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CIRCUIT COURT OF OREGON
MARION COUNTY

STATE OF OREGON, by and through
SECRETARY OF STATE BILL BRADBURY,

Plaintiff,

v.

ELECTION SYSTEMS & SOFTWARE, INC.,
a Nebraska corporation,

Defendant.

Case No. *OLC 13803*

COMPLAINT FOR BREACH OF
CONTRACT

NOT SUBJECT TO MANDATORY
ARBITRATION

The Plaintiff, the State of Oregon by and through its Oregon Secretary of State, alleges as follows for its claim for relief:

1.

The State of Oregon is the plaintiff. At all times relevant to this claim for relief, plaintiff acted by and through the Oregon Secretary of State, Bill Bradbury. The Elections Division is a subdivision of the Office of Secretary of State. At all times relevant to this claim for relief, the Elections Division operated as the agent for the State of Oregon, by and through Secretary of State Bill Bradbury.

2.

Defendant Election Systems & Software, Inc. ("ES&S") is, and was at all times relevant to this claim for relief, a Nebraska corporation.

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3.

The Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq* (“HAVA”), imposes on states, including Oregon, certain requirements applicable to the administration of federal elections. HAVA also imposes on states, including Oregon, certain requirements applicable to the state’s eligibility for federal funds to be used by the states to improve the administration of state elections. In pertinent part, HAVA requires Oregon to establish voting systems that are accessible for individuals with disabilities in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters. HAVA requires plaintiff to take delivery of HAVA-compliant voting systems on or before January 1, 2006 and to provide a fully operational HAVA-compliant voting system for the May, 2006 primary election. In addition to potentially disqualifying non-compliant states from receiving federal financial assistance to improve the administration of elections, HAVA authorizes the federal government to impose penalties on non-compliant states.

4.

On July 18, 2005, the Elections Division issued a Request for Proposal (“RFP”) which invited prospective vendors (“proposers”) to submit proposals to sell to plaintiff an Accessible Voting System satisfying the requirements imposed on plaintiff by HAVA.

5.

Section III of the RFP, entitled “Contractual Provisions,” contained the state’s requirements for product licensing, compliance with applicable laws and warranties, and other specifications. The RFP contained a specific provision, Section C, subsection 6, requiring that every proposer include in its proposal cover letter a statement accepting all terms and conditions included in Section III of the RFP.

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6.

2 On or about August 9, 2005, ES&S submitted to the Elections Division ES&S's response
3 to the RFP. ES&S proposed to provide a system of electronic touch screen voting machines to
4 be installed in all Oregon counties. Specifically, ES&S proposed to sell plaintiff ES&S's
5 AutoMARK™ Voter Assist Terminals; plaintiff would own the machines and use them
6 repeatedly in successive elections without the obligation of making any further payment to
7 ES&S aside from the one-time contract price for delivery of the machines. ES&S represented
8 that the federal government had certified that ES&S's AutoMARK™ machines met the
9 requirements of HAVA and other applicable laws. The proposal specified that the price for the
10 system would not exceed \$934,320.00. In the proposal, ES&S agreed to meet federally
11 mandated deadlines to deliver the machines by January 1, 2006, train Elections Division
12 personnel, and have the system fully operational for the May 2006 primary election.

13

7.

14 In its cover letter to the response to the RFP, dated August 9, 2005, ES&S
15 specifically agreed to plaintiff's condition that plaintiff would entertain only those proposals
16 meeting the specifications of Section III of the RFP: "In compliance with RFP Section C,
17 requirement 6 – Acceptance of Contractual Requirements, ES&S accepts all terms and
18 conditions included in the RFP Section III, Contractual Provisions." A copy of the cover letter
19 containing ES&S's acceptance of the specifications of Section III of the RFP is attached to this
20 Complaint as Exhibit 1 and incorporated herein.

21

8.

22 On or about August 23, 2005, the Elections Division confirmed the agreement with
23 ES&S. On that date, the Elections Division issued formal notice of plaintiff's intention to
24 negotiate final delivery terms for the ES&S voting terminals. The Elections Division suspended
25 its efforts to secure delivery of HAVA-compliant Accessible Voting Systems from any proposer
26 other than ES&S. In accepting ES&S's proposal, issuing the notice of intent to negotiate final

1 delivery terms, and suspending its efforts to secure delivery of HAVA-compliant voting systems
2 from any proposer other than ES&S, the Elections Division relied specifically on ES&S's
3 agreement to be bound by Section III of the RFP.

4 9.

5 Following the issuance of the August 23, 2005 intent to award letter, the Elections
6 Division engaged in numerous and continual efforts to negotiate final delivery terms for the
7 ES&S voting terminals. ES&S resisted these efforts and on January 10, 2006, ES&S informed
8 the Elections Division that ES&S would not agree to final delivery terms containing the
9 provisions which were specified in Section III of the RFP and which had been previously
10 accepted by ES&S. ES&S refused to approve final delivery terms for the HAVA-compliant
11 voting systems unless the Elections Division agreed to accept material changes and revisions to
12 the RFP's Section III Contractual Provisions. The Elections Division declined to modify the
13 Contractual Provisions and refused to release ES&S from the contract by which ES&S agreed to
14 Section III of the RFP and by which plaintiff agreed to negotiate final delivery terms for the
15 ES&S terminals.

16 10.

17 ES&S's breach of the contract prevented plaintiff from meeting its legal obligation under
18 HAVA to take delivery of HAVA-compliant voting systems on or before January 1, 2006. The
19 breach did not relieve plaintiff of its obligation to provide HAVA-compliant voting systems for
20 the May 2006 primary election. To satisfy plaintiff's obligation to provide HAVA-compliant
21 voting systems for the May 2006 primary election despite ES&S's breach of its agreement with
22 plaintiff, plaintiff entered into a contract with IVS LLC ("IVS"), a Kentucky limited liability
23 corporation. Under the contract, IVS will install, configure, maintain and host its HAVA-
24 compliant audio ballot marking service in a minimum of ten of Oregon's 36 counties for the May
25 2006 primary election. In return, plaintiff will pay IVS \$438,600.00. IVS is obligated by the
26 contract to deliver services only for the May 2006 election. However, should the IVS service

1 perform in a satisfactory manner in the May primary election, the Elections Division has agreed
2 in principle with IVS for the company to provide similar services for the November 2006
3 election for all 36 Oregon counties. This will require additional payments to IVS and plaintiff
4 will still be required to acquire a permanent Accessible Voting System for subsequent elections.

5 11.

6 As a result of ES&S's failure to perform under the contract, plaintiff has been damaged in
7 a sum that has not yet been fully determined, but which will include:

8 a. The sum of \$438,600.00 being paid to IVS to provide HAVA-compliant voting
9 services for the May 2006 election.

10 b. The one-time salary and overhead expense of assigning staff and attorneys to the
11 responsibility of negotiating and concluding the agreement with IVS to provide HAVA-
12 compliant service for the May 2006 election.

13 c. Expected additional payments to IVS to provide HAVA-compliant service for the
14 November 2006 election, together with any additional salary and overhead expenses relating to
15 negotiating and concluding a supplemental agreement with IVS for that election.

16 d. The difference between the ES&S contract price (\$934,320.00) and the price
17 which plaintiff ultimately must pay to a vendor to provide a permanent HAVA-compliant
18 Accessible Voting System.

19 e. The one-time salary and overhead expense of assigning staff and attorneys to the
20 responsibility of negotiating and concluding the agreement with a vendor to provide a permanent
21 HAVA-compliant Accessible Voting System.

22 f. The expense of paying any financial penalties imposed under HAVA on plaintiff
23 by the federal government as a result of plaintiff's inability, due to ES&S's breach of its contract,
24 to meet any requirement of HAVA.

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www.essvote.com

August 9, 2005

P. Kevin Walther, CPPB, OPBC
Oregon Secretary of State
Business Services Division
255 Capital Street NE, Suite 180
Salem, OR 97310-1342

Dear Mr. Walther:

Oregon – the “Beaver State” – desires an election system that incorporates the experience, reliability, security, and innovation of an Election company who *knows* your unique election goals and State. Election Systems & Software is that company; we fully understand the Federal and State of Oregon’s election laws and desire to be your partner in implementing a robust HAVA solution.

Election Systems and Software (ES&S) appreciates the opportunity to respond to the State of Oregon’s Request for Proposal (RFP #7004). ES&S fully understands the State’s objectives, nature and scope of work involved, and the engagement presented in the RFP. Accordingly, therefore, ES&S’ solutions are in full compliance with the specifications outlined in the ‘PHASE I – PASS/FAIL MINIMUM REQUIREMENTS’ and ‘PHASE II – MANDATORY SCORED ITEMS’ sections of the RFP.

We are proposing the ES&S AutoMARK™ Voter Assist Terminal, which was designed to offer voters an accessible, independent, and secure voting experience. It was developed for states like Oregon – to be easily integrated in to an optical scan environment and to address the voting needs of all voters.

ES&S is particularly sensitive to the needs of voters with disabilities. Our products are ITA tested and proven – surpassing ADA requirements; not because they have to, but because they should. These standards are consistent with our history in the State of Oregon.

ES&S has conducted business in Oregon for more than 20 years. We have supported Vote-by-Mail elections — including the installation of hardware and software, training, ballot printing, and hardware maintenance — in more than 20 of Oregon’s 36 counties.

As the State of Oregon is aware, ES&S has been an election technology innovator for more than 35 years. In this response, ES&S has included an Accessible Voting System solution that offers the State several unmatched benefits:

- Seamless transition – integrating this solution, to be used in conjunction with many of Oregon counties’ ES&S central count tabulators, will simply build upon many counties’ current ballot tabulating systems and ES&S partnerships;
- Tested and proven – the ES&S AutoMARK is Federally – ITA – certified.
- In-State presence – based in Bend, Oregon, Ryder Election Services, LLC is ES&S’ agent offering ballot printing and hardware maintenance services for many of Oregon’s counties;
- Vote-by-Mail Experience – ES&S is the most experienced Vote-by-Mail vendor in the election industry; and

Exhibit /
Page /



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- Minimal ballot change – ES&S' solution uses the same ballot Oregon counties have been using for over 20 years.

In compliance with RFP Section C, requirement 6 – Acceptance of Contractual Requirements, ES&S accepts all terms and conditions included in RFP Section III, Contractual Provisions.

The following ES&S associates are authorized to represent ES&S during any negotiations, and to serve as the contact point between the State of Oregon and ES&S:

Craig Seibert
Regional Sales Manager
11208 John Galt Blvd.
Omaha, NE 68137
(Tel) 402.321.3865
(Fax) 402.558.5401
(Email) cwseibert@
essvote.com

Mike Devereaux
Vice President of Sales
11208 John Galt Blvd.
Omaha, NE 68137
(Tel) 402.970.1119
(Fax) 402.970.1276
(Email) mddevereaux@
essvote.com

ES&S looks forward to continuing our partnership with the State of Oregon. We anticipate implementing your successful election system, thereby providing unparalleled equipment, service, and support for many years to come.

Sincerely,

Craig Seibert
Regional Sales Manager