

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

SPD# 00-000-00-00033

THIS AGREEMENT is made and entered into by and between Election Systems and Software (ES&S) ("Contractor") and the State Purchasing Agent (A) on behalf of the State of New Mexico.

The parties agree as follows:

1. Definitions

- A. "Administering Agency" refers to the Office of the NM Secretary of State.
- B. "Agreement Administrator" means the individual named by the Administering Agency who has the responsibility for the proper administration of this Agreement.
- C. "Documentation" refers to manuals, handbooks, and other publications supplied with products or supplied in connection with services.
- D. "Procuring Agency" means the Office of the Secretary of State and/or any county clerk within the State of New Mexico that chooses to procure products or services under this Agreement.
- E. "Products" refers to VREMS software and documentation but not to services.
- F. "Project Plan" refers to a document with written approval by the Procuring Agency and Agreement Administrator that describes the tasks and timeframe for the completion of each task concerning the implementation of Software.
- G. "Services" refers to installation, training, technical support and conversion services required for the effective use of Software. All other forms of services and professional services are excluded from this Agreement.
- H. "Software" refers to voter registration and election management software products including conversion and interface software routines. The term "Software" applies to all parts of software, including new releases, updates, and modifications of software. For software, the term "purchase" means "license". All other forms of application system software are excluded from the price agreement.

- I. "Supplies" refers to paper, diskettes, tapes, ribbons and other forms of generally available consumables and **supplies all of which are excluded from this Agreement.**
2. Scope of Work
  - A. The Contractor shall provide voter registration and election management software products and services to procuring agencies of the State of New Mexico in accordance with the terms of this Agreement. This Agreement is a **"price agreement" as defined in Section 13-1-71 NMSA 1978 (1984).** Accordingly, the Contractor shall provide products and services only upon the issuance and acceptance by Contractor of **"purchase orders" as defined in Section 13-1-77 NMSA 1978 (1984).** Purchase orders may be issued to purchase VREMS software and **technical support services** at the rates specified in this Agreement.
  - B. The Contractor agrees to provide procuring agencies the following:
    1. A **nonexclusive,** nontransferable, perpetual license to use the voter registration software on **designated Procuring Agency computer equipment,** notwithstanding any provisions to the contrary in any document other than this Agreement.
    2. Technical support for procuring agencies in the form of user training, technical assistance, conversion assistance and other direct assistance requested by Procuring Agency that relates specifically to the use of Contractor's software. **Contractor is not responsible for trouble shooting Procuring Agency hardware.**
  - C. This Agreement is not an exclusive agreement. Procuring agencies may obtain voter registration software products and services from other sources during the Agreement term. Neither the SPA nor the Administering Agency makes **any expressed or implied warranties whatsoever that any particular number of purchase orders will be issued or that any particular quantity or dollar amount of products or services will be procured.**
  - D. Request for proposals **No. 00-000-00-00033,** the Contractor's proposal, and the contractor's standard software licensing agreement (attached hereto as appendix A) are incorporated by reference into and are made a part of this Agreement. In addition, each purchase order that is accepted by the Contractor will become a part of the Agreement. In the event of any conflict among these documents, the following order of precedence shall apply:
    - (1) the terms and conditions of this document;

- (2) the list of products and services contained in the purchase order;
- (3) the request for proposals;
- (4) the Contractor's proposal; and
- (5) the Contractor's standard software licensing agreement that was submitted as part of the Contractor's proposal.

E. All software installations will be performed in accordance with an approved Project Plan.

### 3. Payment Provisions

All payments under this Agreement are subject to the following provisions:

#### A. Acceptance

In accordance with Section 13-1-158 NMSA 1978 (1984, as amended through 1997), a Procuring Agency shall determine whether all products and services delivered to it meet the Contractor's published specifications. No payment shall be made for any products or services until the products or services have been accepted in writing by the Procuring Agency. Unless otherwise agreed upon between the Procuring Agency and the Contractor, within thirty (30) days from the date the Procuring Agency receives written notice from the Contractor that payment is requested for services or within thirty (30) days from the receipt of products, the Procuring Agency shall issue a written certification of complete or partial acceptance or rejection of the products or services. Unless the Procuring Agency gives notice of rejection within the thirty (30) day period, the products or services will be deemed to have been accepted.

#### B. Payment of Invoice

Payment of Invoice Payment will be made to the Contractor's designated mailing address, as listed in paragraph 32. In accordance with Section 13-1-158, NMSA 1978, payment shall be tendered to the Contractor within thirty (30) days of the date of certification. Procuring agencies agree to make a reasonable effort to pay the Contractor for products or services rendered within thirty (30) days of acceptance. After the sixtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due to the Contractor at the rate of one and one-half percent per month.

Payment will be made to the Contractor's designated mailing address. Procuring agencies agree to make a reasonable effort to pay the Contractor for products or services rendered within thirty (30) days of acceptance. In accordance with Section 13-1-158, NMSA 1978, payment shall be tendered to the Contractor within thirty (30) days of the date of certification. After the sixtieth day from the date that written certification of acceptance is

issued, interest shall be paid on the unpaid balance due to the Contractor at the rate of one and one-half percent per month.

C. Payment of Taxes

Procuring Agency shall be responsible for remitting payment for invoices, including taxes, to the Contractor. Payment of taxes for any money received under this Agreement shall be the Contractor's sole responsibility and shall be reported under the Contractor's federal and state tax identification numbers. The Contractor shall be reimbursed by the Procuring Agency for New Mexico gross receipts tax or local option taxes for the transaction. If the Procuring Agency is exempt from such taxes, the Procuring Agency shall provide Contractor with proof of exemption with the payment to Contractor for an invoice that included such taxes. Applicable taxes shall be billed as a separate item on the invoice.

D. Invoices

Invoices shall be submitted to the Procuring Agency at the address provided by the Procuring Agency.

E. Rates

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

a. County Voter Registration and Election Management System Software and Maintenance:

County Size (# of registered voters)	Cost *	1 <sup>st</sup> Year Maintenance	Additional Years Maintenance **
0 – 10,000	\$20,000	Included	\$3,000
10,000 - 20,000	\$30,000	Included	\$4,500
20,000 – 50,000	\$45,000	Included	\$6,750
50,000 – 100,000	\$55,000	Included	\$8,250
Over 100,000	0.65 per voter	Included	15% of purchase price

b. Other County Costs:

Travel Related Costs:

One Trainer (to train 1- 9 people): \$2750  
 Two Trainers (to train 10-20 people): \$5050

c. Central Voter Registration System Software *:	<u>\$195,000</u>
d. Yearly Maintenance for the Central System **: (15% of purchase price)	<u>\$29,250</u>
e. Other Central System Costs:	
Travel Related Costs:	
One Trainer (to train 1- 9 people):	<u>\$1375</u>
Two Trainers (to train 10-20 people):	<u>\$2525</u>
f. Additional Customization/Upgrade/Modification/Support Hourly Rate:	
<u>\$125 per hour</u>	
g. Pilot County (San Juan) Costs:	
Total Software License Costs:	<u>\$45,000</u>
Installation/ Conversion Costs:	<u>Included</u>
Other Costs (Travel):	<u>\$ 2,750</u>
Yearly Maintenance Costs:	<u>\$ 6,750</u>

\* Initial software license rate includes required initial customization, technical and user documentation, installation/conversion costs, and training and training materials

\*\* Yearly maintenance includes maintenance and upgrades for existing software, updates to supplemental files & utilities, revisions to documentation, and help desk services. Contractor will not increase yearly maintenance fees more than 6% per year without the prior written approval of the New Mexico Secretary of State.

4. Agreement Term

The Agreement term shall begin on January 06, 2000, or as soon thereafter as possible, through January 06, 2004. The SPA reserves the right to extend this Agreement for **four** (4) additional one-year terms or a portion thereof for the purpose of providing procuring agencies access to software maintenance, upgrades and technical support. The Agreement Administrator will provide Contractor written notice of the intention to extend the agreement at least ninety (90) days prior the expiration of the initial agreement term. Contractor may submit new rates for software products and services. The New Mexico Secretary of State shall have the opportunity to approve or reject the new rates before the contract is extended.

5. Termination

The following provisions are applicable in the event that the agreement is terminated.

A. **Termination for Convenience**

At any time, the SPA, after consulting with the Secretary of State, or the Contractor may terminate this Agreement, in whole or in part, by giving the other party (30) days written notice; provided, however, neither the SPA nor a Procuring Agency has the right to terminate a specific purchase order for convenience after it has been issued if the product is ultimately accepted.

B. **Termination for Cause**

Either party may terminate this Agreement for cause based upon material breach of this Agreement by the other party, provided that the non-breaching party shall give the breaching party written notice specifying the breach and shall afford the breaching party a reasonable opportunity to correct the breach. If within thirty (30) days after receipt of a written notice the breaching party has not corrected the breach or, in the case of a breach which cannot be corrected in thirty (30) days, begun and proceeded in good faith to correct the breach, the non-breaching party may declare the breaching party in default and terminate the Agreement effective immediately. The non-breaching party shall retain any and all other remedies available to it under the law.

C. **A Procuring Agency's Rights**

In the event the Agreement expires or is terminated for any reason, a Procuring Agency shall retain its rights in all products and services accepted prior to the effective termination date.

D. **The Contractor's Rights**

In the event the Agreement expires or is terminated for any reason, a Procuring Agency shall pay the Contractor all amounts due for products and services ordered and accepted prior to the effective termination date or ordered before the effective termination date and ultimately accepted.

6. **Reporting**

A. **The Contractor agrees to provide the Agreement Administrator with quarterly status reports that will include but is not limited to the following elements.**

1. The name of each Procuring Agency and amount of each purchase order received for the period
2. The status and percent completion of each purchase order received.

B. The Contractor agrees to provide the SPA with semi-annual consolidated reports containing the name of each Procuring Agency and the amount of each purchase order received for the period as well as the status and/or percent completion of each purchase order in accordance with the following schedule:

<u>Period</u>	<u>Report Due</u>
January 1 through June 30	July 31
July 1 through December 31	January 31

7. Shipment and Risk of Loss

- A. The Contractor shall ship all products F.O.B. destination. Except for loss or damage directly attributable to the negligence of a Procuring Agency, the Contractor shall bear all risk of loss or damage until products have been accepted by the Procuring Agency. Any destination charges for routine delivery are included in the price of the product. Procuring agencies may request expedited delivery, the charges for which shall be pre-paid by the Contractor and billed as a separate item at actual cost. Procuring agencies must be advised of any destination charges prior to the Contractor's acceptance and processing of a purchase order.
- B. Whenever a Procuring Agency does not accept any product and returns it to the Contractor, all related documentation and software furnished by the Contractor shall be returned also and at the expense of the Procuring Agency. The Contractor shall bear all risk of loss or damage with respect to returned products except for loss or damage directly attributable to the negligence of the Procuring Agency

8. Warranties

The Contractor shall provide a Procuring Agency with the following warranties:

A. Published Specifications

The Contractor warrants that all products, in their unaltered form, which are provided under this Agreement will perform in accordance with the Contractor's published specifications.

B. Products

The Contractor warrants that all products purchased under this Agreement will be new and undamaged and will be free from defects in material and workmanship.

1. The warranty period shall be one year. The period begins on the date of acceptance or installation at the Procuring Agency's site by Contractor, whichever occurs later.
2. The Contractor **at its option** will repair or replace any of its products and/or installations which are defective as to workmanship or materials without charge to the Procuring Agency provided that written notice of any defect is given to the Contractor immediately upon discovery of the claimed defect, and such notice is given to the Contractor within the warranty period specified above, or alternatively; the defect is isolated and confirmed on site by service personnel dispatched by the Contractor, in which case written notice shall not be required.
3. The Procuring Agency shall permit the Contractor reasonable access to the agency's premises and to the equipment and software for maintenance and inspection under normal operating conditions.
4. At the Contractor's request, Procuring Agency agrees to return defective materials at the contractor's expense.

C. Limitations of Warranty

The warranties provided in subparagraphs A and B above are limited warranties and do not apply to:

1. Conditions resulting from improper use of the product or software, or
2. Conditions resulting from causes external to the software after delivery, or
3. Conditions resulting from modifications to software other than modifications performed by the Contractor; or
4. Conditions resulting from failure to follow the Contractor's installation, operation or maintenance instructions.



If the Contractor determines that software cannot be repaired or replaced, Contractor will remove the software, and at the Procuring Agency's option, refund the purchase price and related installation charges or apply the purchase price and related installation charges towards the purchase and installation of other Contractor and software.

D. Disclaimer of Warranties

The above warranties are exclusive warranties, and no other warranty express or implied, shall apply. THE CONTRACTOR SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

9. Patent, Copyright, Trademark and Trade Secret Indemnification

A. The Contractor shall defend, at its own expense, the State of NM and its agencies against any claim that any product or service provided under this Agreement infringes any patent, copyright or trademark in the United States or Puerto Rico, and shall pay all costs, damages and attorneys' fees that a court finally awards as a result of any such claim. In addition, if any third party obtains a judgment against a Procuring Agency based upon the Contractor's trade secret infringement relating to any product or service provided under this Agreement, the Contractor agrees to reimburse the State of NM for all costs, attorneys' fees and the amount of the judgment. To qualify for such defense and/or payment, the State of NM or Procuring Agency shall:

1. Give the Contractor prompt written notice of any claim;
2. Allow the Contractor to control the defense or settlement of the claim; and
3. Cooperate with the Contractor in a reasonable way to facilitate the defense or settlement of the claim.

B. If any product or service becomes, or in the Contractor's opinion is likely to become the subject of a claim of infringement, the Contractor shall at its option and expense:

1. Provide a Procuring Agency the right to continue using the product or service;
2. Replace or modify the product or service so that it becomes non-infringing; or

3. Accept the return of the product or service and refund an amount equal to the depreciated value of the returned product or service, less the unpaid portion of the purchase price and any other amounts which are due to the Contractor. The Contractor's obligation will be void as to any product or service modified by the Procuring Agency to the extent such modification is the cause of the claim.

10. Price Reduction

The Contractor shall give procuring agencies the benefit of any rate reductions for its product or services. The Contractor agrees that the Procuring Agency shall pay the lower of the price agreement rate or an advertised promotional discount rate, or the volume discounted rate for commercial and other non-educational governmental customers for the same volume of purchases under substantially the same terms and conditions.

11. Technical Support

The Contractor agrees to maintain a toll-free technical support telephone line, staffed from at least 8:00 A.M. to 5:00 P.M. Mountain time during business days for the State of New Mexico. The line shall be accessible to Procuring Agency personnel who wish to obtain competent technical assistance regarding the installation or operation of products purchased by the Procuring Agency. The Contractor also agrees to provide additional technical support, consisting at a minimum of an emergency telephone number, for extended hours and weekends in the weeks before and after elections.

12. Impracticality of Performance

A party shall be excused from performance under this Agreement for any period that the party is prevented from performing as a result of an act of God, strike, war, civil disturbance, epidemic, or court order, provided that the party has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance. Subject to this provision, such non-performance shall not be deemed a default or a ground for termination.

13. Records and Audit

During the term of this Agreement and for three years thereafter, the Contractor shall maintain detailed records pertaining to the services rendered and products delivered. These records shall be subject to inspection by the Procuring Agency, the Department of Finance and Administration, the NM State Auditor and appropriate federal authorities. The Procuring Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Procuring Agency to recover excessive or illegal payments. Notwithstanding anything in this Agreement to the

contrary, any audit performed by a Procuring Agency shall be limited to an audit of its own billings.

14. Status of Contractor

The Contractor and its agents and employees are independent Contractors and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of State of NM vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement.

15. Use of Subcontractors

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agreement Administrator. Whenever the use of subcontractors is approved, the Contractor shall remain solely responsible for the performance of this Agreement. Payments will be made to only the Contractor. Subcontractor may not receive and process purchase orders under this price agreement.

16. Indemnification

The Contractor shall hold the State of NM and its agencies and employees harmless and shall indemnify the State of NM and its agencies and employees against any and all claims, suits, actions, liabilities and costs of any kind, including attorney's fees for personal injury or damage to property arising from the acts or omissions of the Contractor, its agents, officers, employees or subContractors.

17. Amendments

The Agreement shall only be amended by written instrument executed by duly authorized representatives of the parties.

18. Scope of Agreement

This Agreement incorporates all of the agreements of the parties concerning the subject matter of this Agreement, and all prior agreements have been merged into this Agreement. No prior agreements, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

19. Invalid Term or Condition

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

20. Enforcement of Agreement

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

21. Notice

The Procurement Code, Sections 13-1-28 through 13-1-199 NMSA 1978 (1984, as amended), imposes civil and misdemeanor criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs.

22. Equal Opportunity Compliance

The Contractor agrees to abide by all federal and state laws, rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws, rules and regulations, and executive orders of the Governor, the Contractor agrees to assure that no person in the United States shall, on the grounds of race, color, religion, national origin, sex, sexual preference, age or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If the Contractor is found to be not in compliance with these requirements during the life of this Agreement, the Contractor agrees to take appropriate steps to correct these deficiencies.

23. Limit of Liability

The Contractor's liability to the SPA or a Procuring Agency for any cause whatsoever shall be limited to the purchase price paid to the Contractor for the products and services that are the subject of SPA's or the Procuring Agency's claim. The foregoing limitation does not apply to Paragraphs 9 and 16 of this Agreement or to damages resulting from personal injury caused by the Contractor's negligence.

In no event will the Contractor be liable for any damages resulting from loss of data or use, lost profits or any incidental or consequential damages.

24. Applicable Law

This Agreement shall be governed by the laws of the State of New Mexico.

25. Change in Contractor Representatives

The Administering Agency reserves the right to require a change in Contractor representatives if the assigned representatives are not, in the opinion of the Administering

Agency, serving the needs of the State of New Mexico adequately. The Administering Agency shall make its demand of the Contractor in writing.

26. Release

The Contractor, upon final payment of the amount due under this Agreement, releases the SPA, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement. The Contractor agrees not to purport to bind the State of New Mexico to any obligation not assumed herein by the State of New Mexico, unless the Contractor has express written authority to do so, and then only within the strict limits of the authority. The foregoing release does not apply to Paragraphs 9 and 16 of this Agreement.

27. Conflict of Interest

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement.

28. Site Preparation

A Procuring Agency shall prepare and maintain its site in accordance with written instructions furnished by the Contractor prior to the scheduled delivery date of any software or service and shall bear the costs associated with the site preparation.

29. Assignment

The Contractor shall not assign nor transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the SPA.

30. Agreement Administrator

The Administering Agency shall appoint an Agreement Administrator whose duties shall include but not be limited to the following:

- A. The administrator shall attempt to facilitate dispute resolution between the Contractor and procuring agencies. Unresolved disputes shall be presented to the Administering Agency for resolution.
- B. The administrator shall receive and review quarterly status reports.
- C. The administrator shall review and approve all Project Plans.

D. The administrator shall advise the Administering Agency and the SPA regarding the Contractor's performance under the terms and conditions of the Agreement.

31. Survival

The Agreement paragraphs titled 9, Patent, Copyright, Trademark, and Trade Secret Indemnification; 16, Indemnification; and 23, Limit of Liability shall survive the expiration of this Agreement. Software license, software maintenance any other unexpired agreements that were entered into under the terms and conditions of this Agreement shall survive this Agreement.

32. Notification

Either party may give written notice to the other party in accordance with the terms of this Paragraph 32. Any written notice required or permitted to be given hereunder shall be deemed to have been given on the date of delivery if delivered by personal service or hand delivery or three (3) business days after being mailed.

To SPA: State Purchasing Agent  
Purchasing Division  
Joseph M. Montoya State Building, Room 2016  
1100 St. Francis Drive  
Santa Fe, New Mexico 87505

To Administering Agency:

Secretary of State  
Office of the Secretary of State  
State Capitol Annex, Suite 300  
325 Don Gaspar,  
Santa Fe, New Mexico 87503

To Contractor:

Robert F. Hostetler  
Senior Vice President  
Election Systems and Software (ES&S)  
5520 Dillard Dr. Suite 280  
Cary, NC 27511

Either party may change its representative or address above by written notice to the other in accordance with the terms of this Paragraph 32. The carrier for mail delivery and notices shall be the agent of the sender.

33. Succession

This Agreement shall extend to and be binding upon the successors and assigns of the parties.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of execution by the State Purchasing Agent, below.

State of New Mexico  
State Purchasing Agent

Contractor

By: \_\_\_\_\_  
Louis T. Higgins  
Date: \_\_\_\_\_

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

Secretary of State

Chief Information Officer

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

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

### Contractors Standard Licensing Agreement