources required to implement such Change;
- (f) describing the delivery risks and associated risk mitigation plans; and
- (g) providing such other information as may be relevant to the proposed Change.

(iii) To the extent that a proposed Change is of such magnitude or complexity that it is not feasible for Contractor to produce a detailed Change Assessment within ten (10) business days, Contractor shall prepare a summary Change Assessment outlining such details regarding the prospective Change as Contractor can ascertain within ten (10) business days, and the parties shall agree upon a schedule for the production of a more detailed Change Assessment.

Time for Approval.

Customer shall review the Change Assessment and respond within ten (10) business days, or another period of time as agreed by the parties, indicating whether Customer desires Contractor to implement the Change pursuant to the Change Assessment and, if so, the parties will execute a change order based upon the Change Assessment.

13. Updates and New Products.

a. Updates. During the Warranty Period, Contractor shall provide new releases, upgrades or maintenance patches to Contractor's voting equipment, products and services, along with appropriate documentation ("Updates") at no additional charge. All Updates to software shall be deemed to be Contractor's software for purposes of this Agreement upon delivery. Customer shall timely install all Updates in accordance with Contractor's recommended instructions and may request that Contractor install the updates or perform training on such Updates at Contractor's then current charge for such service. Contractor may charge Customer to provide maintenance and support on the voting equipment, products and services which are required as a result of Customer's failure to timely install an Update. If Customer proposes changes in the Contractor software to Contractor, such proposals will become Contractor's property. Contractor may, in its sole discretion, elect to make or not to make such changes without reference or compensation to Customer or any third party. Upon the termination of the Warranty Period, Customer shall be entitled to receive the Maintenance Services described in the Post-Warranty Maintenance Agreement, attached as Exhibit C, if Customer purchases such services.

Customer shall pay Contractor for the costs of any Update that is required due to a change in state or federal law. Contractor shall provide any software Updates required due to future amendments to the federal "Help America Vote Act of 2002" at no additional cost to Customer.

Contractor shall notify Customer of any defects or problems that arise in any of its equipment, products or services immediately after discovering such defects or problems. Any remedy or fix proposed or developed by Contractor to address or solve the defect or problem shall be provided to Customer at no charge.

b. New Software Products. From time to time, Contractor may offer new software products that are

not currently included within the Contractor software licensed hereunder to Customer and do not use the current code base of the Contractor software and its Updates ("New Products") to Customer. Customer may elect to license a New Product upon the payment of an applicable license fee to Contractor. Unless any such license is effectuated pursuant to a separate license agreement, the New Product shall be deemed to be part of the Contractor's software upon payment of such license fee. Each New Product which is deemed to be part of the Contractor software will be subject to the warranty set forth below upon acceptance, and Customer may thereafter elect to receive Maintenance Services upon the expiration of the Warranty Period.

14. Warranties. Contractor warrants that for one (1) year after the acceptance date (the "Warranty Period"), it will repair or replace any of its voting equipment, products or services, including software, which, while under normal use and service: (a) fails to perform in accordance with its documentation in all material respects, or (b) is defective in material or workmanship. The Warranty shall not include the repair or replacement of any equipment components that are consumed in the normal course of operating the equipment, including printer ribbons, paper rolls, batteries, removable memory packs, cancellation stamps, ink pads or red stripe pens. Any repaired or replaced item of equipment, products or services, including software shall be warranted only for the unexpired term of the original Warranty Period. All replaced components of the Contractor equipment will become the property of Contractor. This warranty is effective provided that (a) Customer promptly notifies Contractor of the failure of performance or defect and is otherwise in compliance with its obligations hereunder, (b) the Contractor's equipment, products and services to be repaired or replaced have not been repaired, changed, modified or altered except as authorized or approved by Contractor, (c) the Contractor's equipment, products or services to be repaired or replaced are not damaged due to accident, theft, vandalism, neglect, abuse, or use which is not in accordance with instructions or specifications furnished by Contractor or causes beyond the reasonable control of Contractor or Customer, including natural disaster, fire, flood, unusually severe weather or Acts of God, and (d) Customer has installed and is using the most recent Update, or the second most recent Update (if any), provided to it by Contractor. This Warranty is void for any units of equipment which: (x) have not been stored or operated in a temperature range according to their specifications, (y) have been severely handled so as to cause mechanical damage to the unit, or (z) have been operated or handled in a manner inconsistent with reasonable treatment of an election product. "Acceptance date" as defined for this section means the date upon which final accepting testing has been completed by the Contractor and the County.

Contractor agrees that, following the warranty period, it shall continue to produce and maintain parts and services necessary to maintain the voting equipment, products and services purchased pursuant to this Agreement in good working condition for the life of the Agreement.

Contractor warrants that Contractor's equipment, products and services will operate in conjunction with the Third Party Items during the Warranty Period, provided that (i) Customer has installed and is using the most recent Update, or the second most recent Update, provided to it by Contractor, and (ii) the Third Party Items are performing in accordance with their own specifications and documentation in all material respects and are not defective in material or workmanship. In the event of a breach of this warranty, Contractor will repair or replace the item that is causing such breach to occur. Customer acknowledges that Contractor has merely purchased the Third Party Items for resale or rental to Customer, and that the proprietary and intellectual property rights to the Third Party Items are owned by parties other than the Contractor ("Third Parties"). Customer further acknowledges that except for the payment to Contractor for the Third Party Items, all of its rights and obligations with respect thereto flow from and to the Third Parties. Contractor shall provide Customer with copies of all documentation and warranties for the Third Party Items which are provided to Contractor.

EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, CONTRACTOR'S OBLIGATIONS, AS DESCRIBED IN THIS SECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES IN THE EVENT OF A BREACH OF THIS SECTION.

15. Limitation of Liability. Contractor, KSOS and County shall not 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 under Section 16(a) of this Agreement, Contractor's total liability to Customer arising out of or relating to this Agreement shall not exceed the aggregate amount paid to Contractor hereunder. Any action by Customer against Contractor, whether in contract, tort, negligence, by statute or otherwise, for direct damages caused by failure to perform under this agreement shall be commenced within the applicable statutory period of limitations. By entering into this Agreement, Customer agrees to accept responsibility for (a) use of the voting equipment, products or services, including software; (b) Customer's intended results (but not the accuracy of tabulation results when the voting equipment and software is used by Customer in accordance with its Documentation) obtained from the use of the voting equipment, products or services, including software; and (c) the selection of, use of and results obtained from any equipment, products or services, including software not provided by the Contractor and used with its voting equipment. Contractor shall not be liable under this Agreement for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee that is caused by (a) County's failure to timely or properly install and use the most recent Update, or the second most recent Update, provided to it by Contractor or (b) County's decision not to receive, or to terminate, hardware or software maintenance and support.

16. Indemnification by Contractor.

a. Intellectual Property Infringement. Contractor shall indemnify and hold Customer 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 of its equipment, products or services, including software, infringes upon any third party's United States patent existing as of the date hereof or United States copyright, trademark or trade secret (a "Third Party Infringement Claim"). Customer shall notify Contractor immediately if it becomes aware of any Third Party Infringement Claim. Customer hereby gives Contractor full and complete authority, and shall provide such information and assistance as is necessary (at Contractor's expense with respect to reasonable out-of-pocket costs), to enable Contractor to defend, compromise or settle a Third Party Infringement Claim. In addition, if Customer is prevented by a Third Party Infringement Claim from using any of Contractor's equipment, products or services in substantially the manner contemplated by this Agreement, Contractor shall, at its expense (i) first attempt to procure for Customer the right to continue such use, or (ii) if Contractor is unable to procure such right, then replace or modify the infringing item. If neither option is commercially reasonable, ES&S may direct Customer to cease use of the infringing item, and shall refund the depreciated amount paid by Customer for the voting system under this Agreement. **THE FOREGOING STATES ES&S' ENTIRE LIABILITY FOR ANY INTELLECTUAL PROPERTY INFRINGEMENT ARISING UNDER THIS AGREEMENT. THE REMEDIES PROVIDED BY ES&S PURSUANT TO THIS SECTION 16(a) SHALL NOT BE AVAILABLE (i) IF THE THIRD PARTY INFRINGEMENT CLAIM RESULTS FROM AN ACTION OR OMISSION OF CUSTOMER DESCRIBED IN SECTION 16(b) BELOW, OR (ii) FOR ANY CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT RELATING SOLELY TO CUSTOMER'S USE OF ANY THIRD PARTY ITEM.**

b. Timely Performance. If, due to Contractor's negligence, (i) Contractor fails to provide any equipment, product or service by an agreed upon specified date, and (ii) such failure has or will result in a material detrimental impact on Customer's ability to meet the requirements of federal or state law, define and conduct elections or to tabulate or report election results in a satisfactory manner or on a timely basis, Customer may pass to Contractor the direct and reasonable out-of-pocket expenses incurred by Customer in working to cure such failure. Customer shall submit to Contractor an itemized statement setting forth the charges for said expenses. Upon Contractor's request, Customer shall also provide Contractor with copies of invoices and other supporting information necessary to confirm the itemized expenses. Customer may, at its option, either accept a credit against future payments to Contractor or accept a cash payment as payment by Contractor under this section. Customer shall take all reasonable steps to mitigate the expenses incurred by Customer hereunder. In the event that Contractor fails to deliver all necessary voting equipment and software sufficiently in time for deployment and use in Customer's August 2006 primary election, and such failure leads to an enforcement proceeding brought by the United States Attorney General under Section 401 of HAVA which results in the issuance of a final non-appealable order by a United States District Court sitting in Kansas that Customer or any County, as applicable, must acquire and use an alternative disability voting system for one or more federal elections which are conducted prior to completion of delivery by Contractor, subject to the limitation of liability set forth in Section 15, Contractor shall indemnify and hold Customer or any applicable County harmless from and against any and all actual damages and costs incurred in procuring such alternative voting system for use in such federal election(s), including all reasonable actual costs incurred in defending such enforcement action.

. 17. Indemnification by Customer.

a. General. Customer shall indemnify and hold harmless Contractor to the extent allowed under the Kansas Tort Claims Act from and against any and all adverse consequences arising out of or relating to the following:

1. Any Third Party Infringement Claim resulting from (i) Customer's failure to timely or properly install and use any Update provided to it by Contractor; (ii) the use of any Contractor equipment or software in combination with other equipment, hardware or software not meeting Contractor's specifications for use with such voting equipment or software; or (iii) Customer's modification or alteration of any item of voting equipment or software without the prior written consent of Contractor;
2. Any claims by Third Parties arising out of or relating to the use or misuse by Customer, its employees and any other persons under its authority or control ("Customer's Representatives") of any Third Party Items;
3. Personal injury (including death) or property damage that is caused by any negligent or willful act, error or omission of one or more of Customer's Representatives; and
4. Customer's decision not to receive, or to terminate the hardware and/or software maintenance services or support.

b. Timely Performance. If, due to Customer's negligence or a failure to perform that is attributable to Customer's action or inaction as required under this Agreement, (i) Contractor is unable or delayed in providing any product or service by a date specified herein, and (ii) such failure has or will result in increased costs of performance by Contractor, then Contractor may charge to Customer any additional expenses incurred by Contractor due to such inability or delay caused by Customer's negligence, action or inaction. Contractor will submit to Customer an itemized statement setting forth the charges for said expenses. Upon Customer's request, ES&S will also provide Customer with copies of invoices and other back-up information necessary to confirm the itemized expenses. Contractor will take all

reasonable steps to mitigate the expenses incurred by Contractor hereunder. The remedies set forth in this section are the full extent of Contractor's remedies for the performance failures described in this Section 17(b).

Contractor shall notify Customer immediately if it becomes aware of any claim for which it may be entitled to indemnification under this section, and hereby gives Customer full and complete authority, and shall provide such information and assistance as is necessary (at Customer's expense with respect to reasonable out-of-pocket costs), to enable Customer to defend, compromise or settle any such claim.

18. Insurance. Attached to this agreement is Contractor's certificate of insurance that sets forth its current insurance coverages. Contractor shall notify KSOS at least 30 days before reducing any insurance coverage set forth on such certificate.

19. Force Majeure. Except for obligations to make payments hereunder, if either party is delayed or prevented from performing its obligations under this Agreement as a result of any cause beyond its reasonable control, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes (other than labor disputes with such party's own employees), transportation delays, governmental regulations and utility or communication interruptions, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent necessary to allow performance after the cause of delay has been removed. Contractor agrees to work with Customer, at Customer's request, to develop mutually agreeable alternatives in order to minimize the negative impact of any such delay.

20. Taxes. KSOS and Kansas counties are tax-exempt entities.

Customer shall not be liable for taxes imposed on or measured by Contractor's income.

All payments made to Contractor pursuant to this Agreement shall be paid to a business entity domiciled in the United States, subject to taxation by its home state and the U.S. government.

21. Confidentiality. During the course of Contractor's performance for Customer, each party may be given access to information (in hardcopy and/or electronic form) that relates to the other's past, present, and future research, development, business activities, products, services, and technical knowledge, and is identified by the discloser as confidential ("Confidential Information"). In connection therewith, subject to the Kansas Open Records Act, the following subsections shall apply:

a. The Confidential Information of the discloser may be used by the receiver only in connection with the Services;

b. Each party agrees to protect the confidentiality of the Confidential Information of the other in the same manner that it protects the confidentiality of its own proprietary and confidential information of like kind, but in no event shall either party exercise less than reasonable care in protecting such Confidential Information.

c. The Confidential Information may not be copied or reproduced without the discloser's prior written consent, however, Customer has permission to copy deliverables for internal purposes;

d. All Confidential Information made available hereunder, including copies thereof, shall be returned or destroyed upon the first to occur of (a) completion of the services or (b) request by the discloser, unless the receiver is otherwise allowed to retain such Confidential Information, however, Customer has permission to retain deliverables for internal purposes;

e. Nothing in this Agreement shall prohibit or limit either party's use of information (including, but not

limited to, ideas, concepts, know-how, techniques, and methodologies) (i) previously known to it without an obligation of confidence, (ii) independently developed by or for it, (iii) acquired by it from a third party which is not, to its knowledge, under an obligation of confidence with respect to such information, or (iv) which is or becomes publicly available through no breach of this Agreement; and

f. If either party receives a subpoena or other validly issued administrative or judicial process demanding Confidential Information of the other party, it shall promptly notify the other of such receipt in order to enable the disclosing party to seek an appropriate protective order. The party receiving the subpoena shall thereafter be entitled to comply with such subpoena or other process to the extent permitted by law and not otherwise protected under any protective order obtained by the disclosing party.

g. Any subcontractor employed by or partnering with Contractor shall be subject to this provision.

22. Proprietary Rights. Contractor owns the software, all documentation and training materials provided by Contractor, the design and configuration of the voting equipment and the format, layout, measurements, design and all other technical information (except for State or County supplied information such as election information) associated with the ballots to be used with the voting equipment. Contractor also owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned items. The aforementioned items also contain confidential and proprietary trade secrets of ES&S which are protected by law and are of substantial value to ES&S. Customer has the right to use the aforementioned items to the extent specified in this agreement.

Customer shall not cause or permit the adaptation, conversion, reverse engineering, disassembly or decompilation of any of the voting equipment or software.

Customer shall keep the software and related documentation free and clear of all claims, liens and encumbrances and shall maintain all copyright, trademark, patent or other intellectual or proprietary rights notices that are set forth on the voting equipment, the software, the documentation, training materials and ballots that are provided, and all permitted copies of the foregoing.

23. License. Contractor grants to Customers who purchase its equipment, products and services a perpetual, nonexclusive, nontransferable (except as permitted in accordance with subsection e below) license (the "License") to use Contractor's software and related documentation. The license allows Customer to use and copy the software (in object code only) and the documentation solely for the purpose of defining and conducting elections and tabulating and reporting election results by such Customer. Customer may not take any of the following actions set forth in subsections a through d with respect to the software or its documentation:

a. Reverse engineer, decompile, disassemble, re-engineer or otherwise create, attempt to create, or permit, allow or assist others to create, the source code or the structural framework for part or all of the software; or

b. Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the software or documentation, in whole or in part, to or by any third party without Contractor's prior written consent;

c. Cause or permit any change to be made to the software without Contractor's prior written consent; or

d. Cause or permit any copying, reproduction, or printing of any output generated by the Contractor's

software in which Contractor owns or claims any registered or common law proprietary intellectual property rights (e.g., copyright, trademark, patent or patent pending), including but not limited to any ballot shells or code stock.

e. In the event that any County licensing Contractor's Unity® Election Management System software or any modules thereof ("Unity") under this Agreement desires to cease use of Unity and assign its rights and obligations under the foregoing license to another County located within the State of Kansas, such County may do so upon its (i) receipt of the written consent of Contractor (which consent shall not be unreasonably withheld or conditioned, nor unduly delayed), and (ii) execution of an assignment and assumption agreement with the assignee County in form and substance acceptable to Contractor. In accordance with such assignment and assumption agreement, the assignor County shall assign and transfer, and the assignee County shall fully assume, all rights and obligations under the foregoing license, including all obligations to pay any and all ongoing software maintenance and support fees to Contractor. Upon consummation of such assignment, the assignor County shall (i) cease any further use of Unity, (ii) be prohibited from any further right to transfer or assign to, or in any way distribute or otherwise share the use of, Unity with any other party, (iii) remove and return to Contractor any and all copies of, and media containing, Unity in its possession or installed on any of its computer systems, and (iv) certify in writing to Contractor that it has removed and returned all such copies of Unity.

24. Term of License. The License shall commence upon the delivery of the software to the Customer and subject to the terms and conditions of this Agreement, shall be a perpetual, nonexclusive, nontransferable license. The license shall survive the termination of all other obligations under this Agreement, and shall be a perpetual license; provided, however, that Contractor may terminate the license if Customer fails to pay the license fee when due or breaches Sections 22, 23, or 25 with respect to such license. Upon the termination of the license, Customer shall immediately return the software and the related documentation (including any and all copies thereof) to Contractor, or if requested by Contractor, destroy the software and documentation and certify in writing to Contractor that such destruction has occurred.

25. Source Code. The license granted does not permit Customer to use the source code for Contractor's software. Contractor shall place the source code in escrow with its third party escrow agent in accordance with the terms of the Escrow Agreement with Iron Mountain Intellectual Property Management, Inc. dated August 16, 2002 ("Escrow Agreement") attached hereto as Exhibit B, and has named Customer as a beneficiary thereunder and will likewise place in escrow the source code for all Updates and New Products provided to Customer. Should Contractor cease operations or become unable or unwilling to maintain and support any of its software, Updates, or New Products provided to Customer while under an obligation to do so, Customer may obtain the source code for such item(s) for the sole purpose of enabling the continuing use of such item(s) in accordance with this Agreement. The source code will remain the property of Contractor and may not otherwise be used by Customer. The cost of using an alternative third party escrow agent shall be borne by Customer.

26. Custom Programming. From time to time after the Effective Date, Contractor and Customer may enter into a written agreement for Contractor to provide custom programming to Customer. Custom programming shall be created, delivered, installed and tested as mutually agreed upon in advance in writing by the Customer and Contractor. Such agreement shall be in the form of an addendum to this Agreement which is executed by both parties. All custom programming shall be deemed to be part of the Contractor's software, and shall be covered by the warranty set forth in this Agreement for a one (1) year period following its acceptance by the Customer. Contractor retains the right to make any custom programming available to other customers. In the event that Customer pays Contractor for any custom programming and such custom programming results in a New Product(s) for Contractor which Contractor sells or licenses to other customers, Customer shall receive a royalty in the amount of ten percent (10%) of revenues received by Contractor from the sale or licensure of such New Product(s)

and, through the payment of such royalty, shall reimburse Customer up to the amount paid by Customer for such custom programming (exclusive of any additional software maintenance and support fees which Customer may pay in connection with such custom programming).

27. Assignment. Except in the case of a merger, sale, transfer or assignment of all or substantially all of the assets of Contractor to a successor who has asserted its intent to continue the business of Contractor, neither party may assign or transfer this agreement or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld or conditioned, nor unduly delayed. The restriction on assignment in this section shall not impede the right of Kansas counties to use this Contract to obtain or purchase voting equipment and related products and services.

28. Care of Government Property: The Contractor shall be responsible for the proper care and custody of any state or county owned personal tangible property and real property furnished for Contractor's use in connection with the performance of this Contract, and Contractor shall reimburse state or county for such property's loss or damage caused by Contractor, normal wear and tear excepted.

29. 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.

30. Notice. Any legal notice or other communication required or permitted hereunder shall be in writing, and will be deemed given when delivered personally, sent by confirmed fax, sent by commercial overnight courier (with written verification of receipt) or sent by registered or certified mail, return receipt requested, postage prepaid. All communications sent to Contractor or KSOS shall be addressed as follows:

Election Systems & Software, Inc.
1208 John Galt Blvd.
Omaha, NE 68137
Attn.: Office of General Counsel
FAX: 402-970-1291

Kansas Secretary of State
120 SW 10th Avenue
Topeka, KS 66612-1594
Attn.: Legal Counsel
FAX: 785-368-8032

Legal notice to the County shall be addressed to the County Election Official at his or her official address.

31. Disputes.

a. Payment Disputes

(i). **Payment of Undisputed Amounts.** In the event of a dispute between Contractor and Customer regarding (1) a product or service for which payment has not yet been made to Contractor, (2) the amount due to Contractor for any product or service, or (3) the due date of any payment, Customer may withhold the disputed amount until such dispute has been resolved in accordance with subsection b below, but shall timely pay all other undisputed amounts to Contractor. Such payment shall not constitute a waiver by Customer or Contractor of any of its rights and remedies against the other party. In the event that Customer has accepted, but not yet paid for, a particular deliverable, and the parties mutually determine that one or more other deliverables dependent upon the previously accepted deliverable are not acceptable, Customer may withhold payment for such accepted deliverable and such withheld payment shall not be subject to interest in

accordance with the Kansas Prompt Payment Act (K.S.A. §75-6403) until such dispute has been resolved in accordance with subsection b below and payment therefor has become due.

(ii). **Remedies for Past Due Undisputed Payments.** If any undisputed payment to Contractor is past due more than thirty (30) days, Contractor may suspend performance under this Agreement until such amount is paid. Contractor hereby reserves a security interest in the equipment and third-party items which will not be satisfied until Contractor has been paid for the Contractor equipment and third-party items. Customer shall, upon request by Contractor, execute financing statements deemed necessary or desirable by Contractor to perfect such security interest. Customer authorizes Contractor to file a copy of this Agreement or a financing statement with the appropriate authorities at any time after the Effective Date in order to perfect Contractor's security interest. A financing statement may be filed by Contractor without Customer's signature on the basis of this Agreement where permitted by law. Customer shall keep the equipment and third-party items in good working order and repair until it has paid for the Contractor equipment and third-party items. If Customer's payment is past due for more than sixty (60) days and is undisputed, Contractor may, with demand and notice to Customer and as applicable, declare the total amount immediately due and payable. Upon receiving such notice, Customer shall make the equipment and third-party items available at its premises for Contractor, and Contractor may remove and sell any or all of the equipment and third-party items as permitted under applicable law.

b. Dispute Resolution Process. Time is of the essence in resolving disputes. Contractor's designated representative shall be Director of Account Services, Janet Buchanan. KSOS's designated representative shall be the Assistant Secretary of State, Janet Chubb, and County's designated representative shall be a person named by the County Election Official. These representatives shall be responsible for overseeing the parties' respective administration and performance of this Agreement and shall also serve as the primary point of contact in the event that any dispute(s) arise during the performance of this Agreement. The initiating party shall notify the responding party's designated representative of any dispute, including all relevant information (e.g. the nature of the dispute, dates, times, persons involved). The responding party's representative shall respond to the notification within five (5) business days. Thereafter, the parties shall use their good faith efforts to resolve the dispute within a reasonable period of time. Notwithstanding anything in this section to the contrary, either party may apply to any court having jurisdiction over the subject matter of the dispute for a temporary restraining order, preliminary injunction, or other appropriate legal remedy at any time.

32. Press Releases. In the event that either the Contractor or Customer desires to issue any press release or other public statement or communication respecting the relationship of the parties, this Agreement or the equipment, products and services to be provided and performed hereunder, such party's designated communications/press representative shall first obtain the prior written approval by the other party's designated communications/press representative of such press release or other public statement, which approval shall not be unreasonably withheld or conditioned, nor unduly delayed.

33. ADA/Accessibility Issues: Contractor agrees to provide Customer any software and/or firmware Updates to support use of sip and puff at no cost to Customer. Customer shall be responsible for any costs associated with purchasing any different or additional equipment, including, but not limited to, the consumable sip and puff instrument as listed on Contractor's price summary, in order to support the use of sip and puff.

Contractor agrees that any voting equipment, products and services purchased and delivered pursuant to this Agreement meets all accessibility requirements given in HAVA and the Americans with Disabilities

Act (ADA). Such requirements include, but are not limited to those listed in the RFP:

- a. Audible features for voters with visual impairment, which audio features shall be capable of working simultaneous with the visual display;
- b. Access to the system by use of stylus, head stick, mouth stick or any other device, and durability of the system to withstand use of these accommodations;
- c. Portability of system for curbside voting;
- d. Adjustability of screen, font, color, language and other parts of the system for ease of use by voters with disabilities.

Contractor shall notify KSOS, 30 days in advance if possible, of any scheduled training or demonstration program that Contractor provides to a County, election official, election workers or the public relating to accessibility or compliance with the ADA. KSOS or the State ADA Coordinator may attend such training programs.

State of Kansas
 Department of Administration
 DA-146a (Rev. 1-01)

CONTRACTUAL PROVISIONS ATTACHMENT

Important: This form contains mandatory contract provisions and must be attached to or incorporated in all copies of any contractual agreement. If it is attached to the vendor/Contractor's standard contract form, then that form must be altered to contain the following provision:

"The Provisions found in Contractual Provisions Attachment (Form DA-146a, Rev. 1-01), which is attached hereto, are hereby incorporated in this contract and made a part thereof."

The parties agree that the following provisions are hereby incorporated into the contract to which it is attached and made a part thereof, said contract being the _____ day of _____, 20_____.

1. **Terms Herein Controlling Provisions:** It is expressly agreed that the terms of each and every provision in this attachment shall prevail and control over the terms of any other conflicting provision in any other document relating to and a part of the contract in which this attachment is incorporated.
2. **Agreement With Kansas Law:** All contractual agreements shall be subject to, governed by, and construed according to the laws of the State of Kansas.
3. **Termination Due To Lack Of Funding Appropriation:** If, in the judgment of the Director of Accounts and Reports, Department of Administration, sufficient funds are not appropriated to continue the function performed in this agreement and for the payment of the charges hereunder, State may terminate this agreement at the end of its current fiscal year. State agrees to give written notice of termination to Contractor at least 30 days prior to the end of its current fiscal year, and shall give such notice for a greater period prior to the end of such fiscal year as may be provided in this contract, except that such notice shall not be required prior to 90 days before the end of such fiscal year. Contractor shall have the right, at the end of such fiscal year, to take possession of any equipment provided State under the contract. State will pay to the Contractor all regular contractual payments incurred through the end of such fiscal year, plus contractual charges incidental to the return of any such equipment. Upon termination of the agreement by State, title to any such equipment shall revert to Contractor at the end of State's current fiscal year. The termination of the contract pursuant to this paragraph shall not cause any penalty to be charged to the agency or the Contractor.
4. **Disclaimer Of Liability:** Neither the State of Kansas nor any agency thereof shall hold harmless or indemnify any Contractor beyond that liability incurred under the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.).
5. **Anti-Discrimination Clause:** The Contractor agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 et seq.) and the applicable provisions of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) (ADA) and to not discriminate against any person because of race, religion, color, sex, disability, national origin or ancestry, or age in the admission or access to, or treatment or employment in, its programs or activities; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements set out at K.S.A. 44-1031 and K.S.A. 44-1116; (d) to include those provisions in every subcontract or purchase order so that they are binding upon such subContractor or vendor; (e) that a failure to comply with the reporting requirements of (c) above or if the Contractor is found guilty of any violation of such acts by the Kansas Human Rights Commission, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration; (f) if it is determined that the Contractor has violated applicable provisions of ADA, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the contracting state agency or the Kansas Department of Administration.

Parties to this contract understand that the provisions of this paragraph number 5 (with the exception of those provisions relating to the ADA) are not applicable to a Contractor who employs fewer than four employees during the term of such contract or whose contracts with the contracting state agency cumulatively total \$5,000 or less during the fiscal year of such agency.
6. **Acceptance Of Contract:** This contract shall not be considered accepted, approved or otherwise effective until the statutorily required approvals and certifications have been given.
7. **Arbitration, Damages, Warranties:** Notwithstanding any language to the contrary, no interpretation shall be allowed to find the State or any agency thereof has agreed to binding arbitration, or the payment of damages or penalties upon the occurrence of a contingency. Further, the State of Kansas shall not agree to pay attorney fees and late payment charges beyond those available under the Kansas Prompt Payment Act (K.S.A. 75-6403), and no provision will be given effect which attempts to exclude, modify, disclaim or otherwise attempt to limit implied warranties of merchantability and fitness for a particular purpose.
8. **Representative's Authority To Contract:** By signing this contract, the representative of the Contractor thereby represents that such person is duly authorized by the Contractor to execute this contract on behalf of the Contractor and that the Contractor agrees to be bound by the provisions thereof.
9. **Responsibility For Taxes:** The State of Kansas shall not be responsible for, nor indemnify a Contractor for, any federal, state or local taxes which may be imposed or levied upon the subject matter of this contract.
10. **Insurance:** The State of Kansas shall not be required to purchase, any insurance against loss or damage to any personal property to which this contract relates, nor shall this contract require the State to establish a "self-insurance" fund to protect against any such loss or damage. Subject to the provisions of the Kansas

Tort Claims Act (K.S.A. 75-6101 et seq.), the vendor or lessor shall bear the risk of any loss or damage to any personal property in which vendor or lessor holds title.

11. **Information:** No provision of this contract shall be construed as limiting the Legislative Division of **Post Audit** from having access to information pursuant to K.S.A. 46-1101 et seq.
12. **The Eleventh Amendment:** "The Eleventh Amendment is an inherent and incumbent protection with the State of Kansas and need not be reserved, but prudence requires the State to reiterate that nothing related to this contract shall be deemed a waiver of the Eleventh Amendment."

EXHIBIT "D"
ACCEPTANCE CRITERIA

IVOTRONIC VOTER TERMINAL WITHOUT SOUND

Inspector: _____

Serial Number: _____ Date: _____

Acceptance Q.C. Testing:

- Connect Battery to terminal. Connect wall adapter
- Insert PEB while holding down Vote button for 1-2 seconds and Calibrate Touchscreen
- Enter Service Menu. Verify Serial Number displayed on screen and on front of unit match
- Verify Firmware: _____
- Clear and Test Terminal. EQC Code: _____
- Check/Set Time and Date. Time Zone: _____
- Connect Comm Pak to Terminal. Select *Printer* on Comm Pak switchbox. Select *Print test message* in Service Menu
- Re-insert PEB and *Open* Terminal. Enter Vote Mode, Vote One Ballot
- Enter Service Menu. Clear and Test Terminal
- Re-insert PEB. Check Public Count __, Protective Count ____
- Remove A/C, Check Battery Voltage ____V
- Remove PEB. Disconnect battery connection for shipping.
- Verify Warranty Label is affixed over the lower right screw hole.
- Cover Touchscreen with Protective Film Sheet. Place end caps on unit and re-insert into box.

EXHIBIT D
ACCEPTANCE CRITERIA

IVOTRONIC VOTER TERMINAL WITH SOUND

Inspector: _____

Serial Number: _____ Date: _____

Acceptance Q.C. Testing:

- Connect Battery to terminal. Connect wall adapter
- Insert PEB while holding down Vote button for 1-2 seconds and Calibrate Touchscreen
- Enter Service Menu. Verify Serial Number displayed on screen and on front of unit match
- Verify Firmware: _____
- Clear and Test Terminal. EQC Code: _____
- Check/Set Time and Date
- Connect Comm Pak to Terminal. Select *Printer* on Comm Pak switchbox. Select *Print test message* in Service Menu
- Re-insert PEB and *Open* Terminal. Enter Vote Mode, Vote One Ballot
- Insert Compact flash w/sound files, connect headphones, insert PEB and vote one ballot in ADA mode
- Enter Service Menu. Clear and Test Terminal
- Re-insert PEB. Check Public Count 0 , Protective Count _____
- Remove A/C, Check Battery Voltage _____V
- Cover Touchscreen with Protective Film Sheet. Place end caps on unit and re-insert into box.

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.
- Select Previous again
- Select Factory Defaults
- Select Save Factory Defaults
- Select Yes

M100 - SYSTEM ACCEPTANCE TESTING cont.

- 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
- 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
- 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

ACCEPTANCE CRITERIA

Unity Software Acceptance Process

Unity Software Acceptance uses a standard test election with sample ballots provided by ES&S to test Unity software for acceptance. The Unity system includes the following software modules:

- **Election Data Manager:** Election officials use Data Manager to create the election database that includes all contest, candidate and precinct information for an election. Officials also use Data Manager to perform election file maintenance.
- **Audit Manager:** Officials use Audit Manager to maintain system security and track user actions with a system audit log.
- **Ballot Image Manager:** Election programmers use Image Manager to format ballots, add additional text to ballots and to generate print-ready ballot layouts.
- **Hardware Programming Manager:** Officials use Hardware Programming Manager to code ballot tabulation equipment for specific elections.
- **Data Acquisition Manager:** This module is used to electronically transfer election results from polling places or regional sites to a central count location.
- **Election Reporting Manager:** Officials use Election Reporting Manager to combine election results from multiple vote tabulators, design election reports and generate print and electronic reports.

Use the following process to test Unity software:

Election Data Manager

- Program a test election in Election Data Manager or open a test election supplied by ES&S.
- Merge your election files.
- Open Audit Manager and verify that the audit log function works properly.

Ballot Image Manager

- Load merged election files from Data Manager into Image Manager.
- Format ballots and generate ballot PDF files.
- (Optional) Print ballots with Ballot on Demand.
- Create the interface file (.ifc file) for Hardware Programming Manager.

Hardware Programming Manager

- Merge the interface file (.ifc file) from Ballot Image Manager into Hardware Programming Manager.
- Verify and edit election information.
- Create the final database for the election.
- Program memory media for vote tabulation hardware with the election definition generated in Programming Manager.

Vote Tabulation Hardware

- Run test ballots through vote tabulation hardware to test the election definition generated in Hardware Programming Manager.

Data Acquisition Manager

- (Optional) Use Data Acquisition Manager to electronically transfer results from precinct ballot tabulators or a regional site to the Election Reporting Manager host PC.

Election Reporting Manager

- Load election totals from ballot tabulation hardware.
- Design report formats.
- Generate election reports.
- Compare results to test totals to ensure system accuracy.

**EXHIBIT D
ACCEPTANCE CRITERIA**

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. Serial Numbers of respective Equipment are attached.

iVotronic Terminals	M100 Units	M650 Units	AutoMARK Units	Unity Soft
<u>Units Delivered</u>	<u>Units Delivered</u>	<u>Units Delivered</u>	<u>Units Delivered</u>	<u>Modules Del</u>
<u>Units Delivered</u>	<u>Units Delivered</u>	<u>Units Delivered</u>	<u>Units Delivered</u>	<u>Modules Del</u>

Firmware/Software Version: _____

Customer: _____

Representative: _____
(Printed Name & Title)

(Signature)

ES&S
Representative: _____
(Printed Name)

(Signature)

Date: _____ / _____ / _____

[END OF EXHIBIT D]

MASTER PREFERRED ESCROW AGREEMENT

Master Number 9111

This agreement "Agreement" is effective August 16, 2002 among DSI Technology Escrow Services, Inc. ("DSI"), Election Systems & Software, Inc. ("Depositor") and any additional party signing the Acceptance Form attached to this Agreement ("Preferred Beneficiary"), who collectively may be referred to in this Agreement as the parties ("Parties").

- A. Depositor and Preferred Beneficiary have entered or will enter into a license agreement, development agreement, and/or other agreement regarding certain proprietary technology of Depositor (referred to in this Agreement as "the License Agreement").
- B. Depositor desires to avoid disclosure of its proprietary technology except under certain limited circumstances.
- C. The availability of the proprietary technology of Depositor is critical to Preferred Beneficiary in the conduct of its business and, therefore, Preferred Beneficiary needs access to the proprietary technology under certain limited circumstances.
- D. Depositor and Preferred Beneficiary desire to establish an escrow with DSI to provide for the retention, administration and controlled access of certain proprietary technology materials of Depositor.
- E. The parties desire this Agreement to be supplementary to the License Agreement pursuant to 11 United States [Bankruptcy] Code, Section 365(n).

ARTICLE 1 -- DEPOSITS

1.1 Obligation to Make Deposit. Upon the signing of this Agreement by the parties, including the signing of the Acceptance Form, and Exhibit D naming the Deposit Account, Depositor shall deliver to DSI the proprietary technology and other materials ("Deposit Materials") required to be deposited by the License Agreement or, if the License Agreement does not identify the materials to be deposited with DSI, then such materials will be identified on Exhibit A. If Exhibit A is applicable, it is to be prepared and signed by Depositor and Preferred Beneficiary. DSI shall have no obligation with respect to the preparation, signing or delivery of Exhibit A.

1.2 Identification of Tangible Media. Prior to the delivery of the Deposit Materials to DSI, Depositor shall conspicuously label for identification each document, magnetic tape, disk, or other tangible media upon which the Deposit Materials are written or stored. Additionally, Depositor shall complete Exhibit B to this Agreement by listing each such tangible media by the item label description, the type of media and the quantity. Exhibit B shall be signed by Depositor and delivered to DSI with the Deposit Materials. Unless and until Depositor makes the initial deposit with DSI, DSI shall have no obligation with respect to this Agreement, except the obligation to notify the parties regarding the status of the account as required in Section 2.2 below.

1.3. Escrow Account Name Identification. Subject to this Section 1, and at the time Depositor makes the initial deposit with DSI in accordance with Section 1.2 above, Depositor shall complete and sign Exhibit D naming the initial account upon which the Deposit Materials are written or stored. Any new deposits referencing new account names made subsequent to the signing of this Agreement, intended by the Depositor to be held in a separate account and maintained separately from the initial account, but made a part of this Agreement, shall be provided for by the Depositor on Exhibit E, and Exhibit E shall be signed by the Depositor and DSI.

1.4 Acceptance of Deposit. When DSI receives the Deposit Materials, DSI will conduct a deposit inspection. At completion of the deposit inspection, if DSI determines that the labeling of the tangible media matches the item descriptions and quantity on Exhibit B, DSI will date and sign Exhibit B and mail a copy thereof to Depositor and Preferred Beneficiary. If DSI determines that the labeling does not match the item descriptions or quantity on Exhibit B, DSI will (a) note the discrepancies in writing on Exhibit B; (b) date and sign Exhibit B with the exceptions noted; and (c) mail a copy of Exhibit B to Depositor and Preferred Beneficiary. DSI's acceptance of the deposit occurs upon the signing of Exhibit B by DSI. Delivery of the signed Exhibit B to Preferred Beneficiary is Preferred Beneficiary's notice that the Deposit Materials have been received and accepted by DSI. Other than DSI's inspection of the Deposit Materials, DSI shall have no obligation to the accuracy, completeness, functionality, performance or non-performance of the Deposit Materials.

1.5 Depositor's Representations. Depositor represents as follows:

- a. Depositor lawfully possesses all of the Deposit Materials deposited with DSI;
- b. With respect to all of the Deposit Materials, Depositor has the right and authority to grant to DSI and Preferred Beneficiary the rights as provided in this Agreement;
- c. As of the effective date of this Agreement, the Deposit Materials are not the subject of a lien or encumbrances, however, any liens or encumbrances made after the execution of this Agreement will not prohibit, limit, or alter the rights and obligations of DSI under this Agreement;
- d. The Deposit Materials consist of the proprietary technology and other materials identified either in the License Agreement or Exhibit A, as the case may be; and
- e. The Deposit Materials are readable and useable in their current form or, if any portion of the Deposit Materials is encrypted, the decryption tools and decryption keys have also been deposited.

1.6 Verification. Upon receipt of a written request from Preferred Beneficiary, DSI and Preferred Beneficiary may enter into a separate proposal agreement pursuant to which DSI will agree, upon certain terms and conditions, to inspect the Deposit Materials for the purpose of verifying its accuracy, completeness, sufficiency and quality ("Verification Proposal Agreement"). Depositor shall reasonably cooperate with DSI by providing its facilities, computer software systems, and technical and support personnel for verification whenever reasonably necessary. If a verification is elected after the Deposit Materials have been delivered to DSI, then only DSI, or at

DSI's election, an independent contractor or company selected by DSI, may perform the verification.

1.7 Deposit Updates. Unless otherwise provided by the License Agreement, Depositor shall update the Deposit Materials within sixty (60) days of each release of a new version of the product, which is subject to the License Agreement. Such updates will be added to the existing deposit. All deposit updates shall be listed on a new Exhibit B and the new Exhibit B shall be signed by Depositor. Each Exhibit B will be held and maintained separately within the escrow account. An independent record will be created which will document the activity for each Exhibit B. The processing of all deposit updates shall be in accordance with Sections 1.2 through 1.6 above. All references in this Agreement to the Deposit Materials shall include the initial Deposit Materials and any updates.

1.8 Removal of Deposit Materials. The Deposit Materials may be removed and/or exchanged only on written instructions signed by Depositor and Preferred Beneficiary, or as otherwise provided in this Agreement.

ARTICLE 2 -- CONFIDENTIALITY AND RECORD KEEPING

2.1 Confidentiality. DSI shall have the obligation to reasonably protect the confidentiality of the Deposit Materials. Except as provided in this Agreement or any subsequent agreement between the Parties, DSI shall not disclose, transfer, make available, or use the Deposit Materials. DSI shall not disclose the terms of this Agreement to any third party. If DSI receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposit Materials, DSI will immediately notify the parties to this Agreement unless prohibited by law. It shall be the responsibility of Depositor and/or Preferred Beneficiary to challenge any such order; provided, however, that DSI does not waive its rights to present its position with respect to any such order. DSI will not be required to disobey any order from a court or other judicial tribunal including, but not limited to, notices delivered pursuant to 7.6 below.

2.2 Status Reports. DSI will issue to Depositor and Preferred Beneficiary a report profiling the account history semi-annually.

ARTICLE 3 -- RIGHT TO MAKE COPIES

3.1 Right to Make Copies. DSI shall have the right to make copies of the Deposit Materials as reasonably necessary to perform this Agreement. DSI shall copy all copyright, nondisclosure, and other proprietary notices and titles contained on the Deposit Materials onto any copies made by DSI. With all Deposit Materials submitted to DSI, Depositor shall provide any and all instructions as may be necessary to duplicate the Deposit Materials including but not limited to the hardware and/or software needed. Any copying expenses incurred by DSI as a result of a request to copy will be borne by the party requesting the copies. Alternatively, DSI may notify Depositor requiring its reasonable cooperation in promptly copying the Deposit Materials in order for DSI to perform this Agreement.

ARTICLE 4 -- RELEASE OF DEPOSIT

4.1 Release Conditions. As used in this Agreement, "Release Condition" shall mean the following:

- a. Depositor's failure to carry out obligations imposed on it pursuant to the License Agreement; or
- b. Depositor's failure to continue to do business in the ordinary course.

4.2 Filing For Release. If Preferred Beneficiary believes in good faith that a Release Condition has occurred, Preferred Beneficiary may provide to DSI written notice of the occurrence of the Release Condition and a request for the release of the Deposit Materials. Within five (5) business days of receipt of a written notice, DSI shall provide a copy of the notice to Depositor. DSI will promptly notify the Parties unless DSI acknowledges or discovers independently, or through the Parties, its need for additional documentation or information in order to comply with this section. Such need for additional documentation or information may extend the time period for DSI's performance under this section.

4.3 Contrary Instructions. From the date DSI mails the notice requesting release of the Deposit Materials, Depositor shall have ten (10) business days to deliver to DSI contrary instructions ("Contrary Instructions"). Contrary Instructions shall mean the written representation by Depositor that a Release Condition has not occurred or has been cured. Upon receipt of Contrary Instructions, DSI shall send a copy to Preferred Beneficiary by commercial express mail. Additionally, DSI shall notify both Depositor and Preferred Beneficiary that there is a dispute to be resolved pursuant to the Section 7.4. Subject to Section 5.2 of this Agreement, DSI will continue to store the Deposit Materials without release pending (a) joint instructions from Depositor and Preferred Beneficiary; (b) dispute resolution pursuant to Section 7.4; or (c) order from a court of competent jurisdiction.

4.4 Release of Deposit. If DSI does not receive Contrary Instructions from the Depositor, DSI is authorized to release the Deposit Materials to the Preferred Beneficiary or, if more than one beneficiary is registered to the deposit, to release a copy of the Deposit Materials to the Preferred Beneficiary. However, DSI is entitled to receive any fees due DSI before making the release. Any copying expenses will be chargeable to Preferred Beneficiary. Upon any such release, the escrow arrangement will terminate as it relates to the Depositor and Preferred Beneficiary involved in the release.

4.5 Right to Use Following Release. Unless otherwise provided in the License Agreement, upon release of the Deposit Materials in accordance with this Article 4, Preferred Beneficiary shall have the right to use the Deposit Materials for the sole purpose of continuing the benefits afforded to Preferred Beneficiary by the License Agreement. Preferred Beneficiary shall be obligated to maintain the confidentiality of the released Deposit Materials.

ARTICLE 5 -- TERM AND TERMINATION

5.1 Term of Agreement. The initial term of this Agreement is for a period of one (1) year. Thereafter, this Agreement shall automatically renew from year-to-year unless (a) Depositor and Preferred Beneficiary jointly instruct DSI in writing that the Agreement is terminated; (b) DSI instructs Depositor and Preferred Beneficiary in writing ninety (90) days after its renewal date that the Agreement is terminated for nonpayment in accordance with Section 5.2; or (c) DSI reserves the right to terminate this Agreement, for any reason, other than nonpayment, by providing Depositor and Preferred Beneficiary sixty (60) days written notice of its intent to terminate this Agreement. If the Deposit Materials are subject to another escrow agreement with DSI, DSI reserves the right, after the initial one year term, to adjust the anniversary date of the Agreement to match the then prevailing anniversary date of such other escrow arrangements.

5.2 Termination for Nonpayment. In the event of the nonpayment of fees owed to DSI, DSI shall provide written notice of delinquency to the parties to this Agreement affected by such delinquency. Any such party shall have the right to make the payment to DSI to cure the default. If the past due payment is not received in full by DSI within one (1) month of the date of such notice, then at any time thereafter DSI shall have the right to terminate this Agreement to the extent it relates to the delinquent party by sending written notice of termination to such affected parties. DSI shall have no obligation to take any action under this Agreement so long as any payment due to DSI remains unpaid.

5.3 Disposition of Deposit Materials Upon Termination. Subject to the foregoing termination provisions, and upon termination of this Agreement, DSI shall destroy, return, or otherwise deliver the Deposit Materials in accordance with Depositor's instructions. If there are no instructions, DSI may, at its sole discretion, destroy the Deposit Materials or return them to Depositor. DSI shall have no obligation to destroy or return the Deposit Materials if the Deposit Materials are subject to another escrow agreement with DSI or have been released to the Preferred Beneficiary in accordance with Section 4.4.

5.4 Survival of Terms Following Termination. Upon termination of this Agreement, the following provisions of this Agreement shall survive:

- a. Depositor's Representations (Section 1.5);
- b. The obligations of confidentiality with respect to the Deposit Materials;
- c. The obligation to pay DSI any fees and expenses due;
- d. The provisions of Article 7; and
- e. Any provisions in this Agreement which specifically state they survive the termination of this Agreement.

ARTICLE 6 -- DSI'S FEES

6.1 Fee Schedule. DSI is entitled to be paid its standard fees and expenses applicable to the services provided. DSI shall notify the party responsible for payment of DSI's fees at least sixty (60) days prior to any increase in fees. For any service not listed on DSI's standard fee schedule, DSI will provide a quote prior to rendering the service, if requested.

6.2 Payment Terms. DSI shall not be required to perform any service, including release of any Deposit Materials under Article 4, unless the payment for such service and any outstanding balances owed to DSI are paid in full. Fees are due upon receipt of a signed contract or receipt of the Deposit Materials whichever is earliest. If invoiced fees are not paid, DSI may terminate this Agreement in accordance with Section 5.2.

ARTICLE 7 -- LIABILITY AND DISPUTES

7.1 Right to Rely on Instructions. DSI may act in reliance upon any instruction, instrument, or signature reasonably believed by DSI to be genuine. DSI may assume that any employee of a party to this Agreement who gives any written notice, request, or instruction has the authority to do so. DSI will not be required to inquire into the truth or evaluate the merit of any statement or representation contained in any notice or document. DSI shall not be responsible for failure to act as a result of causes beyond the reasonable control of DSI.

7.2 Indemnification. Depositor and Preferred Beneficiary each agree to indemnify, defend and hold harmless DSI from any and all claims, actions, damages, arbitration fees and expenses, costs, attorney's fees and other liabilities ("Liabilities") incurred by DSI relating in any way to this escrow arrangement except where it is adjudged that DSI acted with gross negligence or willful misconduct.

7.3 Limitation of Liability. In no event will DSI be liable for any incidental, indirect, special, exemplary, punitive or consequential damages, including, but not limited to, damages (including loss of data, revenue, and/or profits) costs or expenses (including legal fees and expenses), whether foreseeable or unforeseeable, that may arise out of or in connection with this Agreement; and in no event shall the collective liability of DSI exceed ten times the fees paid under this Agreement. The foregoing limitation of liability does not apply with respect to any acts of gross negligence, personal injury claims, property damage claims (excluding the Deposit), or intellectual property infringement ("Exclusions"). With the exception of the Exclusions, DSI shall in no event be liable for any incidental, punitive, special, indirect or consequential damages.

7.4 Dispute Resolution. Any dispute relating to or arising from this Agreement shall be submitted to, and settled by arbitration by a single arbitrator chosen by the San Diego Regional Office of the American Arbitration Association in accordance with the Commercial Rules of the American Arbitration Association. The arbitrator shall apply California law. Unless otherwise agreed by Depositor and Preferred Beneficiary, arbitration will take place in San Diego, California, U.S.A. Any court having jurisdiction over the matter may enter judgment on the award of the arbitrator. Service of a petition to confirm the arbitration award may be made by First Class mail or by commercial express mail, to the attorney for the party or, if unrepresented, to the party at the last known business address. If, however, Depositor and/or Preferred Beneficiary refuses to submit to arbitration, the matter shall not be submitted to arbitration and DSI may submit the matter to any

court of competent jurisdiction. Any costs of arbitration incurred by DSI, including reasonable attorney's fees and costs, shall be divided equally and paid by Depositor and Preferred Beneficiary.

7.5 Controlling Law. This Agreement is to be governed and construed in accordance with the laws of the State of California, without regard to its conflict of law provisions.

7.6 Notice of Requested Order. If any party intends to obtain an order from the arbitrator or any court of competent jurisdiction, which may direct DSI to take, or refrain from taking any action, that party shall:

- a. Give DSI at least five (5) business days prior notice of the hearing;
- b. Include in any such order that, as a precondition to DSI's obligation, DSI be paid in full for any past due fees and be paid for the reasonable value of the services to be rendered pursuant to such order; and
- c. Ensure that DSI not be required to deliver the original (as opposed to a copy) of the Deposit Materials if DSI may need to retain the original in its possession to fulfill any of its other escrow duties.

ARTICLE 8 -- GENERAL PROVISIONS

8.1 Entire Agreement. This Agreement, which includes the Acceptance Form and Exhibits A, B, C, D and E described herein, embodies the entire understanding among all of the parties with respect to its subject matter and supersedes all previous communications, representations or understandings, either oral or written. DSI is not a party to the License Agreement between Depositor and Preferred Beneficiary and has no knowledge of any of the terms or provisions of any such License Agreement. DSI's only obligations to Depositor or Preferred Beneficiary are as set forth in this Agreement. No amendment or modification of this Agreement shall be valid or binding unless signed by all the parties hereto, except that Exhibit A need not be signed by DSI, Exhibit B need not be signed by Preferred Beneficiary, Exhibit C need not be signed by any party, Exhibit D need not be signed by Preferred Beneficiary or DSI and the Acceptance Form need only be signed by the parties identified therein.

8.2 Notices. All notices, invoices, payments, deposits and other documents and communications shall be given to the parties at the addresses specified in the attached Exhibit C and Acceptance Form. It shall be the responsibility of the parties to notify each other as provided in this Section in the event of a change of address. The parties shall have the right to rely on the last known address of the other parties. Any correctly addressed notice or last known address of the other parties that is relied on herein that is refused, unclaimed, or undeliverable because of an act or omission of the party to be notified as provided herein shall be deemed effective as of the first date that said notice was refused, unclaimed, or deemed undeliverable by the postal authorities by mail, through messenger or commercial express delivery services. Unless otherwise provided in this Agreement, all documents and communications may be delivered by First Class mail.

8.3 Severability. In the event any provision of this Agreement is found to be invalid, voidable or unenforceable, the parties agree that unless it materially affects the entire intent and purpose of this Agreement, such invalidity, voidability or unenforceability shall affect neither the

validity of this Agreement nor the remaining provisions herein, and the provision in question shall be deemed to be replaced with a valid and enforceable provision most closely reflecting the intent and purpose of the original provision.

8.4 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the parties. However, DSI shall have no obligation in performing this Agreement to recognize any successor or assign of Depositor or Preferred Beneficiary unless DSI receives clear, authoritative and conclusive written evidence of the change of parties.

8.5 Waiver. Any term of this Agreement may be waived by the party entitled to the benefits thereof, provided that any such waiver must be in writing and signed by the party against whom the enforcement of the waiver is sought. No waiver of any condition, or breach of any provision of this Agreement, in any one or more instances, shall be deemed to be a further or continuing waiver of such condition or breach. Delay or failure to exercise any right or remedy shall not be deemed the waiver of that right or remedy.

8.6 Regulations. Depositor and Preferred Beneficiary are responsible for and warrant compliance with all applicable laws, rules and regulations, including but not limited to customs laws, import, export, and re-export laws and government regulations of any country from or to which the Deposit Materials may be delivered in accordance with the provisions of this Agreement.

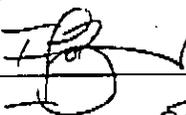
8.7 Attorney's Fees. In any litigation or other proceeding by which one party either seeks to enforce its rights under this Agreement (whether in contract, tort, or both) or seeks declaration of any rights or obligations under this Agreement, the prevailing party who has proven in court by court decree, judgment or arbitrator's decision that the other party has materially breached its representation and/or warranty under this Agreement shall be awarded reasonable attorneys' fees, together with any costs and expenses, to resolve the dispute and to enforce final judgement.

8.8 No Third Party Rights. This Agreement is made solely for the benefit of the Parties to this Agreement and their respective permitted successors and assigns, and no other person or entity shall have or acquire any right by virtue of this Agreement unless otherwise agreed to by all the parties hereto.

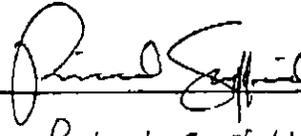
8.9 Authority to Sign. Each of the Parties herein represents and warrants that the execution, delivery, and performance of this Agreement has been duly authorized and signed by a person who meets statutory or other binding approval to sign on behalf of its business organization as named in this Agreement.

8.10 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one instrument.

Election Systems & Software, Inc.
Depositor

By: 
Name: Thomas OBRIEN
Title: CFO
Date: 8/9/02

DSI Technology Escrow Services, Inc.

By: 
Name: Richard Sheffield
Title: VP. Operations
Date: 15 August 02