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Memorandum

To: Offerors

From: Donna Wiltshire, Procurement Director
Ross Goldstein, Deputy Administrator

Date: May 11, 2009

Subject: Determination of Commercial Availability & Cancellation of Solicitation #D38B9200010

Part I. Determination of Commercial Availability

In 2007, the General Assembly passed Chapters 547 and 548, Laws of Maryland 2007, which directed the State Board of Elections (SBE) to certify, for use in elections after January 1, 2010, a voting system that provides a "voter-verifiable paper record." Under this law, SBE was to procure an optical scan voting system, together with ballot marking devices for use by voters with disabilities. The 2007 law also outlined voting system standards that must be met before SBE could select the system. The General Assembly recently enacted House Bill 893 as emergency legislation, which the Governor signed on May 7th, that provides alternative accessibility standards to be used "if, at the time of the procurement of a voting system, there is not a commercially available system that satisfies all the requirements" of § 9-102 of the Election Law Article of the *Annotated Code of Maryland*. If this contingency is met, House Bill 893 directs SBE to implement an optical scan voting system but authorizes the agency to forgo procuring ballot marking devices and instead deploy the existing touchscreen voting units to provide access for voters with disabilities.

Threshold Requirements

Accordingly, SBE must decide whether there is a commercially available voting system that meets the requirements of § 9-102 of the Election Law Article. There are two threshold certification requirements that must be established.

1. § 9-102(d)(2) - whether there is an optical scan voting system with a ballot marking device that has been examined by an independent testing laboratory that was approved by the Election Assistance Commission (EAC) and has been shown by that laboratory to meet either the Federal Election Commission's 2002 Voting System Standards or the EAC's 2005 Voluntary Voting System Guidelines.
2. § 9-102(f)(3) and (h)(1) - whether the voting system complies with the accessibility standards established in the 2005 Voluntary Voting System Guidelines.

Evidentiary Standard

In considering these requirements, it is important to set out the evidentiary standard that will be used to determine whether the above requirements have been met. With regard to the first requirement under § 9-102(d)(2), it has been SBE's longstanding and consistent administrative practice to accept only a laboratory finding that has been formally reviewed and approved by the certifying entity (formerly the National Association of State Election Directors (NASED) and now the EAC). While a strict reading of § 9-102 does not explicitly require such approval, SBE's administrative practice meets the intent of the law and provides the highest level of assurance that the laboratory report is correct, official, conclusive, and complete.

The requirements under § 9-102(f)(3) and (h)(1) are distinct from the § 9-102(d)(2) requirement in that it does not require an independent testing laboratory to examine the system and show that it meets the applicable standards. However, in order to provide a clear standard for vendors to meet as well as a clear evidentiary standard for SBE to apply, a laboratory finding that the system has been formally reviewed and certified by the EAC under its Voting System Testing and Certification Program is required by SBE.

Analysis

Based on information received from the EAC, there are, as of the date of this memorandum, no voting systems that meet the first requirement. However, the EAC anticipates that, within the next 30 to 60 days, one or more systems will have completed the laboratory review and be presented to the EAC for final approval.

Assuming that the first requirement could be met in a timely manner, the next determination is whether the second requirement can be met. According to the EAC, the systems that may be certified within the next 30 to 60 days are all being certified to the Federal Election Commission's 2002 Voting System Standards – not the EAC's 2005 Voluntary Voting System Guidelines as required under § 9-102(f)(3) and (h)(1). Accordingly, applying the evidentiary standard discussed herein, there is **no** voting system that currently has or will in the near future receive final approval from the EAC confirming that a laboratory has found the system to meet the 2005 Voluntary Voting System Guidelines.

Moreover, even if SBE accepted something less than its administrative practice of using EAC certification as the qualifying standard to make a determination of the second requirement, in our opinion, there is not a ballot marking device that meets the accessibility standards of the 2005 Voluntary Voting System Guidelines, which includes the following standard (Vol. 1, Sec 3.2.3e):

If the normal procedure is for voters to submit their own ballots, then the accessible voting station shall provide features that enable voters who lack fine motor control or the use of their hands to perform this submission.

Ballot marking devices require the voter to handle the paper ballot in order to insert it into the optical scan reader after it is marked. We are aware of an adaptation to the AutoMARK ballot marking device that, instead of giving the ballot back to the voter, it is automatically deposited into a bin attached to the unit. However, the EAC has informed us that this solution has not been submitted for laboratory testing, thus, it does not meet the first requirement above.

Conclusion – Determination of Commercial Availability

SBE, in consultation with the Office of the Attorney General, concludes that there is no system that is currently commercially available that satisfies the requirements of § 9-102 of the Election Law Article. As such, SBE will **not** be implementing ballot marking devices for the 2010 election. Instead, SBE will deploy optical scan voting units and its current touchscreen voting units.

Part II. Cancellation

Based on the above conclusion that there is no commercially available voting system that meets the standards of § 9-102 of the Election Law Article, SBE will not be seeking to procure ballot marking devices.

SBE has considered either amending the current solicitation to remove the requirement to propose a ballot marking device and any associated requirements or cancel the solicitation and reissue it at a later date. SBE is aware that there were vendors who did not respond to the current solicitation because they did not have a ballot marking device to offer. Further, SBE believes that a solicitation for only an optical scan voting system will create an opportunity for more offerors to respond, which in turn will lead to more competition and ultimately a more favorable contract for the State. **Accordingly, SBE is canceling the current solicitation.**

Addendum to Memorandum regarding Determination of Commercial Availability and Cancellation of Solicitation
#D38B9200010 (dated May 11, 2009)
Distributed only to ES&S' Representative for Procurement

ES&S and their counsel submitted letters to Attorney General Douglas Gansler in which they state that their voting system meets the requirements of § 9-102 of the Election Law Article. The primary basis for ES&S' assertion that the voting system they are proposing meets the § 9-102 requirements is that it was examined by an independent testing laboratory that has been approved by the EAC.

Analysis of the Laboratory Report

The laboratory, SysTest Labs, Inc., was contracted by the New York State Board of Elections (NYSBOE) to perform a limited test on the AutoMARK Ballot Marking Device. Following the testing, SysTest Labs Inc. issued a report of its findings (Report number V-NY-ESS_ATS-Lot2-TR01 dated February 22, 2008). According to Section 1 – Introduction of the report, the goal of this limited testing was to give the NYSBOE a minimal level of satisfaction that the AutoMARK and its associated software meet the requirements of HAVA section 301(a) and (b), as well as the usability and accessibility requirements of section 3, Volume I of the 2005 Voluntary Voting System Guidelines.

The AutoMARK firmware submitted to New York is a different version than the version submitted to the EAC for certification (evidenced by a different version number). The initial firmware submitted did not function correctly, and it appears four iterations of the firmware were tested before it was determined to be functioning to the minimum standards required (See Table 6 of the report). The software submitted is called AutoMARK Information Management System (AIMS). The AIMS software does not run on the AutoMARK unit but on a standard Windows PC and is used to define the election data. Several iterations of this software were also used to correct discrepancies (See Table 6 of the report). It appears that none of these versions have been submitted for federal certification and that neither the firmware nor software was subject to a source code review.

In addition, ES&S modified the hardware of the AutoMARK (See Table 4 of the report). The test report does not reveal the extent to which the unit was modified but does state that one of the three modifications was unsuccessful, and the unit was removed from testing (See Section 3.2 of the report).

The AutoMARK, in general, passed the parts of Section 3, Volume I of the 2005 Voluntary Voting System Guidelines, although it appears that not every requirement was tested and the results published (See "Lot 1" references in Appendix C of the report). While SysTest Labs, Inc. determined that the AutoMARK met the required acceptance criteria to which it was tested (See Section 6 of the report), the testing and subsequent report was not part of the EAC's Voting System Testing and Certification Program and therefore, does not in anyway grant any kind of certification of the AutoMARK system (See Section 1 of the report).

Analysis of ES&S' Assertion

The first threshold requirement that must be established is whether the *voting system* (optical scan with ballot marking device) has been examined by an independent testing laboratory that was approved by the EAC and has been shown by that laboratory to meet either the Federal Election Commission's 2002 Voting System Standards or the EAC's 2005 Voluntary Voting System Guidelines. In this case, ES&S is presenting a laboratory report for only one component of the system (the ballot marking devices) and that report only examines that one component for limited aspects of compliance with the 2005 Voluntary Voting System Guidelines. Accordingly, this submission fails to meet the first requirement.

Even if SBE accepted that ES&S' pending EAC certification to the 2002 Voting System Standards meets the first requirement, the second requirement must still be met. The SysTest Labs, Inc.'s report to the NYSBOE does not, in our view, meet the second threshold requirement, because the system reviewed by SysTest Labs, Inc. is **not** the system submitted to the EAC for approval under the 2002 Voting System Standards. To meet the first threshold requirement, ES&S would have to propose the same system being certified to the 2002 Voting System Standards. Thus, even assuming the SysTest Labs, Inc.'s report shows compliance with the 2005 Voluntary Voting System Guidelines and thus, meets the second requirement, that ballot marking device would not meet the first threshold requirement.