

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

ELLEN FEDDER, LANCE JONES,
ERNEST LASCHE a/k/a MIKE LASCHE,
BARBARA KLEIN, LOIS HARMES,
JOHN MINDER, DOVIE MURRAY,
JOHN MCBRIDE, SUSAN GAAR,
GARY LAMER, CHARLES CLIFTON,

Plaintiffs,

v.

No. 06 CA 2996

TOM GALLAGHER, CHIEF
FINANCIAL OFFICER, STATE OF
FLORIDA, and GOVERNOR JEB
BUSH, and STATE SENATOR DAN
WEBSTER, as members of and as the
FLORIDA ELECTIONS CANVASSING
COMMISSION, and SUE M. COBB,
as SECRETARY OF STATE,
STATE OF FLORIDA,

and

THE SARASOTA COUNTY
CANVASSING BOARD,
SARASOTA COUNTY JUDGE
PHYLLIS GALEN, SARASOTA
COUNTY COMMISSIONER
PAUL MERCIER, and KATHY
DENT, SARASOTA COUNTY
SUPERVISOR OF ELECTIONS,
as members of and as THE
SARASOTA COUNTY
CANVASSING BOARD, and KATHY
DENT, as Supervisor of Elections,

and

VERN BUCHANAN, Nominee of
the Republican Party of Florida for
the 13th Congressional District of Florida,

Defendants.

**VOTER PLAINTIFFS' JOINDER TO JENNINGS' MOTION TO COMPEL,
AND VOTER PLAINTIFFS' MOTION TO COMPEL,
AND OPPOSITION TO ESS MOTION FOR ADDITIONAL TIME**

Plaintiffs Ellen Fedder, Lance Jones, Ernest Lasche a/k/a Mike Lasche, Barbara Klein, Lois Harmes, John Minder, Dovie Murray, John McBride, Susan Gaar, Gary Lamer, and Charles Clifton (collectively, "Voter Plaintiffs") hereby join Plaintiff Jennings' Motion to Compel Production of Items Within the Custody and Control of the State Under Fla. Stat. § 101.5607 and Fla. Admin. Code Rules 1S-2.015(5)(f), filed November 30, 2006 ("Jennings Motion to Compel"). In addition, Voter Plaintiffs move to compel the production of the materials sought in their own discovery requests and oppose voting equipment vendor Election Systems & Software ("ESS")' motion for additional time to respond.

Florida law unequivocally provides Florida voters with the right to bring an election contest to determine whether their voters were properly counted. A contest is appropriate where, as here, the election results contain unexplained and significant anomalies that appear to be attributable to voting machines and the Plaintiffs have presented facts to support their concern that their votes were not properly recorded. Defendants seek to prevent Florida voters from exercising this right by invoking expired warranties, inapplicable confidentiality agreements, and trade secrecy privileges that they do not themselves possess. This obstructionist approach is particularly troubling because time is of the essence in this dispute: the new Congressional session starts on January 3, 2007, and Florida voters deserve to have their lawfully elected representative seated as soon thereafter as possible.

Yesterday, on December 6, 2007, ESS sought an additional delay so that the parties may submit further evidence on a virtually undisputable question: whether an examination of the voting machines used in an election is reasonably necessary in an election contest prompted by the alleged failure of those machines to count the votes. It is, however, settled law that neither trade secrets nor confidentiality agreements may be used to “conceal fraud or otherwise work injustice.” While new technology may change some facets of elections and election contests, it should not and cannot prevent Florida voters from exercising their rights to bring and reasonably pursue an election contest.

Background

On November 20, 2006, Plaintiff Christine Jennings submitted a Request for Production of Documents and for Inspection of Tangible Things to the Florida Elections Canvassing Commission; the Sarasota County Canvassing Board; Kathy Dent, Sarasota County Supervisor of Elections; Sue Cobb, Florida Secretary of State; and Dawn Roberts, Director of the Florida Division of Elections (“Jennings Discovery Request”). In addition, Jennings moved to compel expedited discovery of the Election Systems & Software, Inc. (“ESS”) source code to the iVotronic system, to all elements of the Unity software suite, and to all personal electronic ballots (“PEBs”) as used in the November 2006 general election in Sarasota County and/or as escrowed with the Department of State under Section 101.5607(1)(a), Florida Statutes. On November 21, 2006, the Court denied Plaintiff’s request for production of the source code, without prejudice.

On November 30, 2006, Jennings filed her renewed Motion to Compel, arguing that the material sought was in the State’s possession, custody, and control (not ESS’s),

that the state has no basis to refuse the requested discovery, and that the entry of a protective order can adequately protect any concerns about trade secrets.

On December 1, 2006, Voter Plaintiffs issued their First Set of Requests For Production and Inspection (“Voter Discovery Request”) to Defendants Florida Elections Canvassing Commission; Sarasota County Canvassing Board; Sue M. Cobb, Florida Secretary of State; and Kathy Dent, Sarasota County Supervisor of Elections. The Voter Discovery Request explicitly seeks copies of access to all materials identified in the Jennings Discovery Request. The Voter Discovery Request also asks for additional materials, among them

- a) records of iVotronic voting machine malfunctions,
- b) communications regarding iVotronic voting machine malfunctions,
- c) studies regarding iVotronic security and reliability, and
- d) all data generated by iVotronic voting machines during the November 7, 2006, election.

A true and correct copy of the Voter Discovery Request is attached as Exhibit A.

On December 5, 2006, Defendants Election Canvassing Commission of the State of Florida, and Sue M. Cobb as Florida Secretary of State (collectively, “State Defendants”¹) issued their Response to the Jennings Discovery Request, refusing to produce responsive materials “to the extent that they seek documentation which is confidential and exempt trade secret (defined by § 812.081 and §§ 815.04 and 815.045, Florida Statutes (2006).” Specifically, State Defendants identified iVotronic source code

¹ Dawn K. Roberts, Director of the Division of Elections of the State of Florida, also joined in the State Defendants’ Response to the Jennings Discovery Request. Roberts is not a Defendant in the Voter Plaintiffs’ suit.

and related documentation, user manuals, operator manuals, training materials, and other documentation related to the use, operation, or maintenance of any part of the iVotronic system as categories of responsive materials which would be withheld in whole or in part based on this asserted “confidential” or “exempt trade secret” status.

Similarly, on December 5, 2006, Defendant Dent issued a Response to Plaintiff’s [Jennings’s] Request for Production of Documents and for Inspection of Tangible Things in which she refused to produce, in whole or in part, the following documents: software used in the November 7, 2006, election to test iVotronic voting machines and their components; user manuals, operator manuals, training materials, and other documentation related to the use, operation, or maintenance of any part of the iVotronic system; documentation necessary to extract and read iVotronic redundant memories; all files loaded onto an iVotronic machine as part of the “ballot programming” process; and the machines themselves. Ms. Dent asserts that such materials are exempt from production based on the contract between Sarasota County and ESS and/or that the materials are “proprietary trade secret matters” under section 90.506, Florida Statutes (2006).

In addition, on December 6, 2006, Defendant² ESS filed its own Motion (“ESS Motion”), seeking additional time to respond to Jennings’s Discovery Request and an evidentiary hearing to determine (among other things) whether Plaintiffs have a “reasonable necessity” to examine voting machine components as part of their election contest.

² Jennings added ESS as a Defendant in her Amended Complaint, filed on November 30, 2006. Voter Plaintiffs have not added ESS as a Defendant, but this Court consolidated both cases on November 30, 2006.

Because Voter Plaintiffs seek all of the same materials sought by Jennings in her motion to compel, and because the state Defendants have now refused to produce such responsive materials, Voter Plaintiffs join in the Jennings Motion and adopt Jennings' arguments in support thereof, with the following supplemental argument. In addition, because Voter Plaintiffs seek additional materials that will likely implicate the same contractual and trade secret concerns already raised by Defendants, Voter Plaintiffs move to compel those additional materials on similar grounds. As this Court is aware, this election contest must be resolved quickly and expeditiously. Voter Plaintiffs join in the Jennings motion increase the efficiency of this proceeding and to allow the Court to consider all related issues together.

Argument

I. Defendants May Not Assert Third Party Trade Secret Privilege In Order to Withhold Discovery.

No Defendant has objected to the relevancy of the materials sought in the Jennings Discovery Request (explicitly incorporated in the Voter Discovery Request). Not only is the information relevant, it is central to the case, which is aimed at discovering what happened during the November 2006 general election that led to over 18,000 unexplained undervotes in Sarasota County. Indeed, refusal to allow the Jennings and Voter Plaintiffs access to this material is tantamount to denying them their right to reasonably contest the election as provided under Florida law.

Defendant Dent and the State Defendants improperly object to production, without specificity or a privilege log, on the basis of a purported right of a third party, ESS. As discussed more fully in Jennings's Motion to Compel of November 30, 2006, any such argument limiting the production of relevant materials is for ESS to make,

whether or not ESS is a party to the action. Section 90.506 clearly states: the privilege may be claimed by the person or the person's agent or employee. Defendants are neither.

Even if ESS asserts that some or all of the materials sought by the Plaintiffs are trade secrets, such a designation is not automatic: "The burden is on the party resisting discovery to show 'good cause' for protecting or limiting discovery by demonstrating that the information sought is a trade secret or confidential business information and that disclosure may be harmful." *American Exp. Travel Related Services, Inc. v. Cruz*, 761 So.2d 1206 (Fla. 4th DCA 2000). This burden carries with it an obligation to identify any such materials with particularity on a privilege log; blanket objections – such as the ones put forward thus far – are insufficient.³

Further, "[i]t is widely recognized that the trade-secret privilege is not absolute." 8 Wigmore, Evidence § 2212(3) (McNaughton rev.1961); Law Revision Council Note to § 90.506 (1976). "The purpose of the [trade secret] privilege is to prohibit a party from using the duty of a witness to testify as a method of obtaining a valuable trade secret *when the lack of disclosure will not jeopardize more important interests.*" Law Revision Council Note to § 90.506 (1976) (emphasis added). Thus, the privilege may be invoked to prevent disclosure only "if the allowance of the privilege will not conceal fraud or

³ Florida Rule of Civil Procedure 1.280 requires parties withholding otherwise discoverable materials on the basis of a trade secret privilege to identify such materials with particularity in order to "enable other parties to assess the applicability of the privilege or protection." Trial courts have the discretion to find waiver of privilege claims for failure to produce a privilege log. *See, e.g., General Motors Corp. v. McGee*, 837 So.2d 1010, 1032 (Fla. 4th DCA 2002), *Metabolife Intern., Inc. v. Holster*, 888 So.2d 140, 141 (Fla. 1st DCA 2004). *See also Gosman v. Luzinski*, 937 So.2d 293, 296 fn.1 (Fla. 4th DCA 2006) ("Obviously, if the sole objection to discovery were that it sought privileged documents, then compliance with Rule 1.280(b)(5) would be required prior to any hearing on the objection as the information contained in the privilege log would be necessary to "assess the applicability of the privilege or protection").

otherwise work injustice.” Fla. Sta. § 90.506 (2006). In addition, the “necessity of disclosure to the presentation of the opponent's case” (among other factors) weighs against suspending the generally applicable discovery obligations. Law Revision Council Note to § 90.506 (1976). Finally, Florida courts recognize that the potential harm of disclosing trade secrets is lessened where, as here, the party seeking discovery lacks any commercial interest in the secret at issue. *See, e.g., Freedom Newspapers, Inc. v. Egly et al.*, 507 So.2d 1180 (Fla.App.Dist.2 1987).

Each of the above factors weighs in favor of production of the requested materials. As set forth in greater detail in Jennings’ Motion for Protective Order, the information sought by Plaintiffs is crucial to their case. Indeed, details regarding the operation and accuracy of the voting technology approved by the state of Florida and selected by Sarasota County are the very essence of this case. Moreover, Plaintiffs seek access to these relevant materials not for competitive gain but for purposes of explaining how thousands of Sarasota residents were apparently deprived what the Supreme Court has held as the “fundamental political right” – the right to vote. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Voter Plaintiffs agree with Jennings that the issuance of a protective order should resolve any concerns that ESS may raise about the disclosure of materials it believes qualifies for trade secret protection. In the interests of expediting discovery, Voter Plaintiffs will abide by any protective order the Court initially determines is necessary “in the interests of the holder of the privilege, the interests of the parties, and the furtherance of justice.” Fla. Stat. § 90.506. *See also* Fla.R.Civ.P. 1.280(c)(7). However, recognizing that it is ESS’s burden to establish that all materials it seeks to designate as trade secrets

qualify as such, and the tremendous and appropriate public interest in understanding whether their votes were counted correctly, Voter Plaintiffs reserve the right to challenge any such designation after discovery has commenced.

II. Sarasota County's Contract With ESS Does Not Prohibit the Release of Materials Sought by Plaintiffs As Part of the Discovery Process.

In addition to improperly asserting a trade secret privilege on behalf of ESS, Defendant Dent insists that a contract with ESS prohibits production of certain responsive materials “without the written consent of ESS or proper court order.” This argument is without merit.

First, no agreement between Sarasota County and ESS can be allowed to preclude those harmed by either of their actions from gaining access to materials that are reasonably calculated to lead to the discovery of admissible evidence. *See, e.g., Nestor v. Posner-Gerstenhaber*, 857 So.2d 953, 955 (Fla. 3d DCA 2003) (contractual confidentiality agreements cannot be used to adversely interfere with the ability of nonparties to pursue discovery); *Scott v. Nelson*, 697 So.2d 1300, 1301 (Fla. 1st DCA 1997) (contractual confidentiality agreements which suppress evidence violate public policy).

Second, the contract itself anticipates that materials designated “confidential,” “proprietary,” or “trade secret” by ESS might still be made available “under public records laws, or any other laws of the State of Florida or the United States of America.” ESS Vendor Contract with Sarasota County (Exhibit B) at paragraph 3.9. Indeed, the contract specifically indemnifies Sarasota County for any “damages suffered by ESS as a

result of any disclosure of ESS materials pursuant to law.” *Id.*⁴ Even though this provision is not a prerequisite for discovery to commence, requests seeking materials central to Plaintiffs’ cause of action satisfy the contractual language.

Third, Dent misrepresents the contract between Sarasota County and ESS and the impact of permitted inspection. Dent asserts, for example, in paragraph 13 of her response that “[p]roviding the machines for any type of access, opening or inspection, will violate the warranty between Sarasota County and Election Systems & Software.” This is simply incorrect. Sarasota’s warranty expired in December of 2004. Exh. B at paragraph 3.3(b).

Dent goes on to ask that if the Court orders any such inspection that the Court also “should specify that parties receiving the items purchase the equipment, as such will be compromised by any actions by Plaintiff and are then unable to be used again by Sarasota County.” While the suggestion that a voter *must purchase* affected voting machines in order to maintain an election contest is absurd, Plaintiffs in this instance are willing to accede to Dent’s terms. If Dent is indeed offering to sell one or more of the iVotronic voting machines in question as a way of facilitating the discovery process, Voter Plaintiffs accept that offer. While in no way agreeing that such an arrangement is necessary under Florida law, Plaintiffs believe that in this particular case, especially given the need for expeditious review, it would likely streamline efforts to coordinate inspection as well as expedite and focus any trade secret arguments that ESS may intend to bring as part of this case.

⁴ The contract further sets forth specific procedures that are triggered if Sarasota County is subject to such a suit, procedures that result in ESS defending or reimbursing Sarasota County for “all fees and costs incurred in defense of such action.” *Id.*

III. ESS's Efforts to Delay Have No Basis and Should Be Rejected.

In its Motion of December 6, ESS argues that it needs additional time in which to decide what position to take regarding discovery production of materials for which it asserts trade secrecy. While Voter Plaintiffs are receptive to suggestions aimed at accommodating the legitimate scheduling needs of any party, ESS misrepresents both the law and the facts in support of a Motion that would ultimately only cause unnecessary delay and prejudice Plaintiffs.

A. ESS Was Not Prejudiced By Being Served With Jennings' Complaint on December 4.

Its careful insinuations notwithstanding, ESS never claims, nor does common sense support, that ESS was actually prejudiced by any lack of notice regarding the development of this contest. As the supplier of both election equipment and “election support services” for Sarasota County in the recent general election, ESS was no doubt aware of voter complaints regarding the performance of its voting equipment that began to emerge even before election day. Media scrutiny focusing on potential malfunctions of its voting machines increased dramatically when the margin of victory – and the undervote rate – of the 13th Congressional District was announced, leading the Secretary of State to call for an audit of ESS' equipment, an audit that by definition required consultation with and the participation of ESS itself. The likelihood of this lawsuit, and the corresponding need to evaluate ESS equipment and materials, was clear almost immediately after polls closed on November 7th.

Moreover, once the lawsuit was filed and Jennings submitted her initial discovery requests seeking access to source code and other related materials, Sarasota County was obligated by its contract to inform ESS of such an attempt: “In the event that a demand is

made upon Customer or the Sarasota County Supervisor of Elections for disclosure of materials or information considered by ESS to be “proprietary,” or a “trade secret,” the Sarasota County Supervisor of Elections or Customer shall notify ESS as soon as possible and ESS shall immediately take all actions it deems necessary to defend itself against such disclosure.” Exh. B. at paragraph 3.9.

ESS’ claims of prejudice amount to technical protestations, not a reflection of the actual notice that ESS had of Plaintiffs’ legitimate and predictable attempts to obtain and evaluate the underlying code of voting machines that reportedly malfunctioned during the election. Furthermore, ESS was obligated under its own contract to “immediately take all actions it deems necessary to defend itself against such disclosure” once made aware of a likely attempt at disclosure. The notion that ESS only *now* has begun to develop its position on trade secrets and source code disclosure or that it must now “retain its own experts” is, to be generous, not credible.

B. No Evidentiary Hearing – Let Alone a Full-Day of Expert Testimony– Is Necessary or Required.

With no party contesting trade secrecy status in order to facilitate the production of discoverable materials, Plaintiffs need only demonstrate a “reasonable necessity” for the information. *See, e.g., Goodyear Tire & Rubber Co. v. Cooley*, 359 So.2d 1200, 1202 (Fla. 1st DCA 1978).

As ESS’ own citations demonstrate, no evidentiary hearing is required to make this finding. In *Uniroyal Goodrich Tire Company v. Eddings*, 673 So.2d 131, 132 (Fla. 4th DCA 1996), for example, the court of appeals identified both an *in camera* hearing as well as an evidentiary hearing as valid mechanisms to determine trade secret status and, by implication, “reasonable necessity.” In *Rare Coin-It, Inc. v. I.J.E., Inc.*, 625 So.2d

1277, 1279 (Fla. 3rd DCA 1993), the court of appeals did not specify any required procedural mechanism from which such a finding need to emerge. Instead, Plaintiffs must simply make some factual showing that in turn permits the Court to “set forth findings of fact supporting a conclusion that disclosure of the trade secrets was reasonably necessary to resolve the issues in dispute.” *See, e.g., Virginia Electronics and Lighting Corp. v. Koester*, 714 So.2d 1164, 1165 (Fla. App. 1 Dist., 1998).

In the immediate case, the requisite factual showing has already been made. On November 20, 2006, in support of her Complaint, Jennings filed the Declaration of Dan Wallach, a nationally renowned computer security expert (and an associate director at ACCURATE, an federally-funded research center that studies technological and policy issues associated with electronic voting systems). In his Declaration, Wallach described in detail the materials that were required to perform an accurate audit of the voting technology and why those materials were necessary. Far from simply “rely[ing] on the argument of plaintiff’s counsel,” as incorrectly described by ESS, Plaintiffs have already made far more than the minimal factual showing required by Florida law.

ESS may, of course, submit written evidence of its own to rebut Wallach’s Declaration. However, a more expansive process like an evidentiary hearing is an unnecessary waste of the resources of the Court and the parties, for at least three reasons. First, the immediate case does not implicate a business competitor relationship between the parties, a situation in which courts tend to take greater care to ensure that overbroad discovery attempts don’t irreparably harm the producing party. *See, e.g., Beck v. Dumas*, 709 So. 2d 601 (Fla. 4th DCA 1998); *Rare Coin-It, Inc. v. I.J.E., Inc.*, 625 So.2d 1277 (Fla. 3rd DCA 1993).

Second, the only question before the Court is an extremely narrow one, the answer to which is self-evident: In an election contest alleging malfunctions of voting technology, is it reasonably necessary to examine that technology in order to determine whether any such malfunctions took place? This is not, as ESS argues, a situation requiring expert testimony – over the course of an entire day, no less – to walk the Court through the “highly technical nature of the Source Code and Proprietary Equipment.” ESS Motion at p.7. ESS experts may ultimately in their own declarations take the counter-intuitive position that such an examination is *not* relevant, but the Court is competent to evaluate such submissions (as well as the explanatory arguments of counsel) in order to determine whether Plaintiffs have met their low evidentiary burden. If the Court feels that it needs more evidence after reviewing those submissions, it can ask for it at that point. Tellingly, even though it argues that a full-day hearing is strictly required, ESS fails to articulate the contents, scope, or parameters of such a hearing.

Indeed, ESS’ own supplemental briefing, submitted today, suggests that the vendor seeks not to present evidence in support of the narrow “reasonable necessity” question but instead wants to weigh the merits of the case before discovery – an example of putting the cart before the horse if there ever was one. ESS argues that delay is appropriate to give the vendor’s expert time to “fully present his findings and conclusions” regarding his undervote theories. Such a presentation – and responsive testimony – should occur at trial, not a preliminary discovery hearing. Moreover, ESS is asking for the same thing Plaintiffs seek – the chance to develop claims and defenses based on relevant evidence. All parties should have that opportunity; only ESS seems to think it should have extra time to do so in advance of production.


Finally, the interests of justice weigh against saddling election contest plaintiffs with this higher evidentiary burden. The Florida trade secret privilege may not “conceal fraud or otherwise work injustice.” *See* § 90.506, Florida Statutes (2006). An election contest alleging the malfunction of voting equipment ordinarily protected by a trade secret privilege clearly triggers the policy considerations embodied in the statute.

Conclusion

For the reasons stated, Voter Plaintiffs respectfully request that the Court grant Jennings’ Motion to Compel. In addition, Voter Plaintiffs respectfully request that the Court compel the production of all materials sought in the Voter Discovery Request. Furthermore, Voter Plaintiffs respectfully request that ESS’s Motion be denied.

DATED: December 7, 2006

Respectfully submitted,

By 

Counsel for Voter Plaintiffs

Lowell Finley, Esq.
(Pro hac vice application to be filed)
VOTER ACTION
1604 Solano Avenue
Berkeley, California 94707
Telephone: (510) 318-2248
Facsimile: (415) 723-7141

Cindy A. Cohn, Esq.
Matthew J. Zimmerman, Esq.
(Pro hac vice applications to be filed)
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, California 94110
Telephone: (415) 436-9333 x127
Facsimile: (415) 436-9993

Elliot M. Minberg, Esq.
Judith E. Schaeffer, Esq.
(Pro hac vice applications to be filed)
PEOPLE FOR THE AMERICAN WAY
FOUNDATION
2000 M Street N.W. #400
Washington, D.C. 20036
Telephone: (202) 467-4999
Facsimile: (202) 293- 2672

Rebecca Harrison Steele, Esq.
Fla. Bar No. 067326
Zeina N. Salam, Esq.
Florida Bar No. 653632
ACLU FOUNDATION OF FLORIDA,
INC.
West Central Florida Office
112 N. Delaware Ave.
Tampa, FL 33606
P.O. Box 18245
Tampa, FL 33679-8245
Telephone: (813) 254-0925

Facsimile: (813) 254-0926

Reginald J. Mitchell, Esq.
Florida Bar No.0621293
PEOPLE FOR THE AMERICAN WAY
FOUNDATION
1550 Melvin Street
Tallahassee, FL 32301
Telephone: (850) 877-0307
Facsimile: (850) 402-1999

Muslima Lewis, Esq.
Director – Voting Rights Project
Florida Bar No. 0158305
Randall C. Marshall, Esq.
Legal Director
Florida Bar No. 181765
Aziza Naa-Kaa Botchway
Florida Bar No.: 017803
ACLU FOUNDATION OF FLORIDA,
INC.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
Telephone: (786) 273-2729
Facsimile: (786) 363-1448

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has been furnished by
facsimile on this 7th day of December 2006 to the following:

Kendall Coffey, Esq.
Florida Bar No.: 259861
Coffey & Wright, LLP
2665 South Bayshore Dr.
PH-2, Grand Bay Plaza
Miami, FL 33133
Telephone: (305) 857-9797
Facsimile: (305) 859-9919
*Attorney for Plaintiff Candidate
Christine Jennings*

Ron Labasky, Esq.
Florida Bar No.: 206326
Young Van Assenderp, P.A.
225 South Adams Street
Suite 200
Tallahassee, FL 32301-1700
Telephone: (850) 222-7206
Facsimile: (850) 561-6834
*Attorney for Defendants Supervisor of
Elections Kathy Dent and Judge Phyllis
Galen*

Sam Hirsch, Esq.
Jessie Amunson, Esq.
Donald E. Verrilli, Esq.
(Pro hac vice applications filed)
Jenner & Block, LLC
601 Thirteenth Street, NW
Suite 1200 South
Washington, DC 20005
Telephone: (202) 639-6000
Facsimile: (202) 661-4900
*Attorneys for Plaintiff Candidate
Christine Jennings*

Glenn Thomas Burhans Jr., Esq.
Florida Bar No.: 605867
Hayden R. Dempsey, Esq.
Florida Bar No.: 0014435
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32301
Telephone: (850) 222-6891
Facsimile: (850) 681-0207
*Attorneys for Defendant Candidate Vern
Buchanan*

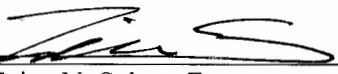
Mark Herron, Esq.
Florida Bar No.: 199737
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308
Telephone: (850) 222-0720
Facsimile: (850) 558-0659
***Attorney for Plaintiff Candidate
Christine Jennings***

Pete Antonacci, Esq.
Florida Bar No.: 280690
Allen C. Winsor, Esq.
Florida Bar No.: 16295
Gray Robinson, P.A.
300 South Bronough Street
Suite 600
Tallahassee, FL 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311
***Attorneys for Defendants, Governor Jeb
Bush, Secretary of State Sue M. Cobb
and State Senator Daniel Webster***

Richard T. Donelan, Jr., Esq.
Florida Bar No.: 198714
Chief Counsel
Department of Financial Services
200 East Gaines Street
Tallahassee, FL 32399-4727
Telephone: (850) 413-3010
Facsimile: (850) 413-3029
***Attorney for Defendant Tom Gallagher,
Chief Financial Officer***

Stephen Demarsh
Florida Bar No.: 335649
Frederick J. Elbrecht
Florida Bar No.: 314609
Office of the County Attorney
1660 Ringling Boulevard, Second Floor
Sarasota, FL 34236-6870
Telephone: (941) 861-7272
Facsimile: (941) 861-7267
***Attorneys for Defendant County
Commissioner Paul Mercier***
Miguel A. DeGrandy
Florida Bar No.: 332331
Miguel DeGrandy P.A.
800 S. Douglass Road, Suite 850
Coral Gables, FL 33134-2088
Telephone: (305) 444-7737
Facsimile: (305) 374-8743
***Attorney for Defendant Election Systems
& Software, Inc.***

Harry O. Thomas, Esq.
Florida Bar No.: 195097
Radey Thomas Yon & Clark, P.A.
Post Office Box 10967
Tallahassee, Florida 32302
301 S. Bronough Street, Suite 200
Tallahassee, FL 32301-1722
Telephone: (850) 425-6654
Facsimile: (850) 425-6694
***Attorney for Defendant Election Systems
& Software, Inc.***

By: 
Zeina N. Salam, Esq.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

ELLEN FEDDER, LANCE JONES,
ERNEST LASCHE a/k/a MIKE LASCHE,
BARBARA KLEIN, LOIS HARMES,
JOHN MINDER, DOVIE MURRAY,
JOHN MCBRIDE, SUSAN GAAR,
GARY LAMER, CHARLES CLIFTON,

Plaintiffs,

v

No. 06 CA 2996

TOM GALLAGHER, CHIEF
FINANCIAL OFFICER, STATE OF
FLORIDA, and GOVERNOR JEB
BUSH, and STATE SENATOR DAN
WEBSTER, as members of and as the
FLORIDA ELECTIONS CANVASSING
COMMISSION, and SUE M. COBB,
as SECRETARY OF STATE,
STATE OF FLORIDA,

and

THE SARASOTA COUNTY
CANVASSING BOARD,
SARASOTA COUNTY JUDGE
PHYLLIS GALEN, SARASOTA
COUNTY COMMISSIONER
PAUL MERCIER, and KATHY
DENT, SARASOTA COUNTY
SUPERVISOR OF ELECTIONS,
as members of and as THE
SARASOTA COUNTY
CANVASSING BOARD, and KATHY
DENT, as Supervisor of Elections,

and

VERN BUCHANAN, Nominee of
the Republican Party of Florida for
the 13th Congressional District of Florida,

Defendants

EXHIBIT A

**PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION AND INSPECTION**

Pursuant to Rule 350 of the Florida Rules of Civil Procedure, Plaintiffs request that Defendants (the Florida Elections Canvassing Commission; Sarasota County Canvassing Board; Sue M. Cobb, Florida Secretary of State; and Kathy Dent, Sarasota County Supervisor of Elections) produce all Documents responsive to the following Requests for Production at the offices of undersigned counsel as soon as practicable and, in any event, within 15 days of the service of these Requests. Plaintiffs also request that Defendants make available for inspection as soon as practicable all things sought in their Requests for Inspection

INSTRUCTIONS

These requests require the production and/or inspection of all responsive materials within the sole or joint possession, custody, or control of any Defendants, including, without limitation, any such Documents that lie within the possession, custody, or control of any agents, agencies, departments, attorneys, employees, consultants, representatives, or other persons or entities acting for, or otherwise subject to the control of, any Defendants.

2. These requests are continuing in nature and require prompt supplemental responses for any and all responsive Documents that come into any Defendant's sole or joint possession, custody, or control after the service of any initial responses

3. Each of these requests requires a separate answer. For each Document, indicate the Request to which it responds.

4. All responsive Documents are required to be produced either (a) as they are kept in the usual course of business (together with copies of any file labels or binder covers for the

files or binders in which they are maintained) or (b) organized and labeled to correspond with the categories of the Requests to which they respond (see Rule 1.350(b)).

5 For any responsive Document or portion thereof that is either redacted or withheld, in whole or in part, on the basis of any assertion of privilege or other asserted exemption from discovery, identify (a) the title or identity of the Document; (b) the date of the Document; (c) the type or nature of the Document; (d) the identity, title or responsibilities, and relationship to Defendants of all persons who either prepared or received the Document; (e) the type and nature of the privilege or exemption asserted; and (f) the contents or subject matter of the Document, with sufficient detail to explain the basis for the privilege or exemption asserted (see Rule 1.280(b)(5)). For any such responsive Document or portion thereof that may not properly be redacted or withheld in its entirety, produce each and every portion thereof to which the claimed privilege or exemption does not apply and specify, on the face of each such page or portion, the fact and reason for the redaction or withholding

6 Wherever possible or necessary to render a given Request more inclusive than it otherwise might be, the singular should be construed to include the plural, and vice versa; the disjunctive should be construed to include the conjunctive, and vice versa; and any verb tense should be construed to include other tenses.

DEFINITIONS

“Defendants” means any and all named Defendants in this action (except Vern Buchanan), both individually and jointly, their offices, subordinates, employees, agents and representatives

2. "Election official" means any employee, agent, or representative of Florida state or local government authorized to take part in (or otherwise participates in) the administration of any election held within Florida.

3. "Document" is used in the broadest sense permissible under the Florida Rules of Civil Procedure to encompass and mean the product of any method of recording information, whether by writing or otherwise, including without limitation: any written, electronic, or computerized files, data, or software; memoranda; correspondence; communications; records; reports; summaries; studies; analyses; evaluations; notes or notebooks; indices; logs; books, booklets, or binders; pamphlets; calendar or diary entries; press clippings; graphs; tables; charts; drawings; maps; meeting minutes; photographs; transcripts; audio or video recordings or tapes; facsimile transmissions; electronic mail messages; administrative decisions, orders, or rulings; and the like

The term "Document" should be construed to encompass all responsive Documents and related materials of any nature and each and every copy or draft of a Document that is not identical to the original or to any other copy or draft

4 The term "DRE" refers to direct recording electronic voting machines.

5 The term "OPSCAN" refers to optical scan voting machines.

6. The term "voting system" refers to the total combination of mechanical, electro-mechanical, or electronic equipment, and any ancillary equipment and software, firmware, and documentation required to program, control, and support the equipment, all of which is used to define ballots, cast and count votes, report and/or display election results, and maintain and produce any audit trail information. Only systems that utilize DRE or OPSCAN voting machines are included in this definition unless otherwise stated.

7 The term "ES&S" refers to Election Systems & Software, as well as the agents thereof. The term also refers to the entity and agents that provide technical assistance and support related to voting equipment.

8 The term "malfunction" refers to any event reported by anyone regarding any voting system or any component thereof indicating (1) that the voting system did not record or may not have accurately recorded a voter's vote, (2) that voters encountered difficulty using the voting system, (3) that voting system exhibited anomalous, unexpected, or unexpected behavior, or (4) that the voting system failed to properly perform any function for which it was certified under state or federal law.

9. Unless otherwise specified, "November 7, 2006, election" and "election of November 7, 2006" refers to the November 7, 2006, election in Sarasota County, Florida.

REQUESTS FOR PRODUCTION

Request for Production No.1.

All Documents responsive to the Plaintiff's [Christine Jennings] Request for Production of Documents and for Inspection of Tangible Things of November 20, 2006.

Request for Production No.2.

Documents sufficient to show the name, address, and job title of all employees and poll workers who participated in the administration of the November 7, 2006, election.

Request for Production No.3.

For the November 7, 2006, election, all Documents discussing, relating to, reflecting, or in any manner memorializing any reported voting system malfunction, including but not limited to Documents identifying any components that reportedly malfunctioned and any remedial action taken.

Request for Production No.4.

For the November 7, 2006, election, all communications between and/or among Defendants, ES&S, election officials, or poll workers regarding the malfunction of any voting system.

Request for Production No. 5.

All Documents prepared by or for, or considered or relied upon, by any Defendant regarding the security, reliability, or accuracy of any DRE or OPSCAN voting system used or considered for use in Florida since January , 2000.

Request for Production No.6.

All data generated by all voting machines used in the November 7, 2006, election, including but not limited to ballot images, data stored in redundant or backup memory, and audit data.

REQUESTS FOR INSPECTION

Request for Inspection No.1

Plaintiffs request access to and the right to inspect all tangible things identified in Plaintiff's [Christine Jennings] Request for Production of Documents and for Inspection of Tangible Things of November 20, 2006

Dated: December 1, 2006

Respectfully submitted,

Zaina N. Salam /mz

Zaina N. Salam

Fla. Bar No. 653632

ACLU West Central Florida

P.O. Box 18245

Tampa, FL 33679-8245

(813) 254-0925 (office)

(813) 254-0926 (fax)

zsalam@aclufl.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has been furnished by facsimile and U.S.

Mail on this 1st day of December, 2006 to the following:

Pete Antonacci
Gray Robinson, P.A.
300 South Bronough Street
Suite 600
Tallahassee, FL 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311

Allen C. Winsor
Gray Robinson, P.A.
300 South Bronough Street
Suite 600
Tallahassee, FL 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311
*Attorneys for Governor Jeb Bush, CFO Tom
Gallagher, Secretary of State Sue Cobb, and
Senator Dan Webster*

Ron Labasky
Young Van Assenderp, P.A.
225 South Adams Street
Suite 200
Tallahassee, FL 32301-1700
Telephone: (850) 222-7206
Facsimile: (850) 561-6834
*Attorney for Supervisor of Elections Kathy Dent
and Judge Phyllis Galen*

Stephen Demarsh
County Attorney
Office of the County Attorney
1660 Ringling Boulevard, Second Floor
Sarasota, FL 34236-6870
Telephone: (941) 861-7272
Facsimile: (941) 861-7267
Attorney for County Commissioner Paul Mercier

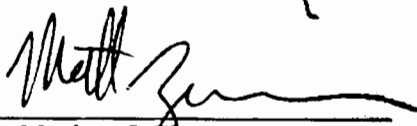
I hereby certify that a true and correct copy of the above has been furnished by U.S. Mail on this

1st day of December, 2006 to the following:

Elections Canvassing Commission
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

Sarasota County Canvassing Board
101 S. Washington Blvd.
Sarasota, FL 34236

By:


Matthew J. Zimmerman

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

ELLEN FEDDER, LANCE JONES,
ERNEST LASCHE a/k/a MIKE LASCHE,
BARBARA KLEIN, LOIS HARMES,
JOHN MINDER, DOVIE MURRAY,
JOHN MCBRIDE, SUSAN GAAR,
GARY LAMER, CHARLES CLIFTON,

Plaintiffs,

v

No. 06 CA 2996

TOM GALLAGHER, CHIEF
FINANCIAL OFFICER, STATE OF
FLORIDA, and GOVERNOR JEB
BUSH, and STATE SENATOR DAN
WEBSTER, as members of and as the
FLORIDA ELECTIONS CANVASSING
COMMISSION, and SUE M. COBB,
as SECRETARY OF STATE,
STATE OF FLORIDA,

and

THE SARASOTA COUNTY
CANVASSING BOARD,
SARASOTA COUNTY JUDGE
PHYLLIS GALEN, SARASOTA
COUNTY COMMISSIONER
PAUL MERCIER, and KATHY
DENT, SARASOTA COUNTY
SUPERVISOR OF ELECTIONS,
as members of and as THE
SARASOTA COUNTY
CANVASSING BOARD, and KATHY
DENT, as Supervisor of Elections,

and

VERN BUCHANAN, Nominee of
the Republican Party of Florida for
the 13th Congressional District of Florida,

Defendants

EXHIBIT B

**PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION AND INSPECTION**

Pursuant to Rule 350 of the Florida Rules of Civil Procedure, Plaintiffs request that Defendants (the Florida Elections Canvassing Commission; Sarasota County Canvassing Board; Sue M. Cobb, Florida Secretary of State; and Kathy Dent, Sarasota County Supervisor of Elections) produce all Documents responsive to the following Requests for Production at the offices of undersigned counsel as soon as practicable and, in any event, within 15 days of the service of these Requests. Plaintiffs also request that Defendants make available for inspection as soon as practicable all things sought in their Requests for Inspection

INSTRUCTIONS

These requests require the production and/or inspection of all responsive materials within the sole or joint possession, custody, or control of any Defendants, including, without limitation, any such Documents that lie within the possession, custody, or control of any agents, agencies, departments, attorneys, employees, consultants, representatives, or other persons or entities acting for, or otherwise subject to the control of, any Defendants.

2 These requests are continuing in nature and require prompt supplemental responses for any and all responsive Documents that come into any Defendant's sole or joint possession, custody, or control after the service of any initial responses

3 Each of these requests requires a separate answer. For each Document, indicate the Request to which it responds

4. All responsive Documents are required to be produced either (a) as they are kept in the usual course of business (together with copies of any file labels or binder covers for the

files or binders in which they are maintained) or (b) organized and labeled to correspond with the categories of the Requests to which they respond (see Rule 1.350(b)).

5 For any responsive Document or portion thereof that is either redacted or withheld, in whole or in part, on the basis of any assertion of privilege or other asserted exemption from discovery, identify (a) the title or identity of the Document; (b) the date of the Document; (c) the type or nature of the Document; (d) the identity, title or responsibilities, and relationship to Defendants of all persons who either prepared or received the Document; (e) the type and nature of the privilege or exemption asserted; and (f) the contents or subject matter of the Document, with sufficient detail to explain the basis for the privilege or exemption asserted (see Rule 1.280(b)(5)). For any such responsive Document or portion thereof that may not properly be redacted or withheld in its entirety, produce each and every portion thereof to which the claimed privilege or exemption does not apply and specify, on the face of each such page or portion, the fact and reason for the redaction or withholding

6 Wherever possible or necessary to render a given Request more inclusive than it otherwise might be, the singular should be construed to include the plural, and vice versa; the disjunctive should be construed to include the conjunctive, and vice versa; and any verb tense should be construed to include other tenses.

DEFINITIONS

“Defendants” means any and all named Defendants in this action (except Vern Buchanan), both individually and jointly, their offices, subordinates, employees, agents and representatives

2. "Election official" means any employee, agent, or representative of Florida state or local government authorized to take part in (or otherwise participates in) the administration of any election held within Florida.

3. "Document" is used in the broadest sense permissible under the Florida Rules of Civil Procedure to encompass and mean the product of any method of recording information, whether by writing or otherwise, including without limitation: any written, electronic, or computerized files, data, or software; memoranda; correspondence; communications; records; reports; summaries; studies; analyses; evaluations; notes or notebooks; indices; logs; books, booklets, or binders; pamphlets; calendar or diary entries; press clippings; graphs; tables; charts; drawings; maps; meeting minutes; photographs; transcripts; audio or video recordings or tapes; facsimile transmissions; electronic mail messages; administrative decisions, orders, or rulings; and the like

The term "Document" should be construed to encompass all responsive Documents and related materials of any nature and each and every copy or draft of a Document that is not identical to the original or to any other copy or draft

4 The term "DRE" refers to direct recording electronic voting machines.

5 The term "OPSCAN" refers to optical scan voting machines.

6. The term "voting system" refers to the total combination of mechanical, electro-mechanical, or electronic equipment, and any ancillary equipment and software, firmware, and documentation required to program, control, and support the equipment, all of which is used to define ballots, cast and count votes, report and/or display election results, and maintain and produce any audit trail information. Only systems that utilize DRE or OPSCAN voting machines are included in this definition unless otherwise stated.

7 The term “ES&S” refers to Election Systems & Software, as well as the agents thereof. The term also refers to the entity and agents that provide technical assistance and support related to voting equipment.

8 The term “malfunction” refers to any event reported by anyone regarding any voting system or any component thereof indicating (1) that the voting system did not record or may not have accurately recorded a voter's vote, (2) that voters encountered difficulty using the voting system, (3) that voting system exhibited anomalous, unexpected, or unexpected behavior, or (4) that the voting system failed to properly perform any function for which it was certified under state or federal law.

9. Unless otherwise specified, “November 7, 2006, election” and “election of November 7, 2006” refers to the November 7, 2006, election in Sarasota County, Florida.

REQUESTS FOR PRODUCTION

Request for Production No.1.

All Documents responsive to the Plaintiff's [Christine Jennings] Request for Production of Documents and for Inspection of Tangible Things of November 20, 2006.

Request for Production No.2.

Documents sufficient to show the name, address, and job title of all employees and poll workers who participated in the administration of the November 7, 2006, election.

Request for Production No.3.

For the November 7, 2006, election, all Documents discussing, relating to, reflecting, or in any manner memorializing any reported voting system malfunction, including but not limited to Documents identifying any components that reportedly malfunctioned and any remedial action taken.

Request for Production No.4.

For the November 7, 2006, election, all communications between and/or among Defendants, ES&S, election officials, or poll workers regarding the malfunction of any voting system.

Request for Production No. 5.

All Documents prepared by or for, or considered or relied upon, by any Defendant regarding the security, reliability, or accuracy of any DRE or OPSCAN voting system used or considered for use in Florida since January , 2000.

Request for Production No.6.

All data generated by all voting machines used in the November 7, 2006, election, including but not limited to ballot images, data stored in redundant or backup memory, and audit data.

REQUESTS FOR INSPECTION

Request for Inspection No.1

Plaintiffs request access to and the right to inspect all tangible things identified in Plaintiff's [Christine Jennings] Request for Production of Documents and for Inspection of Tangible Things of November 20, 2006

Dated: December 1, 2006

Respectfully submitted,

 /mz

Zeina N. Salam
Fla. Bar No. 653632
ACLU West Central Florida
P.O. Box 18245
Tampa, FL 33679-8245
(813) 254-0925 (office)
(813) 254-0926 (fax)
zsalam@aclufl.org
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has been furnished by facsimile and U.S.

Mail on this 1st day of December, 2006 to the following:

Pete Antonacci
Gray Robinson, P.A.
300 South Bronough Street
Suite 600
Tallahassee, FL 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311

Allen C. Winsor
Gray Robinson, P.A.
300 South Bronough Street
Suite 600
Tallahassee, FL 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311
*Attorneys for Governor Jeb Bush, CFO Tom
Gallagher, Secretary of State Sue Cobb, and
Senator Dan Webster*

Ron Labasky
Young Van Assenderp, P.A.
225 South Adams Street
Suite 200
Tallahassee, FL 32301-1700
Telephone: (850) 222-7206
Facsimile: (850) 561-6834
*Attorney for Supervisor of Elections Kathy Dent
and Judge Phyllis Galen*

Stephen Demarsh
County Attorney
Office of the County Attorney
1660 Ringling Boulevard, Second Floor
Sarasota, FL 34236-6870
Telephone: (941) 861-7272
Facsimile: (941) 861-7267
Attorney for County Commissioner Paul Mercier

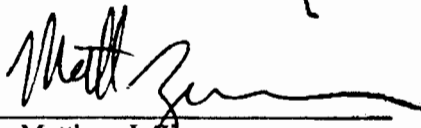
I hereby certify that a true and correct copy of the above has been furnished by U.S. Mail on this

1st day of December, 2006 to the following:

Elections Canvassing Commission
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

Sarasota County Canvassing Board
101 S. Washington Blvd.
Sarasota, FL 34236

By:


Matthew J. Zimmerman

CONTRACT NO. 2002-042

ELECTION SYSTEMS & SOFTWARE, INC. **BCC APPROVED** 11/13/01
VOTER TABULATION SYSTEM AND SERVICES AGREEMENT

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

BETWEEN: Election Systems & Software, Inc., a Delaware corporation ("ES&S"), whose address is: 11208 John Galt Blvd., Omaha, Nebraska 68137,

AND: The County of Sarasota, Florida ("Customer"), a political subdivision of the State of Florida, whose address is: 1660 Ringling Blvd., 2nd Floor, Sarasota, Florida 34236.

RECITALS:

A. Customer has agreed to purchase/license voter tabulation equipment and related software and services from ES&S for use in **Sarasota County, FL** (the "Jurisdiction"). The terms and conditions under which the equipment, software and services shall be provided are set forth in the **GENERAL TERMS** attached hereto and incorporated herein by reference.

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

- Exhibit A (Pricing Summary)
- Exhibit B (ES&S Equipment)
- Exhibit C (ES&S Software Products)
- Exhibit D (Third Party Items)
- Exhibit E (Election Support Services)
- Exhibit F (Hardware Maintenance Services)
- Exhibit G (Software Maintenance Services)
- Exhibit H (Definitions)

BOARD RECORDS
 FILED FOR RECORD
 2001 NOV 4 AM 9:08
 Clerk of Circuit Court
 SARASOTA COUNTY, FL

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

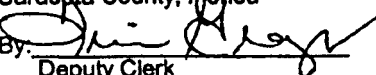

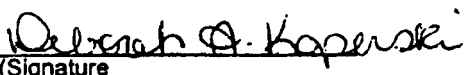

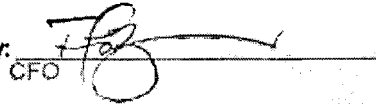
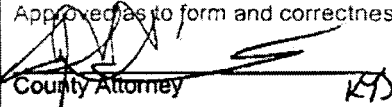
- Agrees to the **GENERAL TERMS** and the terms and conditions set forth in each applicable Exhibit.

Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

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.

[Signature Page to Follow]

<p>ATTEST:</p> <p>KAREN E. RUSHING Clerk of Circuit Court Ex-Officio Clerk of the Board of County Commissioners of Sarasota County, Florida</p> <p>By:  Deputy Clerk</p>	<p>BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY, FLORIDA.</p> <p>By:  Chairman</p>
<p>WITNESSES:</p> <p> (Signature) Deborah A. Koperski (Print Name)</p> <p> (Signature) Beverly J. CAVANAUGH (Print Name)</p>	<p>ELECTION SYSTEMS & SOFTWARE, INC.</p> <p>By:  CFO</p>
<p>Approved as to form and correctness:</p> <p> County Attorney KJD</p>	

CONTRACT NO. 2002-042

BCC APPROVED 11/13/01

**GENERAL TERMS
ARTICLE 1
DEFINITIONS**

All capitalized terms used, but not defined, in these General Terms or on an Exhibit are defined in Exhibit H.

**ARTICLE 2
SALE OF ES&S EQUIPMENT AND THIRD PARTY ITEMS/LICENSE OF ES&S SOFTWARE PRODUCTS**

2.1 **Purchase Terms.** Subject to the terms and conditions of this Agreement, ES&S agrees to sell, and Customer agrees to purchase, a turnkey voting system which shall include the ES&S Equipment and the Third Party Items described on Exhibits B and D hereto and the ES&S Software Products licensed pursuant to Section 2.2 below (hereinafter the "System"). The payment terms for the ES&S Equipment and Third Party Items are set forth on Exhibit A. Title to the Equipment shall pass to Customer as Customer pays ES&S for the ES&S Equipment, ES&S Software Products and Third Party Items, as set forth in Exhibit A.

2.2 **Grant of Licenses.**

a. **ES&S Software Products, Excluding ES&S Firmware.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer a nonexclusive, nontransferable license to use ES&S' software, as described on Exhibit C hereto, and the related Documentation in the Jurisdiction. The license allows Customer to use and copy ES&S' software (in object code only) and the Documentation, solely for the purposes of defining an election and tabulating and reporting election results in the Jurisdiction for the term of Customer's use of the ES&S Equipment.

b. **ES&S Firmware.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer a nonexclusive, nontransferable license to use ES&S' firmware, which is delivered as a part of the ES&S Equipment and is further described on Exhibit C hereto (the "ES&S Firmware") for the term of Customer's use of the ES&S Equipment. The license allows Customer to use the ES&S Firmware (in object code only) in the Jurisdiction and solely in the course of operating the ES&S Equipment as contemplated by the Documentation therefor.

c. **COLLECTIVE DEFINITION AS "ES&S SOFTWARE PRODUCTS".** THE ES&S SOFTWARE DESCRIBED IN SECTION 2.2(a) AND THE ES&S FIRMWARE ARE ES&S' PROPRIETARY SOFTWARE AND ARE HEREINAFTER COLLECTIVELY REFERRED TO AS THE "ES&S SOFTWARE PRODUCTS".

d. **Prohibited Uses.** Customer may not take any of the following actions with respect to the ES&S Software Products or their Documentation:

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

ii. Subject to section 3.9 herein, cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software Products or Documentation, in whole or in part, to or by any third party without ES&S' prior written consent; or

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

2.3 **License Fees.** In consideration for ES&S' grant of the license for the ES&S Software described in Section 2.2(a), Customer shall pay ES&S the onetime License Fees set forth on Exhibit A for the term of Customer's use of the ES&S Equipment. The consideration for ES&S' grant of the license for the ES&S Firmware is included in the cost of the ES&S Equipment.

2.4 **Term of Licenses.** The licenses granted in Section 2.2 shall commence upon the delivery of the ES&S Software described in Section 2.2(a) and continue for the term of Customer's use of the ES&S Equipment. The licenses shall survive the termination of all other obligations under this Agreement and the termination of all Exhibits; provided, however, that ES&S may terminate either license if Customer fails to pay the consideration due for, or breaches Sections 2.2, 2.5, or 3.8 with respect to, such license. Upon the termination of either license for ES&S Software Products or Customer's discontinuance of use of any ES&S Software Product, Customer shall immediately return such ES&S Software Product and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software Product and Documentation and certify in writing to ES&S that such destruction has occurred.

2.5 **Source Code.** The licenses granted in Section 2.2 do not permit Customer to use the source code for the ES&S Software Products. ES&S shall place the source code in escrow with the Florida Department of State and its then current third party escrow agent, and will likewise place in escrow the source code for all Updates (in the form of a complete version update), Add-Ons and New Products (as defined below) provided to Customer. The source code shall be accompanied by such flowcharts and instructions in machine-readable format as shall be reasonably necessary to enable Customer to use the source code as permitted below. Should ES&S cease operations and become unable to maintain and support any of the ES&S Software Products while under an obligation to do so, Customer shall have the right to obtain the source code to the extent necessary to enable Customer to use such ES&S Software Products in accordance with this Agreement. The source code will remain the property of ES&S and may not otherwise be used by Customer. ES&S shall furnish Customer with the name and address of said third party escrow agent. ES&S agrees to immediately notify Customer of any change in escrow agent or change in address of the current escrow agent. ES&S shall at its own cost maintain source code(s) compliant with all state and federal rules, regulations and laws.

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

a. **Updates.** During the Warranty Period, ES&S shall provide new releases, upgrades or maintenance patches to the ES&S Software Products, along with appropriate Documentation (all of which shall be collectively referred to as "Updates") to Customer on a timely schedule and at no additional charge to Customer. Customer is responsible for obtaining any upgrades or purchases of Third Party Items required to operate the Updates. All Updates shall be deemed to be ES&S Software Products for purposes of this Agreement upon delivery. Customer may install Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S may charge Customer at its then-current rates to (i) install Updates or (ii) provide maintenance and support on the ES&S Software Products which is required as a result of Customer's failure to timely install an Update which has been timely provided by ES&S. If Customer proposes changes in the ES&S Software Products to ES&S, such proposals will become ES&S' property. ES&S may, in its sole discretion, elect to make or not to make such changes without reference or compensation to Customer or any third party. Upon the termination of the Warranty Period, Customer shall be entitled to receive the Software Maintenance and Support (as described in Section 2.7 below) on the ES&S Software Products as agreed to by ES&S and the Sarasota County Supervisor of Elections. The parties acknowledge that the providing of Updates is a part of the Software Maintenance and Support, and

WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY.

3.4 Routine Maintenance For ES&S Equipment During Warranty Period. During the Warranty Period, Customer may request that ES&S provide the Routine Maintenance Services (as defined on Exhibit F) for (1) one or more units of ES&S Equipment, at no additional charge to Customer. Any such request shall be made at least sixty (60) days before the Routine Maintenance Services are desired. The terms and conditions of Section 3(c), of Exhibit F, shall govern the providing of the Routine Maintenance Services. ES&S shall convey to Customer in writing the proper method of storing the ES&S Equipment and Customer shall properly store the ES&S Equipment when not in use. Upon the termination of the Warranty Period, Customer shall be entitled to receive the Hardware Maintenance on said equipment as agreed to between ES&S and the Sarasota County Supervisor of Elections.

3.5 Timely Performance. The parties mutually agree that time is of the essence in the performance of this Agreement. If, due to ES&S' negligence, or circumstances within the control of ES&S, (i) ES&S fails to timely perform as required by this Agreement, and (ii) such failure has or will result in a material detrimental impact on Customer's ability to define an election or tabulate or report election results in the Jurisdiction in a satisfactory manner or on a timely basis, then at the discretion of Customer, Customer may pass to ES&S the direct, reasonable, total out-of-pocket expenses incurred by Customer in curing such failure. Customer will submit to ES&S an itemized statement setting forth the charges for said expenses. Upon ES&S' request, Customer will also provide ES&S with copies of invoices and other back-up information necessary to confirm the itemized expenses. ES&S will pay all such itemized expenses in cash or, at Customer's option, by giving Customer a credit against future payments due to ES&S. Customer will take all reasonable steps to mitigate the expenses incurred by Customer hereunder, and ES&S will work with Customer to assist in such mitigation efforts and to achieve the curing of the failure as expeditiously as possible. Except as provided for in Section 3.3(a), the remedies set forth in this section are the full extent of Customer's remedies for the performance failures described in this Section 3.5.

3.6 Limitation Of Liability. Neither party will be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or relating to this Agreement. Except for such liability as may arise under Sections 2.8, 3.5 and 3.10, ES&S' total liability to Customer arising out of or relating to this Agreement will not exceed the aggregate amount to be paid to ES&S hereunder. Any action by Customer against ES&S shall be commenced within the applicable statute of limitations period. By entering into this Agreement, Customer agrees to accept responsibility for (a) the use of the Equipment and Software, and (b) the selection of, use of and results obtained from any equipment, software or services not provided by ES&S and used with the Equipment or Software. ES&S will not be liable on this Agreement for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee which is caused by (y) Customer's failure to install and use the most recent Update, or the second most recent Update, timely provided to it by ES&S or (z) Customer's election not to receive, or to terminate, the Hardware Maintenance Services, or the Software Maintenance and Support.

3.7 Taxes; Interest. Customer will provide ES&S with proof of its tax-exempt status upon request. If Customer does not provide such proof, it shall pay, or shall reimburse ES&S for, all sales and use, excise or other similar taxes imposed on the transactions contemplated by this Agreement, but shall in no event be liable for taxes imposed on or measured by ES&S' income. If Customer disputes the applicability of any tax to be paid pursuant to this Section 3.7, it shall pay the tax and may thereafter seek a refund. Any disputed or undisputed payment which is past due for more than 30 days will bear interest at the rate of one percent (1%) per month (or such lesser amount as may be provided for under Florida Statutes, Sections 218.70 through 218.80 (the "Florida Prompt Payment Act")) for each month or portion thereof during which it remains unpaid.

3.8 Proprietary Rights. Customer acknowledges and agrees as follows:

a. ES&S owns the ES&S Software Products, all Documentation and training materials provided by ES&S, the design and configuration of the ES&S Equipment and the format, layout, measurements, design and all other technical information (except for Customer supplied information such as election information) associated with the ballots to be used with the ES&S Equipment. Customer has the right to use the aforementioned items to the extent specified in this Agreement. ES&S likewise 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. ES&S acknowledges that Customer and Sarasota County Supervisor of Elections retain all proprietary rights to all data collected by Customer and/or Sarasota County Supervisor of Elections as a result of conducting elections and tabulating and reporting election results in the Jurisdiction, including all voter demographic data and voting statistics.

b. Customer shall not knowingly cause or permit the adaptation, conversion, reverse engineering, disassembly or de-compilation of any of the ES&S Equipment or ES&S Software Products.

c. Customer shall keep the ES&S Software Products 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 which are set forth on the ES&S Equipment, the ES&S Software Products, the Documentation, training materials and ballots which are provided, and all permitted copies of the foregoing.

3.9 **Confidentiality.** As a political subdivision of the State of Florida, Customer agrees that any and all information and the materials provided by ES&S hereunder that are marked "confidential," "proprietary," or "trade secret" and which are not required to be made publicly available under public records laws, or any other laws of the State of Florida or the United States of America, will be kept confidential by Customer. Customer and the Sarasota County Supervisor of Elections shall not be liable for any damages suffered by ES&S as a result of any disclosure of ES&S materials pursuant to law. ES&S shall mark any materials or information that it considers to be "confidential," "proprietary," or a "trade secret." In the event that a demand is made upon Customer or the Sarasota County Supervisor of Elections for disclosure of materials or information considered by ES&S to be "confidential," "proprietary," or a "trade secret," the Sarasota County Supervisor of Elections or Customer shall notify ES&S as soon as possible and ES&S shall immediately take all actions it deems necessary to defend itself against such disclosure, provided that ES&S may not take action that would effect (a) the ability of Customer to operate the System; or (b) the obligations of ES&S under this agreement. In the case of any action brought against the Sarasota County Supervisor of Elections and/or Customer pursuant to Florida Statutes Chapter 119 or other law, ES&S shall either (a) defend the Sarasota County Supervisor of Elections and/or Customer in any such action or (b) reimburse the Sarasota County Supervisor of Elections and/or Customer all fees and costs incurred in defense of such action. For the purpose of this paragraph "action" includes proceedings at the trial and the appellate levels.

3.10 **Indemnification by ES&S.**

a. **Intellectual Property Infringement.** ES&S will indemnify, defend and hold Customer and/or the Sarasota County Supervisor of Elections 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 the ES&S Equipment or ES&S Software Products 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"). Notwithstanding the foregoing, ES&S shall have no liability to Customer for any Third Party Infringement Claim resulting out of any acts, errors or omissions of Customer, resulting from (i)

Customer's failure to timely install and use any Update timely provided to it by ES&S; (ii) the use of any ES&S Equipment or ES&S Software Products in combination with other equipment, hardware or software not meeting ES&S' specifications for use with such ES&S Equipment or ES&S Software Products; or (iii) Customer's modification or alteration of any item of ES&S Equipment or ES&S Software Products without the prior written consent of ES&S. ES&S represents to Customer that no Third Party Infringement Claim is outstanding against ES&S as of the Effective Date. Customer shall notify ES&S within thirty (30) days of discovery of any Third Party Infringement Claim. Customer hereby gives ES&S full and complete authority, and shall provide such information and assistance as is necessary (at ES&S' expense with respect to reasonable out-of-pocket costs), to enable ES&S 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 the ES&S Equipment or ES&S Software Products in substantially the manner contemplated by this Agreement, ES&S shall, at its sole option and expense, procure for Customer the right to continue such use or replace or modify the infringing item. **THE FOREGOING STATES ES&S' ENTIRE LIABILITY FOR ANY INTELLECTUAL PROPERTY INFRINGEMENT ARISING UNDER THIS AGREEMENT.**

b. **Personal Injury/Property Damage.** ES&S shall indemnify, defend and hold harmless Customer and/or the Sarasota County Supervisor of Elections from and against any and all Adverse Consequences arising out of or relating to personal injury (including death) or property damage which is caused by any negligent or willful act, error or omission of ES&S, its employees, subcontractors and any other persons under ES&S' authority and control. Customer shall notify ES&S within thirty (30) days of discovery of any claim for which it may be entitled to indemnification under this Section 3.10(b), and hereby gives ES&S full and complete authority, and shall provide such information and assistance as is necessary (at ES&S' expense with respect to reasonable out-of-pocket costs), to enable ES&S to defend, compromise or settle any such claim.

c. **Americans With Disabilities Act.** ES&S will indemnify, defend and hold Customer and/or the Sarasota County Supervisor of Elections harmless from and against any and all Adverse Consequences arising out of or relating to a lawsuit which alleges that the System, or any component(s) thereof, fails to comply with the Americans with Disabilities Act as represented by ES&S in Section 2.8(a). Customer hereby gives ES&S full and complete authority, and shall provide such information and assistance as is necessary (at ES&S' expense with respect to reasonable out-of-pocket costs), to enable ES&S to defend, compromise or settle any such lawsuit.

d. **Survival.** These indemnification provisions shall survive the termination of all other obligations under this Agreement and the termination of all exhibits herein.

3.11 Indemnification By Customer. Sarasota County is a political subdivision defined in Section 768.28, Florida Statutes, agrees to be fully responsible to the limits set forth in such statute for money damages attributable to injury to or loss of property, personal injury or death caused by the negligent or wrongful act of its employees, and agrees to be liable to the statutory limits for any such damages. Nothing contained in this section shall be construed to be a waiver by Sarasota County of any protections under sovereign immunity, Section 768.28, Florida Statutes, or any other similar provision of law. Nothing contained herein shall be construed to be a consent by Sarasota County to be sued by third parties in any matter arising out of this or any other agreement.

3.12 Insurance. Before performing any contract work, the ES&S shall procure and maintain, during the life of the contract, unless otherwise specified, insurance of the types and kinds listed below. The policies of insurance shall be primary and written on forms acceptable to the Customer and placed with insurance carriers approved and licensed by the Insurance Department in the State of Florida and meet a minimum financial AM Best and Company rating of no less than "Excellent":VII. No changes are to be made to these specifications without prior written specific approval by the Customer.

a. **COMPENSATION:** ES&S will provide Workers compensation Insurance, on behalf of all employees who are to provide a service under this contract, as required under Chapter 440, Florida Statutes, and Employers Liability with limits of not less than \$100,000 per employee per accident; \$500,000 disease aggregate; and \$100,000 per employee per disease.

b. **COMMERCIAL GENERAL LIABILITY:** including, but not limited to, bodily injury, property damage, contractual, products and completed operations, and personal injury with limits of not less than \$1,000,000 per occurrence, \$2,000,000 aggregate covering all work performed under this Agreement.

c. **AUTOMOBILE LIABILITY:** including bodily injury and property damage, including all vehicles, owned, leased, hired and non-owned vehicles with limits of not less than \$1,000,000 combined single limit covering all work performed under this Agreement.

d. **ERRORS AND OMISSIONS:** with limits of not less than \$1,000,000 for errors and omissions associated with the ES&S Software Products provided under this Agreement. ES&S shall maintain such insurance for at least two (2) years from the termination of this Agreement and during this two (2) year period, ES&S shall use its best efforts to ensure that there is no change of the retroactive date on this insurance coverage. If there is a change that reduces or restricts the coverage carried during the Agreement, ES&S shall notify Customer's Risk Management Office within thirty (30) calendar days of the change.

e. **UMBRELLA LIABILITY** – with limits of not less than \$5,000,000 per occurrence covering all work performed under this contract.

3.13 **Excusable Nonperformance.** Except for a delay or the failure in the payment of money, if either party is delayed or prevented from performing its obligations under this Agreement due to any cause beyond its reasonable control, including natural disaster, fire, flood, Acts of God, labor disputes and governmental regulations, not the fault of the party failing or delaying the performance, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent necessary to allow performance after the cause of delay has been removed. ES&S agrees to work with Customer to develop mutually agreeable alternatives in order to minimize the negative impact of any such delay.

3.14 **Term; Termination.** This Agreement shall become effective on the Effective Date and shall continue until Customer ceases to use the ES&S Equipment and ES&S Software Products, unless otherwise terminated as provided herein. The parties acknowledge and agree that certain of the Exhibits contain separate termination provisions, and that the termination of any Exhibit shall not constitute a termination of any other Exhibit or of the Agreement as a whole. This Agreement may be terminated at any time:

a. By either party if the other party breaches any material provision hereof and does not cure such breach within 30 days after it receives notification thereof from the non-breaching party; or

b. By either party in the event that funds are not appropriated or otherwise made available by Customer to support the continuation of performance hereunder in any subsequent fiscal period. Customer shall notify ES&S of the termination, which may occur no later than the beginning of the subsequent fiscal period. Upon termination, ES&S shall be reimbursed for the reasonable value of the unrecovered Firmware or Software, if applicable, delivered to Customer hereunder. Customer acknowledges and agrees that its estimated requirements cover the period of this Agreement and are reasonably firm and continuing, and that sufficient funds to pay for the first twelve (12) months of this Agreement are available.

3.15 **Assignment.** Except in the case of a sale, transfer or assignment of all or substantially all of the assets of ES&S to a successor who has asserted its intent to continue the business of ES&S, neither party may assign or transfer this Agreement or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld.

3.16 **Remedies.** Except as specifically provided herein, the remedies provided to the parties under this Agreement shall be cumulative and non-exclusive, and the parties shall be entitled to seek any other rights to which they may be entitled at law or in equity, subject to the terms of this Agreement.

3.17 **Entire Agreement.** This Agreement, including all Exhibits hereto (all of which are incorporated herein by this reference), contains the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior or contemporaneous discussions, negotiations, agreements or understandings between the parties, whether written or oral, regarding the subject matter hereof. Any provision of any purchase order, form or other agreement which conflicts with or is in addition to the provisions of this Agreement shall be of no force or effect. In the event of any conflict between a provision contained in an Exhibit to this Agreement and these General Terms, the provision contained in the Exhibit shall control. No waiver, amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No consent by either party to, or waiver of, a breach by either party shall constitute a consent to or waiver of any other different or subsequent breach by either party.

3.18 **Severability.** If any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by any court of competent jurisdiction, the remaining provisions of this Agreement shall remain in full force and effect. The parties agree to use their best efforts to amend the unenforceable or invalid provision so as to best accomplish the objective of such provision and the parties. Any such amendment shall be in writing and be executed with the same formality as this Agreement.

3.19 **Notice.** Any notice or other communication required or permitted hereunder shall be in writing, and will be deemed given when delivered personally, sent by commercial overnight courier (with written verification of receipt) or sent by registered or certified mail, return receipt requested, postage prepaid, when the return receipt is received. All communications to Customer shall be sent to the attention of James L. Ley, County Administrator, 1660 Ringling Blvd., 2nd Floor, Sarasota, FL 34236; and to the Honorable Kathy Dent, Sarasota County Supervisor of Elections, P.O. Box 4194, Sarasota, FL 34230. All communications to ES&S shall be sent to the attention of the person listed on the signature to this Agreement and at the address set forth on such signature page unless other names or addresses are provided by ES&S.

3.20 **Disputes.**

a. **Payment Disputes.**

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

ii. **Remedies for Past Due Undisputed Payments.** If any undisputed payment to ES&S is past due more than 30 days, ES&S may suspend performance under this Agreement until such amount is paid. To the extent permitted by law, ES&S hereby reserves a security interest in the Equipment and Third Party software which will not be satisfied until either the

ES&S Equipment, Third Party Items purchased by ES&S, and ES&S Software Products have been returned to ES&S or ES&S has been paid for the ES&S Equipment, ES&S Software Products licenses and Third Party Items. Customer shall, upon request by ES&S, execute financing statements deemed necessary or desirable by ES&S to perfect such security interest. Customer authorizes ES&S 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 ES&S' security interest. A financing statement may be filed by ES&S without Customer's signature on the basis of this Agreement where permitted by law. Customer shall keep the Equipment and Third Party software in good working order and repair until it has paid for the ES&S Equipment, ES&S Software Products licenses and Third Party Items. If Customer's payment is past due for more than sixty (60) days, and is undisputed, ES&S may, with demand and notice to Customer, declare the total amount immediately due and payable. If Customer fails to pay the full amount after ten(10) business days of receiving such notice, then Customer agrees to peacefully and immediately deliver any Equipment and Third Party Software to which ES&S is entitled, to ES&S at Sarasota County, Florida. When ES&S has either received the Equipment, Software or Third Party Items purchased by ES&S or been paid for the ES&S Equipment, ES&S Software Products licenses and Third Party Items, it will release any retained security interest or financing statements that are of record within thirty (30) days of receipt.

b. **Dispute Resolution Process.** Time is of the essence in resolving disputes. The initiating party shall notify the responding party of any dispute, including all relevant information (e.g., the nature of the dispute, dates, times, persons involved). The responding party shall respond to the notification within ten (10) business days. Thereafter, the parties shall use their good faith efforts to resolve the dispute within a reasonable period of time. If the parties are unable to do so, either party may notify the other that it intends to submit the dispute to mediation within thirty (30) days after the notice is given. If the dispute is submitted to mediation, the mediation shall be conducted in Sarasota County, Florida by a trained, licensed and experienced mediator with no relationship to either party and who is otherwise acceptable to both parties, in their reasonable discretion. If the parties are unable to resolve their dispute through mediation, either may litigate the dispute in any court of competent jurisdiction, which litigation must occur in Sarasota County, Florida, and ES&S submits to the jurisdiction of said court and agrees to accept service of process. Notwithstanding anything in this Section 3.20(b) to the contrary, either party may apply to any court of competent jurisdiction located in Sarasota County, Florida, for a temporary restraining order and/or preliminary injunction at any time, and ES&S expressly submits to the jurisdiction of said court and agrees to accept service of process.

3.21 **Construction.** As used in this Agreement, "including" means "including without limitation". The singular shall include the plural and vice versa. The title of each Article, Section, Exhibit and Schedule is inserted solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect the meaning, construction or effect of this Agreement.

3.22 **Counterparts; Execution By Facsimile.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument. The parties may execute this Agreement and exchange counterparts of the signature pages by means of facsimile transmission, and the receipt of such executed counterparts by facsimile transmission shall be binding on the parties. Following such exchange, the parties shall, within 5 (five) business days, exchange original versions of such signature pages.

3.23 **Affirmative Action.** ES&S represents that it has developed and implemented an Affirmative Action Plan and Equal Employment Opportunity policy in its workplace. ES&S shall provide copies of such documents to Customer upon request.

3.24 Price Stabilization. The Customer and/or the Sarasota County Supervisor of Elections reserves the right to purchase, and ES&S agrees to sell, additional ES&S Equipment at the prevailing market price or at the same per-unit contract price, which ever is less, for a period not to exceed three (3) years from the Effective Date.

3.25 Other. In performing its obligations or enjoying its rights under this Agreement, each party shall comply with all applicable laws and regulations. ES&S is providing Equipment, Software and services to Customer as an independent contractor, and shall not be deemed to be a "state actor" for purposes of 42 U.S.C. § 1983. ES&S will not be responsible for errors that arise from user errors, voter errors or problems encountered by individuals in voting that are not covered by warranty or for which ES&S is not otherwise responsible for under this Agreement. ES&S may engage subcontractors to provide certain of the Equipment, Software or services, but shall remain fully responsible for such performance. The provisions of Sections 2.2(d), 2.4, 2.8, 3.3(d), 3.5-3.11, 3.13, 3.14(b), 3.16, 3.20 and 3.24 of these General Terms shall survive the termination of this Agreement, to the extent applicable.

[END OF GENERAL TERMS]

**EXHIBIT A
PRICING SUMMARY**

Sale Summary:		
	Refer to	
ES&S Equipment	Exhibit B	\$4,471,425
ES&S Software Products License Fees	Exhibit C	
Third Party Items	Exhibit D	
Election Support Services	Exhibit E	
Shipping and Handling		
Estimated Performance Bond Cost (Actual to be billed)		
Total Before Discounts		\$4,749,289
Early Adopter Discount		\$(35,375)
Total Net Sale		\$4,713,914
Terms & Conditions:		
Note 1: Any applicable state and local taxes are not included, and are the responsibility of the Jurisdiction.		
Note 2: Payment terms are as follows: \$513,500.00 within thirty (30) days of delivery of an equivalent amount of ES&S Equipment. Forty-five percent (45%) of Total Net Sale less \$513,500.00 thirty (30) days after delivery of all ES&S Equipment, ES&S Software Products and Third Party Items, installation and integration, acceptance testing and acceptance as set forth in Section 3.3. Forty-five percent (45%) of Total Net Sale within ten (10) days after Customer's receipt and review of the performance bond to be delivered to ES&S within ninety (90) days after the Effective Date (as provided for in Section 3.1). Ten percent (10%) of Total Net Sale within thirty (30) days after training as per Exhibit E of key election office personnel, including the Supervisor of Elections and poll workers.		
Note 3: ES&S will provide free on-site training sessions for the Sarasota County Supervisor of Elections and staff, as requested, through December 31, 2002. Such training shall be equivalent to the training provided by ES&S at its Election Management Training Center ("EMTC") in Omaha, Nebraska. Subsequently, ES&S will provide training sessions at one of its EMTCs, when and as requested, at its then current rate. Customer shall be responsible for all expenses it incurs in sending personnel to this training.		
Note 4: Election Support Services in excess of those set forth in Exhibit E shall be charged at the rate of \$900 per day, plus expenses through December 31, 2003. Expenses are limited to those allowed pursuant to Chapter 112, Florida Statutes		
Warranty:		
ES&S Hardware & ES&S Software Products warranty period: from the date of acceptance (as per Section 3.3(a) of the General Terms) through December 31, 2004.		

accordingly that the cost of Updates is included in the annual fee for Software Maintenance and Support.

b. **Add-Ons and New Products.** From time to time, ES&S may offer new features which can be added on to the ES&S Equipment and/or ES&S Software Products ("Add-Ons") and new hardware/software products ("New Products") to Customer. Customer may elect to purchase or license, as applicable, an Add-On or New Product upon the payment of a fee to ES&S. Unless any such purchase or license is effectuated pursuant to a separate agreement, the Add-On or New Product shall be deemed to be part of the ES&S Equipment or ES&S Software Products upon payment of such fees. Unless otherwise agreed to between the parties, each Add-On or New Product which is deemed to be part of the ES&S Equipment and/or ES&S Software Products will be subject to the warranty set forth in Section 3.3(b) upon delivery, and Customer may thereafter elect to receive Hardware Maintenance Services (as described in Section 2.7 below) and/or Software Maintenance and Support upon the expiration of the Warranty Period.

2.7 **Compliance with Federal and State Law.** ES&S represents and warrants to Customer that the ES&S Equipment and ES&S Software Products, Updates, Add-Ons and New Products each comply with all applicable requirements of federal and state election laws and regulations. ES&S represents and warrants that the turnkey voting system comprised of ES&S Equipment, ES&S Software Products, and Third Party Items either provided by ES&S or meeting ES&S' specifications and which is being provided to Customer hereunder, is in full and complete compliance with all applicable federal and state election laws and regulations. ES&S further represents and warrants that the System has been certified by the Florida Secretary of State, Division of Elections, for use in the State of Florida. ES&S further represents and warrants that during the Warranty Period and thereafter so long as Customer or the Sarasota County Supervisor of Elections is receiving Hardware Maintenance Services and Software Maintenance and Support (each as defined below), the System shall be maintained or upgraded by ES&S in such a way as to remain fully and completely compliant with all federal and state election laws and regulations, including all current and future requirements necessary to remain certified for use in the State of Florida. For purposes of the immediately preceding sentence, "maintained or upgraded" shall not mean the replacement of the System. Customer shall be responsible for the cost of any Third Party Items which ES&S notifies Customer are hereafter required in order to remain compliant and certified.

As provided in Florida Statutes, Section 287.132-133, by entering into this Agreement or performing any work in furtherance hereof, ES&S certifies that it, its affiliates, suppliers, subcontractors, and consultants who will perform hereunder, have not been placed on the convicted vendor list maintained by the State of Florida Department of Management Services within the thirty-six (36) months immediately preceding the date hereof. This notice is required by Florida Statutes, Section 287.133(3)(a).

For purposes of this Agreement, "Hardware Maintenance Services" are those services described on Exhibit F, and "Software Maintenance and Support" are those services described on Exhibit G. Exhibits F and G are provided for informational purposes only. The parties will execute separate stand-alone agreements which will be substantially similar to Exhibits F and G, under which ES&S will provide the Hardware Maintenance Services and Software Maintenance and Support to Customer upon the termination of the Warranty Period.

2.8 **Compliance with ADA.**

a. **Representation.** ES&S represents to Customer that the System and each component thereof complies with the Americans with Disabilities Act to the extent certified from time to time by the Florida Secretary of State, Division of Elections.

b. **Cure.** In the event that Customer and/or the Sarasota County Supervisor of Elections is sued in a court of competent jurisdiction and said court finds that the System and/or a component(s) thereof is not compliant with the Americans with Disabilities Act as it pertains to the ability of a voter to vote, ES&S agrees, at its sole cost, to immediately take whatever action is necessary, to the extent technically feasible, to comply with court orders and bring the System and/or a component(s) thereof into compliance.

ARTICLE 3 MISCELLANEOUS

3.1 **Performance Bond.** No later than 90 days after the Effective Date, ES&S shall post in favor of, and provide to Customer, a performance bond, acceptable to and approved by Customer, to guarantee performance of all terms and conditions of this Agreement. The performance bond shall be with a bank, surety, or other financial institution acceptable to Customer which is authorized to do business in the State of Florida and which has a "A" policy holder rating and a financial rating of at least Class VII in accordance with the most current of Best's Key Rating Guide. The performance bond shall be in the amount of 100% of the Total Net Sale (as defined on Exhibit A). The performance bond shall be renewed annually and shall terminate upon the expiration of the Warranty Period provided for in Section 3.3. On each renewal date, the amount of the performance bond may be reduced to an amount mutually agreeable to both parties which reflects the value of goods and services to be provided or being provided by ES&S to Customer. The ability of Customer to receive payment under the performance bond shall not be limited by any other provision of this Agreement. In the event that ES&S does not provide the performance bond to Customer within 90 days after the Effective Date, Customer may terminate this Agreement in accordance with Section 3.14.

3.2 **Delivery; Risk of Loss.** ES&S will deliver all of the Equipment and Software that is the subject of this Agreement and identified on Exhibits B-D to Customer at Customer's designated location no later than December 15, 2001. Risk of loss with respect thereto shall pass to Customer when such items are delivered to Customer at Customer's designated location during regular business hours.

3.3 **Acceptance; Warranties.**

a. **Acceptance.** Customer will not accept the Equipment and Software until mutually agreeable acceptance testing is performed on the System by ES&S and the System performs in accordance with this Agreement and to the satisfaction of Customer. Installation and Integration (as set forth on Exhibit E) of the System by ES&S shall occur within ten (10) days, unless extended by mutual agreement of the parties hereto, of delivery pursuant to Section 3.2 and shall occur prior to said acceptance testing. Acceptance testing shall be conducted on a mutually agreeable date and completed within twenty (20) days, unless extended by mutual agreement of the parties hereto, after Installation and Integration. The parties hereto acknowledge and agree that a "Project Plan" not inconsistent with this Agreement will be prepared and mutually agreed upon by the parties subsequent hereto, that said plan will become an integral part of this Agreement and that the terms of which are hereby incorporated herein by this reference. The acceptance testing is to confirm that the Equipment, ES&S Software Products and the System as a whole perform in accordance with this Agreement. If the ES&S Equipment, ES&S Software Products and/or the System as a whole fail(s) to perform in accordance with this Agreement, ES&S shall take back the failed Equipment, and/or Software and immediately furnish Customer with new, replacement Equipment, and Software and/or immediately take whatever action is necessary for the System to perform in accordance with this Agreement. In any event and notwithstanding any other provision of this Agreement, if delivery, installation and integration, and acceptance testing as set forth above have not been completed or the System fails to perform in accordance with this Agreement and to the satisfaction of Customer by January 15, 2002, unless

extended by mutual agreement of the parties hereto, then Customer has the right, without liability and upon notice to ES&S, to immediately and unilaterally terminate this Agreement and ES&S agrees to refund all monies paid to ES&S by Customer pursuant to this Agreement within thirty (30) days of termination.

b. **ES&S Equipment/ES&S Software Products.** ES&S warrants that for the period beginning from the date the equipment is accepted (as per Section 3.3(a)) by Customer through December 31, 2004, (the "Warranty Period"), it will repair or replace at no cost to the Customer any component of the ES&S Equipment or ES&S Software Products which, while under normal use and service: (i) fails to perform in accordance with its Documentation in any material respect, or (ii) is defective in material or workmanship. Any repaired or replaced item of ES&S Equipment or ES&S Software Products shall be warranted only for the unexpired term of the original Warranty Period. All replaced components of the ES&S Equipment or ES&S Software Products will become the property of ES&S. This warranty is effective provided that (I) Customer, within thirty (30) days of discovery of said failure of performance or defect, notifies ES&S of the failure of performance or defect and is otherwise in compliance with its obligations hereunder, (II) the ES&S Equipment or ES&S Software Product to be repaired or replaced has not been repaired, changed, modified or altered except as authorized or approved by ES&S, (III) the ES&S Equipment or ES&S Software Product to be repaired or replaced is not damaged due to accident, theft, vandalism, neglect, abuse, use which is not in accordance with instructions or specifications furnished by ES&S or causes beyond the reasonable control of ES&S or Customer, including natural disaster, fire, flood or Acts of God, and (IV) Customer has installed and is using the most recent Update, or the second most recent Update, provided to it by ES&S.

c. **System.** ES&S warrants that the System, ES&S Equipment, ES&S Software Products, Third Party Items, and/or other materials provided by ES&S to Customer pursuant to this Agreement will operate as a turnkey voting system to accommodate a jurisdiction of at least 450,000 registered voters, and that the ES&S Equipment and ES&S Software Products 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 ES&S, 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. ES&S shall, at its sole expense, immediately take whatever actions are necessary so as to satisfy said warranty. Customer acknowledges that ES&S 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 ES&S ("Third Parties"). Customer further acknowledges that except for the payment to ES&S for the Third Party Items, all of its rights and obligations with respect thereto flow from and to the Third Parties. ES&S shall provide Customer with copies of all documentation and warranties for the Third Party Items which are provided to ES&S.

d. **Services.** ES&S warrants that it shall perform all services, including Election Support Services as set forth in Exhibit E, and provide all materials under this Agreement in a professional, workmanlike manner and in strict accordance with industry standards and with the provisions of this Agreement. ES&S shall perform all services under this Agreement in a professional, workmanlike manner, with such professional care, technical skill, ability, and diligence as is required of similar companies having the level of skill, expertise, and specialized knowledge, as represented to Customer, both orally and in writing, to be possessed by ES&S. In the event of a breach of this Warranty, ES&S shall, at its sole expense, timely re-perform the services or cause the services to be timely re-performed so as to satisfy said Warranty.

e. **Exclusive Remedies.** IN THE EVENT OF A BREACH OF SUBSECTIONS 3.3(b), 3.3(c) OR 3.3(d), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL

EXHIBIT B

ES&S EQUIPMENT DESCRIPTION AND PRICING

QUANTITY	DESCRIPTION	TOTAL UNDISCOUNTED PRICE	TOTAL DISCOUNTED PRICE
3	Model M150, including: (1)		
3	Scanner		
3	Ballot Boxes		
3	Cart/Table		
3	Start-up Kit		
3	Dust Cover		
3	Ballot Joggers		
	IVotronic, including:		
1,200	Voter Terminal (includes booth & PEB)		
200	ADA Voter Terminal (includes booth & PEB)		
15	Supervisor Terminal (includes PEB)		
190	Communication Pack w/ modem & thermal printer		
	TOTAL	\$4,516,425.00	\$4,471,425.00

(1) It is agreed to by ES&S and the Customer that, upon successful certification, two (2) Model 650's will substituted for three(3) Model 150's at no additional cost.

**EXHIBIT C
ES&S SOFTWARE PRODUCTS DESCRIPTION AND PRICING**

NUMBER OF LICENSES	DESCRIPTION	FEE PER LICENSE	UNDISCOUNTED LICENSE FEES	DISCOUNTED LICENSE FEES
1	Unity Election System licensed pursuant to Section 2.2(a) of the General Terms (check modules being licensed):			
X	Data Manager	\$100		
X	Ballot Image Manager	\$2,900		
	Ballot on Demand	-0-		
X	Hardware Programming Manager	\$44,000		
X	Data Acquisition Manager	\$5,800		
X	Reporting Manager	\$7,200		
1	ES&S Firmware Version(s): M150: version 1.3.3 (1) Votronic: version 6.1.3.1	N/A; ES&S Firmware license fee included in the total cost of the ES&S Equipment		
	Total License Fees (including all applicable Documentation)		\$60,000	\$48,000

Note: ES&S Firmware versions may change between execution of contract and first election usage due to ongoing certification of Updates.

(1) It is agreed to by ES&S and the Customer that, upon successful certification, the ES&S Firmware for two (2) Model M650's shall be substituted for three (3) Model M150's at no additional cost to the Customer.

**EXHIBIT D
THIRD PARTY ITEMS**

Results Accumulation Network	
Windows NT4 File Server	Quantity
Dell PowerEdge 2400 - 1GHZ with 512K Cache	1
256MB SDRAM (2X128 SDRAM DIMMS)	1
6 Bay Hot Pluggable Backplane	1
On-board PERC 2/SI w/64MB Cache Single Channel	1
Add-in Raid Card, RAID 1 Hard Drive Configuration	1
18GB U160, SCSI 1In, 10K RPM Hard Drive - 1st	1
18GB U160, SCSI 1In 10K RPM Hard Drive - 2nd	1
48X IDE CD-ROM	1
56K Internal Modem	1
3.5" 1.44MB Floppy Drive	1
Microsoft Mouse	1
3 Year Next Bus. Day On-site Parts & Labor	1
PowerVault 100T 20/40G Internal DDS4 w/no Controller Card	1
Windows NT4 Software -- 10 users	1
56K Internal Modem	1
Arcserve Professional Software for Dell PowerSuite	1
APC Smart UPS-1400 w/Powerchute Software	1
DATA ACQUISITION WORKSTATIONS (2):	
Dell OptiPlex GX110 MiniTower -- 1GHz P-III w/256K Cache	2
Must have 1 ISA Slot	2
256MB Non-ECC SDRAM (2 DIMM)	2
Performance 104 key Keyboard	2
20 GB EIDE Hard Drive	2
P780 17" Ultra Monitor	2
12/8/32 CD/RW Drive	2
Intel Pro/100+Management Adapter w/Wake on LAN	2
3.5" 1.44MB Floppy Drive	2
Windows NT4 or Windows 2000 using FAT 32	2
APC Back-UPS 500 VA	2
MS System Mouse	2
Isobar 6 Ultra Surge Protector (Tripp Lite)	1
U.S. Robotics 56K External Modem	1
3-Year Next Bus. Day On-Site Parts and Labor	2
Serial Cables (Modems)	1
PcAnywhere Communications Software	1

DATA REPORTING/DISPLAY WORKSTATIONS:		
Dell OptiPlex GX110 MiniTower - 1GHz P-III w/256K Cache		4
Must have 1 ISA Slot		4
256MB Non-ECC SDRAM (2 DIMM)		4
Performance 104 key Keyboard		4
20 GB EIDE Hard Drive		4
P780 17" Ultra Monitor		4
12/8/32 CD/RW Drive		4
Intel Pro/100+Management Adapter w/Wake on LAN		4
3 Year Next Bus, Day On-site Parts & Labor		4
3.5" 1.44MB Floppy Drive		4
APC Back-UPS 500 VA		4
MS System Mouse		4
Isobar 6 Ultra Surge Protector (Tripp Lite)		4
Windows NT4 or Windows 2000 using FAT 32		
PRINTER:		
Hewlett-Packard 8100N 32 PPM Laser Printer		1
MISC. NETWORK HARDWARE:		
D-Link 8 Port Ethernet Hub (DSH-8)		1
D-Link 16 Port Ethernet Hub (DSH-16)		1
Cisco 1602 Router / WAN (56K Frame Relay)		2
TOTAL THIRD PARTY ITEMS		\$28,500

Note 1:

The configuration and specification of Third Party Items as per this Exhibit D are subject to change by the manufacturer. Should the actual configuration and specifications as set by the manufacturer differ from those set forth herein, ES&S agrees to provide Third Party Items that are comparable to those described above and are mutually satisfactory to both parties.

**EXHIBIT E
ELECTION SUPPORT SERVICES**

1. **Term.** The services described herein shall be provided for the following elections (the "Elections")

March 2002 (1 st Election Use)
September 2002 Primary
November 2002 General

Provided, however, that this **Exhibit E** may be terminated prior to its expiration pursuant to the same provisions as are set forth in Section 3.14 of the General Terms of the Agreement.

2. **Services.** The election support services to be provided by ES&S, the concurrent obligations of Customer, key pricing assumptions, and fees are described below (*insert "N/A" if not applicable*). Customer acknowledges that ES&S' fees for election support services are based on certain key assumptions, and that a change in any key assumption may require ES&S to change the resulting fee charged to Customer. All travel expenses are subject to Florida Statutes, Chapter 112.

Service	Description	Key Assumptions	Projected No. of Days of Service Provided for			Fee
			March 2002 Election	Sep 2002 Election	Nov 2002 Election	
Project Management	A project manager shall be responsible for the coordination of all election support services, and shall be the primary Customer contact for questions/issues.	Fee reflects \$800 per day. Expenses calculated pursuant to Ch. 112, F.S., not included.	35	20	30	\$76,500
Ballot Production	Provide sample, test and official ballots to be used during Election. Customer will provide all specifications, including election information, to ES&S. ES&S will provide Customer with a proof of each type of ballot on the date specified in a timetable supplied by Customer, and Customer will approve such proofs in writing within 5 calendar days after delivery. Following Customer's approval, ES&S will print and deliver the ballots on the date specified in Customer's timetable.	To be negotiated separately.	N/A	N/A	N/A	N/A
Ballot Layout Coding Services	Creation of the ballot layout to be used by the ES&S Equipment. Customer will provide the election definition information to ES&S, and ES&S will process the information.	Customer to assume responsibility for this task.	N/A	N/A	N/A	N/A

	into a usable format. The election definition files are then defined, used to code the election and transferred to the ES&S Equipments' memory devices. All Customer-created files shall remain the property of Customer.					
Installation and Integration	Provided by ES&S Representative at Customer's site on a mutually agreed-upon date; includes unpacking, inspection, setting up, diagnostic testing and calibration of the ES&S Equipment. Customer will prepare its site and hardware, software and systems not provided by ES&S as per ES&S' instructions, and will make its employees available to assist ES&S as reasonably necessary.	ES&S will train and oversee Customer personnel on the unpacking, inspection, setting up, diagnostic testing and calibration of the ES&S Equipment	15	5	5	\$30,000
Pollworker Training	Provide the Documentation and training. Training will include "train the trainer", pollworker and tabulation system & operator training at Customer's site. Pollworker training includes system overview, setup, operations, troubleshooting and a question/answer session. Tabulation training includes conducting or assisting in the training of Customer personnel in the operation of the ES&S Equipment and ES&S Software Products.		15	0	0	No Charge
Supplies	ES&S will provide the following supplies to Customer: _____ _____	To be negotiated separately	N/A	N/A	N/A	To be negotiated separately
Election Day Support of ES&S Equipment and ES&S Software Products	Assistance, if necessary, in the conduct of logic and accuracy testing. On-site support of pollworkers in the use of ES&S Equipment at the polling places (includes opening polls, handling unit problems, closing of polls, etc.) and supporting the central accumulation of results by ES&S Software Products.	2 ES&S representatives for 3 days per election @\$1400 per rep/per day	6	6	6	\$25,200
Total Fees for Election Support Services						\$131,700

3. Acknowledgements. The parties acknowledge and agree as follows:

- a. Time is of the essence in performing their respective obligations hereunder. Customer's remedies for any failure by ES&S to timely provide election support services is set forth in Section 3.5 of the General Terms. Notwithstanding anything in the remainder of the Agreement to the contrary, if ES&S becomes

aware of any failure by Customer to timely perform its obligations under this Exhibit E, or reasonably believes that such failure may occur, it will immediately notify Customer. ES&S may refuse to provide any services if Customer fails to timely cure such failure of performance or provide adequate assurances of performance within 5 business days after receiving such notification. Any such refusal by ES&S will not constitute a breach of this Agreement.

- b. The Elections will be conducted under Customer's direction and control. ES&S will provide services based on information and instructions provided to it by Customer.
- c. Unless otherwise agreed to by the parties in this Agreement or a separate written agreement, ES&S will not provide any election support services to Customer which are not specifically described in this Exhibit E or elsewhere in this Agreement.
- d. In the event that actual election support service days for any particular Election are less than the projected number of days set forth above, Customer shall not be required to pay for the unused days. If Customer has previously paid for the unused days, ES&S shall refund such payment to Customer.

4. **Approval of Project Manager.** ES&S designates Gary L. Greenhalgh, DRE Systems Specialist, as the ES&S Project Manager for Sarasota County. The Customer has selected ES&S to perform the services contemplated under this Agreement based, in part, on the past successful experience and expertise of Mr. Greenhalgh. Accordingly, ES&S agrees that it shall not, absent good cause, replace or remove Mr. Greenhalgh as Project manager for Sarasota County without prior approval of the Customer. If Mr. Greenhalgh should resign his position as Project Manager or otherwise cease his employment with ES&S, ES&S shall not appoint a successor Project Manager without the prior approval of the Customer. If the Customer, in its sole discretion, determines that the Project Manager is performing his management and, in turn, the operation and maintenance responsibilities of ES&S under this Agreement in an unsatisfactory manner or irreconcilable differences or an unworkable relationship between the Project Manager and the Customer shall arise, ES&S, upon notice by the Customer of such circumstance, shall promptly replace such Project Manager with a successor acceptable to the Customer; provided, however, the Customer represents that it will not give such notice to ES&S unless and until the Customer, in its sole discretion, has exercised reasonable efforts to rectify to its satisfaction, the adverse circumstances regarding the Project Manager.

[END OF EXHIBIT E]

FOR INFORMATIONAL PURPOSES ONLY

**EXHIBIT F
HARDWARE MAINTENANCE SERVICES
(POST-WARRANTY PERIOD)**

1. **Term; Termination.** This Exhibit F shall be in effect from the date on which the Warranty Period expires until the first anniversary thereof (the "Exhibit F Term"). The Exhibit F Term shall automatically renew for an unlimited number of successive one-year periods until this Exhibit F is terminated by the first to occur of (a) Customer's election to terminate it at any time, which shall be given at least 60 days prior to the termination date, (b) the date which is 30 days after either party notifies the other that it has materially breached this Exhibit F, if the breaching party fails to cure such breach (except for a breach pursuant to subsection (c), which will require no notice), or (c) the date which is 30 days after Customer fails to pay any amount due to ES&S under this Exhibit F. The termination of this Exhibit F shall not relieve Customer of its liability to pay any amounts due to ES&S hereunder.

2. **Services.** Subject to the terms and conditions of this Exhibit F, ES&S shall provide the following to Customer (check all that apply):

The Routine Maintenance Services and Remedial Maintenance Services described in Section 3 of this Exhibit F with respect to the products listed on Schedule F1 (the "Products") (collectively the "Hardware Maintenance Services").

Product Parts Only, as described in Section 4 of this Exhibit F.

3. **Maintenance Services.** If Customer elects to receive Hardware Maintenance Services pursuant to Section 2 above, such Hardware Maintenance Services shall be subject to the following terms and conditions:

- a. **Inspection.** If Customer has elected not to receive Hardware Maintenance Services under this Exhibit F for at least a 12-month period, ES&S may require Customer to allow it to inspect the Products before it provides any Hardware Maintenance Services therefore. The purpose of such inspection shall be to determine whether or not the Products are fit for the ordinary purposes for which they are to be used, normal wear and tear excepted ("Normal Working Condition"). The cost of such inspection will be at the current published ES&S rate and shall be due from Customer within 30 days of its receipt of ES&S' invoice therefore. If any of the Products is not in Normal Working Condition, ES&S, at the option of Customer, (i) shall provide such repairs and replacements as it deems reasonable and necessary to restore such Product(s) to Normal Working Condition, at Customer's expense with respect to the cost of any parts used in such repairs or replacements and with respect to ES&S' Out-Of-Pocket Expenses, or (ii) shall not provide any Hardware Maintenance Services with respect to such Product(s). For purposes of this Exhibit F, "Out-Of-Pocket Expenses" shall mean all travel, meal and lodging expenses incurred by ES&S employees or authorized representatives ("ES&S Representatives") who are required to travel to Customer's Designated Location to provide services.
- b. **Routine Maintenance Services.** An ES&S Representative shall provide such services as may be necessary to keep the Products in Normal Working Condition ("Routine Maintenance Services") once each 12 months during the Exhibit F Term or any renewal thereof. Customer may request that Routine Maintenance Services be performed more than once during any such 12-month period. Any such request shall be made at least 60 days before the Routine Maintenance Services are desired. The per-unit fee for such additional Routine Maintenance Services is set forth on Schedule F1 and shall be due within 30 days after invoice. Routine Maintenance Services shall include cleaning, lubrication and

calibration services. At the request of Customer, ES&S shall provide a reasonably detailed record of all Routine Maintenance Services performed with respect to one or more Products. ES&S will schedule the Routine Maintenance Services with Customer. The Routine Maintenance Services will be provided either at Customer's Designated Location or at an ES&S-designated depot facility ("Depot"), as elected by Customer on Schedule F1. Customer shall pay all costs associated with shipping Product(s) to a Depot, including insurance.

c. Remedial Maintenance Services.

Defects Under Normal Use and Service. If a defect or malfunction occurs in any Product while it is under normal use and service, Customer shall promptly notify ES&S, and ES&S shall use reasonable efforts to restore the Product to Normal Working Condition as soon as practicable. The services provided by ES&S pursuant to this Subsection 3(c)(i) are referred to herein as "Remedial Maintenance Services". ES&S shall provide the Remedial Maintenance Services at its Depot; provided, however, that if Remedial Maintenance Services are required for 10 or more Products at any given time, Customer may elect to have them provided at its Designated Location; provided, further, that all Remedial Maintenance Services provided for central count equipment shall be provided at Customer's Designated Location. Customer acknowledges that Product(s) identified on Schedule F1 as "depot repair only" may only be repaired at a Depot.

- ii. **Defects Due to Customer Actions or Omissions.** If a defect or malfunction occurs in any Product due to (1) repairs, changes, modifications or alterations not authorized or approved by ES&S, (2) accident, theft, vandalism, neglect, abuse or use which is not in accordance with instructions or specifications furnished by ES&S or (3) causes beyond the reasonable control of ES&S or Customer, including natural disaster, fire, flood, unusually severe weather or Acts of God, or if Customer does not notify ES&S within 24 hours after it knows of the defect or malfunction or is otherwise not in compliance with its obligations hereunder, Customer shall pay ES&S for the Remedial Maintenance Services at ES&S' then-current rates, as well as for the cost of all parts used in connection with such Remedial Maintenance Services.
- iii. **Timing.** The date(s) on which any Remedial Maintenance Services shall be provided shall be mutually agreed upon by ES&S and Customer. If Customer requires ES&S to provide "emergency" Remedial Maintenance Services (which shall be defined as Remedial Maintenance Services which are provided within 48 hours after Customer notifies ES&S of the need therefor), and such emergency Remedial Maintenance Services are not needed as a result of an action, error or omission by ES&S, Customer shall pay a surcharge, as set forth on Schedule F1.
- iv. **Loaner Unit.** At Customer's request, ES&S shall use reasonable efforts to promptly make available to Customer a product which is the same as, or substantially similar to, the Product for which Remedial Maintenance Services are being performed (a "Loaner Unit"). If the Remedial Maintenance Services are being performed pursuant to Subsection 3(c)(ii) above, Customer shall pay ES&S for the use of the Loaner Unit at ES&S' then-current rates including the cost of shipping.
- d. **Exclusions.** ES&S has no obligation under this Exhibit F to (i) assume the obligations under any existing or expired warranty for a Third Party Item; (ii) repair or replace Product components which are consumed in the normal course of operating the Product, including printer ribbons, paper rolls, batteries, removable memory packs, cancellation stamps, ink pads or red stripe pens, or (iii) repair any ES&S Equipment from which the serial number has been removed or altered. In addition, ES&S may, at any time in its discretion, determine that any Product is no longer fit for Hardware Maintenance Services because it is in such poor condition that it cannot practically be restored to Normal Working Condition, or cannot be restored to Normal Working Condition at an expense which is less than the

then-current value of the Product. If such a determination is made, ES&S shall no longer be required to provide Hardware Maintenance Services for such Product. ES&S shall also refund to Customer an amount equal to (1) that portion of the most recent fee paid for Hardware Maintenance Services which is attributable to such Product, multiplied by (2) a fraction, the numerator of which is the remaining number of days in the Exhibit F Term or renewal period for which such fee was paid and the denominator of which is the total number of days in such Exhibit F Term.

- e. **Sole Provider; Access.** Customer shall not permit any individual other than an ES&S Representative to provide maintenance or repairs with respect to the Products for so long as an Exhibit F Term is in effect. Customer shall provide ES&S Representatives with all information necessary to enable them to provide Hardware Maintenance Services. Customer shall likewise provide full access to the Products and adequate working space for all Hardware Maintenance Services performed at its Designated Location, including sufficient heat, lights, ventilation, electric current and outlets.
- f. **Storage.** Customer shall properly store the Products when they are not in use.

4. **Product Parts Only.** If Customer has elected in Section 2 of this Exhibit F to receive Product Parts Only and not to receive Hardware Maintenance Services, it shall notify ES&S when it needs parts. When ES&S receives such notice, it shall promptly ship such parts to Customer at its own expense and shall bear all risk of loss or damage to the parts until they are delivered to the Designated Location. Customer is responsible for installing the parts. All replaced parts are the property of ES&S, and Customer shall ship them to ES&S at its own expense and bear all risk of loss or additional damage until they are delivered to ES&S. All parts shall be supplied by ES&S to Customer subject to their availability at such time, and pursuant to the most recent list of available parts published by ES&S. All parts shall be either (a) new standard parts, or (b) certified rebuilt parts which are of a quality sufficient to enable the Products to operate, assuming they are otherwise in Normal Working Condition. At ES&S' request, Customer shall store a reasonable number of parts for the Products at its Designated Location. ES&S agrees that it shall maintain spare parts for each item of ES&S Equipment for a minimum of 3 years following the date on which ES&S ceases to manufacture such item.

5. **Fees.** In consideration for ES&S' agreement to provide Hardware Maintenance Services or Product Parts Only under this Exhibit F, Customer shall pay to ES&S a fee for the initial Exhibit F Term and each renewal period. Such fee shall be in addition to any fees or charges separately referred to in any Section of this Exhibit F or the Agreement. The fee for the initial Exhibit F Term is set forth on Schedule F1 and Exhibit A and is due on the date of the expiration of the Warranty Period. ES&S may increase the fee for a renewal period by not more than 5% of the amount of the most recent fee paid by Customer. ES&S shall notify Customer of such increase no later than 60 days before the commencement of such renewal period. Increases in excess of 5% will be mutually agreed upon by ES&S and Customer. The fee for any renewal period shall be due and payable no later than 30 days prior to the beginning of such renewal period.

[END OF EXHIBIT F]

FOR INFORMATIONAL PURPOSES ONLY

Schedule F1

DESCRIPTION OF PRODUCTS

Quantity	Description (Note: *** indicates Depot Repair Only Products)	Initial Maintenance Fee Per Unit	Initial Maintenance Fee In Total	Product Parts Only Fee ("N/A" if Hardware Maintenance Services Provided)
	Total Fees Due For Initial Term			

Per-Unit Fees if Customer requests more than one Routine Maintenance visit in a year: \$ _____

Surcharge for Emergency Remedial Maintenance Services: \$ _____

Customer's _____ Designated _____ Location: _____

Location of Services:

- Customer's Designated Location
- Depot

Equipment Maintenance Fees for years subsequent to the Warranty Period shall be as follows:

Year	First Month Applicable	iVotronic	M150	M650
1		\$ _____ per unit	\$ _____ per unit	\$ _____ per unit
2		\$ _____ per unit	\$ _____ per unit	\$ _____ per unit
3		\$ _____ per unit	\$ _____ per unit	\$ _____ per unit

Maintenance Fee for the initial Exhibit G Term and each renewal period. The Maintenance Fee shall be comprised of (i) a fee for the Software Maintenance and Support provided for the ES&S Firmware, and (ii) a fee for the Software Maintenance and Support provided for all other ES&S Software, and shall be in addition to any fees or charges separately referred to in any Section of this Exhibit G or this Agreement. The Maintenance Fee for the initial Exhibit G Term is set forth on Exhibit A and is due on the first day of the Exhibit G Term. If Customer elects, pursuant to Section 2.6(b), to receive Software Maintenance and Support for an Add-On or New Product during the Exhibit G Term or any renewal thereof, ES&S will charge an incremental Maintenance Fee for such services. In its sole discretion, ES&S may increase the Maintenance Fee for a renewal period by not more than 5% of the amount of the most recent Maintenance Fee paid by Customer. ES&S shall notify Customer of such increase no later than 60 days before the commencement of such renewal period. Increases in excess of 5% will be mutually agreed upon by ES&S and Customer. The Maintenance Fee for any renewal period shall be due and payable no later than 30 days prior to the beginning of such renewal period.

- b. **Specified.** Software Maintenance and Support Fees for years subsequent to the Warranty Period shall be as follows:

Year	First Month Applicable	Fee -ES&S Firmware	Fee- All Other ES&S Software
1		\$	
2		\$	
3		\$	

12. **Proprietary Rights.** ES&S shall own the entire right, title and interest in and to all corrections, programs, information and work product conceived, created or developed, alone or with Customer or others, as a result of or related to the performance of this Exhibit G, including all proprietary rights therein or based thereon. Subject to the payment of the Maintenance Fee, ES&S hereby grants to Customer a non-exclusive license to use that portion of such corrections, programs, information and work product that ES&S actually delivers to Customer pursuant to this Exhibit G. All licensed items shall be deemed to be ES&S Software for purposes of this Agreement. Except and to the extent expressly provided herein, ES&S does not grant to Customer any right, license, or other proprietary right, express or implied, in or to any corrections, programs, information, or work product covered by this Agreement.

END OF EXHIBIT G