

ELECTION SYSTEMS & SOFTWARE, INC.
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 (the "Effective Date"),

BETWEEN: Election Systems & Software, Inc., a Delaware corporation ("ES&S");

AND: Hidalgo County, Texas ("Customer").

IF THE FOLLOWING TERMS AND CONDITIONS CONFLICT WITH THE TEXAS BUILDING AND PROCUREMENT COMMISSION'S TERMS AND CONDITIONS, THE TBPC'S TERMS AND CONDITIONS WILL TAKE PRECEDENCE

RECITALS:

- A. Customer has agreed to purchase/license voter tabulation equipment and related software and services from ES&S for use in Hidalgo County, Texas (the "Jurisdiction"). The terms and conditions under which such equipment, software and services shall be provided are set forth in the **GENERAL TERMS** attached hereto.
- 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 Description and Pricing)
 - Exhibit C (ES&S Software Description and Pricing)
 - Exhibit D (Election Support Services)
 - Exhibit E (Hardware and Software Maintenance and Support Services (Post-Warranty Period))

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

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

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

[Signature]
Signature
Richard Jablonski
Name (Printed or Typed)
VP of Finance
Title
6/17/05
Date

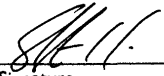
HIDALGO COUNTY, TEXAS
101 South 10th Street
Edinburg, TX 78540
Fax No.: (956) 318-2569

[Signature]
Signature
Ramon Garcia
Name (Printed or Typed)
County Judge
Title
6-27-05
Date

Approved by Commissioners' Court
on 5-24-05

APPROVED AS TO FORM:

ATLAS & HALL, L.L.P.
800 Pecan
McAllen, Texas 78504



Signature

Stephen L. Cron

Name (Printed or Typed)

Attorney

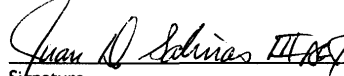
Title

6-21-05

Date

ATTEST:

HIDALGO COUNTY CLERK
100 North Closner
Edinburg, Texas 78539



Signature

Juan D. SACINAS III

Name (Printed or Typed)

County Clerk

Title

6/28/05

Date

**GENERAL TERMS
ARTICLE 1
DEFINITIONS**

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

- a. "Documentation" means the operating instructions, user manuals or training materials for the Equipment and Software.
- b. "Equipment" means ES&S Equipment.
- c. "ES&S Equipment" means ES&S' proprietary hardware or other equipment.
- d. "ES&S Hardware Maintenance Services" and "ES&S Software Maintenance and Support" means those services described on Exhibit E.
- e. "ES&S Software" means ES&S' proprietary election software (including the ES&S Firmware), all Updates and items delivered to Customer under this Agreement, unless licensed pursuant to a separate written agreement.
- f. "Software" means ES&S Software.

**ARTICLE 2
SALE OF ES&S EQUIPMENT AND LICENSE OF ES&S SOFTWARE**

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

2.2 a. **Grant of Licenses.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer nonexclusive, nontransferable licenses to use the ES&S Software, described on Exhibit C, and ES&S' firmware, which is delivered as part of the ES&S Equipment ("ES&S Firmware"), and related Documentation in the Jurisdiction while Customer is using the ES&S Equipment. The licenses allow Customer to use and copy the ES&S Software and ES&S Firmware (in object code only) and the Documentation, in the course of operating the ES&S Equipment and solely for the purposes of defining and conducting elections and tabulating and reporting election results in the Jurisdiction. The licenses granted in this Section 2.2 do not permit Customer to use the source code for the ES&S Software or ES&S Firmware.

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

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

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

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

iv. Cause or permit any copying, reproduction or printing of any output generated by the ES&S Software in which ES&S owns or claims any registered or common law proprietary intellectual property rights (e.g., copyright, trademark, patent or patent pending), including, but not limited to, any ballot shells or ballot code stock.

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 ES&S Software License Fees set forth on Exhibit A. 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(a) shall commence upon the delivery of the ES&S Software described in Section 2.2(a). The licenses shall survive the termination of all other obligations of the parties 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(b), 2.3, or 3.6 with respect to, such license. Upon the termination of either of the licenses granted in Section 2.2 for ES&S Software or upon Customer's discontinuance of the use of any ES&S Software, Customer shall immediately return such ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

2.5 **Updates.** During the Warranty Period (as defined in Section 3.2(a) below), ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software, together with appropriate Documentation ("Updates"), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of third party items required to operate the Updates. All Updates shall be deemed to be ES&S Software for purposes of this Agreement upon delivery. Customer may install the Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S may charge Customer at its then-current rates to (i) install the Updates or (ii) provide maintenance and support on the ES&S Software that is required as a result of Customer's failure to timely or properly install an Update. Upon termination of the Warranty Period, Customer shall be entitled to receive the Software Maintenance and Support described on Exhibit E if it has so elected in Section B of the signature page to this Agreement.

ARTICLE 3 MISCELLANEOUS

3.1 **Delivery; Risk of Loss.** ES&S anticipates shipping the Equipment and Software identified on Exhibits B-C to Customer on or before the "Estimated Delivery Dates" listed on Exhibit A. The Estimated Delivery Dates are merely estimates and may be revised by ES&S because of delays in executing this Agreement, changes requested by Customer, delays in certification, and other events. ES&S will notify Customer of revisions to the Estimated Delivery

Dates as soon as ES&S becomes aware of such revisions. Risk of loss for the Equipment and Software shall pass to Customer when such items are delivered to Customer's designated location. Upon transfer of risk of loss to Customer, Customer shall be responsible for obtaining and maintaining sufficient casualty insurance on the Equipment and Software and shall name ES&S as an additional insured thereunder until all amounts payable to ES&S under this Agreement have been paid by Customer.

3.2 **Warranties.**

a. **ES&S Equipment/ES&S Software.** ES&S warrants that for a 3-year period with respect to the ES&S Equipment, and for a 1-year period with respect to the ES&S Software (the "Warranty Period"), it will repair or replace any component of the ES&S Equipment or ES&S Software which, while under normal use and service: (i) fails to perform in accordance with its Documentation in all material respects, or (ii) is defective in material or workmanship. The Warranty shall not include the repair or replacement of any ES&S Equipment components that are consumed in the normal course of operating the Equipment, including printer ribbons, paper rolls, batteries, removable memory packs, PCMCIA cards, cancellation stamps, ink pads or red stripe pens. The Warranty Period will commence upon delivery. Any repaired or replaced item of ES&S Equipment or ES&S Software shall be warranted only for the unexpired term of the Warranty Period. All replaced components of the ES&S Equipment or ES&S Software will become the property of ES&S. This warranty is effective provided that (I) Customer promptly 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 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 to be repaired or replaced is not damaged as a result of accident, theft, vandalism, neglect, abuse, use which is not in accordance with instructions or specifications furnished by ES&S or causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, and (IV) Customer has installed and is using the most recent Update, or the second most recent Update, provided to it by ES&S. This warranty is void for any units of equipment which: (i) have not been stored or operated in a temperature range according their specifications, (ii) have been severely handled so as to cause mechanical damage to the unit, or (iii) have been operated or handled in a manner inconsistent with reasonable treatment of an electronic product.

b. **Exclusive Remedies.** IN THE EVENT OF A BREACH OF SUBSECTIONS 3.2(a) or 3.2(b), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

3.3 **Maintenance For ES&S Equipment During Warranty Period.** During the Warranty Period, subject to Customer's payment of the fees set forth on Schedule E-1, Customer is entitled to the Maintenance Services in accordance with Article II, Subsection 1(b) of Exhibit E. Upon the termination of the Warranty Period, Customer shall be entitled to receive the Hardware Maintenance Services described on Exhibit E.

3.4 **Limitation Of Liability.** Neither party shall be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or relating to this Agreement. Neither party shall be liable for the other party's negligent or willful misconduct. ES&S' total liability to Customer arising out of or relating to this Agreement shall not exceed the aggregate amount to be paid to ES&S hereunder. Any action by Customer against ES&S must be commenced within 1 year after the cause of action has accrued. By entering into this Agreement, Customer agrees to accept responsibility for (a) the selection of the Equipment and Software to achieve Customer's intended results; (b) the use of the Equipment and Software; (c) the results obtained from the use of the Equipment and Software; (d) 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; or (e) user errors, voter errors or problems encountered by any individual in voting that are not otherwise a result of the failure of ES&S to perform. ES&S shall not be liable under this Agreement for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee that is caused by (y) Customer's failure to timely or properly install and use the most recent Update, or the second most recent Update, 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.

3.5 **Taxes; Interest.** Customer shall provide ES&S with proof of its tax-exempt status. If Customer does not provide such proof, it shall pay, or shall reimburse ES&S for, all sales and use, excise or other similar taxes imposed on the transactions contemplated by this Agreement; provided, however, Customer shall in no event be liable for taxes imposed on or measured by ES&S' income. If Customer disputes the applicability of any tax to be paid pursuant to this Section 3.5, it shall pay the tax and may thereafter seek a refund. Any disputed or undisputed payment not paid by Customer to ES&S when due shall bear interest from the due date at a rate equal to the lesser of one and one-half percent per month or the maximum amount permitted by applicable law for each month or portion thereof during which it remains unpaid.

3.6 **Proprietary Rights.** Customer acknowledges and agrees as follows:

a. ES&S owns the ES&S Software, all Documentation and training materials provided by ES&S, 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 also owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned items. The aforementioned items also contain confidential and proprietary trade secrets of ES&S that are protected by law and are of substantial value to ES&S.

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

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

3.7 **Indemnification.** Customer shall to the extent allowed by law indemnify and hold harmless ES&S from and against any and all Adverse Consequences arising out of or relating to the following:

a. Any Third Party Infringement Claim resulting from (i) Customer's failure to timely or properly install and use any Update provided to it by ES&S; (ii) the use of any ES&S Equipment or ES&S Software in combination with other equipment, hardware or software not meeting ES&S' specifications for use with such ES&S Equipment or ES&S Software; or (iii) Customer's modification or alteration of any item of ES&S Equipment or ES&S Software without the prior written consent of ES&S;

b. Any claims by Third Parties arising out of or relating to the use or misuse by Customer, its employees and any other persons under its authority or control ("Customer's Representatives") of any third party items;

c. Personal injury (including death) or property damage that is caused by any negligent or willful act, error or omission of one or more of Customer's Representatives; and

d. Customer's election not to receive, or to terminate, ES&S Hardware Maintenance Services or ES&S Software Maintenance and Support.

ES&S shall notify Customer immediately if it becomes aware of any claim for which it may be entitled to indemnification under this Section 3.9, and hereby gives Customer full and complete authority, and shall provide such information and assistance as is necessary (at Customer's expense with respect to reasonable out-of-pocket costs), to enable Customer to defend, compromise or settle any such claim.

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

3.9 **Term; Termination.** This Agreement shall be effective on the Effective Date. 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, in writing, at any time by either party if the other party breaches any material provision hereof and does not cure such breach within 30 days after it receives written notification thereof from the non-breaching party.

3.10 **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 or conditioned, nor unduly

delayed. ES&S may assign its right to receive payments under this Agreement to such third party(ies) as ES&S may desire without the prior consent of Customer, provided that ES&S provides written notice (including evidence of such assignment) to Customer thirty (30) days in advance of any payment(s) so assigned.

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

3.12 **Disputes.**

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

b. **Remedies for Past Due Undisputed Payments.** If any undisputed payment to ES&S is past due more than 30 days, ES&S may suspend performance under this Agreement until such amount is paid. If Customer's payment is past due for more than 60 days and is undisputed, ES&S may declare the total amount remaining due under this Agreement to be immediately due and payable, enter the premises where the ES&S Equipment is located and remove them.

3.13 **Other.** 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 may engage subcontractors to provide certain of the Equipment, Software or services, but shall remain fully responsible for such performance. The provisions of Article 2 and Sections 3.2(b), 3.4-3.9, 3.11 and 3.12(b) 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:								
Description	Refer to	Amount						
ES&S Equipment	Exhibit B	\$1,344,875						
ES&S Software License Fees	Exhibit C	\$94,280						
Election Support Services	Exhibit D	\$346,500						
Voter Education/Outreach Materials (Not to exceed amount)		\$3,000						
Shipping and Handling	Note 1	\$11,975						
Total Net Sale		\$1,800,630						
Terms & Conditions:								
<p>Note 1: Any applicable state and local taxes are not included, and are the responsibility of Customer. See Section 3.5. The cost of Shipping and Handling is included. Premium or rush transportation services incurred in connection with deliverables included in the Total Net Sale are additive and will be billed as incurred.</p>								
<p>Note 2: Payment terms are as follows: (a) \$1,800,630 due 60 days after the earlier of (i) delivery of ES&S Equipment or (ii) Customer's receipt of HAVA funds.</p>								
<p>Note 3: Services in excess of those set forth in <u>Exhibit D</u> shall be charged at the then current rates per day, including expenses.</p>								
<p>Note 4: ES&S anticipates delivering the Equipment and Software in accordance with Section 3.1 as follows:</p> <table border="1"> <thead> <tr> <th><u>Equipment/Software</u></th> <th><u>Estimated Delivery Date</u></th> </tr> </thead> <tbody> <tr> <td>ES&S Equipment</td> <td>July 2005</td> </tr> <tr> <td>ES&S Software</td> <td>July 2005</td> </tr> </tbody> </table>			<u>Equipment/Software</u>	<u>Estimated Delivery Date</u>	ES&S Equipment	July 2005	ES&S Software	July 2005
<u>Equipment/Software</u>	<u>Estimated Delivery Date</u>							
ES&S Equipment	July 2005							
ES&S Software	July 2005							
Warranty:								
ES&S Equipment – Warranty Period: August 2005 – July 2008	3 years							
ES&S Software – Warranty Period: August 2005 – July 2006 <i>See Section 3.2 for Warranty terms and conditions</i>	1 year							
Ongoing Services:								
Description	Refer to	Annual Fee						
Maintenance Services during Warranty Period; Payment is due 30 days after invoice.	Section 3.3	See Schedule E-1 for Fees						
Post Warranty Hardware Maintenance Services Services commence in August 2008. Fees reflect a one-year term. Payment is due at the start of the maintenance period.	Exhibit E	\$26,345						
Post Warranty Software Maintenance & Support Services								
- ES&S Firmware	Exhibit E	\$14,370						
- All Other ES&S Software	Exhibit E	\$18,000						
<p>Services commence in August 2006. Fees reflect a one-year term. Payment is due at the start of the maintenance period.</p>								

EXHIBIT B
ES&S EQUIPMENT DESCRIPTION AND PRICING

QUANTITY	DESCRIPTION	TOTAL PRICE
350	15" iVotronic Voter Terminal with Booth, PEB, and 128mb Flashcard (Version 8.0.1.0)	\$875,000
125	15" iVotronic ADA Terminal with Booth, PEB, 128mb Flashcard, and Headset (Version 8.0.1.0)	\$374,375
4	15" iVotronic Supervisor Terminal with PEB, 128mb Flashcard, Power Supply and Cord (Version 8.0.1.0)	\$8,800
90	Printer Pack	\$58,500
125	128mb Flashcard	\$8,750
250	Supervisor PEB	\$18,750
2	PEB Reader	\$700
130	iVotronic Operators Manual	Included
90	Printer Pack Paper Rolls	Included
	TOTAL	\$1,344,875

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

DESCRIPTION	NUMBER OF LICENSES
Unity Election System licensed pursuant to Section 2.2(a) of the General Terms (check modules being licensed):	
Data Manager (Version 7.2.1.0)	1
Ballot Image Manager (Version 7.2.0.0)	1
iVotronic Image Manager (Version 7.2.0.0)	1
Ballot on Demand with Okidata 9300DXN Ballot on Demand Printer	1
Hardware Programming Manager (Version 5.0.3.0)	1
Data Acquisition Manager	N/A
Reporting Manager	N/A
ES&S Firmware (see Notes 1 and 2 below)	1
Total License Fees (including all applicable Documentation)	\$94,280

Note 1: ES&S Firmware versions may change between execution of the Agreement and first election usage due to ongoing certification of Updates.

Note 2: ES&S Firmware license fee included in the total cost of the ES&S Equipment.

**EXHIBIT D
ELECTION SUPPORT SERVICES**

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

<p>November 2005 March 2006 April 2006 November 2006</p>

2. **Services.** The election support services to be provided by ES&S, a description of such services and total fees are described below. Customer acknowledges that ES&S' fees for election support services are based on the descriptions listed in the table below, and that a change in the descriptions may require ES&S to change the fees charged to Customer. For purposes of ES&S' provision of Election Support Services under this Agreement, a "Service Day" shall mean the performance of any agreed upon Election Support Services on or off of Customer's facilities, as applicable, by one (1) ES&S employee, contractor or agent on any one (1) calendar day or portion thereof. By way of example, "ten Service Days" could be used by Customer through the provision of Election Support Services by one (1) ES&S employee, contractor or agent on each of ten (10) different calendar days, two (2) ES&S employees, contractors or agents on each of five (5) different calendar days, or ten (10) ES&S employees, contractors or agents on one (1) calendar day.

Role/Function	Area of Work or Description	Primary Responsibility
Project Management	A project manager appointed by ES&S shall be responsible for the overall planning, communication, management and coordination of ES&S Services. This person shall be the liaison for Customer with ES&S as it pertains to all products, services and obligations set forth in the contract.	ES&S
Shipping Material	Dispose of shipping materials (boxes, packaging, etc.)	Customer
Training – Unity	A system overview that covers the modules licensed by Customer. Class size is limited to 10 and course participant manuals are included. (Customer will ensure participants have an appropriate level of technical experience – including intermediate skills in relational database administration).	ES&S
Training – DRE	ES&S will provide classroom-style training with hands-on practice with the DRE system. General operations, ballot tabulation procedures, log audit capability, reporting, backups and general maintenance procedures will be covered. Course participant manuals are included. Class size limited to 20.	ES&S
Training – Poll Worker Train – The-Trainer	ES&S agrees to conduct Poll Worker "Train the Trainer" classes. Class size is limited to 20. Manuals are provided (up to 20), and a master template for duplication for Poll Workers is included.	ES&S

Role/Function	Area of Work or Description	Primary Responsibility
Pre-Election L&A Testing	ES&S will assist in the development of logic and accuracy procedures (according to State Elections Code), and assist in the actual L&A testing procedures.	ES&S
Election Day Support	ES&S will provide software accumulation assistance on Election Day/Night of each contracted election.	ES&S
	Total Election Support Service Days: 230	
	Total Fees: \$299,000	

Role/Function	Area of Work or Description	Primary Responsibility
Installation - DRE Terminal	ES&S will inspect the iVotronic Terminal at the customers delivery location to make sure it is operating properly and is within specifications for tabulating election day ballots.	ES&S
	Total Installation Fees: \$47,500	

Note: In the event that Customer does not utilize all 230 of the Election Support Service Days contracted for herein in support of the Elections set forth in Section 1 of this Exhibit D above, Customer may carry forward and utilize any such remaining Election Support Service Days in support of any additional elections conducted by Customer through December 31, 2007. Thereafter, Customer shall separately purchase from, and contract with, ES&S for any additional Election Support Services Days desired by Customer to support any elections occurring after December 31, 2007

[END OF EXHIBIT D]

**EXHIBIT E
MAINTENANCE SERVICES
(POST-WARRANTY PERIOD)**

**ARTICLE I
GENERAL**

1. **Term; Termination.** This Exhibit E shall be in effect from the date on which the Warranty Period expires until the first anniversary thereof (the "Hardware Maintenance Term"). The Hardware Maintenance Term shall automatically renew for an unlimited number of successive one year periods until this Exhibit E is terminated by the first to occur of (a) Customer's election to terminate it at any time, notice of which election shall be given to ES&S at least 60 days prior to the termination date, (b) the date that is 30 days after either party notifies the other that the other has materially breached this Exhibit E, and the breaching party fails to cure such breach within such 30-day period, or (c) the date that is 30 days after Customer fails to pay any amount due ES&S under this Exhibit E. The termination of this Exhibit E shall not relieve Customer of its liability to pay any amounts due ES&S hereunder.

2. **Fees.** In consideration for ES&S' agreement to provide Hardware Maintenance Services and Software Maintenance and Support under this Exhibit E, Customer shall pay to ES&S the Hardware Maintenance and Software Maintenance Fees set forth on Schedule E1 for the initial Term and each renewal period. The Hardware Maintenance and Software Maintenance Fees for the initial Term are due on the date of the expiration of the Warranty Period. ES&S may increase the Hardware Maintenance and Software Maintenance Fees for a renewal period by not more than 5% of the amount of the most recent Fees paid by Customer. The Hardware Maintenance and Software Maintenance Fees for any renewal period shall be due and payable no later than 30 days prior to the beginning of such renewal period. The Software 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 E or the Agreement. If Customer elects to receive Software Maintenance and Support for an Add-On or New Product during the Term or any renewal thereof, ES&S will charge an incremental Software Maintenance Fee for such services.

**ARTICLE II
HARDWARE**

1. **Maintenance Services.** The Hardware Maintenance Services to be provided to Customer under this Exhibit E for the ES&S Equipment listed on Schedule E1 (the "Products") shall be subject to the following terms and conditions:

a. **Inspection.** If Customer has elected not to receive Hardware Maintenance Services under this Exhibit E for a period of 12 months or more, ES&S may require Customer to allow it to inspect the Products before it provides any Hardware Maintenance Services. 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 plus ES&S' Out-of-Pocket Expenses, 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 ES&S 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, or (ii) shall not provide any Hardware Maintenance Services with respect to such Product(s). For purposes of this Exhibit E, "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. Customer's "Designated Location" shall mean Customer's owned or leased facility at which Customer desires ES&S to perform the Hardware Maintenance Services. Customer's Designated Location is specified on Schedule E1.

b. **Remedial Maintenance Services.**

i. **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 1(b)(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, ES&S may elect to have Remedial Maintenance Services provided at Customer's 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 E1 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 as a result of (1) repairs, changes, modifications or alterations not authorized or approved by ES&S, (2) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S or (3) causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations, and utility or communication interruptions, 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 that 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 E1.

iv. **Loaner Unit.** At Customer's request, ES&S shall use reasonable efforts to promptly make available to Customer a product that 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 2(b)(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.

c. **Exclusions.** ES&S has no obligation under this **Exhibit E** to (i) assume the obligations under any existing or expired warranty for a Third Party Item; (ii) repair or replace Product components that are consumed in the normal course of operating the Product, including printer ribbons, paper rolls, batteries, removable memory packs, cancellation stamps, ink pads or red stripe pens, or (iii) repair any Product 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 that 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 that is attributable to such Product, multiplied by (2) a fraction, the numerator of which is the remaining number of days in the Hardware Maintenance Term or renewal period for which such fee was paid and the denominator of which is the total number of days in such Hardware Maintenance Term.

d. **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 a Hardware Maintenance 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.

e. **Storage.** When not in use, Customer shall properly store the Products in accordance with the storage requirements established in the Documentation.

ARTICLE III **SOFTWARE**

1. **Services Provided.** ES&S shall provide maintenance and support services for the ES&S Software ("Software Maintenance and Support"), to enable it to perform in accordance with its Documentation in all material respects, and to cure any defect in material or workmanship.

2. **Updates.** During the Software Maintenance Term and any renewals thereof, ES&S shall continue to provide updates in accordance with any update schedule determined by ES&S.

3. **Reinstatement of Software Maintenance and Support.** If the Software Maintenance Term or any renewal thereof expires without being renewed, Customer may thereafter resume receiving Software Maintenance and Support upon (a) notification to ES&S,

(b) payment of all fees which would have been due to ES&S had the Software Maintenance Term not expired, and (c) the granting to ES&S of access to the ES&S Software, so that ES&S may analyze it and perform such maintenance as may be necessary before resuming the Software Maintenance and Support.

4. **Conditions.** ES&S shall not provide Software Maintenance and Support for any item of ES&S Software if such item requires such services as a result of (a) repairs, changes, modifications or alterations not authorized or approved by ES&S, (b) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S, (c) causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, (d) Customer's failure to timely and properly install and use the most recent Update, or the second most recent Update, provided to it by ES&S, (e) Customer's failure to notify ES&S within 24 hours after Customer knows of the need for such services, or (f) if Customer is otherwise not in compliance with its obligations under this Agreement. Any such Software Maintenance and Support shall be provided at the fees to be agreed upon by the parties if and when the need for such Software Maintenance and Support arises.

5. **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 E, including all proprietary rights therein or based thereon. Subject to the payment of all Software Maintenance Fees, 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 E. 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.

**Schedule E1
DESCRIPTION OF PRODUCTS**

HARDWARE

Year	Qty	Description (Note: *** indicates Depot Repair Only Products)	Maintenance Fee Per Unit, Per Year	Maintenance Fee In Total
Warranty Period (3 years)	479	iVotronic Terminal***	\$55	\$26,345
First Post-Warranty Year	479	iVotronic Terminal***	\$55	\$26,345

Note 1: The Maintenance Fee Per Unit for the iVotronic Terminal represents a break-fix, depot repair service ("Remedial Maintenance" as described in Section 1(c)(i)).

Note 2: The Per Unit Fees for more than one Maintenance event in a 12-month period, shall be 90% of the then current maintenance fee per unit.

Note 3: The surcharge for Emergency Remedial Maintenance Services shall be 150% of the then current maintenance fee per unit.

Note 4: Location of Services

- Customer's Designated Location – Edinburgh, TX
- Depot

SOFTWARE

Year	First Month Applicable	Fee –ES&S Firmware	Fee- All Other ES&S Software
2006	July	\$14,370	\$18,000

TBC

General Instructions, Terms and Conditions
Revised March, 2001
TABLE OF CONTENTS

I. BIDDER GUARANTEE

II. TYPES OF CONTRACTS

- A. AUTOMATED FIRM PRICE
- B. AUTOMATED DISCOUNT-FROM-LIST
- C. NON-AUTOMATED DISCOUNT-FROM-LIST

III. GENERAL PROVISIONS

- A. TERM OF CONTRACT
- B. SHIPMENT IDENTIFICATION and DELIVERY
- C. INSPECTION AND TESTS
- D. LATE DELIVERY
- E. BACK ORDERS
- F. DAMAGE ASSESSMENTS
- G. EMERGENCY DELIVERIES
- H. SUBSTITUTIONS
- I. PURCHASES OFF CONTRACT

IV. PREPARATION OF BID:

- A. GEOGRAPHICAL AREA BIDDING
- B. FREIGHT CHARGES and F.O.B. POINT
- C. BID PRICES
- D. TAXES
- E. USAGE FIGURES
- F. REFERENCED EXAMPLE
- G. CONDITION of PRODUCTS
- H. WARRANTY
- I. UNIT OF MEASURE
- J. ALTERNATE BIDS
- K. TEXAS SPECIFICATIONS
- L. SAMPLES
- M. SIGNATURE on BID
- N. ATTACHMENTS
- O. ADDENDUMS
- P. ELECTRICAL ITEMS
- Q. SPECIAL DISCOUNTS
- R. BID PREPARATION EXPENSE

V. SUBMISSION OF BID

- A. BID PACKAGE
- B. FAXED BIDS
- C. NO BIDS
- D. PUBLIC BID OPENING
- E. LATE BIDS
- F. AMENDING/WITHDRAWING BID

VI. EVALUATION AND AWARD:

- A. BID EVALUATION
- B. TIE BIDS
- C. NOTICE OF AWARD (NOA)
- D. QUALIFIED ORDERING ENTITY LIST
- E. PERFORMANCE BOND

VII. PRICE CHANGES

- A. PROCEDURES to FOLLOW
- B. ACCEPTANCE of PRICE INCREASES
- C. PRICE DECREASES

VIII. INVOICING

IX. PAYMENT

X. CANCELLATION

- A. CANCELLATION of CONTRACT ORDERS
- B. AUTHORIZED RELIEF FROM PERFORMANCE
- C. CANCELLATION of CONTRACT

XI. OTHER PROVISIONS

- A. SUBCONTRACTING PROGRAM (HUBS)
- B. COOPERATIVE PURCHASING PROGRAM
- C. RECYCLED PRODUCTS
- D. MATERIAL SAFETY DATA SHEETS
- E. OSHA
- F. ADVERTISEMENT
- G. TECHNOLOGY ACCESS CLAUSE
- H. INDEMNIFICATION CLAUSE
- I. DISPUTE RESOLUTION
- J. DEBT LIABILITY

**GENERAL INSTRUCTIONS, TERMS AND CONDITIONS
FOR TERM CONTRACTS AND SCHEDULED CONTRACTS
Revised March, 2001**

Please read the following information carefully. Any exceptions to these terms and conditions will be cause for a bid to be disqualified. Also read the Special Instructions contained in each Invitation for Bids ("IFB"). The Special Instructions in the IFB will take precedence over the General Instructions, Terms and Conditions when they are in conflict.

I. BIDDER GUARANTEE:

A. Bidder agrees to comply with all terms and conditions contained in this document and the IFB.

B. Bidder guarantees product offered will meet or exceed the written specifications identified in the IFB.

C. Bidder agrees to protect the State from claims involving infringement of patents or copyrights.

II. TYPES OF CONTRACTS: Each IFB will identify the type of contract being advertised.

A. **Automated Firm Price:** Prices bid are firm for the period specified in the IFB and all extensions. Price decreases are acceptable.

B. **Automated Discount-From-List:** Prices bid may be increased during the term of this type of contract based upon changes in an approved price list or other approved method as identified in the IFB.

1. This type of contract provides for discounts from a current manufacturer's price list **OR** a percentage add-on to a manufacturer's distributor/producers type price list. Current price list means the latest price list in effect between the "date mailed" as shown on the IFB and the bid opening date. Manufacturer's price list means a price list published in some form by the manufacturer of a product and available to and recognized by the trade. It does not mean a price list especially prepared for a given bid. The TBPC shall be the sole determinate as to acceptability. **IMPORTANT: Price lists must be submitted with the bid; otherwise, an award may be made only at a firm fixed price for the duration of the contract and all extensions.**

2. Requests for price increases must be documented with a new dated price/cost list which is the same type as the one submitted with the bid. The maximum allowable increase will be determined by the following formula:

Original Bid Price X New Mfg. Cost/ Price List = Max. Allowable Contract Price

Original **Mfg.** Cost/Price List

3. Prices for this type of contract cannot be increased for 30 days after the contract begins unless otherwise specified in the IFB. Price reductions shall be offered immediately upon becoming available to a vendor at any time after award.

4. When discount-from-list bids are requested, firm price (price protected with no price increase) bids will be accepted only if bidder passes on to the State any price decreases as they occur.

5. **NOTE:** If a bidder fails to submit a price/cost list or submits a price/cost list which fails to meet the requirements of the IFB, the IFB may still be considered unless otherwise specified. The vendor **will not** be entitled to any price increases during the term of the contract or any extensions if an award is made.

C. Non-Automated Discount-From-List: This type of contract requires the submittal of at least one current, dated manufacturer's printed price list/catalog from which contract prices are to be calculated. Bid prices under this type of contract may be increased when documented with new pricing information. The following conditions apply:

1. One copy of the price/list catalog is required. Failure to submit an acceptable price list/catalog with the bid will disqualify the IFB.

2. A discount percentage must be indicated for all items offered on the price list. This percentage will be used for the term of the contract.

3. Bidder shall block out items on the price list/catalog which are not being offered. When a price list/catalog contains more than one price column, bidder **MUST** indicate which column applies to the bid; otherwise, the lowest price column will be used.

4. After awards are made, the vendor must furnish copies of current price lists/catalogs properly identified, edited and dated to each qualified ordering entity upon request.

5. Prices in this category cannot be increased for 30 days after the contract begins unless otherwise specified in the IFB. Price reductions will be accepted at any time after award has been made.

III. GENERAL PROVISIONS:

A. Term of Contract and Purchase Order Dates:

1. The IFB shall state the term of the contract and applicable extensions. Any extended contract may be extended up to 90 days at the sole option of the state.

2. Purchase orders dated during the term of the contract must be honored even if received after the contract expiration date. Vendors may not specify a "final order" receipt date.

Pricing is established by the date the order is placed unless otherwise stated in the contract.

3. Confirmation orders will be the date the order is mailed but will show the date the order was originally placed.

B. Shipment Identification and Delivery: Delivery requirements will be addressed in the Special Instructions contained in each IFB. The following shall be applicable unless in conflict with specific contract instructions.

1. **Identification of Shipments:** In addition to the complete destination address, each package must be clearly marked with the TBPC purchase order number and requisition number as shown on the order. Each shipment must be accompanied by a packing slip.

2. **Packaging and Labeling:** All items shipped must be properly labeled showing the brand name, package quantity, lot number (if applicable) and any other necessary identifying information usually used by the vendor.

3. **Hours for Delivery:** Delivery shall be made during the normal working hours of the qualified ordering entity unless prior approval for after-hours delivery has been obtained from the qualified ordering entity.

C. Inspection and Tests: All goods are subject to inspection and testing by the State. Authorized TBPC personnel shall have access to a vendor's place of business for the purpose of inspecting contracted merchandise. Tests may be performed on samples obtained by TBPC request or taken from regular shipments. When products tested fail to meet or exceed all applicable specifications, the cost of the sample used and the cost of any testing shall be borne by the vendor. Goods which have been delivered and rejected in whole or in part may be, at the State's option, returned to the vendor at vendor's risk and expense or disposed of in accordance with TBPC rules or applicable statutes. The vendor may request that goods be held at vendor's risk for a reasonable period of time for later disposition at the vendor's expense. Latent defects may result in revocation of acceptance of any product.

D. Late Delivery: If a delivery delay is foreseen, vendor shall give notice to the qualified ordering entity and the TBPC. The qualified ordering entity or the TBPC has the right to extend the delivery date if reasons appear valid. The vendor must keep the qualified ordering entity advised at all times of the status of the order. If the vendor has orders in their possession which have not been completed within the specified delivery time, the TBPC reserves the right to withhold issuance of further orders until all orders have been filled and acceptable assurance has been given that the event will not be repeated.

E. Back Orders: Qualified ordering entities may purchase on the open market any commodity reported by a vendor to be on back order when the resultant delivery time is unsatisfactory. Damages may be applicable in cases of a pattern of back orders.

F. **Damage Assessment**: If a vendor is in default on an order, the State reserves the right to purchase the item in default and charge the increase in price, if any, and cost of handling to the vendor. Failure to pay a damage assessment is cause for contract cancellation and/or suspension or removal of the vendor from the State's Centralized Master Bidders List (CMBL).

G. **Emergency Deliveries**: In case of an emergency experienced by a qualified ordering entity, the vendor is requested to supply the needed material immediately, if possible. If the vendor cannot respond, then the emergency requirement may be purchased on the open market. Such purchases shall not be considered a breach of contract by the State or the vendor.

H. **Substitutions**: All substitutions require prior written approval of the TBPC. The TBPC reserves the right to require the vendor to offer possible substitutes if any material or equipment becomes unobtainable during the term of the contract. Outstanding orders are not automatically amended by an approved substitution. The vendor must contact the qualified ordering entity prior to shipment of the substituted goods.

I. **Purchases Off Contract**: Under certain circumstances, the state permits state agencies to purchase commodities available through a contract on the open market. Such circumstances may be identified in the IFB.

IV. **PREPARATION OF BID**:

A. **Geographical Area Bidding**: IFBs may require pricing by zone, TxDOT district, COG area, or other defined geographical area. A bidder may bid any one or more geographical area identified in the IFB, but a submitted IFB must be for an entire area. Any exception that requires bidding for the entire state will be stated in the IFB.

B. **Freight Charges & F.O.B. Point**: Quote all bids F.O.B. destination, transportation prepaid and allowed, i.e., included in the price bid, (sidewalk or store-door delivery) unless special contract instructions direct or permit otherwise. Alternate F.O.B. point or freight terms may be offered but are subject to rejection by the TBPC.

C. **Bid Prices**: Bid prices must be firm for acceptance for 60 days from bid opening date unless otherwise specified in the IFB.

D. **Taxes**: Purchases made from State contracts are exempt from state and city sales or most use taxes and Federal excise taxes. Items that are not exempt will be identified in the IFB. Do not include exempted taxes in bid.

E. **Usage Figures**: Quantities shown on the IFB under the term "Usage" are estimated requirements based upon purchase orders for a prior period indicated in the IFB. These figures are not to be construed as guaranteed purchases under the contract; however, the figures will be used as a factor for determining the award and bonding requirements.

State agencies will purchase all commodity requirements from contract vendors but only in such quantities as actual needs require.

F. **Referenced Example:** Any catalog number, brand name or manufacturer's reference used in an IFB is descriptive only (not restrictive) and is used to indicate type and quality desired. Bids for brands of like nature and quality will be considered. If bidding other than the referenced example, the bidder must show the manufacturer, brand or trade name, and model number and give a full description of the product offered. The submission of illustrations and specification brochures is encouraged to provide a complete description of the product being offered. If a bidder takes no written exception to the referenced example in the bid, the brand names, numbers, etc., exactly as specified in the IFB shall be furnished.

G. **Condition of Products:** All items bid shall be new and unused, of current production, and in first class condition, including containers suitable for shipment and storage, unless otherwise specified in the IFB.

H. **Warranty:** Manufacturer's standard warranty shall apply unless otherwise stated in the IFB.

I. **Unit of Measure:** If offering a bid price for a different unit of measure, the exception and proposed packaging must be shown by the line item bid.

J. **Alternate Bids:** Alternate or supplemental bids shall be submitted as a separate item and be identified by the bidder's name and signature and be cross-referenced to the applicable item in the IFB.

K. **Texas Specifications:** When a Texas Specification is referenced in the IFB, a copy of the specification may be obtained from the TBPC. Please retain the specification for future use.

L. **Samples: DO NOT** send samples unless requested. Any samples submitted must be furnished at no cost to the State. If not destroyed in examination, samples will be returned to the bidder on request at bidder's expense. Samples submitted to verify specifications prior to making an award may be retained for the duration of the contract for later comparison with items delivered. Each sample should be marked with bidder's name, address, bid opening date and contract number. Do not attach samples to bid pages.

M. **Signature on Bid:** Bid must be manually signed or it will be disqualified. The person signing the bid must have authority to bind the represented company to a contract. An unsigned bid cannot be signed after the bid opening time even though the bidder or a representative is present at the bid opening.

N. **Attachments:** Bidders may include attachments to describe commodities being bid and/or to exhibit that products offered meet all written specifications; however, do not submit samples unless requested to do so. Each page of an attachment submitted with a

bid must be identified by the contract class number as recorded on the first page of the IFB and by the bid date and time of opening. The name of the company

submitting the attachment must also be prominently displayed on each page of the attachment. No terms or conditions recorded on any attachment will be considered binding unless specifically made a part of the bid in writing. **WARNING: Any added terms or conditions may result in disqualification of a bid, e.g., bids subject to laws of a state other than Texas, requirements for prepayment, limitations on remedies, etc.**

O. **Addendums:** Should an addition or correction become necessary after an IFB is issued, an addendum relating the necessary information will be mailed to all bidders on record with the TBPC as having had received a copy of the initial IFB. Bidders are required to acknowledge the addendum by returning the addendum with the bid or by physically noting the change or addition on the bid.

P. **Electrical Items:** All electrical items furnished shall meet all applicable OSHA standards and regulations and bear the appropriate listing from UL, FMRC or NEMA.

Q. **Special Discounts:** Bidders are encouraged to offer discounts for large one time order deliveries, educational purposes, etc. The conditions for earning the discount may be indicated by the item being bid or by submitting a separate page with the information. These discounts will not be considered in determining the low bid but will be part of any contract issued.

R. **Bid Preparation Expense:** Any expense related to the submission of a bid is the sole responsibility of the bidder. The state will not reimburse bidders for any cost related to bid preparation or submission.

V. **SUBMISSION OF BID:**

A. **Bid Package:** Bids should be submitted on the TBPC IFB form. Each bid must be placed in a separate, sealed envelope and be properly identified. Bids must be time stamped at the TBPC not later than the date and time specified for the bid opening. **Only the completed, signed cover page and those pages on which a bidder is submitting a bid need to be returned. Pages with no bids should not be returned.**

1. Bids via the U. S. Postal Service are to be sent to the P. O. Box address on the front of the IFB. Bids sent by a delivery service require the street address. Note that the ZIP codes are different.

or hand deliver/Express Mail to:

1711 San Jacinto, Room 180, Austin, TX 78701.

Price lists should be attached to the IFB. If this is not possible, be certain that any price list submitted is properly identified (see example above). CAUTION: Price lists

submitted separately must be received not later than the bid opening date and time. Any terms and conditions recorded in a price list will not be considered a part of a bid unless specifically identified by the bidder and referenced in writing.

B. **Faxed Bids: CAUTION:** The State offers facsimile (FAX) service as a convenience only. The number is (512) 463-1400. Only this number is to be used for FAX bids and its use is for bids only. The State is not responsible for bids received late, illegible, incomplete, or otherwise non-responsive because of electronic equipment failure or operator error. Written confirmation is **NOT** required for faxed bids.

C. **No Bids:** If not bidding, do not return bid form. "No Bids" are considered "non-responsive" and are not considered a bid for purposes of retention on the bid list.

D. **Public Bid Opening:** Because of the number of items included in most term contracts and the high number of bidders, only the names and addresses of bidders will be read at a public bid opening if requested. Approximately two weeks after bid opening, a copy of the bid tabulation is usually available for public review. To purchase a copy of a tabulation call (512)463-3377.

E. **Late Bids:** Late bids will **NOT** be considered under any circumstances.

F. **Amending/Withdrawing Bid:** A bid cannot be altered or amended after the bid opening date and time. Any alterations made before the opening date and time should be initialed by the bidder or the bidder's authorized agent identified in the bid. No bid can be withdrawn after the opening date and time without approval of the TBPC. All approvals shall be based upon an acceptable written reason for the action.

VI. BID EVALUATION AND AWARD:

A. Bid Evaluation:

1. The State reserves the right to make an award on the basis of low line item bid, low total of line items, or in any other combination that will serve the best interests of the State, to reject any and all bid items in the sole discretion of the State, waive minor technicalities, and make an award in the best interest of the State.
2. A response to an IFB is an offer to contract with the State based upon the terms, conditions and specifications contained in the IFB.
3. Bids do not become contracts until a signed Notice of Award (NOA) is issued.
4. The contract shall be governed, construed and interpreted under the laws of the state of Texas as the same may be amended from time to time. Any legal action must be filed in Travis County, Texas.
5. The State will not be bound by any communication with bidders other than the IFB, these "General Instructions, Terms and Conditions," any written addendum's issued by the TBPC, Commission Rules, and State Law.

6. The factors listed in Texas Government Code, Title 10, Subtitle D, Sections 2155.074, 2155.144, 2156.007 and 2157.003 shall be considered in making an award.
7. The TBPC shall be sole judge of "the best interest of the State."

B. **Tie Bids:** In case of tie bids, the award will be made in accordance with Rule 1 TAC Section 113.6(b)(3) and 113.8 (preferences). Consistent and continued tie bidding could cause rejection of the bids by the TBPC and/or investigation for antitrust violations.

C. **Notice of Award (NOA):** The successful bidder will be notified of the acceptance of their bid by the issuance of a signed NOA. The bidder must advise the TBPC within 10 days from the date of the NOA of any errors requiring correction.

D. **Qualified Ordering Entity List:** A directory of state agencies and other qualified ordering entities is available for a fee.

E. **Performance Bond:** When a performance bond is required, the amounts shall be as follows unless otherwise stated in the IFB:

For total awards of up to \$100,000 no bond required.

\$100,000 to \$250,000 a bond for \$25,000

\$250,000 to \$500,000 a bond for \$50,000

Over \$500,000 a bond for \$50,000 plus 5% of the amount over \$500,000

rounded to the next \$1000

1. Any required bond (s) must be filed with the TBPC within 30 days from the date of the NOA.
2. The only forms of surety acceptable as a performance bond are:
 - Cashier's Check
 - Certified Check
 - Irrevocable Letter of Credit issued by a financial institution subject to the laws of Texas.
 - Surety or Blanket Bond from a company chartered or authorized to do business in Texas.
 - United States Treasury Bond.
 - Certificate of Deposit

Note: Bonds completed (signed) by an out-of-Texas surety require a counter signature and seven digit license number by a Texas resident agent of a company chartered or authorized to do business in Texas or a copy of reciprocal agreement between states.

3. A separate performance bond **MUST** be provided for each contract awarded and must reference the contract number(s) for which the bond is provided (except as noted in Texas Administrative Code 113.2(8) - Blanket Bond).

4. Supplemental advertisements and awards made on an existing contract class will require bonding in an amount consistent with the schedule above. All references to the bond by vendor and/or surety companies must reference the contract number in lieu of or in addition to the bonding company's number, and the effective dates of the contract.

5. Bonds and other forms of surety must be made payable to the TBPC.

VII. PRICE CHANGES:

During the life of a contract only industry-wide published price changes as reflected in a manufacturer's printed price list, published documentation, or other approved method in an IFB may be submitted to the TBPC for price adjustment consideration.

A. Procedures to Follow:

1. Automated Discount-From-List Contract:

- a. Type new unit price on a copy of the Notice of Award next to the old unit price.
- b. Submit a copy of the new manufacturer's price/cost list.
- c. Vendor shall compute new unit prices at the same percentage as reflected in the original bid (See II. B. 2. p. 1 for formula). Prices will be verified for accuracy.

2. Non-Automated Discount-From-List Contract:

- a. Submit a copy of the new manufacturer's price lists/catalogs.
- b. Vendor must furnish copies of the new price lists/catalogs to the qualified ordering entities currently using this contract. This should be done immediately upon approval of the price increases by the TBPC.

3. Other Price Adjustment Type Contracts:

- a. The method of adjusting prices for other price adjustment type contracts will be specified in the IFB instructions.
- b. The index used as a basis for prices bid will also be identified in the IFB.

B. **Acceptance of Price Increases:** The TBPC will accept or reject increases within ten working days after receipt of a properly submitted request. If a properly submitted increase is rejected, the vendor may cancel such items from the contract by giving the TBPC written notice. Cancellation will not go into effect for ten working days after receipt of the written request. Old prices must be honored on orders dated up to the official date of cancellation.

C. **Price Decreases:** Vendors are required to implement immediately any price decreases that may become available. The TBPC must be notified in writing of any decreases for file updating purposes and notice to contract users.

VIII. INVOICING: Invoices (2 copies) must be submitted in duplicate to the receiving entity in compliance with the following procedure:

A. The invoice must show name of vendor exactly as shown on the purchase order, the Texas Payee Identification Number (P.I.N.), and the correct "Remit to:" address.

B. Invoice must show name of receiving entity.

C. Invoice must show requisition number and order number. Some contracts are awarded with blanket TBPC numbers and do not require that the orders issued by qualified ordering entities be processed through the TBPC prior to being sent to the vendor. Invoices for this type contract must show the blanket contract number assigned in the NOA and the qualified ordering entity requisition number supplied by the qualified ordering entity.

D. Invoice should include a description of each item. Items should be shown in numerical order and must correspond with the item numbers shown on the purchase order.

E. Quantity, unit and price of each item must be shown. All prices should be extended on the invoice.

F. Total all extensions on invoice.

G. Discount, if applicable, must be stated, extended and deducted to arrive at a NET TOTAL for invoice.

H. Shipment date of merchandise must be shown.

I. Date of purchase order must be shown.

IX. PAYMENT:

A. Payment normally will be made to the vendor within 30 days after receipt of a properly prepared invoice or the receipt of and the acceptance of goods ordered, whichever is later. State agencies are required by state law to pay properly submitted

invoices within thirty days or the vendor may charge a late payment fee established by law.

B. Payments for merchandise purchased with state appropriated funds will be made through state warrants issued by the Comptroller of Public Accounts. Payments by qualified ordering entities will be made through the entity's local payment system.

C. Partial payments are an exception, but may be made with the prior written approval of the paying entity.

D. Electronic payment may be available through some ordering entities.

E. If a blanket purchase order extends beyond a state biennial appropriation period, payments for consumable merchandise delivered after the end of the state biennium are contingent upon the continued availability of appropriations to make such payments.

X. CANCELLATION:

A. **Cancellation of Contract Orders:** Orders are canceled in writing by the qualified ordering entity or the TBPC. Orders may be canceled without the consent of the vendor for failure to meet contractual obligations. If cancellation is requested by a qualified ordering entity for some other reason, through no fault of the vendor, the vendor's permission to cancel is required. All correspondence from the vendor pertaining to the cancellation of an order is to be addressed to the qualified ordering entity with a copy to the TBPC.

B. **Authorized Relief from Performance (Force Majeure):** The State will grant relief, as necessary, from performance of the contract if vendor is prevented from compliance and performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributable to the fault or negligence of the vendor. The burden of proof for the need of such relief rests with the vendor. To obtain release based on Force Majeure, the vendor must provide the TBPC with sufficient documentation to show that suitable merchandise or service is unobtainable from any source.

C. **Cancellation of Contract:** The TBPC reserves the exclusive right to cancel a contract either in whole or in part for convenience without damage or liability to vendor. Abandonment of a contract by a vendor for whatever reason without notification and approval of TBPC subjects the vendor to damages and all legal remedies available to the state.

XI. OTHER PROVISIONS:

A. **Subcontracting Program (HUBs) - Good Faith Effort:**

State agencies are required to make a good faith effort to assist Historically Underutilized Businesses (HUBs) in receiving contract awards issued by the state, see Tex. Gov't. Code

Ann. Title 10, Subtitle D, Chapter 2161 (formerly Tex. Rev. Civ. Stat. Ann. Art. 601b). The goal of this program is to promote fair and competitive business opportunities for all businesses contracting with the State of Texas.

A list of all TBPC certified HUBs may be electronically accessed through the Internet. The TBPC information server is available through the Internet based World-Wide-Web. Although there are alternatives to connect to this data, the preferred method is through the Internet using a Web Browser (like Netscape, Mosaic, etc.). Using a Web Browser, please connect to <http://www.tbpc.state.tx.us> (this is the home page for TBPC).

B. Cooperative Purchasing Program: State statutes provides for local governments, school districts, special districts, and certain non-profit entities to make purchases through state contracts. Any contract issued by the TBPC is subject to purchases by these entities unless a specific exclusion is made in the special instructions for a contract. Only contract purchase orders issued by the TBPC or orders issued through a TBPC contract are eligible for contract pricing.

C. Recycled Products: Definitions:

1. **Environmentally Sensitive Product:** A product that protects or enhances the environment or that damages the environment less than traditionally available products.
2. **Pre-consumer Materials:** Materials or by-products that have not reached a business entity or consumer for an intended end use including industrial scrap material and overstock, or obsolete inventories from distributors, wholesalers and other companies. The term does not include materials and by-products generated from, and commonly reused within, an original manufacturing process or separate operation within the same or a parent company.
3. **Post-consumer Materials:** Finished products, packages or materials generated by a business entity or consumer that have served their intended end uses, and that have been recovered or otherwise diverted from the waste stream for the purpose of recycling.
4. **Recycled Material Content:** The portion of a product made with recycled materials consisting of pre-consumer materials (waste), post-consumer materials (waste), or both.
5. **Recycled Materials:** Materials, goods or products that contain recyclable materials, industrial waste, or hazardous waste that may be used in place of raw or virgin materials in manufacturing a new product.
6. **Recycled Product:** A product that meets the requirements for recycled material content as prescribed by the rules established by the Texas Natural Resource Conservation Commission in consultation with the TBPC. The product must be clearly identified as recycled by packaging, markings, literature, etc.

7. **Remanufactured Product:** A product that has been repaired, rebuilt, or otherwise restored to meet or exceed the original equipment manufacturer's (OEM) performance specifications; provided, however, the warranty period for a remanufactured product may differ from the OEM warranty period.

NOTE: Texas state law requires that a purchasing preference be given to any product made from recycled material if the product meets written specifications as to quality and quantity. If a product bid on this solicitation contains recycled material, please identify the item number and report the percent of **all recycled material** in the product **and** the percent of **post-consumer material** used in the product. "Post-consumer" means material that has been recycled after sale to a consumer as opposed to reuse of manufacturing waste material prior to sale. In addition, identify any products that meet the criteria of "Environmentally Sensitive."

Information Request: Please send information on any products not listed in this contract that are related and available through your company which contain recycled material along with the percent of post- and pre-consumer content to: Texas Building and Procurement Commission, Procurement Division, Recycled Products Coordinator, Box 13047, Austin, TX 78711-3047.

When bidding, please consider the following:

Packing & Packaging: Use of the minimum amount of packing and packaging material consistent with assuring no damage to product in transit. The use of recyclable and recycled material content packing and packaging material is preferred. For quantities requiring palletized shipping, the State prefers pallets to be constructed of 100% post-consumer plastic lumber or corrugated board with a minimum of 40% post-consumer content.

New or Unused: The term shall not be interpreted to exclude the use of recycled content materials in products supplied. Nothing in a solicitation shall be construed to preclude the use of recycled content materials in a product regardless of any referenced specifications such as ANSI, ASTM, or Federal specifications so long as the material meets the performance requirements of such specifications and all required laws and regulations.

D. **Material Safety Data Sheets:** A vendor must provide, at no cost, at least one copy of any applicable Manufacturer's Material Safety Data Sheet(s) (MSDS) with each shipment during the term of the contract. If OSHA or Federal or State laws provide for additional requirements, those requirements are in addition to the MSDS requirement.

E. **OSHA:** All items must meet all applicable OSHA standards and regulations and all electrical items must bear the appropriate listing from UL, FMRC or NEMA.


F. **Advertisement:** Vendors are prohibited from using contract award information, sales values/volumes and/or state of Texas customers in sales brochures or other promotions,

including press releases, unless prior written approval is obtained from the Texas Building and Procurement Commission, Central Procurement.

G. **TECHNOLOGY ACCESS CLAUSE**. The Vendor expressly acknowledges that state funds may not be expended in connection with the purchase of an automated information system unless that system meets certain statutory requirements relating to accessibility by persons with visual impairments. Accordingly, the Vendor represents and warrants to the qualified ordering entity that the technology provided to the qualified ordering entity for purchase is capable, either by virtue of features included within the technology or because it is readily adaptable by use with other technology, of:

1. providing equivalent access for effective use by both visual and nonvisual means;
2. presenting information, including prompts used for interactive communications, in formats intended for both visual and nonvisual use; and
3. being integrated into networks for obtaining, retrieving, and disseminating information used by individuals who are not blind or visually impaired.

For purposes of this clause, the phrase "equivalent access" means a substantially similar ability to communicate with or make use of the technology, either directly by features incorporated within the technology or by other reasonable means such as assistive devices or services that would constitute reasonable accommodations under the Federal Americans with Disabilities Act or similar state or federal laws. Examples of methods by which equivalent access may be provided include, but are not limited to, keyboard alternatives to mouse commands and other means of navigating graphical displays and customizable display appearance.

 H. **INDEMNIFICATION CLAUSE**. The contractor shall defend, indemnify, and hold harmless the State of Texas, all of its officers, agents and employees from and against all claims, actions, suits, demands, proceedings, costs, damages, and liabilities, arising out of, connected with, or resulting from any acts or omissions of contractor or any agent, employee, subcontractor, or supplier of contractor in the execution or performance of this contract.

I. **DISPUTE RESOLUTION**. The dispute resolution process provided for in chapter 2260 of the Texas Government Code must be used by the TBPC and the contractor to attempt to resolve all disputes arising under this contract.

J. **DEBT LIABILITY**. Bidder agrees that any payments due under this contract will be applied towards any debt, including but not limited to delinquent taxes and child support that is owed to the State of Texas.

H. HIDALGO COUNTY BUILDINGS & GROUNDS —

1. **Requesting approval of Change Order No. 1 (within the allowance) in connection with Asbestos Abatement and Demolition original contract (C-05-006-01-25) amount remains the same as certified by project architect, Luis A. Figueroa, ROF, for: "Disposal of approx. 40 Elbows/Joints of Asbestos Pipe Insulation from the Bravo Building."**

On motion of Commissioner Palacios, seconded by Commissioner Garza, the Court made a UNANIMOUS vote of approval.

I. HIDALGO COUNTY HEALTH DEPARTMENT —

1. **Presentation for discussion, consideration and approval for Hidalgo County to exercise the option to renew for an additional one (1) year term (as provided in contact) with HemoCue, Inc.**

On motion of Commissioner Palacios, seconded by Commissioner Garza, the Court made a UNANIMOUS vote of approval.

J. HIDALGO COUNTY ELECTIONS DEPARTMENT —

1. **Discussion, consideration and action (if applicable) Voting Election Systems Workshop and Vendor Showcase by certified and state awarded vendors held on Friday, May 20, 2005 at the UT-Pan A M's International Trade & Technology (ITT) Building located on the corner of University Drive and 4th Street (Miguel Nevarez Ave.) in Edinburg, Texas.**

Presentation made by Martha Salazar.

- ✓ 2. **Discussion, consideration and action on selection of a state certified and awarded vendor with authority to purchase and Electronic Voting System through TBPC's non automated contract #578-N1; or in the alternative,**

On motion of Commissioner Garza, seconded by Commissioner Flores, the Court made a UNANIMOUS vote of approval on the recommendation of Judge Ramon Garcia and the Election Department to select ESS.

3. **Discussion, consideration and approval to advertise and solicit other procurement methods (RFB or RFP) for the purchase of an Electronic Voting System to include hardware, software, training, support and maintenance with specifications, requirements and scope of services to be developed, drafted and presented by the Elections Dept. (with direction from the "Court") for approval to Commissioner's Court before publication of the project.**

NO ACTION taken on this item.

CONTRACT INFORMATION

THIS CONTRACT IS

ACTIVE

CONTRACT No
C-05-004-05-24

CONTRACT TYPE:
SERVICES AGREEMENT

BID NO.
2005004

BUYER
LRM

BID DESCR:
ELECTIONS VOTING MACHINES

Election's
DEPARTMENT

AWARDED VENDOR
ELECTION SYSTEMS & SOFTWARE, INC. (ES&S)

CONTRACT AWARD FOR DEPT (1)
ELECTIONS DEPARTMENT

CONTRACT MANAGER
ROCIO

CONTRACT TERMS:

STARTING DATE: **08/01/05** | ENDING DATE: **07/31/06**

RENEWED/EXTENDED

REFER TO NEW CONTRACT NO. _____

60 DAY EXTENSION:

START DATE | END DATE

EXPIRES UPON COMPLETION

RENEWAL OPTION(S): OTHER SEE CONTRACT COMMENTS

INSURANCE

INS EXP DATE | GEN LIA INSR | AUTO LIA INSR | WKMANS COMP

EXPIRATION DATES:

CONTRACT COMMENTS:

STATE CONTRACT NO. TBPC-578-N1
THREE (3) YEAR WARRANTY ON ES & S
EQUIPMENT

BID REMARKS
APPROVED ON TUESDAY, MAY 24, 2005
BY COMMISSIONER COURT.
TO: (ES&S) ELECTION SYSTEMS &
SOFTWARE INCORPORATED

CONTRACT PRICES:

ITEM DESCRIPTION:	UNIT:	PRICE:
ES & S EQUIPMENT (EXHIBIT B)		\$ 1,344,875.00
ES & S SOFTWARE LICENSE FEES (EXHIBIT C)		\$ 94,280.00
ELECTIONS SUPPORT SERVICES (EXHIBIT D)		\$ 346,500.00
VOTER EDUCATION/OUTREACH MATERIALS (NOT TO EXCEED)		\$ 3,000.00
SHIPPING/HANDLING (NOTE 1)		\$ 11,975.00

MULTIPLE AWARD? YES

(If Yes See Below for Add'l Info.) NO

Contract Scanned? NO

LUMP SUM AMOUNT:

\$ 1,800,630.00

Contract No	Awarded Vendor	For Departments	Ins Exp Date
Contract No 2	Awarded Vendor 2	For Departments 2	Ins Exp Date 2
Contract No 3	Awarded Vendor 3	For Departments 3	Ins Exp Date 3
Contract No 4	Awarded Vendor 4	For Departments 4	Ins Exp Date 4
Contract No 5	Awarded Vendor 5	For Departments 5	Ins Exp Date 5
Contract No 6	Awarded Vendor 6	For Departments 6	Ins Exp Date 6
Contract No 7	Awarded Vendor 7	For Departments 7	Ins Exp Date 7
Contract No 8	Awarded Vendor 8	For Departments 8	Ins Exp Date 8
Contract No 9	Awarded Vendor 9	For Departments 9	Ins Exp Date 9
Contract No 10	Awarded Vendor 10	For Departments 10	Ins Exp Date 10

LAST UPDATED ON:

6/29/2005

STATE CONTRACT

Project Type

CLOSED

BID_OPENIN

BID_AWARD

BID PROCESS STATUS

**ELECTION SYSTEMS & SOFTWARE, INC.
UNITY™ ONLINE
APPLICATION SERVICE PROVIDER AND BALLOT SERVICES AGREEMENT**

THIS APPLICATION SERVICE PROVIDER AND SERVICES AGREEMENT ("Agreement") is made as of the date on which it is signed by the last of the parties hereto ("Effective Date"),

BETWEEN: Election Systems & Software, Inc., a Delaware corporation ("ES&S");

AND: Hidalgo County, Texas ("Customer").

IF THE FOLLOWING TERMS AND CONDITIONS CONFLICT WITH THE TEXAS BUILDING AND PROCUREMENT COMMISSION'S TERMS AND CONDITIONS, THE TBPC'S TERMS AND CONDITIONS WILL TAKE PRECEDENCE.

RECITALS

- A. ES&S is a provider of election-related products and services, including Unity™ Online on Exhibit "A" hereto (the "Site"). The parties have agreed that ES&S shall host and make available to Customer the Site and provide certain services to Customer, subject to the **GENERAL TERMS AND CONDITIONS** attached hereto.
- B. The following Exhibits are incorporated into, and constitute an integral part of, this Agreement (check all that apply):

Exhibit A (Site Services and Fees)

Exhibit D (Support Responsibilities)

Exhibit B (Ballot Layout Services and Fees)

Exhibit E (Issue Response Timeframe)

Exhibit C (Ballot Printing Services and Fees)

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

- Agrees to the **GENERAL TERMS AND CONDITIONS** and to the terms and conditions set forth on each Exhibit.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska.
- 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.

ELECTION SYSTEMS & SOFTWARE, INC.
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1276


Signature

Todd V. Uroevich

Name (Printed or Typed)

Vice President, After Market Sales

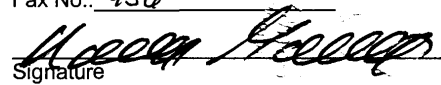
Title

09/23/05

Date

144212v2

Hidalgo County, Texas
Elections Administration Bldg. 101 S. 10th Ave
Edinburg, TX 78539
Fax No.: 956-


Signature

RAMON GARCIA

Name (Printed or Typed)

HIDALGO COUNTY JUDGE

Title

Oct. 14, 2005
Date

Approved by Commissioners' Court

on **10-11-05 ah**

GENERAL TERMS AND CONDITIONS

ARTICLE I DEFINITIONS

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

"Site" means collectively the ES&S software and network infrastructure in the data center located in Omaha, Nebraska.

"Services" means collectively the activities that ES&S will engage in for the Customer which may include but is not limited to customer data creation/conversion, ballot services, printing services and customer service.

"Documentation" means one User Product Manual and one Training Work Book.

"Escrowed Materials" means copies of all schematics, component descriptions and source code for the ES&S Software.

"ES&S Software" means ES&S' proprietary election software, all Updates and items provided to Customer through access to the Site.

ARTICLE II CUSTOMER RIGHT OF USE

2.1 TERMS OF LICENSE. Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer a nonexclusive, nontransferable license (the "License") to access and use the ES&S Software through the Site, and the related Documentation in the Jurisdiction. The License allows Customer to use the ES&S Software (in object code only) and the Documentation, solely for the purposes of managing the candidate/contest process and other election-related activities in the Jurisdiction. Customer may not take any of the following actions with respect to the ES&S Software or its Documentation:

- a) Reverse engineer, de-compile, 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;
- b) Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software or Documentation, in whole or in part, to or by any third party without ES&S' prior written consent; or
- c) Cause or permit any change to be made to the ES&S Software without ES&S' prior written consent.

2.2 ACCESS.

- a) Customer access to the Site is at Customer's sole cost, using DSL (or faster) Internet access. Customer will access the Site through security access measures and/or Access Codes (such as user ids and passwords) provided by ES&S. Customer access to the Site via a dial up connection does not comply with the minimum requirements of the site (see Section 3.9.) Customer can make up to three (3)

Access Codes available only to those employees who need to access the Site for the Purpose described above and shall be responsible for all authorized and unauthorized uses of the Access Codes. If any unauthorized person or entity obtains an Access Code, Customer shall immediately notify ES&S and ES&S shall deny access for the particular Access Code(s) and issue Customer a new Access Code(s) within 1 business day.

- b) **User Conduct.** Customer agrees to comply with all applicable laws, statutes, ordinances, and regulations related to use of the ES&S Software. Customer may not use our ES&S Software to engage in fraud or other illegal activity, or to infringe the intellectual property rights of others.

Customer agrees that Customer will not use any device, software, or routine to interfere or attempt to interfere with the proper working of the Site or any transaction conducted on the Site. Customer agrees that Customer will not take any action that imposes an unreasonable or disproportionately large load on our infrastructure or limits our ability to provide access to ES&S Software. Customer agrees that Customer will not collect, copy, reproduce, alter, modify, create derivative works, or publicly display any content or information from the Site without the prior expressed written permission of ES&S. Customer agrees that you will not use any robot, spider, or other automatic device or routine to access or interface with the Site.

Subject to the terms and conditions of this Agreement, ES&S grants a limited license to Customer to make use of the Site and the ES&S Software only for their intended purposes. This license expressly excludes any resale of the Site and the ES&S Software, making any derivative of the Site or the ES&S Software, the collection and use of other users' email addresses or other materials (for example, advertisements), or any data extraction or data mining whatsoever, except with the express consent of the owner of such materials.

ES&S retains all right, title, and interest in and to all intellectual property rights in and to the site and ES&S software including any copyrights, patents, trademarks, service marks and trade names worldwide (collectively, Unity Online). Customer shall only use E&SS Unity Online with the express permission of ES&S and then only in the manner authorized. Under no circumstances may Customer alter, modify, or change ES&S Unity Online.

- 2.3 PASSWORDS AND SECURITY.** At all times Customer shall maintain the confidentiality of user names and passwords. If Customer is a corporation, partnership or other legal entity, Customer may allow employees to use user names and passwords, provided that Customer is responsible for all activity and all changes by such employees. Permitting use of the ES&S Software by a third party is prohibited and is a violation of this Agreement. If there is a breach of security through the account, Customer must immediately change your password and also notify ES&S at uol-support@essvote.com Customer will be liable for any unauthorized use of the ES&S Software until ES&S is notified during normal business hours of the security breach.

2.4 PROPRIETARY RIGHTS.

- a) **ES&S.** Customer acknowledges and agrees that this Agreement grants Customer no title or right of ownership in or to the Site, the software or any associated

materials or intellectual property of ES&S. Customer shall not remove or alter any ES&S proprietary or copyright notices.

- b) **Customer.** ES&S acknowledges and agrees that this Agreement grants ES&S no title or right of ownership in or to any Customer data supplied or input by, or on behalf of, Customer ("Customer Data"). ES&S agrees not to use the Customer Data for any purpose other than to perform its obligations under this Agreement.

Upon expiration or earlier termination of this Agreement, upon request by Customer and payment of any outstanding fees due hereunder, ES&S shall return all Customer Data to Customer.

ARTICLE III SERVICES

3.1 CUSTOMER SUPPORT. Upon Customer's payment of the set up and access fee set forth on Exhibit "A" (the "Service Fee"), ES&S shall provide certain support services for a one year period (Service term). Telephone support at 1-800-247-8683 during normal business hours on days other than United States holidays to answer routine questions regarding the use of the Site or the accessing of the Site. Customer support hours are 8:00 a.m. to 5:00 p.m. Central Time Monday through Friday. The respective support responsibilities of the parties for support are set forth on Exhibit "D" attached hereto.

3.2 DATA CONVERSION/CREATION. As a part of such services, ES&S shall convert or create the Data so that it can be processed by the Site. ES&S is not responsible for errors in data entry or other services, programs, hardware, data files or output provided to Customer which results from errors in the data provided by Customer or from Customer's failure to comply with the provisions of Exhibit "D". In the event that Customer creates such Data with no assistance by ES&S, ES&S shall waive the associated fees normally assessed for such Data creation.

3.3 BALLOT SERVICES. If selected by Customer, ES&S shall perform ballot services as set forth in Exhibit "B" (*Ballot Layout Services) and Exhibit "C" (Ballot Printing Services).

3.4 INSTALLATION. ES&S shall be responsible for installation and configuration services for the Site and Customer shall be solely responsible for all software, hardware and internet connectivity as are necessary to enable Customer to access the Site.

3.5 SITE AVAILABILITY. The Site will be available to Customer 98% of the time within the designated Customer Service operating hours set forth in section 3.1. If issues with accessing the Site arise, the agreed upon response timeline set forth in Exhibit "E" will be followed. Customer and ES&S agree that responsibility for trouble-free operation of the Site and Site is dependent upon a number of factors, including, without limitation, Customer's adherence to the terms of this Agreement and any ES&S recommended practices (e.g., the use of certain hardware and software and the establishment of certain security procedures). Notwithstanding the above, Customer understands and acknowledges that from time to time the Site may be inaccessible or inoperable for various reasons, including, without limitation equipment malfunctions, upgrades or modifications or causes beyond ES&S' reasonable control (e.g., interruption or failure of telecommunication or digital transmission links, hostile network attacks, network congestion or other failures). ES&S will use commercially reasonable efforts to minimize any disruption, inaccessibility and/or inoperability of the Site, and will provide 24 hours' prior notice of any scheduled downtime.

3.6 UPDATES. ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software, along with appropriate documentation ("Updates"), on a schedule defined by ES&S. All Updates shall be subject to the License.

- a) Providing updates, upgrades, maintenance patches, new versions and error corrections (collectively, "Updates") to the Site, when and as deemed necessary by ES&S. All Updates will be deemed to be part of the Site for purposes of this Agreement. ES&S will provide notice of each Update and all information reasonably necessary to enable Customer to use the Update, including additional training if ES&S deems it necessary.
- b) If Customer requests maintenance and support services different from those described above, ES&S may notify Customer that the requested services are subject to additional fees to be negotiated between the parties.

3.7 BACKUP AND DATA RECOVERY. ES&S shall store and back up all Data which has been input on to the Site, on a regular basis as determined by ES&S (every 24 hours Monday through Friday). ES&S shall recover Customer data lost only if it is due to a failure or malfunction of the site. ES&S is not responsible for lost data due to Customer's negligence, willful misconduct, actions or inactions.

3.8 TRAINING. ES&S shall provide training on the use of the Site to the extent and in the manner set forth on Exhibit "A".

3.9 OBLIGATIONS OF CUSTOMER. Customer agrees to perform the following:

- a) Provide recommended hardware/software environment located at Customer's to include the following:
 Desktop PC's and software
 DSL Internet connectivity for all participating sites
 LAN, cabling, and wiring
 Local Systems Administration

Client Hardware & Software Requirements		
Description	Minimum	Recommended
OS	Windows 2000	Windows 2000/Windows XP
Browser	Internet Explorer 5.5 with 128 bit encryption	Internet Explorer 6.0 or higher with 128 bit encryption
Processor	Pentium II 450	Pentium III 800
Monitor	17" @ 800x600	17"/19" @ 1024x768
Available Hard Drive Space	1GB	2GB
RAM	128	256
Connectivity	DSL/Cable	High speed – 128k

- b) Data entry / re-entry of any lost Customer data due to Customer's negligence, willful misconduct, actions or inactions.

**ARTICLE IV
TERM; TERMINATION**

The initial term of this Agreement shall be for a one year period beginning on the Effective Date, and may be renewed for successive terms thereafter. Customer shall notify ES&S at least ninety (90) days prior to the expiration of the initial term or any renewal term of its desire to renew the Agreement for an additional term, and such renewal shall be conditioned upon the parties' mutual agreement as to the terms and conditions under which the renewal will occur. This Agreement may be terminated by either party at any time if the other party breaches any material provision hereof and fails to cure such breach within 30 days after receiving notice from the nonbreaching party. ES&S may also immediately terminate the Agreement if it receives notice from Customer that sufficient funds have not been appropriated to enable it to pay any amount due hereunder on a timely basis. Upon termination of the Agreement by ES&S as permitted by this Article IV, Customer shall pay to ES&S any unrecovered costs as of the date of termination and ES&S' reasonable costs to withdraw from the relationship created by this Agreement. Upon any termination of this Agreement, Customer shall (a) immediately cease any further access to or use of the Site, and (b) promptly deliver to ES&S all Confidential Information which is the property of ES&S and all copies thereof, destroy all files and memoranda prepared based on the Confidential Information and provide ES&S with a written certification that all the Confidential Information has been returned or destroyed.

ARTICLE V FEES

5.1 FEES. In consideration for ES&S granting the license pursuant to Section 2.1, providing services pursuant to Article III, Customer shall pay ES&S the Access Fees set forth on Exhibit "A" upon the Effective Date. Customer shall pay ES&S the Ballot Layout service fee set forth on Exhibit "B". In addition, Customer shall pay ES&S the Ballot Printing Fees, if ES&S is selected by Customer to print, as set forth on Exhibit "C" in accordance with the payment thereon.

5.2 TAXES. Customer shall pay, or shall reimburse ES&S for, all federal, state and local taxes imposed on the transactions contemplated by this Agreement, except for taxes imposed on or measured by ES&S' income.

5.3 INTEREST. Any amounts due to ES&S which are not timely paid hereunder shall bear interest at the rate of one and one-half percent (or such lesser amount as may be permitted by applicable state law) for each month or portion thereof during which they remain unpaid.

ARTICLE VI MISCELLANEOUS

6.1 CUSTOM PROGRAMMING. From time to time after the date of this Agreement, ES&S may provide custom programming to Customer. Custom programming shall be created, implemented, tested and paid for by Customer as mutually agreed upon in advance by Customer and ES&S. Such agreement shall be in the form of an addendum to this Agreement, which is executed by both parties. All custom programming shall be deemed to be part of the ES&S Software. ES&S retains the right to make any custom programming available to other customers.

6.2 CONFIDENTIALITY. During the term of this Agreement, each party (the "Disclosing Party") may provide the other (the "Receiving Party") with certain confidential and proprietary information ("Confidential Information"). Confidential Information includes, without limitation, the Data, the terms of this Agreement and all information relating to the Disclosing Party's operations, services, products, research or development. Confidential Information shall not include information that (a) is publicly known at the time of its disclosure; (b) is lawfully received by the Receiving Party

from a third party not under an obligation of confidentiality to the Disclosing Party; or (c) is published or otherwise made known to the public by the Disclosing Party. The Receiving Party shall refrain from using the Disclosing Party's Confidential Information except to the extent necessary to exercise its rights or perform its obligations under this Agreement. The Receiving Party shall likewise restrict its disclosure of the Disclosing Party's Confidential Information to those who have an absolute need to know such Confidential Information in order for the Receiving Party to perform its obligations and enjoy its rights under this Agreement. Such persons shall be informed of and shall agree to the provisions of this Section 6.1, and the Receiving Party shall remain responsible for any unauthorized use or disclosure of the Confidential Information by any of them. The Receiving Party may also disclose Confidential Information of the Disclosing Party pursuant to the requirement or request of a governmental agency, a court or administrative subpoena, an order or other legal process or requirement of law, or in order to defend its rights hereunder, so long as it shall (x) first notify the Disclosing Party of such request, requirement or proposal for use in defense; (y) in the case of a required disclosure, furnish only such portion of the Confidential Information as it is advised in writing by counsel that it is legally required to disclose; and (z) cooperate with the Disclosing Party in its efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to that portion of the Confidential Information that is required to be disclosed.

Each Receiving Party acknowledges that the Disclosing Party's Confidential Information is a valuable, special and unique asset of the Disclosing Party, and that its unauthorized disclosure and use would cause irreparable damage to the Disclosing Party. Accordingly, each Receiving Party agrees that the Disclosing Party shall be entitled to legal and equitable relief, including such injunctive relief as may be necessary to protect its interests, in the event of a breach by the Receiving Party of this Section 6.1.

6.3 EXCUSABLE NONPERFORMANCE. Except for a delay or failure in the payment of money (including without limitation a delay or failure which is due to a failure to appropriate funds, as described in Article IV), if either party is delayed or prevented from performing its obligations under this Agreement due to any cause beyond its reasonable control including, without limitation, acts of God, natural disasters, fires, riots, acts of war, terrorism or insurrection, floods, unusually severe weather, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent reasonably necessary to allow performance after the cause of delay has been removed.

6.4 NOTICE. Any notice, consent or other communication required or permitted hereunder shall be in writing, and shall be deemed given when delivered personally, sent by confirmed facsimile transmission, sent by commercial overnight courier with written verification of receipt or sent by registered or certified mail, return receipt requested, postage prepaid and the receipt is returned to the sender. All communications shall be sent to the attention of the persons listed on the signature page to this Agreement and at the addresses or facsimile numbers set forth on such signature page unless other names, addresses or facsimile numbers are provided by either or both parties in accordance herewith.

6.5 NONWAIVER. Either party's failure at any time to require strict performance by the other of any of the provisions hereof shall not waive or diminish that party's rights thereafter to demand strict compliance therewith or with any other provision. Waiver by either party of any default by the other shall not waive any other or similar defaults by the other.

6.6 ENTIRE AGREEMENT. This Agreement, including all Exhibits hereto contains the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior agreements and understandings between the parties, whether written or oral, regarding the subject matter hereof. If any provision of this Agreement is invalid under any

applicable statute or rule of law, it is to that extent to be deemed omitted. The remainder of the Agreement shall be valid and enforceable to the maximum extent possible. Any modifications, revisions or amendments to this Agreement must be set forth in a writing signed by authorized representatives of both parties.

6.7 ASSIGNMENT. Neither party may assign this Agreement, or assign, subcontract or delegate any of its obligations hereunder, without the prior written consent of the other party hereto, provided, however, no such consent shall be required if ES&S makes such an assignment or transfer in the course of a sale or acquisition of all or substantially all of the assets or business of ES&S and the surviving or acquiring entity agrees in writing to be bound by all terms and conditions of this Agreement. Any purported assignment in violation of the preceding sentence shall be void and of no effect. This Agreement shall be binding upon and inure to the benefit of the parties' respective successors and permitted assigns.

6.8 COUNTERPARTS; EXECUTION BY FACSIMILE. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument. The parties may execute this Agreement and exchange counterparts of the signature pages by means of facsimile transmission, and the receipt of such executed counterparts by facsimile transmission shall be binding on the parties. Following such exchange, the parties shall promptly exchange original versions of such signature pages.

6.9 SURVIVAL. The provisions of Sections 2.4, 3.4, Article 4, Sections 5.1-5.3, and 6.1-6.4 shall survive the expiration or any termination of this Agreement.

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**EXHIBIT A
UNITY ONLINE SITE, SERVICES, FEES AND PAYMENT TERMS**

Unity™ Online Fees

Fee Description	Registered Voters			
	≤ 20,000	20,001 - 100,000	100,001 - 250,000	> 250,000
Account Creation/ Training	\$250	\$500	\$1,000	\$1,500
*Database Build	\$1,000	\$2,000	\$3,500	\$5,000
Yearly Access Fee	\$250	\$500	\$1,500	\$2,500

- Training (Provided via WebEx)
- Database build waived for customers building their own data base

PAYMENT TERMS:

100% of payment for services due within thirty (30) calendar days from issuance of invoice.

Annual access fees thereafter are due on the anniversary date of the Agreement and are subject to price increases of up to 6% per year.

Prices are based on registered voters, (active and inactive) and a maximum of 3 concurrent users. Any changes in these maximums may require changes in pricing to Customer. In the event that the number of registered voters exceeds the pre-defined pricing level an increase in annual access fees will result.

**EXHIBIT B
BALLOT LAYOUT SERVICES, FEES AND PAYMENT TERMS**

Layout Pricing in Conjunction with Unity™ Online

Number of Ballot Styles Produced	Price
1-5	\$10
6-10	\$45
11-25	\$90
26-50	\$200
51-75	\$400
76-100	\$600
101-150	\$800
151-200	\$1,100
201-500	\$1,500
501-1,000	\$2,000
1,001-2,000	\$3,000
2,001-4,000	\$5,000
> 4,000	\$7,000

PAYMENT TERMS:

100% of payment for Ballot Layout services due within thirty (30) calendar days from issuance of invoice.

Service fees are subject to price increases of up to 6% per year.

**EXHIBIT C
BALLOT PRINTING SERVICES, FEES & PAYMENT TERMS**

Ballot Print Charges in Conjunction with Unity™ Online

Service Description	Price per Ballot		
	≤ 50,000	50,001 – 250,000	> 250,000
14 and 17 inch ballots for Visible Light Readers:			
Base ballot charge	\$0.23	\$0.21	\$0.19
Backside of ballot	\$0.03	\$0.03	\$0.03
Stub and / or numbering	\$0.03	\$0.03	\$0.03
Folding	\$0.02	\$0.02	\$0.02
Scoring	\$0.02	\$0.02	\$0.02
Packaging	\$0.01	\$0.01	\$0.01
Color requirements: A color bar on the ballot. (Other designs or methods quoted separately)	\$0.02	\$0.02	\$0.02
<ul style="list-style-type: none"> • Prices are exclusive of freight • Additional charges will be added for special requests, including watermarking, unique packaging requirements and expedited delivery requirements. 			
Note: 19" ballots and ballots printed for use with Infra Red tabulators are quoted separately.			

PAYMENT TERMS:

100% of payment for Ballot Printing services due within thirty (30) calendar days from issuance of invoice.

Service fees are subject to price increases of up to 6% per year.

**EXHIBIT D
SUPPORT RESPONSIBILITIES**

Responsibilities of ES&S	Responsibilities of Customer
<ul style="list-style-type: none"> ➤ Maintain secure Site – availability and performance. ➤ Provide support as outlined in Agreement ➤ Provide backup of site data. ➤ Provide data recovery of site data if due to a site malfunction or failure. ➤ Notification of necessary hardware and operating system upgrades required at customer site. ➤ Data Center upgrade impact planning and assistance ➤ Notification of scheduled maintenance or upgrades to be performed. 	<ul style="list-style-type: none"> ➤ Hardware problem diagnosis and resolution (All hardware and all software located at the customer site) ➤ Third-party software problem diagnosis and resolution ➤ Support of approved operating systems – Windows XP, Windows 2000 Professional and Windows XP Professional.. ➤ Day-to-day administrative duties, including but not limited to, site access (internet connectivity), setup workstations (computer hardware and software), setup printing, customize desktops, monitor desktop PC system performance and drive capacity. ➤ Contacting the appropriate vendor if replacement of parts are necessary ➤ Responsible for maintaining and managing software license compliance and hardware warranty agreements ➤ Consumables, such as toner ➤ Customer-installed third-party software ➤ Cost associated with any additional hardware or software required to perform required upgrades ➤ Routine cleaning, or maintenance and mechanical wear ➤ Damage caused by misuse, abuse, or neglect ➤ Damage caused by manufacturer's parts ➤ Damage caused when warranted parts were repaired or replaced by an organization other than those approved by the hardware manufacturer ➤ Maintain a set of change and configuration logs defined by ES&S ➤ Data integrity of Customer election data

EXHIBIT E
ISSUE RESPONSE TIMEFRAME

The following Issue Response Timeframe is the guideline ES&S will follow to acknowledge the receipt of an issue with the site (application software or hardware) initiated by the Customer.

The response time frames are as follows:

NOTE: Hours listed are Central Time Zone.

Hour issue reported	Customer Notification Response Timeframe
Between 8:00 am and 5:00 pm Monday – Friday (Central Time)	4 hours from time when issue received
Between 5:01 pm and 11:59 pm Monday – Friday (Central Time)	Call back after 8:00 am (Central Time) following business day
Between 12:00 am and 7:59 am Monday – Friday (Central Time)	Call back after 8:00 am (Central Time) of business day issue received
Saturday, Sunday and Holidays (Central Time)	Call back after 8:00 am (Central Time) next business day

The timeframe above is not a resolution commitment and Customer should not assume that the issue will be resolved within the timeframe stated above.

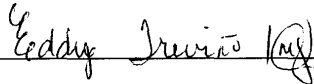
ELECTION SYSTEM AND SOFTWARE

Hidalgo County ELECTIONS Department

Alarm Monitoring Service Agreement

Approved in cc on October 11, 2005

ATTEST:

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