

AMENDMENT #1
**VOTER REGISTRATION AND ELECTION MANAGEMENT SYSTEM SOFTWARE
AND SUPPORT SERVICES (VREMS)**

State Purchasing Division Contract # 00-000-00-00033

This bilateral Amendment #1 is entered into by and between Election Systems & Software, Inc. (ES&S) ("Contractor") and the State Purchasing Agent ("SPA") on behalf of the Secretary of State ("SOS") and the State of New Mexico (collectively, the "State"). This Amendment #1 to State Purchasing Division Contract # 00-000-00-00033 (the "Agreement") is effective on date signed by NMSPA ("Effective Date"), and is issued to modify the Agreement as enumerated in the following:

1. **Scope of Work.**

A. Paragraph 2.D. of the Agreement is hereby amended by replacing Contractor's standard software licensing agreement referenced therein and attached to the Agreement as appendix A with the Voter Registration Software License/Maintenance and Support Agreement attached hereto as Appendix A and fully incorporated herein by this reference.

B. Paragraph 2.E. of the Agreement is hereby deleted in its entirety and amended to read as follows:

"All Software installations will be performed in accordance with an approved Project Plan which may be modified as agreed upon in writing by the parties from time to time, a current copy of which is attached hereto as Appendix B and fully incorporated herein by this reference."

2. **Rates.** Paragraph 3.E. of the Agreement is hereby deleted and amended by replacing it in its entirety with the Pricing and Payment Schedule attached hereto as Appendix C and fully incorporated herein by this reference.

3. **Agreement Term.** Paragraph 4 of the Agreement is hereby amended by extending the term of the Agreement through January 6, 2008.

4. **Notification.** Paragraph 32 of the Agreement is hereby amended by replacing the representative and address information of Contractor to the following:

"To Contractor:

Kenneth Carbullido
Senior Vice President, Software Services
Election Systems & Software, Inc.
11208 John Galt Boulevard
Omaha, Nebraska 68137"

5. **Appropriations.** The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico and/or the United States Government for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature and/or the United States Government, this Agreement shall terminate upon written notice being given by SOS to Contractor. SOS' decision as to whether sufficient appropriations are available shall be accepted by Contractor and shall be final. In the event that SOS terminates this Agreement due to insufficient appropriations, SOS shall pay Contractor for all services performed and deliverables provided by Contractor up to the effective date of such termination and accepted by SOS. . The amount of such payment may be paid from any appropriations available for such purposes, and SOS' highest-ranking officer or official shall use his/her best efforts to timely and sufficiently request the appropriation necessary to pay such amount.

6. **Continuing Validity of Agreement.** Except as specifically set forth in this First Amendment, all remaining terms and conditions of the Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties have caused this Amendment #1 to be signed by their duly authorized representatives, in two (2) original counterparts, on the date(s) indicated below.

STATE OF NEW MEXICO
STATE PURCHASING AGENT

ELECTION SYSTEMS & SOFTWARE, INC.

By: _____

Mike Vinyard

Date: _____

By: _____

Date: _____

SECRETARY OF STATE

CHIEF INFORMATION OFFICER

By: _____

Rebecca Vigil-Giron

Date: _____

By: _____

Moira Gerety

Date: _____

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

TAXATION AND REVENUE DEPARTMENT

ID No:

By:

Date:

APPENDIX A

**ELECTION SYSTEMS & SOFTWARE, INC.
VOTER REGISTRATION AND ELECTION MANAGEMENT SYSTEM SOFTWARE
LICENSE/MAINTENANCE AND SUPPORT AGREEMENT**

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

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

AND: State of New Mexico ("Customer").

RECITALS:

A. Customer has agreed to license/purchase voter registration software and related products and services from ES&S for use in the State of New Mexico (the "Jurisdiction"). The terms and conditions under which such license, products and services shall be provided are set forth on the **GENERAL TERMS** attached hereto.

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

- X Exhibit A ES&S Software Licensed by Customer
- X Exhibit B Oracle Software Sublicense
- X Exhibit C Maintenance Services
- X Exhibit C-1 Support Responsibilities
- X Exhibit D Definitions

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

- Agrees to the **GENERAL TERMS** and the terms and conditions set forth on each Exhibit.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the State of New Mexico.
- Represents and warrants to the other party that as of its signature date indicated below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, INC.
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1275

STATE OF NEW MEXICO
(Customer)

Fax _____ No.: _____

Signature

Signature

Ken Carbullido

Name (Printed or Typed)
Senior Vice President

Title

Date

Name (Printed or Typed)

Title

Date

GENERAL TERMS

ARTICLE 1 LICENSE OF ES&S SOFTWARE

1.1 **Grant of License.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer a perpetual, nonexclusive, nontransferable license (the "License") to use the ES&S Software and the related Documentation in the Jurisdiction. The License allows Customer to use and copy the ES&S Software (in object code only) and the Documentation, solely for the purposes of managing the voter registration process and other election-related activities in the Jurisdiction. Customer may not take any of the following actions with respect to the ES&S Software or its Documentation:

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

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

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

1.2 **Term of License.** The License shall commence as of the date of delivery of the ES&S Software. The License shall survive the termination of all other obligations under this Agreement and the termination of all Exhibits, and shall terminate upon the date on which Customer discontinues the use of the ES&S Software; provided, however, that ES&S may terminate the License prior to such date if Customer fails to pay the License Fee set forth in the Amendment, or breaches Sections 1.1, 1.4, or 2.3 of this Agreement. Upon the termination of the License, Customer shall immediately return the ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy the ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

1.3 **Source Code.** The License does not permit Customer to use the source code for the ES&S Software. ES&S has placed the source code in escrow with its third party escrow agent and will likewise place in escrow the source code for all Updates, Add-Ons and New Products (as defined in Section 1.5 below) provided to Customer. Should ES&S cease operations and become unable to maintain and support any of the ES&S Software, Updates, Add-Ons or New Products provided to Customer while under an obligation to do so, Customer may obtain the source code for such item(s) for the sole purpose of enabling the continuing use of such item(s) in accordance with this Agreement. The source code will remain the property of ES&S and may not otherwise be used by Customer. The cost of using an alternative third party escrow agent shall be borne by Customer.

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

a. **Updates.** During the Warranty Period, ES&S shall provide new releases, upgrades or maintenance patches to the ES&S Software, along with appropriate Documentation

("Updates"), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of Third Party Products required to operate the Updates. All Updates shall be deemed to be ES&S Software for purposes of this Agreement upon delivery. Customer may install Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S may charge Customer at its then-current rates to (i) install Updates or (ii) provide maintenance and support on the ES&S Software which is required as a result of Customer's failure to timely install an Update. If Customer proposes changes in the ES&S Software to ES&S, such resulting source code will become ES&S' property. ES&S may, in its sole discretion, elect to make or not to make such changes without reference or compensation to Customer or any third party. Upon the termination of the Warranty Period, Customer shall be entitled to receive the Maintenance Services described on Exhibit C if it has so elected in Section B of the signature page to this Agreement.

b. **Add-Ons and New Products.** From time to time, ES&S may offer fundamentally new and different functionality not already licensed to Customer hereunder which can be added on to the ES&S Software ("Add-Ons") and new software products with fundamentally new or different functionality features not already licensed to Customer ("New Products") to Customer. Any fundamental functionality of the ES&S Software licensed hereunder provided by ES&S shall not require the licensure by Customer of any Add-Ons or New Products. Customer may elect to license an Add-On or New Product upon the payment of a license fee to ES&S. Unless any such license is effectuated pursuant to a separate license agreement, the Add-On or New Product shall be deemed to be part of the ES&S Software upon payment of such license fee. Each Add-On or New Product which is deemed to be part of the ES&S Software will be subject to the warranty set forth in Section 2.2(a) upon delivery, and Customer may thereafter elect to receive Maintenance Services therefor upon the expiration of the Warranty Period.

1.5 **Compliance with Applicable Law.** ES&S represents to Customer that the ES&S Software, Updates, Add-Ons and New Products will each comply with all applicable requirements of state and federal law at the time of delivery. As long as Customer is under warranty or has paid for and is receiving Maintenance Services in accordance with the terms and conditions of Exhibit C to this Agreement, ES&S shall provide Customer with any Updates required by changes in federal law which ES&S performs in the normal course of development, which do not require significant development work and which are technically feasible and commercially reasonable at no additional charge. Customer shall pay ES&S for any Update which is required due to a change in state or federal law which requires a significant amount of development work or is otherwise not technically feasible or commercially reasonable. In the

event that ES&S determines that a change in state or federal law requires a significant amount of development work for which Customer shall pay, ES&S will negotiate in good faith with Customer in an attempt to apply the costs of such development work across ES&S' applicable customer base.

ARTICLE 2 MISCELLANEOUS

2.1 **Custom Programming.** From time to time after the date of this Agreement, ES&S may provide custom programming to Customer. Custom programming shall be created, delivered, installed and tested as mutually agreed upon in advance by Customer and ES&S. Such agreement shall be in the form of an addendum to this Agreement which is executed by both parties. All custom programming shall be deemed to be part of the ES&S Software, and shall be covered by the warranty set forth in Section 2.2(a) for a 90-day period following its acceptance by Customer. ES&S retains the right to make any custom programming available to other customers.

2.2 **Warranties.**

a. **ES&S Software.** ES&S warrants that for 90 days after the Acceptance Date (the "Warranty Period"), it will repair or replace any of the ES&S Software which, while under normal use and service: (i) fails to perform in accordance with its Documentation and in accordance with official preprinted marketing materials, proposals, or quote published by ES&S in all material respects, or (ii) is defective in material or workmanship. Any repaired or replaced item of ES&S Software shall be warranted only for the unexpired term of the original Warranty Period. All replaced components of the ES&S Software will become the property of ES&S. This warranty is effective provided that (I) Customer promptly notifies ES&S of the failure of performance or defect and is otherwise in compliance with its obligations hereunder, (II) the ES&S Software to be repaired or replaced has not been repaired, changed, modified or altered except as authorized or approved by ES&S, (III) the ES&S Software to be repaired or replaced is not damaged due to accident, theft, vandalism, neglect, abuse, use which is not in accordance with instructions or specifications furnished by ES&S or causes beyond the reasonable control of ES&S or Customer, including natural disaster, fire, flood, unusually severe weather or Acts of God, (IV) Customer has Timely Installed and is using all Updates (if any), provided to it by ES&S, (V) the ES&S Software is used with hardware and software meeting specifications supplied by ES&S, and (VI) the data and/or the database structure used in conjunction with the ES&S Software is not manipulated using application software other than the ES&S Software unless Customer obtains ES&S' prior written approval of such manipulation or such modification, change or alteration is performed by Customer temporarily during an emergency situation and then only for such period of time as an emergency condition exists and it is not reasonably practicable for Customer to obtain ES&S' prior authorization or approval in writing. Upon expiration of the warranty, Customer shall be entitled to the Maintenance Services set forth in Exhibit C to this Agreement in accordance with the terms and conditions of Exhibit C.

b. **System.** ES&S warrants that the ES&S Software will operate in conjunction with the Third Party Products during the Warranty Period, provided that (i) Customer has Timely Installed and is using the most recent Update, or the second most recent Update, provided to it by ES&S, and (ii) the Third Party Products are performing in accordance with their own specifications and documentation in all material respects and are not defective in material or workmanship. In the event of a breach of this warranty, ES&S will repair or replace the item of ES&S Software which is causing such breach to occur. Customer acknowledges that ES&S has merely purchased the Third Party

Products for resale or rental to Customer, and that the proprietary and intellectual property rights to the Third Party Products are owned by parties other than ES&S ("Third Parties"). Customer further acknowledges that except for the payment to ES&S for the Third Party Products, all of its rights and obligations with respect thereto flow from and to the Third Parties. ES&S shall provide Customer with copies of all documentation and warranties for the Third Party Products which are provided to ES&S. ES&S is responsible for interfaces with third party software and maintenance of integration with third party software to the extent it has been marketed as a material part of the system and such third party software meets all minimum specifications provided by ES&S to Customer.

c. **Exclusive Remedies. IN THE EVENT OF A BREACH OF SUBSECTIONS 2.2(a) or 2.2(b), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

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

a. **ES&S owns the ES&S Software, all Documentation and training materials provided by ES&S.** Customer has the right to use the aforementioned Products to the extent specified in this Agreement. ES&S likewise owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned Products. The aforementioned Products also contain confidential and proprietary trade secrets of ES&S which are protected by law and are of substantial value to ES&S. Refer to Section 1.1 herein.

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

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

2.4 **Indemnification By ES&S.** ES&S will indemnify and hold Customer harmless from and against any and all damages, amounts paid in settlement and reasonable fees and costs (including reasonable attorneys fees) (collectively "Adverse Consequences") arising out of or relating to a claim that any of the ES&S Software infringes upon any third party's United States patent existing as of the date hereof or United States copyright, trademark or trade secret (a "Third Party Infringement Claim"). Customer shall notify ES&S immediately if it becomes aware of any Third Party Infringement Claim. Customer hereby gives ES&S full and complete authority, and shall provide such information and assistance as is necessary (at ES&S' expense with respect to reasonable out-of-pocket costs), to enable ES&S to defend, compromise or settle a Third Party Infringement Claim. In addition, if Customer is prevented by a Third Party Infringement

Claim from using any item of ES&S Software in substantially the manner contemplated by this Agreement, ES&S shall, at its sole option and expense, procure for Customer the right to continue such use or replace or modify the infringing item. If neither option is commercially reasonable, ES&S may direct Customer to cease use of the infringing item, and shall refund the depreciated cost thereof (as determined in accordance with GASB) to Customer. **THE FOREGOING STATES ES&S' ENTIRE LIABILITY FOR ANY INTELLECTUAL PROPERTY INFRINGEMENT ARISING UNDER THIS AGREEMENT. THE REMEDIES PROVIDED BY ES&S PURSUANT TO THIS SECTION 2.4 SHALL NOT BE AVAILABLE (i) IF THE THIRD PARTY INFRINGEMENT CLAIM RESULTS FROM AN ACTION OR OMISSION OF CUSTOMER DESCRIBED IN SECTION 2.5(a) BELOW, OR (ii) FOR ANY CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT RELATING SOLELY TO CUSTOMER'S USE OF ANY THIRD PARTY ITEM.**

2.5 **Indemnification By Customer.** To the extent permitted by applicable law, Customer shall indemnify and hold harmless ES&S from and against any and all Adverse Consequences arising out of or relating to the following:

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

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

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

d. Customer's election not to receive, or to terminate, the Maintenance Services.

ES&S shall notify Customer immediately if it becomes aware of any claim for which it may be entitled to indemnification under this Section 4.8, and hereby gives Customer full and complete authority, and shall provide such information and assistance as is necessary (at Customer's expense with respect to reasonable out-of-pocket costs), to enable Customer to defend, compromise or settle any such claim.

[END OF GENERAL TERMS]

EXHIBIT A
ES&S Software Modules Licensed by Customer
PowerProfile Enterprise Module Checklist

PowerProfile Enterprise (Check all that apply)

- X Voter Registration Module
- X Absentee Module
- X Mail Election Module
- X Election Worker Module
- X NVRA Module
- X Election Management Module
- X Polling Place Module
- X Street File Module
- X **Mass Change**
- X Notices Module
- X Image Indexing Module
- X **Duplicate Checking Module**
- X Petitions Module
- X Public Service Requests Module
- X Standard Pollbooks and ID cards
- X Current SOS File Export
- X Agency Interfaces for Department of Justice, Department of Motor Vehicles, Department of Health, Social Security Administration, and National Change of Address
- X State Portal/Early Voting and Candidate Filing Module
- X IJury Module
- X GIS Interface Module

Why our
databases
don't talk.
MVD and
SOS don't
talk, why?

EXHIBIT B

Oracle Software Sublicense

1. **GRANT OF SUBLICENSE.** ES&S hereby represents that it has entered into an agreement with Oracle Corporation (“Oracle”) to license Oracle’s Application Specific Full Use Programs (the “Oracle Software”), and that such license gives ES&S the right to sublicense the Oracle Software to Customer for use solely as a part of the System. In consideration for Customer’s agreement to pay a sublicense fee to ES&S in accordance with Section 2 below and subject to the terms and conditions of this Agreement, ES&S hereby grants a nonexclusive and nontransferable sublicense to Customer to use one copy of the Oracle Software as a part of the System. The Oracle Software may be used only with hardware and software which has been approved by ES&S, and it may be used on only one central processing unit. The prohibitions, acknowledgments and agreements set forth in Article II, Section 2.1 of the **GENERAL TERMS AND CONDITIONS** with respect to Customer’s use of the ES&S Software shall also apply to Customer’s use of the Oracle Software, except that only one copy of the Oracle Software may be made for backup and archive purposes and Customer is prohibited from publishing the results of benchmark test runs on the Oracle Software.

2. **SUBLICENSE FEE.** Customer shall pay ES&S the Oracle Sublicense Fee set forth on Exhibit A in order to sublicense the Oracle Software. The Oracle Sublicense Fee may be modified from time to time by ES&S due to (but not necessarily limited to) changes to ES&S’ license agreement with Oracle or changes in the use of the Oracle Software by Customer. Customer shall notify ES&S immediately of any such intended changes.

3. **TERM.** The sublicense of the Oracle Software shall be effective on the Acceptance Date and shall terminate on the date that the License is terminated; provided, however, that ES&S may also terminate this sublicense if required to do so by Oracle. Upon termination of the sublicense, Customer shall immediately return the Oracle Software and any related documentation (including any and all copies thereof) to ES&S.

4. **RELATIONSHIP OF ORACLE.** The parties acknowledge and agree that Oracle is a third party beneficiary of the sublicense granted hereunder, to the extent permitted by applicable law. ES&S hereby disclaims, on behalf of Oracle and to the extent permitted by applicable law, all of Oracle’s liability for any damages, whether direct, indirect, incidental or consequential, arising from Customer’s use of the Oracle Software.

5. **SUBSEQUENT RELEASES.** ES&S shall provide subsequent releases of the Oracle Software to Customer as they are made available to ES&S from time to time by Oracle. ES&S shall also provide support to Customer for the Oracle Software, to the extent ES&S receives information or assistance regarding such support from Oracle. ES&S will provide this support as long customer is paying the annual Oracle maintenance and support fees.

EXHIBIT C

ES&S Software Maintenance and Support

1. **SERVICES PROVIDED.** Upon Customer's and or applicable Counties' payment of the maintenance and support fee set forth on Exhibit A (the "Maintenance Fee"), ES&S shall provide certain maintenance and support services (the "Maintenance Services") for a one-year period (the "Maintenance Term"). The respective support responsibilities of the parties for maintenance and support are set forth on Exhibit D-1 attached hereto. The Maintenance Term shall renew for successive one-year periods unless (a) Customer notifies ES&S no later than 60 days in advance of any renewal that it no longer desires the Maintenance Services or (b) Customer fails to pay the Maintenance Fee for the renewal period on a timely basis.

2. **REINSTATEMENT OF MAINTENANCE SERVICES.** If the Maintenance Term (or any renewal thereof) expires without being renewed, Customer may thereafter resume receiving Maintenance Services upon (a) notification to ES&S, (b) payment of all Maintenance Fees which would have been due to ES&S had the Maintenance Term or renewal not expired, and (c) the granting to ES&S of access to the System, so that ES&S may analyze it and perform such maintenance as may be necessary before resuming the Maintenance Services.

3. **SYSTEM ADMINISTRATORS.** Customer shall designate 2 System Administrators and shall notify ES&S of their names, telephone numbers and email addresses no later than 60 days after the execution of this Agreement. Following such notification, ES&S shall provide specialized training on the use of the System to the System Administrators. ES&S and the System Administrators shall use reasonable efforts to complete such training and to certify the System Administrators in the use of the System (using ES&S' standard certification procedures) by the Acceptance Date.

4. **UPDATES.** ES&S shall provide new releases, upgrades or maintenance patches to the ES&S Software, along with appropriate documentation ("Updates"), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of third party hardware and/or software required to operate the Update. All Updates shall be subject to the License upon delivery. Customer may install Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S may charge Customer at its then-current rates to (a) install Updates or (b) perform Maintenance Services required as a result of Customer's failure to Timely Install an Update. Customer shall report any failure of performance of an Update within 3 business days after Customer discovers, or in its exercise of reasonable diligence, and actual use of any given module, should have discovered, such failure of performance. Customer's failure to so timely notify ES&S of such failure of performance may significantly jeopardize and limit ES&S' ability to adequately correct such failure. ES&S' obligation to provide Maintenance and Support Services hereunder is conditional upon Customer having Timely Installed and using an Update provided to it by ES&S.

5. **CONDITIONS.** ES&S shall not be obligated to provide Maintenance and Support Services if:
 - (a) the ES&S Software is not used with hardware and software meeting minimum specifications supplied by ES&S;
 - (b) the hardware and software used with the ES&S Software is not in good operating order or is not installed in a suitable operating environment;
 - (c) the ES&S Software or any hardware or software with which the ES&S Software is used is modified, changed or altered without ES&S' prior authorization or approval in writing unless such modification, change or alteration is performed by Customer temporarily during an emergency situation and then only for such period of time as an emergency condition exists and it is not reasonably practicable for Customer to obtain ES&S' prior authorization or approval in writing;

- (d) the data and/or the database structure used in conjunction with the ES&S Software is manipulated using application software other than the ES&S Software unless Customer obtains ES&S' prior written approval of such manipulation;
- (e) the failure of performance is caused by Customer, its employees or authorized representatives, or any third party;
- (f) Customer does not notify ES&S of the failure of performance within 3 business days after Customer discovers, or in its exercise of reasonable diligence, and actual use of any given module, should have discovered, such failure of performance and is otherwise not in compliance with its obligations hereunder; or
- (g) Customer does not pay any Maintenance Fee on a timely basis.

EXHIBIT C-1
Support Responsibilities

Responsibilities of ES&S	Responsibilities of Customer
<ul style="list-style-type: none"> ➤ VR software support as outlined in contract ➤ Remote installation of initial data and Oracle software ➤ Installation of Oracle software upgrades ➤ Database analysis and recommendation of tuning parameters as required ➤ Implement tuning recommendations approved by customer as required ➤ Outline operational and technical requirements for a Backup and Recovery Strategy ➤ Outline procedures and provide scripts for performing routine database exports ➤ Notification of OS Service Packs approved by ES&S. ES&S will coordinate with the customer to set a schedule when routine maintenance or upgrades will be performed ➤ Upgrade impact planning and assistance ➤ Server recovery providing backups are available ➤ Database recovery or database restore if needed provided a backup is available ➤ Products purchased by customer <ul style="list-style-type: none"> • Assist Customer in its performance of the following: <ul style="list-style-type: none"> ▪ Hardware problem diagnosis ▪ Support of ES&S approved third-party software required to run VR Products (i.e. PC Anywhere) • ES&S will work with customer technicians to resolve problems after the customer has contacted the appropriate vendor ➤ Third Party Products purchased from ES&S <ul style="list-style-type: none"> ▪ Diagnose and fix Software problems 	<ul style="list-style-type: none"> ➤ Hardware problem diagnosis and resolution ➤ Third-party software problem diagnosis and resolution ➤ Support of approved operating systems – Windows 2000 Professional, Windows XP Workstation ➤ Support of ES&S approved third-party software required to run VR Products (i.e. PC Anywhere) ➤ Day-to-day administrative duties, including but not limited to, system access, setup workstations, setup printing, customize desktops, monitor system performance and drive capacity. ➤ Become thoroughly familiar with VR product manuals and documentation ➤ Understand proper use of VR application functions and proper use of VR application in the conduct of election management and administration ➤ Inquire directly with ES&S support for questions regarding use of VR application ➤ Customer is required to provide direct or dial-up access to system with all necessary logins and passwords. ➤ Backup and archiving of data (including the network operating system, applications, and data.) ➤ Validate any data input and output in the day to day use of VR application ➤ Maintaining system configurations, including hard drive partitioning and capacity management. ➤ Contacting the appropriate vendor if replacement of parts are necessary ➤ Responsible for maintaining and managing software license compliance and hardware warranty agreements ➤ Consumables, such as toner ➤ Customer-installed third-party software ➤ Cost associated with any additional hardware or software required to perform required upgrades ➤ Routine cleaning, or maintenance and mechanical wear ➤ Damage caused by misuse, abuse, or neglect ➤ Damage caused by manufacturer's parts ➤ Damage caused when warranted parts were repaired or replaced by an organization other than those approved by the hardware manufacturer ➤ Maintain a set of change and configuration logs defined by ES&S

GENERAL CONDITIONS

ES&S strongly recommends that Customer employ a Network Administrator. The responsibilities of the Systems Administrator include, but are not limited to: Software and network operating system support.
Configures, installs, and maintains PC hardware, network servers, and components.
Performs general maintenance, and upgrades to the network. Optimizes network performance.
Analyzes and resolves system level problems. Maintains systems documentation.
Have a thorough understanding of all the elements of the network such as the hardware, software, communications devices, cabling, topologies and protocols. Must be able to analyze and resolve problems, lift equipment, have good technical communications skills, diagnose and troubleshoot network and PC systems, perform backups on all systems, creating and delete new users, add printers.

[THE REMAINDER OF THIS PAGE WAS INTENTIONALLY LEFT BLANK]

EXHIBIT D

Definitions

“Documentation” means one User Product Manual and one Training Work Book.

“ES&S Software” means the modules which the parties have selected on Exhibit B, all Updates provided to Customer by ES&S and all custom programming created by ES&S for Customer.

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

“System” means, collectively, the ES&S Software, the Third Party Products, the Oracle Software and the Final Converted Data, as installed and configured by ES&S pursuant to this Agreement.

“Third Party Products” means hardware, software and equipment which have been manufactured, created and/or licensed by persons other than ES&S

“Timely install” means Customer’s installation and use of an Update provided to it by ES&S no later than Eighteen Months after ES&S’ delivery of such update to customer.

_____ **APPENDIX A**

ELECTION SYSTEMS & SOFTWARE, INC.
VOTER REGISTRATION AND ELECTION MANAGEMENT SYSTEM SOFTWARE
LICENSE/MAINTENANCE AND SUPPORT AGREEMENT

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

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

AND: State of New Mexico ("Customer").

RECITALS:

C. Customer has agreed to license/purchase voter registration software and related products and services from ES&S for use in the State of New Mexico (the "Jurisdiction"). The terms and conditions under which such license, products and services shall be provided are set forth on the **GENERAL TERMS** attached hereto.

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

- X Exhibit A ES&S Software Licensed by Customer
- X Exhibit B Oracle Software Sublicense
- X Exhibit C Maintenance Services
- X Exhibit C-1 Support Responsibilities
- X Exhibit D Definitions

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

- Agrees to the **GENERAL TERMS** and the terms and conditions set forth on each Exhibit.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the State of New Mexico.
- Represents and warrants to the other party that as of its signature date indicated below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, INC.
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1275

STATE OF NEW MEXICO
(Customer)

Fax _____ No.: _____

Signature

Signature

Ken Carbullido

Name (Printed or Typed)
Senior Vice President

Title

Date

Name (Printed or Typed)

Title

Date

GENERAL TERMS

ARTICLE 3 LICENSE OF ES&S SOFTWARE

3.1 **Grant of License.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer a perpetual, nonexclusive, nontransferable license (the "License") to use the ES&S Software and the related Documentation in the Jurisdiction. The License allows Customer to use and copy the ES&S Software (in object code only) and the Documentation, solely for the purposes of managing the voter registration process and other election-related activities in the Jurisdiction. Customer may not take any of the following actions with respect to the ES&S Software or its Documentation:

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

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

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

3.2 **Term of License.** The License shall commence as of the date of delivery of the ES&S Software. The License shall survive the termination of all other obligations under this Agreement and the termination of all Exhibits, and shall terminate upon the date on which Customer discontinues the use of the ES&S Software; provided, however, that ES&S may terminate the License prior to such date if Customer fails to pay the License Fee set forth in the Amendment, or breaches Sections 1.1, 1.4, or 2.3 of this Agreement. Upon the termination of the License, Customer shall immediately return the ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy the ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

3.3 **Source Code.** The License does not permit Customer to use the source code for the ES&S Software. ES&S has placed the source code in escrow with its third party escrow agent and will likewise place in escrow the source code for all Updates, Add-Ons and New Products (as defined in Section 1.5 below) provided to Customer. Should ES&S cease operations and become unable to maintain and support any of the ES&S Software, Updates, Add-Ons or New Products provided to Customer while under an obligation to do so, Customer may obtain the source code for such item(s) for the sole purpose of enabling the continuing use of such item(s) in accordance with this Agreement. The source code will remain the property of ES&S and may not otherwise be used by Customer. The cost of using an alternative third party escrow agent shall be borne by Customer.

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

a. **Updates.** During the Warranty Period, ES&S shall provide new releases, upgrades or maintenance patches to the ES&S Software, along with appropriate Documentation

("Updates"), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of Third Party Products required to operate the Updates. All Updates shall be deemed to be ES&S Software for purposes of this Agreement upon delivery. Customer may install Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S may charge Customer at its then-current rates to (i) install Updates or (ii) provide maintenance and support on the ES&S Software which is required as a result of Customer's failure to timely install an Update. If Customer proposes changes in the ES&S Software to ES&S, such resulting source code will become ES&S' property. ES&S may, in its sole discretion, elect to make or not to make such changes without reference or compensation to Customer or any third party. Upon the termination of the Warranty Period, Customer shall be entitled to receive the Maintenance Services described on Exhibit C if it has so elected in Section B of the signature page to this Agreement.

b. **Add-Ons and New Products.** From time to time, ES&S may offer fundamentally new and different functionality not already licensed to Customer hereunder which can be added on to the ES&S Software ("Add-Ons") and new software products with fundamentally new or different functionality features not already licensed to Customer ("New Products") to Customer. Any fundamental functionality of the ES&S Software licensed hereunder provided by ES&S shall not require the licensure by Customer of any Add-Ons or New Products. Customer may elect to license an Add-On or New Product upon the payment of a license fee to ES&S. Unless any such license is effectuated pursuant to a separate license agreement, the Add-On or New Product shall be deemed to be part of the ES&S Software upon payment of such license fee. Each Add-On or New Product which is deemed to be part of the ES&S Software will be subject to the warranty set forth in Section 2.2(a) upon delivery, and Customer may thereafter elect to receive Maintenance Services therefor upon the expiration of the Warranty Period.

3.5 **Compliance with Applicable Law.** ES&S represents to Customer that the ES&S Software, Updates, Add-Ons and New Products will each comply with all applicable requirements of state and federal law at the time of delivery. As long as Customer is under warranty or has paid for and is receiving Maintenance Services in accordance with the terms and conditions of Exhibit C to this Agreement, ES&S shall provide Customer with any Updates required by changes in federal law which ES&S performs in the normal course of development, which do not require significant development work and which are technically feasible and commercially reasonable at no additional charge. Customer shall pay ES&S for any Update which is required due to a change in state or federal law which requires a significant amount of development work or is otherwise not technically feasible or commercially reasonable. In the

event that ES&S determines that a change in state or federal law requires a significant amount of development work for which Customer shall pay, ES&S will negotiate in good faith with Customer in an attempt to apply the costs of such development work across ES&S' applicable customer base.

ARTICLE 4 MISCELLANEOUS

4.1 **Custom Programming.** From time to time after the date of this Agreement, ES&S may provide custom programming to Customer. Custom programming shall be created, delivered, installed and tested as mutually agreed upon in advance by Customer and ES&S. Such agreement shall be in the form of an addendum to this Agreement which is executed by both parties. All custom programming shall be deemed to be part of the ES&S Software, and shall be covered by the warranty set forth in Section 2.2(a) for a 90-day period following its acceptance by Customer. ES&S retains the right to make any custom programming available to other customers.

4.2 **Warranties.**

a. **ES&S Software.** ES&S warrants that for 90 days after the Acceptance Date (the "Warranty Period"), it will repair or replace any of the ES&S Software which, while under normal use and service: (i) fails to perform in accordance with its Documentation and in accordance with official preprinted marketing materials, proposals, or quote published by ES&S in all material respects, or (ii) is defective in material or workmanship. Any repaired or replaced item of ES&S Software shall be warranted only for the unexpired term of the original Warranty Period. All replaced components of the ES&S Software will become the property of ES&S. This warranty is effective provided that (I) Customer promptly notifies ES&S of the failure of performance or defect and is otherwise in compliance with its obligations hereunder, (II) the ES&S Software to be repaired or replaced has not been repaired, changed, modified or altered except as authorized or approved by ES&S, (III) the ES&S Software to be repaired or replaced is not damaged due to accident, theft, vandalism, neglect, abuse, use which is not in accordance with instructions or specifications furnished by ES&S or causes beyond the reasonable control of ES&S or Customer, including natural disaster, fire, flood, unusually severe weather or Acts of God, (IV) Customer has Timely Installed and is using all Updates (if any), provided to it by ES&S, (V) the ES&S Software is used with hardware and software meeting specifications supplied by ES&S, and (VI) the data and/or the database structure used in conjunction with the ES&S Software is not manipulated using application software other than the ES&S Software unless Customer obtains ES&S' prior written approval of such manipulation or such modification, change or alteration is performed by Customer temporarily during an emergency situation and then only for such period of time as an emergency condition exists and it is not reasonably practicable for Customer to obtain ES&S' prior authorization or approval in writing. Upon expiration of the warranty, Customer shall be entitled to the Maintenance Services set forth in Exhibit C to this Agreement in accordance with the terms and conditions of Exhibit C.

b. **System.** ES&S warrants that the ES&S Software will operate in conjunction with the Third Party Products during the Warranty Period, provided that (i) Customer has Timely Installed and is using the most recent Update, or the second most recent Update, provided to it by ES&S, and (ii) the Third Party Products are performing in accordance with their own specifications and documentation in all material respects and are not defective in material or workmanship. In the event of a breach of this warranty, ES&S will repair or replace the item of ES&S Software which is causing such breach to occur. Customer acknowledges that ES&S has merely purchased the Third Party

Products for resale or rental to Customer, and that the proprietary and intellectual property rights to the Third Party Products are owned by parties other than ES&S ("Third Parties"). Customer further acknowledges that except for the payment to ES&S for the Third Party Products, all of its rights and obligations with respect thereto flow from and to the Third Parties. ES&S shall provide Customer with copies of all documentation and warranties for the Third Party Products which are provided to ES&S. ES&S is responsible for interfaces with third party software and maintenance of integration with third party software to the extent it has been marketed as a material part of the system and such third party software meets all minimum specifications provided by ES&S to Customer.

c. **Exclusive Remedies.** IN THE EVENT OF A BREACH OF SUBSECTIONS 2.2(a) or 2.2(b), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

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

a. ES&S owns the ES&S Software, all Documentation and training materials provided by ES&S. Customer has the right to use the aforementioned Products to the extent specified in this Agreement. ES&S likewise owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned Products. The aforementioned Products also contain confidential and proprietary trade secrets of ES&S which are protected by law and are of substantial value to ES&S. Refer to Section 1.1 herein.

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

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

4.4 **Indemnification By ES&S.** ES&S will indemnify and hold Customer harmless from and against any and all damages, amounts paid in settlement and reasonable fees and costs (including reasonable attorneys fees) (collectively "Adverse Consequences") arising out of or relating to a claim that any of the ES&S Software infringes upon any third party's United States patent existing as of the date hereof or United States copyright, trademark or trade secret (a "Third Party Infringement Claim"). Customer shall notify ES&S immediately if it becomes aware of any Third Party Infringement Claim. Customer hereby gives ES&S full and complete authority, and shall provide such information and assistance as is necessary (at ES&S' expense with respect to reasonable out-of-pocket costs), to enable ES&S to defend, compromise or settle a Third Party Infringement Claim. In addition, if Customer is prevented by a Third Party Infringement

Claim from using any item of ES&S Software in substantially the manner contemplated by this Agreement, ES&S shall, at its sole option and expense, procure for Customer the right to continue such use or replace or modify the infringing item. If neither option is commercially reasonable, ES&S may direct Customer to cease use of the infringing item, and shall refund the depreciated cost thereof (as determined in accordance with GASB) to Customer. **THE FOREGOING STATES ES&S' ENTIRE LIABILITY FOR ANY INTELLECTUAL PROPERTY INFRINGEMENT ARISING UNDER THIS AGREEMENT. THE REMEDIES PROVIDED BY ES&S PURSUANT TO THIS SECTION 2.4 SHALL NOT BE AVAILABLE (i) IF THE THIRD PARTY INFRINGEMENT CLAIM RESULTS FROM AN ACTION OR OMISSION OF CUSTOMER DESCRIBED IN SECTION 2.5(a) BELOW, OR (ii) FOR ANY CLAIM OF INTELLECTUAL PROPERTY INFRINGEMENT RELATING SOLELY TO CUSTOMER'S USE OF ANY THIRD PARTY ITEM.**

4.5 **Indemnification By Customer.** To the extent permitted by applicable law, Customer shall indemnify and hold harmless ES&S from and against any and all Adverse Consequences arising out of or relating to the following:

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

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

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

d. Customer's election not to receive, or to terminate, the Maintenance Services.

ES&S shall notify Customer immediately if it becomes aware of any claim for which it may be entitled to indemnification under this Section 4.8, and hereby gives Customer full and complete authority, and shall provide such information and assistance as is necessary (at Customer's expense with respect to reasonable out-of-pocket costs), to enable Customer to defend, compromise or settle any such claim.

[END OF GENERAL TERMS]

EXHIBIT A
ES&S Software Modules Licensed by Customer
PowerProfile Enterprise Module Checklist

PowerProfile Enterprise (Check all that apply)

- X Voter Registration Module
- X Absentee Module
- X Mail Election Module
- X Election Worker Module
- X NVRA Module
- X Election Management Module
- X Polling Place Module
- X Street File Module
- X Mass Change
- X Notices Module
- X Image Indexing Module
- X Duplicate Checking Module
- X Petitions Module
- X Public Service Requests Module
- X Standard Pollbooks and ID cards
- X Current SOS File Export
- X Agency Interfaces for Department of Justice, Department of Motor Vehicles, Department of Health, Social Security Administration, and National Change of Address
- X State Portal/Early Voting and Candidate Filing Module
- X IJury Module
- X GIS Interface Module

EXHIBIT B

Oracle Software Sublicense

6. **GRANT OF SUBLICENSE.** ES&S hereby represents that it has entered into an agreement with Oracle Corporation (“Oracle”) to license Oracle’s Application Specific Full Use Programs (the “Oracle Software”), and that such license gives ES&S the right to sublicense the Oracle Software to Customer for use solely as a part of the System. In consideration for Customer’s agreement to pay a sublicense fee to ES&S in accordance with Section 2 below and subject to the terms and conditions of this Agreement, ES&S hereby grants a nonexclusive and nontransferable sublicense to Customer to use one copy of the Oracle Software as a part of the System. The Oracle Software may be used only with hardware and software which has been approved by ES&S, and it may be used on only one central processing unit. The prohibitions, acknowledgments and agreements set forth in Article II, Section 2.1 of the **GENERAL TERMS AND CONDITIONS** with respect to Customer’s use of the ES&S Software shall also apply to Customer’s use of the Oracle Software, except that only one copy of the Oracle Software may be made for backup and archive purposes and Customer is prohibited from publishing the results of benchmark test runs on the Oracle Software.

7. **SUBLICENSE FEE.** Customer shall pay ES&S the Oracle Sublicense Fee set forth on Exhibit A in order to sublicense the Oracle Software. The Oracle Sublicense Fee may be modified from time to time by ES&S due to (but not necessarily limited to) changes to ES&S’ license agreement with Oracle or changes in the use of the Oracle Software by Customer. Customer shall notify ES&S immediately of any such intended changes.

8. **TERM.** The sublicense of the Oracle Software shall be effective on the Acceptance Date and shall terminate on the date that the License is terminated; provided, however, that ES&S may also terminate this sublicense if required to do so by Oracle. Upon termination of the sublicense, Customer shall immediately return the Oracle Software and any related documentation (including any and all copies thereof) to ES&S.

9. **RELATIONSHIP OF ORACLE.** The parties acknowledge and agree that Oracle is a third party beneficiary of the sublicense granted hereunder, to the extent permitted by applicable law. ES&S hereby disclaims, on behalf of Oracle and to the extent permitted by applicable law, all of Oracle’s liability for any damages, whether direct, indirect, incidental or consequential, arising from Customer’s use of the Oracle Software.

10. **SUBSEQUENT RELEASES.** ES&S shall provide subsequent releases of the Oracle Software to Customer as they are made available to ES&S from time to time by Oracle. ES&S shall also provide support to Customer for the Oracle Software, to the extent ES&S receives information or assistance regarding such support from Oracle. ES&S will provide this support as long customer is paying the annual Oracle maintenance and support fees.

EXHIBIT C

ES&S Software Maintenance and Support

1. **SERVICES PROVIDED.** Upon Customer's and or applicable Counties' payment of the maintenance and support fee set forth on Exhibit A (the "Maintenance Fee"), ES&S shall provide certain maintenance and support services (the "Maintenance Services") for a one-year period (the "Maintenance Term"). The respective support responsibilities of the parties for maintenance and support are set forth on Exhibit D-1 attached hereto. The Maintenance Term shall renew for successive one-year periods unless (a) Customer notifies ES&S no later than 60 days in advance of any renewal that it no longer desires the Maintenance Services or (b) Customer fails to pay the Maintenance Fee for the renewal period on a timely basis.
2. **REINSTATEMENT OF MAINTENANCE SERVICES.** If the Maintenance Term (or any renewal thereof) expires without being renewed, Customer may thereafter resume receiving Maintenance Services upon (a) notification to ES&S, (b) payment of all Maintenance Fees which would have been due to ES&S had the Maintenance Term or renewal not expired, and (c) the granting to ES&S of access to the System, so that ES&S may analyze it and perform such maintenance as may be necessary before resuming the Maintenance Services.
3. **SYSTEM ADMINISTRATORS.** Customer shall designate 2 System Administrators and shall notify ES&S of their names, telephone numbers and email addresses no later than 60 days after the execution of this Agreement. Following such notification, ES&S shall provide specialized training on the use of the System to the System Administrators. ES&S and the System Administrators shall use reasonable efforts to complete such training and to certify the System Administrators in the use of the System (using ES&S' standard certification procedures) by the Acceptance Date.
4. **UPDATES.** ES&S shall provide new releases, upgrades or maintenance patches to the ES&S Software, along with appropriate documentation ("Updates"), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of third party hardware and/or software required to operate the Update. All Updates shall be subject to the License upon delivery. Customer may install Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S may charge Customer at its then-current rates to (a) install Updates or (b) perform Maintenance Services required as a result of Customer's failure to Timely Install an Update. Customer shall report any failure of performance of an Update within 3 business days after Customer discovers, or in its exercise of reasonable diligence, and actual use of any given module, should have discovered, such failure of performance. Customer's failure to so timely notify ES&S of such failure of performance may significantly jeopardize and limit ES&S' ability to adequately correct such failure. ES&S' obligation to provide Maintenance and Support Services hereunder is conditional upon Customer having Timely Installed and using an Update provided to it by ES&S.
6. **CONDITIONS.** ES&S shall not be obligated to provide Maintenance and Support Services if:
 - (h) the ES&S Software is not used with hardware and software meeting minimum specifications supplied by ES&S;
 - (i) the hardware and software used with the ES&S Software is not in good operating order or is not installed in a suitable operating environment;
 - (j) the ES&S Software or any hardware or software with which the ES&S Software is used is modified, changed or altered without ES&S' prior authorization or approval in writing unless such modification, change or alteration is performed by Customer temporarily during an emergency situation and then only for such period of time as an emergency condition exists and it is not reasonably practicable for Customer to obtain ES&S' prior authorization or approval in writing;

- (k) the data and/or the database structure used in conjunction with the ES&S Software is manipulated using application software other than the ES&S Software unless Customer obtains ES&S' prior written approval of such manipulation;
- (l) the failure of performance is caused by Customer, its employees or authorized representatives, or any third party;
- (m) Customer does not notify ES&S of the failure of performance within 3 business days after Customer discovers, or in its exercise of reasonable diligence, and actual use of any given module, should have discovered, such failure of performance and is otherwise not in compliance with its obligations hereunder; or
- (n) Customer does not pay any Maintenance Fee on a timely basis.

EXHIBIT C-1
Support Responsibilities

Responsibilities of ES&S	Responsibilities of Customer
<ul style="list-style-type: none"> ➤ VR software support as outlined in contract ➤ Remote installation of initial data and Oracle software ➤ Installation of Oracle software upgrades ➤ Database analysis and recommendation of tuning parameters as required ➤ Implement tuning recommendations approved by customer as required ➤ Outline operational and technical requirements for a Backup and Recovery Strategy ➤ Outline procedures and provide scripts for performing routine database exports ➤ Notification of OS Service Packs approved by ES&S. ES&S will coordinate with the customer to set a schedule when routine maintenance or upgrades will be performed ➤ Upgrade impact planning and assistance ➤ Server recovery providing backups are available ➤ Database recovery or database restore if needed provided a backup is available ➤ Products purchased by customer <ul style="list-style-type: none"> • Assist Customer in its performance of the following: <ul style="list-style-type: none"> ▪ Hardware problem diagnosis ▪ Support of ES&S approved third-party software required to run VR Products (i.e. PC Anywhere) • ES&S will work with customer technicians to resolve problems after the customer has contacted the appropriate vendor ➤ Third Party Products purchased from ES&S <ul style="list-style-type: none"> ▪ Diagnose and fix Software problems 	<ul style="list-style-type: none"> ➤ Hardware problem diagnosis and resolution ➤ Third-party software problem diagnosis and resolution ➤ Support of approved operating systems – Windows 2000 Professional, Windows XP Workstation ➤ Support of ES&S approved third-party software required to run VR Products (i.e. PC Anywhere) ➤ Day-to-day administrative duties, including but not limited to, system access, setup workstations, setup printing, customize desktops, monitor system performance and drive capacity. ➤ Become thoroughly familiar with VR product manuals and documentation ➤ Understand proper use of VR application functions and proper use of VR application in the conduct of election management and administration ➤ Inquire directly with ES&S support for questions regarding use of VR application ➤ Customer is required to provide direct or dial-up access to system with all necessary logins and passwords. ➤ Backup and archiving of data (including the network operating system, applications, and data.) ➤ Validate any data input and output in the day to day use of VR application ➤ Maintaining system configurations, including hard drive partitioning and capacity management. ➤ Contacting the appropriate vendor if replacement of parts are necessary ➤ Responsible for maintaining and managing software license compliance and hardware warranty agreements ➤ Consumables, such as toner ➤ Customer-installed third-party software ➤ Cost associated with any additional hardware or software required to perform required upgrades ➤ Routine cleaning, or maintenance and mechanical wear ➤ Damage caused by misuse, abuse, or neglect ➤ Damage caused by manufacturer's parts ➤ Damage caused when warranted parts were repaired or replaced by an organization other than those approved by the hardware manufacturer ➤ Maintain a set of change and configuration logs defined by ES&S

GENERAL CONDITIONS

ES&S strongly recommends that Customer employ a Network Administrator. The responsibilities of the Systems Administrator include, but are not limited to: Software and network operating system support.
Configures, installs, and maintains PC hardware, network servers, and components.
Performs general maintenance, and upgrades to the network. Optimizes network performance.
Analyzes and resolves system level problems. Maintains systems documentation.
Have a thorough understanding of all the elements of the network such as the hardware, software, communications devices, cabling, topologies and protocols. Must be able to analyze and resolve problems, lift equipment, have good technical communications skills, diagnose and troubleshoot network and PC systems, perform backups on all systems, creating and delete new users, add printers.

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EXHIBIT D

Definitions

“Documentation” means one User Product Manual and one Training Work Book.

“ES&S Software” means the modules which the parties have selected on Exhibit B, all Updates provided to Customer by ES&S and all custom programming created by ES&S for Customer.

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

“System” means, collectively, the ES&S Software, the Third Party Products, the Oracle Software and the Final Converted Data, as installed and configured by ES&S pursuant to this Agreement.

“Third Party Products” means hardware, software and equipment which have been manufactured, created and/or licensed by persons other than ES&S

“Timely install” means Customer’s installation and use of an Update provided to it by ES&S no later than Eighteen Months after ES&S’ delivery of such update to customer.

**Appendix C-1
Payment Schedule
Ongoing Support Services**

Rates:

The Contractor may charge procuring agencies the following rates for software products and services:

PowerProfile Enterprise Central Solution Implementation: \$2,732,653.00.

This includes: Power Profile Enterprise License Fee, Professional Services - Implementation Services, Professional Services - Systems Support Services ES&S Development HW, SW, Peripheral Costs, ES&S Travel and Associated Expenses.

Payments will be made as project milestones are accepted by Agency as detailed in Exhibit C-2.

Optional Professional Products and Services:

- a. Oracle Application Specific Full Use Licenses \$53,668 per processor
 - Oracle 9i Enterprise Edition (CPU license) \$30,667
 - Partitioning Option for 9i EE (CPU license) \$ 7,667
 - Oracle Label Security for 9i EE (CPU license) \$ 7,667
 - Oracle 9i Application Server SE (CPU license) \$ 7,667

Annual Support for Oracle Licenses per CPU:
Year (1) \$15,954 Year (2) \$16,752 Year (3) \$17,589 Year (4) \$18,468

- b. Monitoring Tools
 - Quest DB Monitoring and Tuning Tools \$15,000

Annual Support for Quest DM Tools: \$2500

- c. Citrix Licenses (per 100 users): \$360 Per License
 - Annual support for Citrix Licenses: \$50 Per License

- d. Optional Services

Implementation Year (1) Year (2) Year (3) Year (4)

Project Management			\$ 99,792	\$104,782	\$110,021
In-State Support Rep	\$70,400	\$120,686	\$126,720	\$133,056	\$139,709
State Data Center Monitoring	\$ 2,000	\$ 12,000	\$ 12,600	\$ 13,230	\$ 13,892
County Device Monitoring	\$ 8,250	\$ 49,000	\$ 51,975	\$ 54,574	\$ 57,302
ASP Host Fee	\$20,000	\$ 60,000	\$ 63,000	\$ 66,150	\$ 69,458
Data Replication/Backup Data Center		\$115,860			

- e. County Voter Registration and Election Management System Annual Software and Maintenance:

County Size (# of registered voters)	1 st Year Maintenance	Additional Years Maintenance **
--------------------------------------	----------------------------------	---------------------------------

0 – 10,000	Included	\$3,000
10,000 – 20,000	Included	\$4,500
20,000 – 50,000	Included	\$6,750
50,000 – 82,500	Included	\$8,250
Over 82,500	Included	10 cents / voter

Annual Maintenance for the counties is calculated on voter registration on July 1 at the beginning of each fiscal year.

- f. Secretary of State Annual Maintenance and Support for Voter Registration/ Election Management System Software:
Year (1) \$103,935, Year (2) \$118,385, Year (3) \$133,557, Year (4) \$149,488

Monthly invoices will be sent to the Secretary of State beginning 90 days after acceptance of the PowerProfile Enterprise Central Solution.

Yearly maintenance includes maintenance and upgrades for existing software, updates to supplemental files & utilities, revisions to documentation, and help desk services.

- g. Additional Customization/Upgrade/Modification/Support Hourly Rate: \$125 per hour

Exhibit C-2
Payment Schedule
Pricing and Payment Schedule

<u>Milestone</u>	<u>Scheduled Date</u>	<u>Payment Amount</u>
Project Plan Acceptance	August 8, 2003	\$ 217,000
Functional Analysis Acceptance	August 22, 2003	\$ 217,000
Pilot County Implementation and Acceptance	September 19, 2003	\$ 434,000
Ten (10) Non-Power Counties Implementation and Acceptance (Exception: Bernalillo County)	October 17, 2003	\$ 434,000
PowerProfile 7.0 Release	December 16, 2003	\$ 434,000
Completion of Training	February 9, 2004	\$ 434,000
Statewide System Operational	March 5, 2004	\$ 434,000
System Acceptance	March 19, 2004	\$ 128,653