



**STATE OF HAWAII  
OFFICE OF ELECTIONS**

802 LEHUA AVENUE  
PEARL CITY, HAWAII 96782  
[www.hawaii.gov/elections](http://www.hawaii.gov/elections)

KEVIN B. CRONIN  
CHIEF ELECTION OFFICER

March 3, 2008

Terry E. Thomason, Esq.  
Altson, Hunt, Floyd, & Ing  
American Savings Bank Tower,  
18th Floor, 1001 Bishop Street  
Honolulu, HI 96813

Dear Mr. Thomason:

This letter responds to the Protest of Award (protest) of Election Systems & Software (ESS or petitioner), dated February 20, 2008, to Request for Proposal No. RFP-06-047-SW (RFP) that your office filed with the Office of Elections on February 20, 2008. It constitutes the decision in writing concerning ESS's protest under H.R.S. §103D-701(c).

This decision respectfully denies the petitioner's protest.

ESS's protest presents two general issues: the first relates to changing the deciding official for the protest, and the second, to the merits of the voting machine equipment selection process. This decision turns first to consider the company's argument to change the deciding official and then, the selection process.

*I. CHANGE OF DECIDING OFFICIAL*

ESS argues in its characterization "OE (Office of Elections) and SPO (state procurement officer) have repeatedly and inexplicably mishandled past procurements for the voting machines and election services requirement" as the essential grounds to support its position for a change of deciding official in this proceeding. This claim overlooks Kevin Cronin's appointment to serve as chief elections officer for the state of Hawaii, effective February 1, 2008. Cronin, formerly an assistant general counsel to the Public Service Commission of Wisconsin, began his duties and responsibilities February 1, 2008. He substituted for Interim Chief Election Officer Rex Quidilla as the deciding officer. Cronin was neither involved at any time with the Office of Elections' (OE) prior procurements nor with the current procurement, including the RFP's development, the offerors' proposals' evaluation, and the successful vendor's selection. He did not know the identity of any Evaluation Committee member or staff and their involvement in evaluating the proposals. As a result, the procurement officer's independence is clear and assured.

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## II. *PROTEST TO THE SELECTION PROCESS*

ESS essentially protests on two grounds. The first relates to the general issue of the reasonableness of Hart's price and the second, to the general issue of the handling of election services. Each ground is discussed after laying out the facts.

### *A. Facts*

In 2004 and 2006, the elections under the then contract in the state of Hawaii cost an average \$5.65 million dollars. The 2004 election cost \$5.4 million dollars and the 2006 election, \$5.9 million dollars. The then contract for voting machines used in the elections expired December 31, 2006.

On September 4, 2007, the OE issued Request for Proposal No. RFP-06-047-SW (RFP) for sealed offers for a new leased voting and vote counting equipment system for all elections of every nature beginning 2008 through 2016. The RFP's purpose was to obtain for all Hawai'i voters a voting and vote counting system that establishes, allows, and facilitates for all voters access to the voting process under state laws and under the federal Voting Rights Act (VRA) and Help America Vote Act (HAVA) that enables all voters, including those individuals with disabilities and limited reading or English proficiency, to cast their votes in secret and without assistance from others.<sup>1</sup>

Among others, the RFP by its terms imposed on all offerors who had an interest in responding to the RFP a requirement to inquire in writing about the RFP. Specifically, the RFP obliged each offeror "to list any exceptions they may have to the terms, conditions, specifications, or other requirements listed herein" that included any subject recognized in the RFP.<sup>2</sup> Any offeror's inquiry was due "by the (d)eadline for the (w)ritten (i)nquiries," September 25, 2007.<sup>3</sup>

Moreover, the RFP's evaluation criteria included the objective cost price analysis to apply to each offeror's proposal. The objective cost price detailed the legally prescribed formula for performing and calculating the evaluation criteria's price and the points to be awarded based on pricing, fifteen (15) points; technical criteria, fifty (50) points; implementation plan and schedule, five (5) points; understanding project, five (5) points; and on-site demonstration, twenty five (25) points.<sup>4</sup>

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<sup>1</sup> See Office of Elections, "REQUEST FOR PROPOSAL," No. RFP-06-047-SW, September 3, 2007. § 1.030, at 2 (RFP).

<sup>2</sup> See RFP § 1.080, at 4.

<sup>3</sup> Ibid. See also RFP § 1.060, at 3.

<sup>4</sup> See RFP § 5.020, at 18-19.

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Before submitting its proposal on October 11, 2007, ESS (petitioner) did not in any manner at any time question, challenge, contest, or in any way express any concern about the RFP-established contents including the cost price analysis or the relative weighting of pricing.

On October 11, 2007, the deadline and opening deadline for each offeror's proposal, the petitioner's proposal to the RFP was received and opened along with the other two offerors' qualified proposals. The three qualified proposals were transmitted to the Evaluation Committee (committee) consisting of seven duly appointed persons. They included the state's four county clerks, two representatives of the disability voting community, and the interim chief election officer.

During the period September 4 through October 11, 2007, the petitioner took no action to submit to the committee or the purchasing officer in writing in any form at any time any question, challenge, contest, or in any way express to the purchasing officer any concern or issue concerning, relating to, or arising from the RFP-established cost price analysis or the relative weighting of pricing for evaluation each offeror's proposal.

Between November 14 and 16, 2007, each offeror provided to the committee on-site demonstrations of the offeror's voting machine equipment to determine its recommendation to the procurement office of the voting system "the most advantageous to the state taking into consideration price and the evaluation factors" identified in the RFP.<sup>5</sup>

On November 28, 2007, the petitioner submitted its best and final offer (BAFO). It discussed the petitioner's iVotronic equipment component of its proposal, but its BAFO did not withdraw such equipment from its proposal for the committee's evaluation. Moreover, the BAFO stated "Solution 4: Model 100 ES&S AutoMARK, and Model 650 for 2008 through 2018."<sup>6</sup>

On December 6, 2007, the OE asked the petitioner about its voting equipment components. The RFP required that both the "(n)ew (s)ystem shall meet or exceed the Voluntary Voting Systems Guidelines" (VVSG) and the system shall be certified by an approved independent testing authority.<sup>7</sup> Accordingly, the office asked the petitioner to identify its system components that would need to be upgraded to meet the Voluntary Voting Systems Guidelines (VVSG).<sup>8</sup> The petitioner responded, "Enhancing the Model 100 for compliance with the VVSG requires a significant system re-design to comply with 2005 guidelines. As a result, ES&S *does not intend* to enable the Model 100 to be 2005 compliant (emphasis supplied)."<sup>9</sup>

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<sup>5</sup> See H.R.S. §103D-303(g). This provision establishes the standard for evaluating the offerors' proposals to the RFP.

<sup>6</sup> See ES&S, BAFO, November 28, 2007, at 10, attached as Exhibit A.

<sup>7</sup> See RFP, Section Seven, Appendix B, § 7.2, at B-11.

<sup>8</sup> See ES&S letter to Attn: Scott Nago, Office of Elections from Mathew E. Nelson, Senior Vice President-Domestic Sales, December 13, 2007, attached as Exhibit B.

<sup>9</sup> Ibid.

On January 31, 2008, upon the committee's recommendation, the voting machine equipment contract was awarded to Hart.

On February 4, 2008, the petitioner requested a debriefing of the committee.

On February 7, 2008, a debriefing was conducted.

Finally, on February 20, 2008, the petitioner filed a protest.

### *B. Discussion*

The petitioner protests the procurement officer's decision to award the contract to Hart intercivic (*Hart*) on two essential grounds. They are the procurement officer:

1. ignored his affirmative duty to confirm the reasonableness of Hart's proposal price as mandated by applicable procurement rules; and
2. continued the long-term mishandling of election services through unfair evaluations calculated to favor Hart.<sup>10</sup>

Each protest ground is discussed in turn.

#### 1. Failure to Consider Reasonableness of Hart's Price.

The petitioner argues the purchasing officer had a duty to consider the reasonableness of Hart's price for which the failure to do so renders void the selection of Hart. The petitioner's argument, however, assumes a duty that does not attach, if it exists, in this proceeding as a matter of law. Hawai'i state law provides, "... no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers."<sup>11</sup> This clear and plain statutory language means the legislature determined the state's public policy requires a protest based on the content of a solicitation must be first submitted in writing to the procurement officer before the deadline for the receipt of offers and, if not done, no protest can be made based on the content of the solicitation. This requirement applies to all protests based on all of a solicitation's contents, including price and its application, and rendering all contract awards subject to the state procurement process under law.

Here, the petitioner must have submitted to the RFP's procurement officer in writing before the date set for the receipt of offers on October 11, 2007, any issues concerning the RFP's content. This must be done before the petitioner can base a protest on the pricing content of the RFP as the petitioner now does. There can be no alternate reasonable interpretation. The petitioner's protest based on price when the company did not by any means in any form at any time raise any question, challenge, contest, or in any way express to the purchasing officer any concern or issue concerning or arising from the RFP-established cost price analysis or the

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<sup>10</sup> See Protest of Award, February 20, 2008, at 4.

<sup>11</sup> See H.R.S. § 103D-701.

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or the relative weighting of pricing fails.<sup>12</sup> The petitioner may not raise in its protest any RFP-established cost price issues leading to the procurement officer's decision to award the contract to Hart.

Alternatively, if the petitioner may raise the RFP's price content in the solicitation, including its application to the pricing of Hart's offer at this time, the petitioner's argument the procurement officer failed to exercise its duty to consider the reasonableness of Hart's price is misplaced at best. There are six good reasons.

First, and perhaps most important, Hawai'i law directs the "(a)ward shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals."<sup>13</sup> This standard requires a judgment be made of what is most important to the state.<sup>14</sup> The committee exercised its informed judgment and discretion when it recommended Hart to the procurement officer and he exercised his informed judgment when he awarded the contract to Hart.

Second, the RFP process for selecting the best voting machine system for the state of Hawai'i's voters elicited from four competent, experienced, and qualified vendors – Hart, Premier, petitioner ESS, and Dominion – adequate, reasonable, and representative prices that the Evaluation Committee, composed of each of the state's four county clerks, representatives of the handicap voter communities, and a representative from the OE (committee), could in its informed judgment consider when advising the OE's procurement officer. Hart's price for the 2008 election was \$6.6 million dollars; Premier's price was \$7.2 million dollars; ESS's price \$3 million dollars, and finally, Dominion did not qualify to submit a proposal to consider.

Third, the petitioner's claim concerning the price overlooks the point the price factor complies with state law. The state procurement code provides:

When applicable, cost shall be an evaluation factor. The proposal with the lowest cost factor must receive the highest available rating allocated to cost. Each proposal that has a higher cost factor than the lowest must have a lower rating for cost. The points allocated to higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price.<sup>15</sup>

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<sup>12</sup> See also *Clinical Laboratories of Hawai'i v. City & County of Honolulu, Department of Budget & Fiscal Services*, PCU 2000-8, December 17, 2000.

<sup>13</sup> See H.R.S. §103D-303 (g).

<sup>14</sup> See Haw. Admin. R. § 1-122-1.

<sup>15</sup> See Haw. Admin. R. § 3-122-52(d) (1) & (2).

This standard is incorporated into and implemented in the RFP. It provides, "The proposal offering the lowest cost price will be automatically allocated 15 points. The number of points assigned to the other proposals will be determined using the following formula:

$$\frac{\text{Lowest price (\$)} \times 15 \text{ points (maximum)}}{\text{Offeror's Proposal (\$)}} = \text{points}$$

Accordingly, the RFP consistently follows the pricing standard under state law.

Fourth, the petitioner derived the greatest benefit from the RFP's pricing determination as applied because, as the lowest bidder, it received the highest number of points (15) for the price factor, and Hart, the lowest number of points (5), calculated based on the same required identical objective and rational cost price analysis.

Fifth, the OE recognized factors other than price under the RFP were more important to the people of Hawai'i. This decision is authorized under law.<sup>17</sup> Nothing in the code mandates cost have the greatest weight or be the controlling factor. The weighing decision is left to the procuring agency. Here the OE determined the RFP's factors other than price totaled seventy-five (75) points,  $\frac{3}{4}$  of the total points an offeror could earn for its proposal, based on technical criteria of fifty (50) points and on-site demonstrations of twenty five (25) points.<sup>18</sup> The RFP's other factors including price totaled twenty-five (25) points,  $\frac{1}{4}$  of the total awardable, based on price of fifteen (15) points, implementation plan and schedule of five (5) points, and understanding the project of five (5) points.<sup>19</sup> This process led to the committee's recommendation to the procurement officer to accept Hart's proposal.

Sixth, and last, Hawaii law and administrative rule recognize that a request for proposal may recognize, incorporate, and weight in the judgment of the procurement official the relevant factors including, among others, price. The state procurement law so provides.<sup>20</sup> Here, the RFP includes price as a factor, but it is not necessarily the only factor or the most important factor.

For these reasons, the petitioner's argument the procurement officer ignored his affirmative duty to confirm the reasonableness of Hart's proposal price is not supported.

If the petitioner's pricing and reasonableness arguments are considered, its claim to be entitled to the contract fails. The value of Hart's proposal in relation to the petitioner's is in fact reasonable. Hart's first year cost is \$6.6 million. This cost is essentially the same as the annual

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<sup>16</sup> See RFP § 5.020, at 18.

<sup>17</sup> See Haw. Admin. R. § 3-122-52.

<sup>18</sup> See RFP § 5.050, at 18.

<sup>19</sup> *Id.*, at 19.

<sup>20</sup> See H.R.S. §103D-303 (g).

cost of each of the last two (2) state elections, \$5.4 million dollars for the 2004 election and \$5.9 million dollars for the 2006 election. Furthermore, Hart's proposal contained digital imaging technology, digital reading of ballots, large counter displays, primary ballot component that will allow for fewer invalidated ballots, large bin capacity, increased bin security, equipment refreshers (periodic replacement of hardware, ballot readers, PCs, networking devices, security components, and new technologies) for election night distribution procedures that can and should allow the state to obtain election results in a more accurate and timely manner. These significant elections day enhancements were not included in and would not be provided by ESS's proposal. The result is that Hart's proposal in fact offers, establishes, and provides more value added to the voters and state of Hawai'i than the petitioner's proposal would.

Finally, the petitioner claims the procurement officer did not require Hart to submit cost data to determine the sufficiency of its price. The petitioner argues the procurement officer "was legally obligated to obtain cost and pricing data related to Hart's proposed price."<sup>21</sup> Its argument overlooks Hart's proposal's contents that include cost data. Hart provided the procurement officer with a table listing "the unit costs of the hardware, software, and service components for the three Hart Voting System configuration options offered to the State (sic) of Hawaii,"<sup>22</sup> While this format may not have been the one ESS would use if it was submitting the data for Hart, this listing nevertheless included each item and its unit cost. This data enabled the procurement officer to determine the sufficiency of Hart's price.

## 2. Long-term Mishandling of Election Services through Unfair Evaluations Calculated to Favor Hart.

The petitioner argues the purchasing officer continued a long-term mishandling of election services through unfair evaluations calculated to favor Hart, citing alleged errors in the manner in which the committee members performed their duties. The petitioner's argument appears to ignore the state procurement regulations that describe the personnel who may be involved in the request for proposal evaluation process. Notably among these regulations is the authorization for information about the evaluation process to be disclosed to employees of government bodies.<sup>23</sup> This authorization on its face enables each county clerk participating on the committee to consult with the clerk's election staff members. The regulations authorized the county clerks to discuss the RFP with other state personnel.<sup>24</sup> The committee members had clear authority to discuss the RFP with county and state employees.

The petitioner, in addition to extra-committee consultations, lists what it believes constitute other representative samples of errors to support its allegation about the procurement

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<sup>21</sup> See Protest, at 6-8.

<sup>22</sup> See Hart Proposal, October 11, 2007, at 9-11.

<sup>23</sup> See Haw. Admin. R. § 3-122-45.01 (c).

<sup>24</sup> See Haw. Admin. R. § 3-122-45.01 (2)(c)(ii).

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officer.<sup>25</sup> The petitioner primarily presents a list of alleged actions by one or more committee members, including its claims of:

- (3) application of "evaluation factors not announced in the RFP;"
- (4) "erroneously deduct(ing) points from ES&S;"
- (5) "Hart's proposal failing to meet (the RFP criteria) or had obvious deficiencies (and) failed to deduct points from Hart;" and
- (6) committee's "indifference to (ES&S information submitted) demonstrated procurement officer's failure to (provide each offeror) fair and equal treatment with respect to any opportunity for discussion and revision of proposals required by HRS §103D-303(f).<sup>26</sup>

Mindful of the petitioner's claims, no reasonable material basis exists for the procurement officer to find any reasonable material committee action:

- (3) *misapplying* or using evaluation factors not announced in the RFP;
- (4) deducting erroneously points from ESS;
- (5) awarding to Hart's proposal more points than its proposal warranted or failing to deduct points for its equipment's deficiencies; and
- (6) showing indifference to ESS and demonstrating unfair and unequal treatment "with respect to any opportunity for discussion and revision of proposals required by HRS §103D-303(f).<sup>27</sup>

Moreover, the petitioner ignores in its alleged use of inappropriate standards that the RFP informs that all relevant county, state, and federal laws would apply. This appears in the RFP.<sup>28</sup> These laws include the Americans with Disabilities Act (ADA), among others.

This voting machine equipment RFP procurement process constituted a dynamic evaluative process. The petitioner's claims, even if accurate, document well the human process the committee members performed in exercising their best judgment about each offeror's proposal under the RFP. This process, like any request for proposal evaluation process, is not an exact science; it involves human discretion and judgment. In addition, the RFP process, like any request for proposal process, is not required to be perfect but only reasonable and not arbitrary or capricious. Here, the committee as a body exercising its informed and sound judgment, reasonably and appropriately applied to the petitioner's proposal the RFP-established reasonable and appropriate lawful criteria. In doing so, the committee acted in a reasonable and not an arbitrary and capricious manner when it determined its recommendation to the OE's procurement officer for decision.

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<sup>25</sup> See "Protest of Award," February 20, 2008, at 12.

<sup>26</sup> *Id.*, at 13, 14, 16, and 19, respectively.

<sup>27</sup> *Id.*, at 19.

<sup>28</sup> See RFP, § 2.020, at 9.

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Finally, the petitioner chronicles its view of alleged bad faith actions against ESS. It begins with claimed "bad faith actions against ES&S," commencing with a claimed July 14, 2004, Honolulu Advertiser article,<sup>29</sup> continuing for 4 pages.<sup>30</sup> *Carl*, supra at footnote 1, establishes the legal authority about the conduct and actions that constitute bad faith in the state procurement process. The October 21, 2004, hearing decision the petitioner cites did not find either the SPO or the OE acted in bad faith toward the petitioner in favor of Hart. Moreover, the petitioner presents no evidence that the SPO's or the procurement officer Rex Quidilla's or any committee member's conduct or actions constitute bad faith in this proceeding under state law.

For these reasons, the petitioner's argument the purchasing officer continued a long-term mishandling of election services through unfair evaluations calculated to favor Hart lacks merit. The petitioner's protest on the grounds of bad faith is denied.

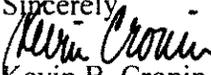
### III. CONCLUSION

Based on the foregoing reasons, the protest of Election Systems & Software (ESS), dated February 20, 2008, is respectfully denied.

### IV. NOTICE

ESS, your client, is hereby informed it has the right to an administrative hearing for which it is required to submit a request directly to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, within seven (7) calendar days after this final decision pursuant to Haw. Admin. R. Ch. 3-126, Subchapter 5.<sup>31</sup>

Further, ESS is informed it is required to inform Administrator Aaron Fujioka, State Procurement Office, within seven (7) calendar days after this decision if an administrative appeal will be filed.

Sincerely,  
  
Kevin B. Cronin  
Procurement Officer

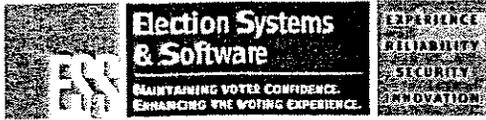
cc: Patricia T. Ohara, Esq.  
Deputy Attorney General

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<sup>29</sup> *Id.*, at 20.

<sup>30</sup> *Id.*, at 20-24.

<sup>31</sup> Haw. Admin. R. Ch. 3-126, Subchapter 5 can be accessed at [www.spo.hawaii.gov](http://www.spo.hawaii.gov) and clicking on "Administrative Rules Chapter 103D", then on Chapter 3-126, "Legal and Contractual Remedies."



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November 28, 2007

Attn: Scott Nago  
Office of Elections  
802 Lehua Avenue  
Pearl City, Hawaii 96782

RE: ES&S HI BAFO Response - RFP #06-047-SW

Dear Mr. Nago:

Thank you for your invitation to participate in the State of Hawaii's Best and Final Offer process. The attached pages include ES&S' response to State of Hawaii Best and Final Offer questions issued November 21, 2007. Our submission includes ES&S responses to all issued questions and revised pricing.

Please contact me or Lou Dedier should you have any questions or require any clarification for our submission, and thank you for your time and consideration.

**CONTACT INFORMATION**

Matthew E. Nelson  
Senior Vice President – Domestic Sales

Lou Dedier  
Vice President, General Manager – Western Region  
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Very Respectfully,

Matthew E. Nelson

## ES&S State of Hawaii BAFO Response RFP #06-047-SW

**1. Will the DS200 be available for deployment in the 2008 Elections?**

**ES&S RESPONSE**

Yes. The DS200 is currently in production at ES&S' manufacturing facility.

**2. What is the weight of the DS200?**

**ES&S RESPONSE**

The weight of the DS200 is approximately 25 pounds.

**3. Is the DS200 digital scan precinct ballot counter accessible for voters who are blind and visually impaired?**

**ES&S RESPONSE**

Yes. When used in conjunction with the DS200 Universal Voting Console (UVC), or other approved accessibility devices such as the ES&S iVotronic or ES&S AutoMARK Voter Assist Terminal, the DS200 provides full support for voters who are blind or have low vision.

**4. Are all DS200 components VVSG 2005 certified (e.g. cut and drop box and any other devices that need to be attached to the machine)?**

**ES&S RESPONSE**

DS200 system hardware, without the Universal Voting Console, has been tested as an individual system component to 2005 standards and is currently undergoing full system certification to 2002 standards as part of ES&S' Unity 4.0 voting system. Full system certification of the DS200 and related hardware and software to VVSG 2005 standards is expected in 2008. Full certification of the DS200 UVC is also expected in 2008. Certification of the DS200 was successfully completed by the Florida Department of State in August 2007.

**5. What is the alternative option if the DS200 does not get certified by EAC?**

**ES&S RESPONSE**

ES&S is an industry leader in developing and certifying compliant voting systems. ES&S has fully supported and adhered to Federal Voluntary Voting System Guidelines, from system design to final production, since the initial draft of Federal system guidelines were released in 1990.

Based on our 15-year history of successful voting system certifications and existing relationships with leading system test laboratories, we are confident that the DS200 solution will be certified to 2005 EAC standards. ES&S used the 2005 and 2007 voting system standards to define requirements during product design. In the unlikely event that the DS200 does not receive certification, the State of Hawaii is free to approve the use of any system based on guidelines developed by the State like the DS200 using a similar approach as the State of Florida or extend the use of 2002 certified systems such as the Model 100 precinct based voting system.

**6. Is there an audio output and headphones for the visual display results of the scanned ballot to enable voters who are blind or visually impaired to independently know the outcome of their scanned ballot e.g. was it accepted?**

#### **ES&S RESPONSE**

Planned enhancements for the DS200 and UVC provide audio channels and headphone jacks that may be used to review an audio summary of all ballot selections. A voter can review the audio ballot summary at the UVC after completing ballot selections and after the voter's marked ballot is inserted into the DS200. After the DS200 finishes playing the audio ballot, the voter can accept and cast the ballot or reject the ballot for editing from the UVC. If the voter chooses to reject the accessible, UVC-based voted and marked ballot, the ballot must be spoiled and a new ballot marked at the UVC station.

When used in conjunction with devices approved to support voters who are blind or have low vision, such as the ES&S iVotronic or ES&S AutoMARK, the ES&S voting system provides both audio and display ballot summaries.

**a. Can the volume and speed of speech be increased and decreased?**

#### **ES&S RESPONSE**

Yes. Audio ballot volume is fully adjustable on the DS200 UVC panel, iVotronic and the ES&S AutoMARK. Audio ballot tempo control is adjustable with the DS200 UVC panel and the ES&S AutoMARK.

**b. Does the visual ballot screen go blank with audio output?**

#### **ES&S RESPONSE**

The DS200 does not output a ballot display during audio voting at this time.

Both the ES&S iVotronic and ES&S AutoMARK include options for blanking or not blanking the screen while voting an audio ballot.

c. Can the font size of the visual ballot screen be increased? If so, at how many settings e.g. one option as found on the AutoMark?

#### ES&S RESPONSE

For enhanced privacy and security, the DS200 does not currently output a ballot display during audio voting. Voters with low vision may use the UVC audio ballot to privately mark ballot selections. Ballots marked using the UVC will reflect voter selections but will be marked in manner that does not violate the voter's privacy. Voters can validate selections from the DS200 prior to casting. Ballot summaries and cast ballot confirmation may be provided through the UVC and DS200 audio channels.

The ES&S iVotronic and ES&S AutoMARK both support one ballot zoom level. The ballot zoom for both systems increases ballot text to the sizes specified in the Help America Vote Act and Voluntary Voting System Guidelines.

d. Is there a reverse image option (light text on dark background) as found on the AutoMark?

#### ES&S RESPONSE

ES&S carefully selected DS200 screen colors to meet all VVSG requirements for contrast and display without requiring adjustment by the voter or poll worker.

The ES&S iVotronic and ES&S AutoMARK both support a high-contrast, black and white ballot display for voters who have difficulty distinguishing contrast.

**7. Are there plans to upgrade the present ballot box for the M100?**

#### ES&S RESPONSE

Yes. An enhanced, plastic ballot box is available for both the DS200 and Model 100. ES&S' new ballot box features an increase in storage capacity over the existing Model 100 metal ballot box from a maximum of 2800 ballots to up to 5000 ballots, eases portability with the addition of in-line skate wheels and a telescoping handle, and provides enhanced security with uniquely shaped key locks and sturdy construction.

**8. Please provide pricing for the AutoMark to be used in conjunction with the M 100?**

#### ES&S RESPONSE

Pricing for the AutoMARK to be used in conjunction with the M100 would be \$1,284.00 per unit for years 2008 through 2016 and \$453.00 per unit for 2018. This is based on ES&S providing 460 units per election. Please see the attached for details concerning an M100, AutoMARK, and M650 solution.

**9. Why is the ballot quantity decreased with the use of the DS200? Please provide pricing for the full complement of ballots.**

**ES&S RESPONSE**

The DS200 utilizes a flexible, state-of-the-art digital image manager that provides greater density and capacity for contests and races on the ballot. As a result, ballot space is utilized more efficiently and the gross number of required ballot pages can be reduced.

Pricing included in our bid response reflected 11 or 14-inch ballot lengths at \$0.35 per ballot with the following specifications:

- Two sided
- Two colors
- Stubs
- Numbering
- Packaging and shrink wrapping

If the State of Hawaii opts to use a longer ballot, the prices would be:

- **17-inch:** \$0.42 per ballot
- **19-inch:** \$0.49 per ballot

**— Note -**

Includes the same specifications referenced above for 11 and 14-inch ballots

**10. What is the unit cost to produce ballots?**

**ES&S RESPONSE**

ES&S' pricing was based on a unit cost of \$0.35 cents per ballot for 11 or 14-inch ballot lengths. Prices for longer ballots are specified in our response to question 9 above.

**11. Can the M100 be used for the entire term of the contract? If so, please provide pricing?**

**ES&S RESPONSE**

Yes, if the State of Hawaii opts to use a ballot tabulation device that meets 2002 FVSS beyond 2008, ES&S could continue providing parts and maintenance for the M100 for Hawaii for the term of the contract. Should the State of Hawaii elect to use the M100 for the entire term of the contract, the price would be \$199.00 per unit for years 2008 through 2016 and \$70.00 per unit for 2018. This is based on ES&S providing 460 units per election. Please see the attached for details concerning an M100, AutoMARK, and M650 solution. See the additional pricing attached to this response for detailed pricing through 2018.



**12. Can the M550 be used for the entire term of the contract? If so, please provide pricing?**

**ES&S RESPONSE**

Due to revised hardware requirements included in the 2005 VVSG, the M550 cannot be used for the entire term of the contract. The M550 has reached its end of model life and is being replaced by the ES&S Model 650 high-speed central ballot tabulator, which provides greater flexibility and a broader feature set than the Model 550. ES&S has no plans to redesign the Model 550 to meet 2005 VVSG requirements and cannot provide parts and service for these tabulators for the term of Hawaii's contract.

**13. Please provide additional information on electronic security features that may exist between Unity and voting devices and within Unity itself. Are any additional security features planned and if so, for what voting equipment? Will Hawaii be allowed to utilize equipment that may contain enhanced security features?**

**ES&S RESPONSE**

Yes. ES&S will make any updated product security features available to the State of Hawaii. All ES&S products are independently tested and evaluated for potential software and hardware security improvements. The list of ES&S planned security enhancements is lengthy, but highlights include:

- Enhanced security through the implementation of asymmetric keys with NIST approved AES 256 bit encryption, and PKI encryption
- Adding digital signatures using 2048 bit EC-DSRA asymmetric PKI on all critical data coming to and from ES&S tabulators.
- Increased password strength
- Improved password and key management tools within Unity software – allowing authorized users to update or change passwords for election hardware

Each product in ES&S' voting system features specific security tools and procedures that contribute to the overall security of the voting system. The following table provides general descriptions of security features and procedures for each product proposed for the State of Hawaii.

PRODUCT	SECURITY FEATURES AND PROCEDURES
DS200	<ul style="list-style-type: none"> <li>• Keyed locks protect ballot compartments, the tabulator platform, ballot slot, USB memory stick, and all other critical system components.</li> <li>• Ballot box includes two independent, lockable compartments</li> <li>• Lockable emergency ballot bin stores contested ballots for resolution board review.</li> <li>• System can print a cancellation stamp on valid cast ballots to prevent accidental dual scanning.</li> <li>• Environmentally friendly, internal lithium ion battery requires no special maintenance</li> <li>• Seamless transition from AC to DC power.</li> <li>• Check and charge batteries without turning the unit on.</li> <li>• Stores all votes and election configuration files to an external USB memory stick (up to 1 GB).</li> </ul>



PRODUCT	SECURITY FEATURES AND PROCEDURES
Model 100	<ul style="list-style-type: none"> <li>• The front panel of the Model 100 locks to prevent unauthorized access to the internal components of the scanner, the ballot box and the PC Card that contains the ballot definition.</li> <li>• System functions will not execute if election workers do not configure the system properly.</li> <li>• After the polls open, access to the keypad that changes the operating mode of the scanner remains locked until the polls are officially closed.</li> <li>• The hardware circuitry of the Model 100 does not have the ability to overwrite or change the election definition or system firmware once a precinct official installs the election program.</li> <li>• The Model 100 requires the retention of paper ballots and proper election procedures by election officials as a redundant means of providing system security.</li> </ul>
Model 650	<ul style="list-style-type: none"> <li>• The security of the Model 650 resides within its election definition. No data other than the current election ID data may be added to or updated.</li> <li>• The election definition, as well as the control program for the scanner, are contained on a zip disk. After the control program is installed, the hardware circuitry has no capability to write or otherwise change the program.</li> <li>• The scanner's design does not include any form of data entry keypad that can be used to alter programming. All operator functions are limited to the machine controls provided on the front panel.</li> <li>• The system has a locking rear panel that prevents unauthorized access to the internal components.</li> <li>• The Model 650 system stores vote totals in nine separate locations within the memory. The removable media is stored in a proprietary format that is recoverable only by the reporting system.</li> </ul>
Election Data Manager	<ul style="list-style-type: none"> <li>• Audit Manager runs in the background of most Unity programs and provides system security for Election Data Manager.</li> <li>• Passwords set in Audit Manager protect Election Data Manager. Users can deactivate the password function in Audit Manager.</li> <li>• Audit Manager employs user IDs to enforce access levels.</li> <li>• Audit Manager tracks and reports all user actions in Data Manager based on user ID.</li> <li>• System security for Election Data Manager limits casual access to sensitive election information but Data Manager security also depends on good security at the election office. Officials should limit access to Data Manager and election databases to authorized personnel only. Officials should also make sure that the PC running Data Manager remains secure before and after an election. Officials ensure that databases are secure and retain all original election materials used to create the election database.</li> </ul>
Audit Manager	<ul style="list-style-type: none"> <li>• Audit Manager supplies system security for most Unity applications.</li> <li>• Audit Manager installs with Election Data Manager and runs in the background of most Unity software.</li> <li>• Election officials use Audit Manager to manage user profiles for Unity software and set access levels for each user. For example, officials can use Audit Manager to create a user that can enter database information in Data Manager but not design ballots in Image Manager. Election officials can activate or deactivate password access in Audit Manager.</li> <li>• Audit Manager records all user actions in supported Unity software as a continuous audit log. Election officials can format and print reports based on the log.</li> </ul>

PRODUCT	SECURITY FEATURES AND PROCEDURES
Digital Scan Image Manager	<ul style="list-style-type: none"> <li>• Audit Manager runs in the background of most Unity software and provides security for Image Manager.</li> <li>• Users can deactivate Image Manager passwords in Audit Manager.</li> <li>• Audit Manager employs user IDs to limit user access.</li> <li>• Audit Manager tracks and reports all user actions in Image Manager based on user ID.</li> <li>• ES&amp;S designed Reporting Manager to limit casual access to sensitive election information but system security also depends on sound practices at the election office. Officials should limit access to Image Manager and ballot layouts to authorized personnel only. Officials should also make sure that the PC running Image Manager remains secure before and after each election. Access to ballot layouts should be regulated and officials should carefully inspect ballots from the printer to make sure finished ballots match the original ballot design. Officials should save all original election materials used to create ballot layouts.</li> </ul>
Election Reporting Manager	<ul style="list-style-type: none"> <li>• Election Reporting Manager provides a user/security system with space to store up to 50 user profiles and access rights in the CNTLFILE.V5 file.</li> <li>• Election Reporting Manager includes a standalone program (UERMMNGR.COB) that allows officials to add and maintain user records. If the election administrator does not add users to the standalone program, Election Reporting Manager will not enable user access features. If the election administrator does add user records, Reporting Manager will require a password to access the program and alter access privileges to menus based on the user's settings.</li> <li>• Depending on a user's access rights, Reporting Manager limits selections in the <b>Main</b> menu, the <b>Update</b> menu and the <b>Miscellaneous</b> menu. Unavailable menu selections appear in gray.</li> <li>• Reporting Manager saves a record of all user actions to the system audit log. The ID of the logged in user also appears in the log.</li> <li>• The election administrator can activate or deactivate user access controls in UERMMNGR.COB.</li> <li>• The UERMMNGR.COB program requires an administrative password for access.</li> <li>• System security for Reporting Manager limits casual access to system files and election results but security also depends on sound practices at the election office. Officials should limit access to Reporting Manager and election results to authorized personnel only. Election officials should also make sure that the PC running Reporting Manager remains secure before and after each election. Access to election results generated in Reporting Manager should be regulated and officials should compare election reports generated in Reporting Manager to scanner totals in order to make sure that final results are consistent with the results from ballot scanning equipment.</li> <li>• Officials should retain all paper ballots and election results disks, PEBs or PC Cards to ensure system security.</li> </ul>

PRODUCT	SECURITY FEATURES AND PROCEDURES
Data Acquisition Manager	<ul style="list-style-type: none"> <li>• Data Acquisition Manager programs contain the option to assign a password for program activation and a program configuration password.</li> <li>• Acquisition Manager records a log of all user actions and connection activity.</li> <li>• All transmissions that occur between the DAM Remote program or precinct scanners and the DAM Host program use a proprietary ES&amp;S protocol that includes private data formats and data checks. The protocol is not compatible with any standard communications protocol. If a standard PC with a modem attempts to link to a server, or if a precinct scanner mistakenly calls a standard modem, the scanner will momentarily link with the PC but will not transfer usable information.</li> <li>• Precinct workers must access Acquisition Manager with an eight-character password before the program allows data transmission.</li> <li>• A password must be entered before a user can cancel either the Host or Modem Manager applications ensuring that connections cannot be severed before data transmission is complete.</li> <li>• ES&amp;S designed Data Acquisition Manager to limit casual access to election information but security also depends on the adherence to best practices at the election office and remote counting sites. Officials should limit access to Acquisition Manager and to stored scanner results to authorized personnel only. Officials should also make sure that the PC running Data Acquisition Manager remains secure before and after each election and should compare final election results to totals generated directly from scanners to ensure that data was not tampered with during the results transfer.</li> </ul>
Hardware Programming Manager	<ul style="list-style-type: none"> <li>• Election administrators can enable password controls in Programming Manager and store the passwords in CNTLFILE.DAT. If the administrator enables passwords, users must enter passwords the program will activate.</li> <li>• Hardware Programming Manager records an audit log of all actions taken within the program. Programming Manager stores user operations in an encrypted log file created specifically for the election being generated. Users can print the log from the <b>Utilities</b> menu.</li> <li>• ES&amp;S designed Programming Manager to limit casual access to election information but system security also depends on the adherence to best practices at the election office. Officials should limit access to Programming Manager and election definitions to authorized personnel only. Officials should also ensure that the PC running Programming Manager remains secure before and after each election and check the ballot positions for candidates on the finished ballot to those specified in Hardware Programming Manager.</li> </ul>

Table 1 Security features and procedures

**14. Please provide clarification of whether an IVotronic is capable of: 1) providing a pre-voting review screen of all party candidates (in Primary election) prior to selecting a party; 2) providing the opportunity to change a party after initial selection without need for PEB/precinct official intervention**

**ES&S RESPONSE**

Yes, for open primary elections, the voter may review the contents of all ballots prior to selecting a party on the IVotronic. Once a voter selects a party, a poll worker must cancel the ballot and reinitialize the system in order for the voter to change a party selection.



### Computer Based Training

ES&S sees great value in adding a Computer-Based Training (CBT) solution to our Best and Final Offer. ES&S would like to include its online training for election workers to the State of Hawaii BAFO for no additional fee. The State of Hawaii would be responsible for annual licensing costs in years 2010-2018 at \$46,826. Choosing the ES&S CBT solution benefits the State of Hawaii by ensuring that your voting system vendor and your training provider have an existing relationship to facilitate exchange of technical product and procedural information.

### ES&S Additional Pricing Detail

#### Solution 4: Model 100, ES&S AutoMARK, and Model 650 for 2008 through 2018

	Optical Scan	DRE	Absentee Mail	Total Amount
Election Year 2008	\$2,567,548.50		\$477,542.50	\$3,045,091.00
Election Year 2010	\$2,567,548.50		\$477,542.50	\$3,045,091.00
Election Year 2012	\$2,567,548.50		\$477,542.50	\$3,045,091.00
Election Year 2014	\$2,567,548.50		\$477,542.50	\$3,045,091.00
Election Year 2016	\$2,567,548.50		\$477,542.50	\$3,045,091.00
Election Year 2018*	\$2,504,489.50		\$396,920.50	\$2,901,410.00
<b>GRAND TOTAL:</b>				<b>\$18,126,865.00</b>

#### Pricing Footnotes:

1. The 4.712% excise tax has not been included and is additive to our proposed annual fees.
2. ES&S has included a \$50,000 annual allowance to be applied towards the Voter Training conducted before each election.



Solution 4; Model 100, ES&S AutoMARK, and Model 650 for 2008 through 2018.

Description: Equipment	Qty	Unit Price		Polling Place System Annual Fee		Absentee System Annual Fee		Total System Annual Fee	
		2008 - 2016	2018	2008 - 2016	2018	2008 - 2016	2018	2008 - 2016	2018
<b>Polling Place System:</b>									
Model 100 Precinct Scanner	405	\$199.00	\$70.00	\$80,595.00	\$28,350.00	\$80,595.00	\$28,350.00	\$80,595.00	\$28,350.00
ES&S AutoMARK Voter Assist Terminal	405	\$1,294.00	\$453.00	\$528,020.00	\$183,455.00	\$528,020.00	\$183,455.00	\$528,020.00	\$183,455.00
<b>Absentee Walk-In System: (Equipment Also Used for Election Day Back-Up)</b>									
Model 100 Precinct Scanner	55	\$199.00	\$70.00	\$10,945.00	\$3,850.00	\$10,945.00	\$3,850.00	\$10,945.00	\$3,850.00
ES&S AutoMARK Voter Assist Terminal	55	\$1,294.00	\$453.00	\$70,620.00	\$24,915.00	\$70,620.00	\$24,915.00	\$70,620.00	\$24,915.00
<b>Absentee Mail System:</b>									
Model 650 Absentee Mail Scanner	10	\$16,123.00	\$4,279.00	\$161,200.00	\$42,790.00	\$161,200.00	\$42,790.00	\$161,200.00	\$42,790.00
<b>Ancillary Services per Appendix C:</b>									
Project Management	1,354	\$781.00	\$949.00	\$877,433.00	\$1,084,187.00	\$152,951.00	\$190,749.00	\$1,030,394.00	\$1,294,946.00
Technical and Operational Support		Included	Included	Included	Included	Included	Included	Included	Included
On-Site Programming		Included	Included	Included	Included	Included	Included	Included	Included
Preventative Maintenance		Included	Included	Included	Included	Included	Included	Included	Included
Inventory Log		Included	Included	Included	Included	Included	Included	Included	Included
Testing		Included	Included	Included	Included	Included	Included	Included	Included
Training Support-OOE and County Staff		Included	Included	Included	Included	Included	Included	Included	Included
Training Support-Poll Worker Trainee Training		Included	Included	Included	Included	Included	Included	Included	Included
Training Support-Election Day Official Training		Included	Included	Included	Included	Included	Included	Included	Included
Training Support-Voter Training	1	\$50,000.00	\$50,000.00	\$42,500.00	\$42,500.00	\$7,500.00	\$7,500.00	\$50,000.00	\$50,000.00
Logistical Support (i.e. Manuals)	1	Included	Included	Included	Included	Included	Included	Included	Included
Acceptance Testing	1	\$9,720.00	N/A	\$9,720.00	N/A	N/A	N/A	\$9,720.00	N/A
Modifications to Tested System (Included in Preventative Maintenance)	Included	Included	Included	Included	Included	Included	Included	Included	Included
Delivery Services	1	\$129,903.00	\$152,240.00	\$113,503.00	\$146,240.00	\$16,000.00	\$16,000.00	\$129,903.00	\$152,240.00
Storage Services	1	\$379,353.00	\$479,949.00	\$329,353.00	\$429,949.00	\$50,000.00	\$50,000.00	\$379,353.00	\$479,949.00
Software	1	\$105,234.00	\$130,280.00	\$93,150.00	\$123,206.00	\$7,084.00	\$7,084.00	\$105,234.00	\$130,280.00
Results Accumulation Network	1	\$17,993.00	\$3,697.00	\$17,993.00	\$3,697.00	N/A	N/A	\$17,993.00	\$3,697.00
Ballots (1,050,000 Model 100, ES&S AutoMARK, and Absentee Ballots for 2008 through 2018)	1	\$367,500.00	\$367,500.00	\$314,702.50	\$314,702.50	\$52,797.50	\$52,797.50	\$367,500.00	\$367,500.00
Supplies	1	\$111,524.00	\$139,429.00	\$91,524.00	\$109,429.00	\$39,000.00	\$39,000.00	\$111,524.00	\$139,429.00
<b>Totals</b>				<b>\$2,567,648.50</b>	<b>\$2,504,489.50</b>	<b>\$477,542.50</b>	<b>\$396,920.50</b>	<b>\$3,045,091.00</b>	<b>\$2,901,410.00</b>





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OFFICE OF ELECTIONS

December 13, 2007

'07 DEC 14 P12:20

Attn: Scott Nago  
Office of Elections  
802 Lehua Avenue  
Pearl City, Hawaii 96782

RE: ES&S HI BAFO Response - RFP #06-047-SW

Dear Mr. Nago:

Thank you for your invitation to participate in the State of Hawaii's Best and Final Offer process. The attached page includes ES&S' response to the State of Hawaii's additional inquiries issued December 6, 2007.

Please contact me should you have any questions or require any clarification for our submission, and thank you for your time and consideration.

**CONTACT INFORMATION**

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Very Respectfully,

Matthew E. Nelson

**EXHIBIT B**

ES&S State of Hawaii Additional Inquiry Response  
RFP #06-047-SW

1. With the Election Assistance Commission reviewing the next iteration of the Voluntary Voting System Guidelines, which of your voting equipment would need to be upgraded to meet these requirements? What would the cost be to the State?

ES&S RESPONSE

DS200

ES&S designed the DS200 using the standards in the 2005 VVSG, as they exist today. The DS200 hardware has been successfully tested by a voting system testing laboratory for compliance with both the VVSG 2002 and the VVSG 2005 hardware standards. These test results have been filed with the EAC and are currently under review for federal certification.

ES&S is very active and involved in the review of the next iteration of the VVSG. We have specifically designed the DS200 with these requirements in mind, architecting security, hardware, and software components of the platform to accommodate these latest and evolving standards. While we are confident that the DS200 will meet these standards, they are still under development. Thus it is difficult for ES&S to know with certainty the nature and extent of any changes that will be needed to ultimately comply with such requirements.

MODEL 100 AND MODEL 650

Enhancing the Model 100 for compliance with the 2005 VVSG requires a significant system re-design to comply with 2005 guidelines. As a result, ES&S does not intend to enable the Model 100 to be 2005 compliant.

The Model 650 also requires significant enhancements to ensure compliance with the 2005 standards. As a result, ES&S does not intend to enable the Model 650 to be 2005 compliant. In response to this, ES&S is currently developing a 2005 VVSG compliant high-speed central count imaging system that will replace the Model 650, and operate with the DS200 precinct count system. ES&S expects this system to be ready in 2009 with prototypes available in late 2008.

INKAVOTE PBC

The InkaVote PBC, developed by Unisyn Voting Solutions, fully complies with 2002 VVSG standards and is currently undergoing review for compliance with 2005 standards. Unisyn estimates completion of certification testing to 2005 standards in 2008.

ADDITIONAL COSTS

ES&S' pricing for the State of Hawaii already includes all costs for the supply and implementation of voting system equipment proposed in our response. ES&S will not pass the costs to the State incurred in connection with federal certification to the 2005 VVSG. Should the State request system modifications that are unique to the State of Hawaii, ES&S will perform such modifications at terms and pricing to be mutually agreed upon by the parties.



ALSTON HUNT FLOYD & ING  
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Attorneys for Petitioner  
ELECTION SYSTEMS & SOFTWARE, INC.

DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2008 MAR -7 P 3:54

HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

ELECTION SYSTEMS & SOFTWARE,  
INC.,

Complainant,

v.

KEVIN CRONIN, OFFICE OF  
ELECTIONS; DESIGNEE OF AARON  
FUJIOKA, ADMINISTRATOR, STATE  
PROCUREMENT OFFICE, STATE OF  
HAWAII,

Respondent.

No. \_\_\_\_\_

**REQUEST FOR HEARING;  
EXHIBIT "A"; CERTIFICATE OF  
SERVICE**

Hearing

Date : \_\_\_\_\_

Time : \_\_\_\_\_

Officer: \_\_\_\_\_

**REQUEST FOR HEARING**

Pursuant to Hawaii Revised Statutes ("HRS") §§ 103D-701 and 709  
and Hawaii Administrative Rules ("HAR") §§ 3-126-42 and 3-126-59, Election  
Systems & Software, Inc. ("ES&S"), by and through its attorneys, Alston Hunt

ALSTON HUNT FLOYD & ING  
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OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

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KEVIN CRONIN, OFFICE OF  
ELECTIONS; DESIGNEE OF AARON  
FUJIOKA, ADMINISTRATOR, STATE  
PROCUREMENT OFFICE, STATE OF  
HAWAII,

Respondent.

No. \_\_\_\_\_

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EXHIBIT "A"; CERTIFICATE OF  
SERVICE**

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Date : \_\_\_\_\_

Time : \_\_\_\_\_

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**REQUEST FOR HEARING**

Pursuant to Hawaii Revised Statutes ("HRS") §§ 103D-701 and 709  
and Hawaii Administrative Rules ("HAR") §§ 3-126-42 and 3-126-59, Election  
Systems & Software, Inc. ("ES&S"), by and through its attorneys, Alston Hunt

Floyd & Ing, hereby requests administrative review of the decision of the Procurement Officer of the Office of Elections, State of Hawaii, dated March 3, 2008, attached hereto as Exhibit "A." ES&S requests that the matter be scheduled for hearing and, if appropriate, disposition upon submission of memoranda of law in lieu of a hearing pursuant to HAR § 3-126-68(d).

**I. BACKGROUND**

The State of Hawaii Office of Elections ("OE")<sup>1</sup> sought proposals to provide a voting equipment system for five elections cycles, with an option to extend for a sixth cycle, or, through 2018. The solicitation was designated Request for Proposal No. RFP -06-047-SW: "Sealed Offers For A New Leased Voting Equipment System for the 2008, 2010, 2012, 2014 and 2016 Primary, General and Special Elections, Department of Accounting and General Services, Office of Elections" ("RFP"). ES&S was among the offerors whose proposals were considered for award.

On or about January 31, 2008, the OE gave notice of contract award to Hart InterCivic, Inc. ("Hart") for contract award in the amount of \$52,875,944. Hart's offered price was nearly three times more than ES&S' proposed price, \$18,126,865, to perform the same work. ES&S was the next highest ranked offeror after Hart.

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<sup>1</sup> The Administrator of the State Procurement Office delegated the authority to award the contract to the acting Chief Elections Officer, Rex Quidilla. The current Chief Elections Officer, Kevin Cronin, who took office on February 1, 2008, acted as procurement officer to decide the protest.

ES&S requested a debriefing on the procurement, which took place on February 12, 2008. On February 20, 2008 ES&S filed a timely protest of award. The ES&S protest alleged, *inter alia*, that

(1) The OE ignored its affirmative duty to perform a cost and pricing analysis of Hart's price to confirm the reasonableness of Hart's proposal price as mandated by applicable procurement rules;

(2) The OE committed numerous errors and violations of law in the evaluation of the proposals; and

(3) The State has engaged in a longterm pattern and practice of bad faith conduct favoring Hart to ES&S' detriment.

On March 3, 2008, the procurement officer denied ES&S' protest.

See Ex. A.

ES&S is aggrieved as set forth below.

## **II. ES&S' GRIEVANCES AND LAWS AND RULES INVOLVED**

The hearings officer shall decide whether the determinations of the procurement officer were in accordance with the statutes, rules and the terms and conditions of the solicitation and shall order such relief as may be appropriate under HRS Chap. 103D. HRS § 103D-709(f). The principles of law and administrative rules upon which ES&S intends to rely include but are not limited to the following:

### **A. Failure to Perform Cost and Pricing Analysis Violates the Law**

The contract file, admissions by the OE at debriefing and the procurement officer's decision demonstrate that no cost and pricing analysis

was performed. This fatal flaw in the procurement process invalidates the award as follows:

(1) The OE was legally obligated to perform a cost and pricing analysis of the Hart price and failed to do so. HRS § 103D-312; HAR Title 3, Subchapter 15 (HAR § 3-122-121 et seq.); HAR § 3-122-57

(2) The OE violated the Procurement Code and rules that were designed to protect the public from unreasonably high prices by providing "increased economy . . . and maximizing best value to the fullest extent practicable." HAR § 3-120-1(a)(5); Carl Corp. v. State of Hawaii, 85 Hawaii 431, 456, 946 P.2d 1, 26 (1997).

(3) The OE failed to comply with the requirement that "The procurement officer shall require cost or pricing data or both in support of the following . . . (1) Any contract, resulting from competitive sealed proposals . . . expected to exceed \$100,000. . . ." HAR § 3-122-123. The exceptions to this requirement did not apply. HAR § 3-122-124.

(4) The OE failed to apply cost or pricing data as required by HAR §§ 3-122-128, 3-122-129, 3-122-130; HAR Chap. 3-123.

(5) The OE failed to reject the unreasonably priced Hart proposal as required under HRS § 103D-308; HAR § 3-122-97.

**B. The OE Committed Numerous Errors and Violations of Law in the Evaluation of Proposals**

The OE failed to comply with Procurement Code requirements imposed on the evaluation process, as shown in the contract file and admissions by the OE at debriefing:

(1) Evaluation Committee members were permitted to (and did) consult with persons outside the evaluation committee. The evaluations were therefore not performed by qualified and appointed committee members as required by HAR § 3-122-45.01.

(2) The appointed evaluation committee members applied evaluation factors not announced in the RFP. HRS § 103D-303(g).

(3) The evaluation committee erroneously deducted points from ES&S.

(4) Despite the failure of Hart's proposal to meet the criteria in the RFP and its other deficiencies, the evaluation committee failed to deduct points from Hart in accordance with the terms of the solicitation.

(5) The procurement officer and the evaluation committee failed to consider information submitted by ES&S in its responses to questions and in its Best and Final Offer, and further failed to afford ES&S fair and equal treatment with respect to any opportunity for discussions and revision of proposals as required by HRS § 103D-303.

**C. OE Has Engaged in a Documented and Longstanding Course of Conduct Favoring Hart to the Detriment of ES&S**

ES&S presented a detailed history and supporting evidence of actions of the OE and the State Procurement Office ("SPO") in favor of Hart and against the interests of ES&S. The most egregious was the State's decision following ES&S' successful appeal of the SPO's decision rejecting ES&S' protest in 2004. The State decided to pay ES&S over \$132,000 in costs, rather than award ES&S the disputed contract, despite the administrative hearings officer's

express finding that ES&S should have received the award. The State's subsequent actions demonstrate the State has willfully disregarded its legal and regulatory obligations to ES&S' detriment. By their repeated refusal to comply with the Procurement Code and its rules, the State Procurement Office and the Office of Elections have acted against ES&S in "reckless disregard of clearly applicable laws or rules." HAR § 3-126-36 (c) (concerning "bad faith" determinations) and violations of the standards established by the Hawaii Supreme Court in Carl Corp., supra. Therefore, award of attorneys fees is warranted.

### **III. RELIEF SOUGHT**

ES&S respectfully requests that the administrative hearings officer determine:

- (1) Pursuant to HAR § 3-126-68(d), there is no dispute of fact and the parties may submit memoranda of law in lieu of a hearing;
- (2) An expedited decision is necessary and will be issued to prevent further prejudice to Complainant ES&S;
- (3) Resolicitation of the contract will delay urgent State requirements and is not in the public interest;
- (4) Based on all information presented, the award to Hart is invalidated and the contract awarded to Hart should be terminated pursuant to HRS § 103D-707(1)(B);
- (5) The contract should be awarded to ES&S, as the offeror whose proposal was evaluated as next in line for award;

(6) Because the State acted in bad faith, ES&S shall be awarded attorneys' fees and costs of the proceeding; and

(7) Such other and further relief as the hearings officer determines appropriate pursuant to HRS § 103D-709(f).

DATED: Honolulu, Hawaii, March 7, 2008.



---

TERRY E. THOMASON  
CORIANNE W. LAU  
ELIZABETH HAWS CONNALLY

Attorneys for Complainant  
ELECTION SYSTEMS & SOFTWARE, INC.



'08 APR -8 24:37

KEVIN B. CRONIN  
CHIEF ELECTION OFFICER

STATE OF HAWAII  
OFFICE OF ELECTIONS

802 LEHUA AVENUE  
PEARL CITY, HAWAII 96782  
www.hawaii.gov/elections

STATE OF HAWAII  
OFFICE OF ELECTIONS

April 8, 2008

To: Mr. Aaron S. Fujioka, Administrator  
State Procurement Office

From: Kevin B. Cronin, Procurement Officer  
Office of Elections

Subject: ELECTIONS SYSTEMS AND SOFTWARE WAIVER OF STAY  
PROVISION RE: RFP-06-047-SW, SEALED OFFERS FOR A  
LEASED VOTING EQUIPMENT SYSTEM

SECOND AMENDED WAIVER OF STAY REQUEST  
SUPPLEMENTAL INFORMATION

This supplements the second amended waiver request previously submitted by Procurement Officer Kevin Cronin, chief election officer, for a waiver of the stay invoked under Haw. Rev. Stat. §103D-701(f) and Haw. Admin. R. § 3-126-5 in this proceeding. This supplementary information arises from the testimony of Hart Intercivic, Inc. (Hart), the successful bidder, provided to the House of Representative's Legislative Management Committee on April 4, 2008, based its letter about which its attorney testified during the committee hearing. This provides the OE's drop dead date by which it needs to begin communicating with Hart to begin preparations for the 2008 elections.

The chief procurement officer, based on this second amended waiver request and this supplemental information, is respectfully requested to act on this request at the earliest possible time.

EXHIBIT F

Mr. Aaron S. Fujioka  
April 8, 2008  
Page Two

### *REQUEST FOR WAIVER OF STAY*

The OE respectfully requests the chief procurement officer determine without delay that the award of the contract to Hart is necessary to protect the substantial interests of the state under Haw. Rev. Stat. §103D-701(f).

### *FACTS*

On April 4, 2008, Hart by David Minkin, Esq., Hart's attorney, produced its April 4, 2008, letter attached below at the House of Representatives' Legislative Management Committee meeting and gave Cronin a copy.

### *STATE INTERESTS INVOLVED*

The state interests in conducting the 2008 elections that are described in the second amended request for waiver of stay remain the same. These general interests are more specifically identified in several areas.

After careful and thoughtful consideration by the OE in light of all circumstances, the OE's drop dead date to begin 2008 fall election preparations is April 15, 2008. The current protest appeal cannot be decided before April 29, 2008, at the earliest based on the hearing dates ordered rescheduled by the hearing examiner.

The OE's drop dead date no later than April 15 and the pending appeal's earliest decision date no earlier than April 29 makes the need for decision whether to approve or disapprove the procurement officer's request for waiver of the stay critical and compelling at this time.

The OE's drop dead date to begin implementation of the contract and specific election preparations means we cannot afford a delay beyond that date. Delaying elections preparations after that date will have an adverse impact on the voters of the state of Hawaii, in my view. The following items by subject area need to be addressed:

### *BALLOT OPERATIONS*

1. The ballot design needs to be finalized. Although the design of the ballot may seem like a secondary issue, poor design of the ballot may lead to confusion and ultimately voters being disenfranchised because voters did not vote properly. Under the previous vendor it has taken us over three (3) election cycles to design a ballot that would

Mr. Aaron S. Fujioka  
April 8, 2008  
Page Three

help to eliminate confusion. This also includes the "pick a party" feature never used but now required in the state of Hawaii.

2. Demonstration ballots need to be printed. The printing of demonstration ballots requires the ballot design. In order to educate voters on the mechanics of voting, voting information materials need to be created and finally determined. Demonstration ballots are the key to voter education because a voter can practice the mechanics of voting.

3. Ballot handling and voting instructions need to be drafted and finalized. Another key piece to voter education is the development of voting instructions. These instructions, like demonstration ballots, depend on the ballot design. The instructions concern the proper mechanics of voting.

#### *COMPUTER OPERATIONS*

1. The telephone lines needed to convey the election information including results need to be installed at the various counting centers throughout the state. Before submitting to Hawaii Telecomm the request to install telephone lines, the minimum requirements need to be established. These requirements cannot be determined until OE determines the vendor's requirements and connectivity issues for integrating into their system the needed telephone lines. Sufficient lead time is required to allow Hawaiian Telecomm to install the phone lines at each counting center in time for the elections.

#### *COUNTING CENTER OPERATIONS*

1. The Request for Proposals (RFP) provides for a required acceptance test on the voting system before implementing and using voting system. The acceptance test ensures that the voting system meets the minimum requirements to conduct elections in Hawaii. Sufficient lead time is required to have sufficient time to address any unforeseen and unforeseeable issues that may arise and to create solutions for any such issues in time for the elections.

2. The new voting system requires OE to consider and determine what changes to existing policies and procedures are needed. This is part of the installation process that occurs in all jurisdictions. Examples of impacted areas are resolving voter errors with ballots at the election and auditing absentee ballots.

Mr. Aaron S. Fujioka  
April 8, 2008  
Page Four

#### *PRECINCT OPERATIONS*

1. The election manuals and training materials need to be created and finalized. Once done, the trainers who will train the approximately 3,500 precinct officials who will work at the polls on election day must begin training in May. After they are trained, the trainers must educate the large number of precinct officials.

2. The polling place signs and materials need to be created, finalized, and printed. This includes various signs and materials that are displayed in the polling place on election day such as the How to Vote Poster which includes the voting instructions for voters' use on election day.

#### *VOTER SERVICE OPERATIONS*

1. A voter education plan needs to be created, established, and implemented. A proper voter education program needs to be developed but, more importantly, implemented to minimize voter confusion at the polls on election day. Without proper voter education, some voters may become disenfranchised if their vote is not counted because they failed to vote properly. The more time OE delays the implementation of voter education, the fewer voters the office can reach out to and educate for the election.

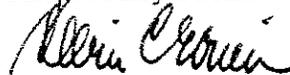
The foregoing points concerning ballot, computer, counting center, precinct, and voter service operations reveal the human intensive, dynamic and not static process in the election preparations. This requires the work of not only OE, but each of the state's four county clerks and staff, many contract personnel, and thousands of volunteers, all of whom need to be identified and coordinated effectively, not perfectly. Any delay beyond OE's drop dead date of April 15 because of the existing stay arising out of the protest appeal now preventing the OE from working with Hart to prepare for the elections will not allow the state to properly implement the required ballot, computer, counting center, precinct, and voter service operations discussed above. Any continued delay beyond April 15 will have serious and drastic consequences for the voters and the integrity of the 2008 elections.

Mr. Aaron S. Fujioka  
April 8, 2008  
Page Five

CONCLUSION

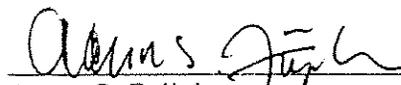
For these reasons, the OE respectfully requests that the chief procurement officer determine without delay that the award of the contract at issue in this proceeding is necessary to protect the substantial interests of the state under Haw. Rev. Stat. §103D-701(f) to conduct its elections in September and November 2008.

Respectfully Submitted,



Kevin B. Cronin  
Procurement Officer  
Chief Election Officer

Approved  Disapproved

 4/11/08  
\_\_\_\_\_  
Aaron S. Fujioka                      Date  
Chief Procurement Officer

cc: Pat Ohara, Esq., Deputy Attorney General  
    Robyn Chun, Esq., Deputy Attorney General

CPO Comments: Based upon the Office of Elections' determination that April 15, 2008 is their drop-dead date to avoid jeopardizing an orderly primary election on September 20 and general election on November 4, 2008, and therefore protecting the substantial interests of the State, the request for a waiver of stay is granted.



April 4, 2008

David J. Minkin  
McCorriston Miller Mukai MacKinnon LLP  
P.O. Box 2800  
Honolulu, Hawaii 96803-2800

Dear Mr. Minkin,

Hart InterCivic is ready, willing, and able to begin work as described in our proposal in answer to the Request for Proposal, No. RFP-06-047-SW, Sealed Offers for a New Leased Voting Equipment System for the 2008, 2010, 2012, 2014 and 2016 Primary, General, and Special Elections as issued by the Department of Accounting and General Services, Office of Elections.

Presently, we have time to build and deliver all equipment as proposed, but we have to start immediately, preferably by April 7, 2008, to work with the Office of Elections to ensure the proper voting laws, rules, and regulations are followed in preparation for the upcoming elections.

Sincerely,

A handwritten signature in black ink, appearing to read 'Phillip Braithwaite'.

Phillip Braithwaite  
Senior Vice President & General Manager  
Election Solutions  
Hart InterCivic



"Geppert, Rich"  
<RGeppert@hartic.com>  
04/29/2008 09:35 AM

To <Scott.Nago@hawaii.gov>  
cc  
bcc  
Subject Re: Project Milestones

History: This message has been replied to and forwarded.

Scott-

I added in drop dead dates below. Any dates that have passed add increased risk for the State to the project. The longer this goes on the more risk for the State. We'll have to work together on recovery strategies.

Thanks,  
-Rich

**From:** Scott.Nago@hawaii.gov [mailto:Scott.Nago@hawaii.gov]  
**Sent:** Tuesday, April 29, 2008 11:50 AM  
**To:** Geppert, Rich  
**Subject:** Re: Project Milestones

Do you have an absolute drop dead date? If that date has passed, just say so.

"Geppert, Rich" <RGeppert@hartic.com>

04/29/2008 05:25 AM

To <Scott.Nago@hawaii.gov>  
cc  
Subject Project Milestones

Scott-

Per your request, below is a list of major Project tasks and other items that would be adversely affected if an additional Stay is imposed. Many of these items have already been seriously affected by the overall Protest (ie. already late because we don't have an executed contract):

- Renting office space – **The market in HI is hot. We've had to pass up several good opportunities. The opportunity cost here is that we'll have to settle for less when we are able to pull the trigger.**
- Renting warehouse space - **We've found a great location/facility on Kapiolani (the one next to the convention center ☺). Problem is it needs some work and the landlord is going to have to put some money into it to fix it up. We have to move in June 2 in order to preserve equipment delivery and pre-deployment preparation dates. Which gives the landlord 30 days from today to do the work. And he's not going to do it without a signed lease from us. And we can't sign the lease until the Prime contract is signed..... If we signed the lease today the schedule has already slipped. Thus the equipment won't be in HI according to the project schedule. As it continues to slip, the window of opportunity shrinks and the risk increases for receiving the equipment and preparing it for the election in a timely manner.**
- Procuring third-party hardware, including computers, scanners, and printers. – **Drop dead date for that was last Friday. Any further delays increase the risk of not achieving timely**

**delivery.**

- Procuring Ballot Transport Containers – Karen Mendes from FCA told me last week that if that order hadn't been placed by then, it's already late.
- Procuring Ballot Stock – We have already spent over a million dollars on ballot stock for HI. We still need to order more. The labor that goes into preparing it (perforating and round cornering) should have started April 16.
- Finalize assembly of voting equipment – Start assembly date for the majority of the units was supposed to have been April 14, with May 5 being the start assembly for the final eScan units. We're doing as much as we can now to minimize impact on schedule delivery times.
- Shipping of voting equipment – Must ship May 15.
- Executing sub-contractor agreements, particularly with a ballot printer and local delivery/pickup vendors. – Already late with the printer. They have to put a substantial investment into some new equipment to do this job. The shipping company on Oahu must be secured before equipment can ship on May 15. Other subcontractors must be secured by June 2.

All of the above are "big ticket" items that are absolutely critical to keep on schedule. For example, we're almost at the point where we'll need to ship equipment by air versus boat, which will be 7 times more expensive. As it is, we're slipping daily due to the Protest, and we are unable to move forward without an executed contract.

Let me know if I can provide you additional information.

Thanks,

-Rich

Rich Geppert, PMP, CERA  
Project Manager  
Hart InterCivic, Inc.  
972-542-5311 (Office)  
512-350-7424 (Mobile)

[www.hartintercivic.com](http://www.hartintercivic.com)



"Braithwaite, Phillip"  
<PBraithwaite@hartic.com>  
04/29/2008 04:35 PM

To <Scott.Nago@hawaii.gov>  
cc "Harrell, Travis" <THarrell@hartic.com>, "Geppert, Rich"  
<RGeppert@hartic.com>, "Simmonds, Ted"  
<TSimmonds@hartic.com>, "David J. Minkin"  
bcc

Subject Protest and Project Update

History: This message has been replied to and forwarded.

Mr. Nago,

Hart continues to be committed to this project and to delivering the State of Hawaii election systems and services that ensure successful elections for the State through 2018 to the best of our ability.

However, while the protest process continues on and the ultimate resolution of the various protest issues and of the contract award includes the potential of continued delays, it is our responsibility to provide an updated assessment of the impact such a delay will have on our ability to deliver the project on the schedule and under the conditions proposed in our response to the RFP.

Hart's strong preference is to resolve the protest issue in the fastest way possible. This preference is based on our perspective that to do otherwise will only introduce additional risk to schedule, cost and performance that could work to the detriment of all the stakeholders in this project.

Hart has worked diligently to advance work on this project as far and as quickly as possible under the constraints associated with resolution of the protest. In doing so, we have already invested substantial monetary and personnel resources in project planning and coordination, as well as identifying and qualifying local sources for critical services, personnel and facilities needed to execute the project as proposed. We have now reached a point in the overall project plan that requires Hart to make major additional resource commitments before further material progress can be achieved. These commitments include:

- Renting office space
- Renting warehouse space
- Procuring third-party hardware, including computers, scanners, printers, uninterruptable power supplies, etc.
- Procuring Ballot Transport Containers
- Procuring Ballot Stock
- Completing assembly of voting equipment
- Shipping of voting equipment
- Executing sub-contractor agreements, particularly with ballot printer, equipment moving vendors, etc.

These commitments involve millions of dollars, and Hart will not make continued investments without an executed, clear, protest-free contract with the State of Hawaii.

Our hesitancy to make such an unsecured investment should not be interpreted as any lessening of our dedication or commitment to the success of this project, nor does it signal that imposition of more delays will make successful completion of the project impossible to achieve. We are only apprising you that the prevalence of current conditions prevents us from moving forward in critical areas that increase potential risk to the State, its schedule, and costs and performance reflected in our proposal.

Some examples of specific impacts that may be precipitated by additional delays include:

- Delays in production of Hart Voting System components and procurement of third-party hardware that decrease configuration, setup and testing time and increase costs for expedited shipping.
- Potential loss of essential sub-contractors, particularly the ballot printer vendor, who have already made substantial investments in this project but cannot afford to pass up other firm contract work. Additionally, sub contractors may not agree to certain terms and conditions of the contract in such a compressed timeframe. This could lead to ballots being produced on the mainland.
- More intense effort being required of Hart personnel that detracts from their ability to oversee

delivery of other services such as Voter Education and Outreach, Office of Election and poll worker training, and other optional items.

We are available to work with your office in any way that we can to cement a long-term partnership, so please do not hesitate to call on us for any additional information or assistance you deem will be beneficial in moving forward.

**Regards,**  
Phillip W. Braithwaite  
Senior Vice President & General Manager  
Election Solutions  
Hart InterCivic  
512.252.6566- direct  
512.565.7591- cell  
[www.hartic.com](http://www.hartic.com)

## AGREEMENT

The undersigned parties to this Agreement (hereinafter "Agreement") hereby agree as follows:

### 1. PARTIES

- a. ELECTION SYSTEMS & SOFTWARE, INC.  
(hereinafter "ES&S")

Address: c/o Terry E. Thomason, Esq.  
Corianne W. Lau, Esq.  
Alston Hunt Floyd & Ing  
1001 Bishop St., ASB Tower 18<sup>th</sup> Floor  
Honolulu, HI 96813  
Fax: 524-5976

- b. KEVIN B. CRONIN, OFFICE OF ELECTIONS;  
DESIGNEE OF AARON FUJIOKA, ADMINSTRATOR,  
STATE PROCUREMENT OFFICE, STATE OF HAWAII  
(hereinafter "OE")

Address: c/o Russell Suzuki, Esq.  
Patricia Ohara, Esq.  
Deputy Attorneys General  
Dept. of the Attorney General  
State of Hawaii  
425 Queen St.  
Honolulu, HI 96813  
Fax 586-1372

Steven K. Chang, Esq.  
Office of Elections  
802 Lehua Ave.  
Pearl City, HI 96782  
Fax 453-6006

- c. HART INTERCIVIC, INC.  
(hereinafter "Hart")

Address: c/o David Minkin, Esq.  
Robert G. Klein, Esq.  
McCorriston Miller Mukai Mackinnon, LLP  
Five Waterfront Plaza, 4<sup>th</sup> floor  
500 Ala Moana Blvd.  
Honolulu, HI 96813  
Fax 524-8293

## **2. RECITALS**

- a. WHEREAS on or about January 31, 2008, the OE gave notice of award of contract to Hart for Request for Proposal No. RFP-06-047-SW; Sealed Offers For A New Leased Voting Equipment System for the 2008, 2010, 2012, 2014 and 2016 Primary, General and Special Elections, Department of Accounting and General Services, Office of Elections ("RFP"). Although the OE disputes that a contract exists, for purposes of this Agreement, the OE acknowledges that it issued a notice of award to Hart ("Award").
- b. The award to Hart was for \$52,875,944 for the election years 2008-2016, with an option to extend for a sixth election cycle through 2018.
- c. ES&S, which had been ranked second in the evaluation process with a proposal price of \$18,126,865 for six election cycles, requested and was given a timely debriefing by the OE on February 12, 2008. ES&S timely filed a protest of the award to Hart on February 20, 2008.

- d. The OE's Procurement Officer Kevin Cronin, denied ES&S' protest on or about March 3, 2008.
- e. On March 7, 2008, ES&S timely filed a Request for Hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH"), which has proper jurisdiction of this matter, designated as PCH-2008-3.
- f. Hart filed a motion to intervene in PCH-2008-3 on March 12, 2008, which was granted on March 14, 2008.
- g. On March 17, 2008, ES&S filed a Motion for Summary Judgment and the OE filed a Motion to Dismiss Complainant's request for Hearing Filed March 7, 2008, or in the Alternative for Summary Judgment ("Motion to Dismiss") , both of which were argued at hearing on March 20, 2008.
- h. On March 20, 2008, Hearings Officer Craig H. Uyehara entered an Order Denying the OE's Motion to Dismiss.
- i. Also on March 20, 2008, Hearings Officer Uyehara entered an Order Granting in Part and Denying in Part Petitioner's [ES&S] Motion for Summary Judgment ("Order"). The Order stated that "[p]ursuant to Hawaii Revised Statutes § 103D-312 and Hawaii Administrative Rules Chapter 122, Title 3, Subchapter 15, Respondent [the OE] had a legal duty to perform an analysis of Intervenor's [Hart's] offered price to

determine whether the price was reasonable; and the undisputed evidence established that no such analysis was performed by Respondent prior to the award to intervenor. To this extent, Petitioner's motion for summary judgment is granted. . . ." The hearings officer denied ES&S' motion as to other issues raised in the request for hearing and ruled that those issues remain for hearing.

- j. On April 4, 2008, ES&S filed a motion for clarification and/or reconsideration of the Order. After hearing on April 10, 2008, the motion was denied on April 11, 2008.
- k. On April 15, 2008, ES&S was given documentation showing that on or about April 4, 2008, the OE submitted a request for a "substantial interest" determination under HRS § 103D-701(f) to the State Procurement Office in order to lift the stay on the award to Hart. The request was supplemented on April 8, 2008. The State Procurement Office granted the request on April 11, 2008.
- l. WHEREAS the parties were set for hearing on PCH-2008-3 on April 29, 2008, but such hearing has been indefinitely continued, pending execution of this Agreement by the parties.
- m. WHEREAS the OE asserts that the notice of award requires an analysis of remedies pursuant to HRS § 103D-706, ES&S

and Hart disagree and assert that the notice of award requires an analysis of remedies pursuant to HRS § 103D-707.

- n. WHEREAS, the parties hereto, ES&S, the OE and Hart, wish to resolve the current dispute, reserve certain claims and rights and provide the opportunity for the procurement authority to perform its legal duties.

### **3. DEFINITION OF TERMS**

- a. Parties. The terms "Parties," "ES&S," "OE" and/or "Hart" shall mean and be deemed to include the Parties and their respective past, present and future officers, directors, shareholders, officials, members, owners, partners, joint venturers, principals, employees, agents, managing agents, parent companies, subsidiaries, administrators, trustees, receivers, insurers, reinsurers, sureties, subrogees, representatives, successors and assigns; and all persons, corporations, partnerships, companies or entities claiming by, through or under any of the Parties. The terms "Parties," "ES&S," "OE" and/or "Hart" in this Agreement shall also mean and be deemed to include the Parties, ES&S, OE and/or Hart individually, singly, collectively, severally, jointly,

and jointly and severally, and the use of only one gender shall include all genders.

- b. Administrative Proceeding. In this Agreement, the term "Proceeding" shall mean and refer to that certain Administrative Proceeding filed by ES&S with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, entitled "IN THE MATTER OF: ELECTION SYSTEMS & SOFTWARE, INC., PETITIONER, VS. KEVIN CRONIN, OFFICE OF ELECTIONS; DESIGNEE OF AARON FUJIOKA, ADMINISTRATOR, STATE PROCUREMENT OFFICE, STATE OF HAWAII, RESPONDENT, AND HART INTERCIVIC, INTERVENOR, PCH-2008-3," including, without limitation, all complaints, counterclaims and amendments thereto, in the Proceeding.
- c. Reserved Claims. "Reserved Claims" in this Agreement shall refer to claims in connection with this Proceeding for preparation costs, attorneys' fees and costs, and interest pursuant to HAR § 3-126-7 and Hawaii procurement law. All Reserved Claims and any defenses to such Reserved Claims shall be deemed to be preserved and reserved for later resolution, and no Reserved Claim and/or defense to such Reserved Claim shall be deemed to be waived or the asserting Party otherwise prejudiced in any manner, by

reason of the reservation of such Reserved Claim and/or defense under this Agreement. Nothing herein shall limit the Parties' ability to assert additional or future claims based on actions of the other Parties going forward.

#### **4. TERMS OF AGREEMENT**

NOW, THEREFORE, in light of the foregoing recitals and definitions, which are specifically incorporated and deemed a material part of the Agreement, and in consideration of the promises and agreements set forth below and for other good, valuable and adequate consideration hereby deemed received, the Parties agree as follows:

- a. The Award of Contract to Hart is terminated as of the Effective Date of this Agreement.
- b. The OE has until **May 14, 2008** to perform its duties pursuant to Hawaii Revised Statutes ("HRS") § 103D-312, Hawaii Administrative Rules ("HAR") Chapter 122, Title 3 and Subchapter 15 to perform a cost and/or price analysis as required by applicable law, of Hart's offered price to determine whether the price was reasonable.
- c. The evaluations and ranking of the proposals shall stand undisturbed and are subject only to the required cost and/or price analysis as required by applicable law, to be performed by the OE in accordance with this Agreement.

- d. OE shall perform a cost and/or price analysis pursuant to methods and means required by applicable law. Upon completion and notice of award or rejection of the proposal price as "clearly unreasonable," the documentation of the cost and/or price analysis shall be delivered to all Parties, along with contents of contract file on **May 14, 2008**.
- e. Within 72 hours of request by OE, Hart will be required to provide the OE information within its custody and control containing cost and pricing data to comply with HRS § 103D-312 and HAR §§ 3-122-125 through 3-122-130.
- f. Contemporaneously with the execution of this Agreement, the parties hereto will execute a Stipulation and Order Governing Confidentiality of Documents; Exhibit "A" which establishes the procedure for the disclosure of material and information deemed proprietary and/or confidential and resolution of disputes in connection with the disclosure.
- g. Within 72 hours of Hart's production and any supplementation of production of documents and data, the OE shall determine whether any additional documents and data are required to perform its analysis and the OE will request additional documents and data from Hart.
- h. Once the OE makes a determination that it has sufficient documents and data to perform its legal duty to perform a

cost and price analysis, and has made a determination of whether the Hart proposal price is "reasonable" or must be rejected as "clearly unreasonable" pursuant to the Procurement code, including HAR § 3-122-97(b)(2)(C), the OE must deliver on May 14, 2008 its written determination, all supporting documentation and data to all parties as required by applicable law and pursuant to the Stipulation and Order Governing Confidentiality of Documents; Exhibit "A", and logs listing withheld or redacted documents that include document bates number, date, document type (cost calculations, letter, e-mail, etc.), author, recipients, description, basis for withholding, and source of the document.

- i. ES&S, OE and Hart reserve all rights to assert claims and rights under the Procurement Code or otherwise, including, but not limited to, debriefing, document demand, protest and requests for hearing.
- j. All parties reserve all rights to assert and defend against Reserved Claims under PCH-2008-3 or any additional or future claims at a future hearing date.
- k. OAH shall retain jurisdiction to enforce the terms and conditions of this Settlement Agreement until the latter of (1) such time as the OE renders a determination on the

reasonableness of Hart's proposal price and no protests are timely filed, or (2) the resolution of discovery issues pursuant to the Stipulation and Order Governing Confidentiality of Documents; Exhibit "A," Reserved Claims and as required by applicable law. If, in the future, the OE applies to the State chief procurement officer ("CPO") for a substantial interest determination, and a substantial interest determination is obtained, any challenge to that determination will be filed with the CPO within two working days of the date of receipt of the determination along with all supporting documents. The CPO will issue its decision on the challenge no later than two working days from the date of receipt of the challenge. Any challenge to the CPO's decision will then be submitted to the OAH within two working days from the date of receipt of the decision. Hearing on the CPO's decision will be expedited and arguments submitted by way of briefs and documentary evidence, and the decision of the OAH will be expedited.

#### **5. GOVERNING LAW**

This Agreement shall be subject to, governed by, construed and enforced pursuant to the laws of the State of Hawaii.

#### **6. CONSTRUCTION**

This Agreement shall be construed without regard to the identity of the person(s) who drafted the provisions contained herein. Each and every provision of this Agreement shall be construed as though each of the parties participated equally in the drafting thereof. As a result of the foregoing, any rule of construction against the drafting party shall not be applicable.

**7. NO REQUIREMENT TO INTERVENE AND NOTICE TO PARTIES**

All parties hereto shall remain parties to this and all future related administrative proceedings, including Reserved Claims, without future need to intervene. All parties shall effect service promptly of all documents on all other parties, via fax, email or hand-delivery unless the serving party obtains express permission to serve by U.S. Mail from the party receiving service.

**8. REPRESENTATION OF AUTHORITY**

Each individual executing this Agreement on behalf of a party expressly represents and warrants to the others that he or she has authority to do so and thereby to bind the party to the terms of this Agreement.

**9. COUNTERPART AND FACSIMILE SIGNATURES**

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. In making proof of this Agreement, it shall not be necessary to produce or account for more than

a single counterpart containing the respective signatures of each of the parties hereto. The parties hereto are entitled to rely upon a facsimile signature of the other parties to this Agreement upon receipt by facsimile transmission via telecopier.

Dated this 7<sup>th</sup> day of May, 2008 (the "Effective Date").

ELECTION SYSTEMS & SOFTWARE,  
INC.

\_\_\_\_\_  
By:  
Its:



\_\_\_\_\_  
KEVIN B. CRONIN, OFFICE OF  
ELECTIONS; DESIGNEE OF AARON  
FUJIOKA, ADMINSTRATOR, STATE  
PROCUREMENT OFFICE, STATE OF  
HAWAII

HART INTERCIVIC, INC.



\_\_\_\_\_  
By: President & CEO  
Its:

APPROVED AS TO FORM AND CONTENT

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Terry E. Thomason, Esq.  
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APPROVED:

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Craig H. Uyehara, Esq.  
Hearings Officer  
Office of Administrative Hearings

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In The Matter Of: Election Systems & Software, Inc., Petitioner, Vs. Kevin Cronin, Office  
Of Elections; Designee Of Aaron Fujioka, Administrator, State Procurement Office, State  
Of Hawaii, Respondent, And Hart Intercivic, Intervenor, PCH-2008-3