

**ELECTION SYSTEMS & SOFTWARE, INC.  
VOTER TABULATION SYSTEM AND SERVICES 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:** **Marin County, California** ("Customer").

**RECITALS:**

A. Customer has agreed to purchase/license voter tabulation equipment and related software and services from ES&S for use in Marin County, California (the "Jurisdiction"). The terms and conditions under which such equipment, software and services shall be provided are set forth in the **GENERAL TERMS** attached hereto.

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

Exhibit A (Pricing Summary)

Exhibit F (Hardware and Software Maintenance and Support Services-Post-Warranty)

Exhibit B (ES&S Equipment Description and Pricing)

Exhibit G (Acceptance Criteria)

Exhibit C (ES&S Software Description and Pricing)

Exhibit H (Certificate of Insurance)

Exhibit D (Third Party Items)

Exhibit I (Additional Terms and Conditions)

Exhibit E (Election Support Services)

Exhibit J (Existing County Template)

**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 in each Exhibit.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the **State of California**, without regard to conflicts of law principles that would require the application of the laws of any other state.
- Represents and warrants to the other party that as of the date of its signature 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) 970-1291

MARIN COUNTY, CALIFORNIA  
3501 Civic Center Drive Room #121  
San Rafael, CA 94903  
Fax No.:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (Printed or Typed)

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Name (Printed or Typed)

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Title

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Title

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Date

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Date

**GENERAL TERMS  
ARTICLE 1  
DEFINITIONS**

All capitalized terms used, but not otherwise defined, in these General Terms or in an Exhibit shall have the following meanings:

- a. "Acceptance Testing" means performance of the acceptance testing procedures outlined on Exhibit G to confirm that the ES&S Equipment and/or ES&S Software performs in accordance with the warranties set forth in Section 3.2(a) of this Agreement.
- b. "Documentation" means the operating instructions, user manuals or training materials for the Equipment and Software.
- c. "Equipment" means ES&S Equipment and Third Party hardware or equipment.
- d. "ES&S Equipment" means ES&S' proprietary hardware or other equipment.
- e. "ES&S Hardware Maintenance Services" and "ES&S Software Maintenance and Support" means those services described on Exhibit F.
- f. "ES&S Software" means ES&S' proprietary election software (including the ES&S Firmware), all Updates and items delivered to Customer pursuant to Article III of Exhibit F and, unless licensed pursuant to a separate written agreement, all Add-Ons and New Products licensed to Customer.
- g. "GAAP" means United States generally accepted accounting principles, as in effect from time to time.
- h. "Software" means ES&S Software and Third Party software.

**ARTICLE 2  
SALE OF ES&S EQUIPMENT AND THIRD PARTY ITEMS/LICENSE OF ES&S SOFTWARE**

2.1 **Purchase Terms.** Subject to the terms and conditions of this Agreement, ES&S agrees to sell, and Customer agrees to purchase, the ES&S Equipment and the Third Party Items described on Exhibits B and D. All equipment supplied will be in new condition unless otherwise specified and accepted by Customer. The payment terms for the ES&S Equipment and Third Party Items are set forth on Exhibit A. Title to the Equipment shall pass to Customer when Customer has paid ES&S the total amount set forth on Exhibit A for the ES&S Equipment, ES&S Software and Third Party Items.

2.2 **Grant of Licenses.**

a. **ES&S Software Excluding ES&S Firmware.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer a nonexclusive, nontransferable license to use ES&S' software, described on Exhibit C, and related Documentation in the Jurisdiction while Customer is using the ES&S Equipment. The

license allows Customer to use and copy ES&S' software (in object code only) and the Documentation, solely for the purposes of defining and conducting elections and tabulating election results in the Jurisdiction and reporting the Jurisdiction's election results.

b. **ES&S Firmware.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer a nonexclusive, nontransferable license to use ES&S' firmware, which is delivered as a part of the ES&S Equipment and is further described on Exhibit C (the "ES&S Firmware"). The license allows Customer to use the ES&S Firmware (in object code only) in the Jurisdiction and solely in the course of operating the ES&S Equipment as contemplated by the Documentation therefor.

c. **COLLECTIVE DEFINITION AS "ES&S SOFTWARE".** **THE ES&S SOFTWARE DESCRIBED IN SECTION 2.2(a) AND THE ES&S FIRMWARE ARE ES&S' PROPRIETARY SOFTWARE PRODUCTS AND ARE HEREINAFTER COLLECTIVELY REFERRED TO AS THE "ES&S SOFTWARE".**

d. **Prohibited Uses.** Customer shall not take any of the following actions with respect to the ES&S Software or the Documentation:

i. 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;

ii. 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

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

iv. Cause or permit any copying, reproduction or printing of any proprietary ballot shells or code stock. Customer shall, however, be able to print ballots by purchasing a printer meeting ES&S' specifications, either through ES&S or a third party vendor.

2.3 **License Fees.** In consideration for ES&S' grant of the license for the ES&S Software described in Section 2.2(a), Customer shall pay ES&S the ES&S Software License Fees set forth on Exhibit A. The consideration for ES&S' grant of the license for the ES&S Firmware is included in the cost of the ES&S Equipment.

2.4 **Term of Licenses.** The licenses granted in Section 2.2 shall commence upon the delivery of the ES&S Software described in Section 2.2(a). The licenses shall survive the termination of all other obligations of the parties under this Agreement and the termination of all Exhibits; provided, however, that ES&S may terminate either license if Customer fails to pay the consideration due for, or breaches Sections 2.2, 2.5, or 3.6 with respect to, such license. Upon the termination of either of the licenses granted in Section 2.2 for ES&S Software or upon Customer's discontinuance of the use of any ES&S Software, Customer shall immediately return such ES&S Software and the related Documentation (including any and all copies

thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

2.5 **Source Code.** The licenses granted in Section 2.2 do 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 2.6 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 continued use of such item(s) in accordance with this Agreement. The source code shall remain at all times 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.

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

a. **Updates.** During the Warranty Period (as defined in Section 3.2(a) below), ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software approved by the California Secretary of State, together with appropriate Documentation (“Updates”), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of Third Party Items 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 the 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) train Customer on such Updates, if requested; (ii) install the Updates; or (iii) provide maintenance and support on the ES&S Software that is required as a result of Customer’s failure to timely or properly install an Update. If Customer proposes changes in the ES&S Software to ES&S, such proposals will become ES&S’ property. ES&S may, in its sole discretion, elect to make or not to make such changes without attribution or compensation to Customer or any third party. Upon termination of the Warranty Period, Customer shall be entitled to receive the Software Maintenance and Support described on Exhibit F 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 to Customer new features that can be added on to the ES&S Equipment or ES&S Software (“Add-Ons”) or new hardware or software products (“New Products”). Customer may elect to purchase or license, as applicable, an Add-On or New Product upon the payment of the applicable purchase price or license fee to ES&S. Unless a software license is effectuated pursuant to a separate license agreement, and software 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 that is deemed to be part of the ES&S Equipment or ES&S Software will be covered by a one-year warranty under the terms and conditions set forth in Section 3.2(a), commencing upon satisfactory completion of Acceptance Testing as defined in Article I for such Add-Ons or New Products, and Customer may thereafter elect to receive Hardware and/or Software Maintenance and Support therefore, as applicable, upon the expiration of such one-year warranty.

2.7 **Compliance with Law.** In performing its obligations or enjoying its rights under this Agreement, each party shall comply with all applicable laws and regulations. In addition, ES&S represents and warrants to Customer that, at the time of delivery, the ES&S Equipment

and ES&S Software will comply with all applicable requirements of federal and state election laws and regulations, including the 2002 Federal Election Commission Voluntary Voting Systems Standards ("VVSS") at the time of delivery and will have been certified by the appropriate state authorities for use in the Jurisdiction. ES&S further represents and warrants that during the Warranty Period and thereafter so long as Customer is receiving ES&S Hardware Maintenance Services and ES&S Software Maintenance and Support, the ES&S Equipment and ES&S Software shall be maintained or upgraded by ES&S at no additional charge to Customer in such a way as to remain compliant with all applicable federal and state election laws and regulations, including all current and future requirements necessary to remain certified for use in the Jurisdiction. For the purposes of the immediately preceding sentence, "maintained or upgraded" shall mean such changes to individual items of the ES&S Equipment or ES&S Software as are technologically feasible and commercially reasonable. This Section 2.7 shall not obligate ES&S to replace or add new physical components to the voter tabulation system contracted for herein at no additional charge to Customer. Customer shall be responsible for the cost of any Third Party Items that ES&S notifies Customer are hereinafter required in order for the ES&S Equipment and ES&S Software to remain compliant and certified.

### **ARTICLE 3 MISCELLANEOUS**

3.1 **Delivery; Risk of Loss.** Time is of the essence. ES&S anticipates shipping the Equipment and Software identified on Exhibits B-D to Customer on or before the "Delivery Dates" listed on Exhibit A. The Delivery Dates may be mutually revised by ES&S and Customer because of delays in executing this Agreement, or changes requested by Customer. ES&S will work with Customer to revise Delivery Dates as soon as ES&S becomes aware of such revisions. Risk of loss for the Equipment and Software shall pass to Customer when such items are received at Customer's designated location. ES&S will work with Customer to conduct and complete Acceptance Testing of the Equipment in accordance with the Acceptance Criteria set forth on Exhibit G within fifteen (15) calendar days after delivery of the Equipment.

3.2 **Warranties.**

a. **ES&S Equipment/ES&S Software.** ES&S warrants that for the period of time that commences upon completion of the relevant Acceptance Testing and expires after 12 months (the "Warranty Period"), it will repair or replace any component of the ES&S Equipment or ES&S Software within 20 days of notification by the County of defect (or such longer period of time as may be necessary in the event any repair or replacement requires any development work by ES&S and/or any requisite federal and/or state certification of such repair or replacement solution), which, while under normal use and service: (i) fails to perform in accordance with its Documentation in any material respects, or (ii) is defective in material or workmanship. The Warranty shall not include the repair or replacement of any ES&S Equipment components that are consumed in the normal course of operating the Equipment, including printer ribbons, paper rolls, batteries, removable memory packs, cancellation stamps, ink pads or red stripe pens. All replaced components of the ES&S Equipment or 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 Equipment or 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 Equipment or ES&S Software to be

repaired or replaced is not damaged as a result of 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 acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, and (IV) Customer has installed and is using the most recent Update, or the second most recent Update, provided to it by ES&S.

b. **System.** ES&S warrants that the ES&S Equipment and ES&S Software will operate in conjunction with the Third Party Items during the Warranty Period, provided that (i) Customer has 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 Items 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 Equipment or ES&S Software that is causing such breach to occur. Customer acknowledges that ES&S has merely purchased the Third Party Items for resale or rental to Customer, and that the proprietary and intellectual property rights to the Third Party Items 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 Items, 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 Items which are provided to ES&S within 10 days of ES&S' delivery of Third Party Items.

c. **Exclusive Remedies. IN THE EVENT OF A BREACH OF SUBSECTIONS 3.2(a) or 3.2(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.**

3.3 **Routine Maintenance For ES&S Equipment During Warranty Period.** During the Warranty Period, Customer may request that ES&S provide the Routine Maintenance Services described in Article II, Section 1(b) of Exhibit F for one or more units of ES&S Equipment. Any such request shall be made at least 60 days before the Routine Maintenance Services are desired. The per-unit fee for such Routine Maintenance Services is set forth on Exhibit A and shall be due within 30 days after invoice. The terms and conditions of Section 2(b) of Exhibit F shall govern the providing of the Routine Maintenance Services. When the ES&S Equipment is not in use, Customer shall properly store the ES&S Equipment in accordance with the storage requirements established in the Documentation. Upon termination of the Warranty Period, Customer shall be entitled to receive the Hardware Maintenance Services described on Exhibit F if it has so indicated in Section B of the signature page to this Agreement. Customer reserves the option to use its own IT staff and/or contractors to make repairs of Third Party Items that are supplied by ES&S after expiration of the applicable warranties provided by such third party manufacturers. Customer understands, acknowledges and agrees to assume the risk that performance of such repair work during any applicable warranties provided by any third party manufacturers may void such warranties.

3.4 **Limitation Of Liability.** Neither party shall be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or

relating to this Agreement. Neither party shall be liable for the other party's negligent or willful misconduct. Except for such liability as may arise under Section 3.8(b), ES&S' total liability to Customer arising out of or relating to this Agreement shall not exceed the aggregate amount to be paid to ES&S hereunder. By entering into this Agreement, Customer agrees to accept responsibility for (a) the selection of the Equipment and Software to achieve Customer's intended results; (b) the use of the Equipment and Software; (c) the results obtained from the use of the Equipment and Software; (d) the selection of, use of and results obtained from any equipment, software or services not provided by ES&S and used with the Equipment or Software; (e) errors that arise from mechanical or electronic component failures that are not covered under warranty or not subject to preventative efforts or cure under this Agreement; or (f) user errors, voter errors or problems encountered by any individual in voting that are not otherwise a result of the failure of ES&S to perform. ES&S shall not be liable under this Agreement for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee that is caused by (1) Customer's failure to timely or properly install and use the most recent Update, or the second most recent Update, provided to it by ES&S or (2) Customer's election not to receive, or to terminate, the Hardware Maintenance Services or the Software Maintenance and Support.

3.5 **Taxes; Interest.** Customer shall provide ES&S with proof of its tax-exempt status. If Customer does not provide such proof, it shall pay, or shall reimburse ES&S for, all sales and use, excise or other similar taxes imposed on the transactions contemplated by this Agreement; provided, however, Customer shall in no event be liable for taxes imposed on or measured by ES&S' income. If Customer disputes the applicability of any tax to be paid pursuant to this Section 3.5, it shall pay the tax and may thereafter seek a refund. Any disputed or undisputed payment not paid by Customer to ES&S when due shall bear interest from the due date at a rate equal to the lesser of one and one-half percent per month or the maximum amount permitted by applicable law for each month or portion thereof during which it remains unpaid.

3.6 **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, the design and configuration of the ES&S Equipment and the format, layout, measurements, design and all other technical information (except for Customer supplied information such as election information) associated with the ballots. This paragraph is not meant to exclude Customer from procuring printers and/or printing services from a third party vendor that is not subject to this Agreement and this paragraph does not subject Customer to any royalty fees payable to ES&S by using such printers and printing services. Customer has the right to use the aforementioned items to the extent specified in this Agreement and shall have the right to make an appropriate number of confidential copies of relevant Documentation for internal use only by its employees in order to fulfill the purposes of this Agreement. Customer shall maintain all copyright notices or other confidential or proprietary notices set forth in the Documentation on all copies of such Documentation. ES&S also owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned items. The aforementioned items also contain confidential and proprietary trade secrets of ES&S that are protected by law and are of substantial value to ES&S.

b. Customer shall not cause or permit the adaptation, conversion, reverse engineering, disassembly or decompilation of any of the ES&S Equipment or 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 that are set forth on the ES&S Equipment, the ES&S Software, the Documentation, training materials and ballots that are provided, and all permitted copies of the foregoing.

3.7 **Confidentiality.** During the term of this Agreement, each party (the "Disclosing Party") may provide the other (the "Receiving Party") with certain confidential and proprietary information ("Confidential Information"). Confidential Information includes the Documentation, the information imparted during training provided by ES&S, and any other information relating to Customer's or ES&S' operations, financial information, or research and development. "Confidential Information" will not include information that (a) is publicly known at the time of its disclosure; (b) is lawfully received by the Receiving Party from a third party not under an obligation of confidentiality to the Disclosing Party; (c) is published or otherwise made known to the public by the Disclosing Party; (d) was generated independently by the Receiving Party before disclosure by the Disclosing Party; or (e) is required by law to be a "public record". The Receiving Party will refrain from using the Disclosing Party's Confidential Information except to the extent necessary to exercise its rights or perform its obligations under this Agreement. The Receiving Party will likewise restrict its disclosure of the Disclosing Party's Confidential Information to those who have an absolute need to know such Confidential Information in order for the Receiving Party to perform its obligations and enjoy its rights under this Agreement. Such persons will be informed of and will agree to the provisions of this Section 3.7, and the Receiving Party will remain responsible for any unauthorized use or disclosure of the Confidential Information by any of them. The Receiving Party may also disclose Confidential Information of the Disclosing Party pursuant to the requirement or request of a governmental agency, a court or administrative subpoena, an order or other legal process or requirement of law, or in order to defend its rights hereunder, so long as it shall (1) first notify the Disclosing Party of such request, requirement or proposal for use in defense; (2) in the case of a required disclosure, furnish only such portion of the Confidential Information as it is advised in writing by counsel that it is legally required to disclose; and (3) cooperate with the Disclosing Party in its efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to that portion of the Confidential Information that is required to be disclosed. Upon the termination of this Agreement in its entirety, each Receiving Party shall return all Confidential Information of the Disclosing Party which is in its possession or under its control.

3.8 **Indemnification by ES&S.**

a. **General.** ES&S shall defend, indemnify and hold harmless Customer, its Board of Supervisors, officers, directors, agents, employees and volunteers from and against any and all demands, claims, actions, losses, liabilities, damages, and costs, including payment of reasonable attorneys' fees, arising out of or resulting from the performance of this Agreement, except for those caused by the sole negligence or willful misconduct of Customer, its Board of Supervisors, officers, directors, employees, agents or volunteers.

b. **Intellectual Property Infringement.** 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 Equipment or ES&S Software infringes upon any third party's copyright, trademark or patent existing as of the date hereof (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 of the ES&S Equipment or ES&S Software in substantially the manner contemplated by this Agreement, ES&S, at its sole option and expense, shall procure for Customer the right to continue such use or shall 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 cost for the infringing item to Customer, and Customer shall cease and desist from any further use thereof and return the infringing item to ES&S; provided, however, that if loss of the infringing item causes the voter tabulation system to fail to (i) perform in accordance with its Documentation, (ii) be compliant with all applicable federal and state election laws and regulations, or (iii) remain certified by the appropriate state authorities for use in the Jurisdiction, and ES&S is unable, despite commercially reasonable efforts, to modify the voter tabulation system to resolve such failures, then ES&S shall instead refund the amount paid by Customer for the voter tabulation system under this Agreement.

c. **Timely Performance.** If, due to ES&S' negligence, (i) ES&S fails to provide any product or service by a date specified herein, and (ii) such failure has or will result in a material detrimental impact on Customer's ability to define and conduct elections or to tabulate election results in the Jurisdiction or to report the Jurisdiction's election results in a satisfactory manner or on a timely basis, Customer may pass to ES&S the direct and reasonable out-of-pocket expenses incurred by Customer to cure such failure. Customer will submit to ES&S an itemized statement setting forth the charges for said expenses. Upon ES&S' request, Customer will also provide ES&S with copies of invoices and other back-up information necessary to confirm the itemized expenses. Customer may, at its option, either accept a credit against future payments to ES&S or accept a cash payment as payment by ES&S under this Section 3.8(c). Customer shall take all reasonable steps to mitigate the expenses incurred by Customer hereunder.

3.9 **Indemnification By Customer.** 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 or properly install and use any Update provided to it by ES&S, where ES&S has previously informed Customer of the need for the installation in order to avoid such claims; (ii) the use of any ES&S Equipment or ES&S Software in combination with other equipment, hardware or software not meeting ES&S' specifications for use with such ES&S Equipment or ES&S Software; or (iii) Customer's modification or alteration of any item of ES&S Equipment or ES&S Software without the prior written consent of ES&S;

b. Any claims by Third Parties arising out of or relating to the misuse of Third Party Items as defined/listed on Exhibit D to this Agreement by Customer or its employees;

c. Customer's election not to receive, or to terminate, ES&S Hardware Maintenance Services or ES&S Software Maintenance and Support.

ES&S shall notify Customer immediately if it becomes aware of any claim for which it may be entitled to indemnification under this Section 3.9, 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.

3.10 **Insurance.** Attached to this Agreement as Exhibit H1 is a certificate of insurance that sets forth ES&S' current insurance coverages. It is understood and agreed that Customer shall not pay any sum to ES&S under this Agreement unless and until Customer is satisfied that all insurance required by this Agreement is in force at the time services hereunder are rendered. Attached to this Agreement as Exhibit H2 is Customer's minimum insurance coverage requirements. Failure to maintain insurance as required in this Agreement may be grounds for material breach of contract.

3.11 **Excusable Nonperformance.** If either party is delayed or prevented from performing its obligations under this Agreement as a result of any cause beyond its reasonable control, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent necessary to allow performance after the cause of delay has been removed. ES&S agrees to work with Customer, at Customer's request, to develop mutually agreeable alternatives in order to minimize the negative impact of any such delay.

### 3.12 **Term; Termination**

a. Continuance of this Agreement for the full period specified shall be contingent upon satisfactory performance of the ES&S Equipment and ES&S Software and ES&S. Unsatisfactory service or product performance as reasonably determined by Customer may be cause for termination of the Agreement without penalty to Customer.

b. This Agreement may be terminated, in writing, by either party if the other party breaches any material provision hereof and does not cure such breach within thirty (30) calendar days after it receives written notification thereof from the nonbreaching party. In the event that a material breach by ES&S may jeopardize Customer's ability to timely prepare for or conduct an Election under this Agreement, the notice and cure period shall be reduced to as short a period as reasonably practicable in order to ensure that Customer is able to timely prepare for or conduct such Election(s).

c. This Agreement may be terminated by Customer without cause upon thirty (30) days prior written notice to ES&S. Notice shall be deemed served on the date of mailing. If notice for termination for cause is given by Customer to ES&S and it is later determined that ES&S was not in default or the default was excusable, then the notice of termination shall be deemed to have been given without cause pursuant to this

paragraph (c). Additionally, Customer may terminate or amend this Agreement immediately upon giving written notice to ES&S if advised that funds are not available from external sources for this Agreement or any portion hereof, or if funds in the Customer's yearly proposed and final budget are not appropriated by Customer for this Agreement or any portion hereof.

d. If this Agreement is terminated under paragraph (a) or (c) above, ES&S shall only be paid for services completed and provided prior to notice of termination. In the event termination under paragraph (a) or (c) above, ES&S shall be paid an amount which bears the same ratio to the total compensation authorized by the Agreement as to the services actually performed bear to the total services of ES&S covered by this Agreement, less payments of compensation previously made.

e. ES&S shall not incur any expenses under this Agreement after notice of termination and shall cancel any outstanding expense obligations to a third party that ES&S can legally cancel.

3.13 **Assignment.** Except in the case of a sale, transfer or assignment of all or substantially all of the assets of ES&S to a successor who has asserted its intent to continue the business of ES&S, neither party may assign or transfer this Agreement or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld or conditioned, nor unduly delayed. ES&S may assign its right to receive payments under this Agreement to such third party(ies) as ES&S may desire without the prior consent of Customer, provided that ES&S provides written notice (including evidence of such assignment) to Customer thirty (30) days in advance of any payment(s) so assigned.

3.14 **Remedies.** Except as specifically provided herein, the remedies provided to the parties under this Agreement shall be cumulative and non-exclusive, and the parties shall be entitled to seek any other rights to which they may be entitled at law or in equity, subject to the terms of this Agreement.

3.15 **Entire Agreement.** This Agreement, including all Exhibits and Appendices hereto contain the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior or contemporaneous discussions, negotiations, agreements or understandings between the parties, whether written or oral, regarding the subject matter hereof. Any provision of any purchase order, form or other agreement that conflicts with or is in addition to the provisions of this Agreement shall be of no force or effect. In the event of any conflict between a provision contained in an Exhibit to this Agreement and these General Terms, the provision contained in the Exhibit shall control. No waiver, amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No consent by either party to, or waiver of, a breach by either party shall constitute a consent to or waiver of any other different or subsequent breach by either party.

3.16 **Severability.** If any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, the remaining provisions of this Agreement shall remain in full force and effect. The unenforceable or invalid provision shall be changed and interpreted so as to best accomplish the objectives of such provision within the limits of applicable law or applicable court decisions.

3.17 **Notice.** Any notice or other communication required or permitted hereunder shall be in writing, and will be deemed given when (a) delivered personally, (b) sent by confirmed fax, (c) sent by commercial overnight courier (with written verification of receipt) or (d) sent by registered or certified mail, return receipt requested, postage prepaid, when the return receipt is received. All communications shall be sent to the attention of the persons listed on the signature page to this Agreement and at the addresses or fax numbers set forth on such signature page unless other names, addresses or fax numbers are provided by either or both parties in accordance herewith.

3.18 **Disputes.**

a. **Payment Disputes.**

i. **Payment of Undisputed Amounts.** In the event of a dispute between the parties regarding (1) a product or service for which payment has not yet been made to ES&S, (2) the amount due ES&S for any product or service, or (3) the due date of any payment, Customer shall nevertheless pay to ES&S when due all undisputed amounts. Such payment shall not constitute a waiver by Customer or ES&S of any of its rights and remedies against the other party.

ii. **Remedies for Past Due Undisputed Payments.** If any undisputed payment to ES&S is past due more than 30 days, ES&S may suspend performance under this Agreement until such amount is paid.

b. **Dispute Resolution Process.** Time is of the essence in resolving disputes. The initiating party shall notify the responding party of any dispute, including all relevant information (e.g., the nature of the dispute, dates, times, persons involved). The responding party shall respond to the notification within 5 business days. Thereafter, the parties shall use their good faith efforts to resolve the dispute within a reasonable period of time. Notwithstanding anything in this Section 3.18 to the contrary, any legal proceedings arising out of or relating to this Agreement shall be brought in Marin County, California.

3.19 **Construction.** As used in this Agreement, “including” means “including without limitation”. The singular shall include the plural and vice versa. The title of each Article, Section, Exhibit and Schedule is inserted solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect the meaning, construction or effect of this Agreement.

3.20 **Counterparts; Execution By Facsimile.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument. The parties may execute this Agreement and exchange counterparts of the signature pages by means of facsimile transmission, and the receipt of such executed counterparts by facsimile transmission shall be binding on the parties. Following such exchange, the parties shall promptly exchange original versions of such signature pages.

3.21 **Affirmative Action.** ES&S represents that it has developed and implemented an Affirmative Action Plan and Equal Employment Opportunity policy in its workplace. ES&S shall provide copies of such documents to Customer upon request.

3.22 **Most Favored Customer.** If, during the first two (2) years after the Effective Date, ES&S enters into a written agreement with any other customer located within the State of California for substantially the same quantity and configuration of ES&S Equipment, ES&S Software, and Election Support Services as those purchased by Customer under this Agreement, and such other customer purchases Add-Ons and/or New Products as defined in Section 2.6(b), ES&S will offer such Add-Ons and/or New Products to Customer during such time period for the same prices and on the same payment terms as offered to such other customer.

3.23 **Other.** ES&S is providing Equipment, Software and services to Customer as an independent contractor, and shall not be deemed to be a “state actor” for purposes of 42 U.S.C. § 1983. ES&S may engage subcontractors to provide certain of the Equipment, Software or services, but shall remain fully responsible for such performance. The provisions of Article 2 and Sections 3.2(d), 3.4-3.9, 3.11, 3.12(b), 3.14 and 3.18 of these General Terms shall survive the termination of this Agreement, to the extent applicable.

3.24 **HAVA Compliance Notice.**

Pursuant to this Agreement and by order of the Secretary of State, voting systems certified for use in California shall comply with all applicable state and federal statutes, regulations, rules and requirements, including, but not limited to, those voting system requirements set forth in the California Elections Code and the Help America Vote Act of 2002, and those requirements incorporated by reference in the Help America Vote Act of 2002, that are in effect as of the date of this Agreement. Further, voting systems shall also comply with all applicable state and federal voting system guidelines, standards, regulations and requirements that derive authority from or are promulgated pursuant to and in furtherance of the California Elections Code or the Help America Vote Act of 2002 or other applicable state or federal law when appropriate, that are in effect as of the date of this Agreement, including but not limited to, the 2002 Voting System Standards/Guidelines, developed by the Federal Election Commission and adopted by the Election Assistance Commission (EAC) and EAC Advisory 2005-004, dated July 20, 2005. This does not include future final court interpretations of existing state or federal law not in effect as of the date of this Agreement.

Voting system manufacturers and/or their agents shall assume full responsibility for any representation that a voting system complies with all applicable state and federal requirements as referenced above. In the event such representation is determined to be false or misleading, voting system manufacturers or their agents shall be responsible for the cost of any upgrade, retrofit or replacement, of any voting system or its component parts, found to be necessary for certification or to otherwise be in compliance.

Any voting system purchased with funds allocated by the Secretary of State's Office shall meet all applicable state and federal standards, regulations and requirements, including, but not limited to, those voting system requirements as set forth in the California Elections Code and the Help America Vote Act of 2002 and those requirements incorporated by reference in the Help America Vote Act of 2002 that are in effect as of the date of this Agreement, including but not limited to, the 2002 Voting System Standards/Guidelines, developed by the Federal Election Commission and adopted by the Election Assistance Commission (EAC) and EAC Advisory 2005-004, dated July 20, 2005.

**[END OF GENERAL TERMS]**

**EXHIBIT A  
PRICING SUMMARY**

<b>Sale Summary:</b>		
<b>Description</b>	<b>Refer to</b>	<b>Total</b>
ES&S Equipment	Exhibit B	\$681,625
ES&S Software License Fees	Exhibit C	\$1,000
Unity on-Line Database Build	Note 4	\$3,500
Third Party Items	Exhibit D	\$2,566
Election Support Services	Exhibit E	\$22,100
Installation	Exhibit E	\$11,050
Shipping and Handling	Note 1	\$3,250
<b>Net Sale Subtotal</b>		<b>\$725,091</b>
Estimated State and Local Taxes		\$50,731
<b>Total Net Sale</b>		<b>\$775,822</b>

**Terms & Conditions:**

**Note 1:** Estimated state and local taxes are included. These estimated taxes are the responsibility of Customer, including any changes in the tax rates that may apply to the Net Sale Subtotal; See Section 3.5. The cost of Shipping and Handling is included. Premium or rush transportation services requested by Customer are additive and will be billed as incurred.

**Note 2:** Payment terms are as follows:

- 75% of Total Net Sale is due within thirty (30) calendar days of delivery and completion of Acceptance Testing as set forth in Exhibit G.
- 25% of Total Net Sale due on July 1, 2006.

**Service Days:**

ES&S will present a monthly accounting of service days provided for Customer approval. Customer will only pay for service days for which a monthly accounting has been approved.

**Note 3:** Services in excess of those set forth in Exhibit E shall be charged at the rate of \$1,300 per day, including expenses; provided, however, through December 31, 2006, in the event Customer purchases "blocks" of at least 20 service days to be used consecutively with at least sixty (60) days advance written notice, such services will be charged at the rate of \$987.50, including expenses.

**Note 4:** In the event Customer builds their own database for use with Unity On-Line, the Net Sale Subtotal may be reduced by \$3,500.

**Note 5:** Should the ES&S AutoMARK Voter Assist Terminals not be available for delivery by May 1, 2006; ES&S will supply currently, or previously owned, ES&S AutoMARK Terminals that will be available for a one time election use.

**Warranty:**

ES&S Equipment and ES&S Software – Warranty Period:	One year
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**Ongoing Services:**

<b>Description</b>	<b>Refer to</b>	<b>Annual Fee</b>
Routine Maintenance Services during Warranty Period; Payment is due 30 days after invoice.	Section 3.3	N/A
<b>Post Warranty Hardware Maintenance Services:</b> Fees reflect a one-year term. Payment is due at the start of the maintenance period.	Exhibit F	\$13,000
<b>Post Warranty Software Maintenance &amp; Support Services:</b> ES&S Firmware: Fees reflect a one-year term. Payment is due at the start of the maintenance period.	Exhibit F	\$3,900

All Other ES&S Software: Fees reflect a one-year term. Payment is due at the start of the maintenance period.	Exhibit F	\$1,500
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**EXHIBIT B**  
**ES&S EQUIPMENT DESCRIPTION AND PRICING**

<b>Item</b>	<b>Price Per Unit</b>	<b>Quantity</b>	<b>Extended Amount</b>
ES&S AutoMARK Voter Assist Terminal with Headset and 256mb Flashcard and start up kit	\$4,950	130	\$643,500
ES&S AutoMARK Table	\$325	115	\$37,375
ES&S AutoMARK 256mb Flashcard	\$75	10	\$750
<b>Total</b>			<b>\$681,625</b>



**EXHIBIT C**  
**ES&S SOFTWARE DESCRIPTION AND PRICING**

DESCRIPTION	NUMBER OF LICENSES
<b>Unity Election System licensed pursuant to Section 2.2(a) of the General Terms</b> (check modules being licensed):	
UNITY On Line	1
<b>ES&amp;S Firmware</b> (see Notes 1 and 2 below)	1
<b>Total License Fees</b> (including all applicable Documentation)	<b>\$1,000</b>

**Note 1:** ES&S Firmware versions may change between execution of the Agreement and first election usage due to ongoing certification of Updates.

**Note 2:** ES&S Firmware license fee included in the total cost of the ES&S Equipment.

**EXHIBIT D  
THIRD PARTY ITEMS**

<b>DESCRIPTION</b>	<b>QTY</b>
<b>DELL GX520 WORKSTATION</b>	
Dell OptiPlex GX520 MiniTower - 3.20GHz P-IV 800MHZ FSB	1
Windows XP Pro using NTFS	1
1GB ECC SDRAM (2 DIMMS)	1
Dell USB Enhanced Multimedia Keyboard	1
Dell PS/2 2-Button Mouse w/Scroll	1
80 GB 7200RPM Hard Drive	1
48X/32X/48X Max, CD-RW	1
3.5" 1.44MB Floppy Drive	1
128MB USB HiSpeed Memory Key	1
17" Dell UltraSharp 1740FPV Flat Panel Adjustable Stand VGA/DVI	1
Internal Dell Business Audio Speaker	1
Microsoft Office Basic Edition 2003 w/Adobe Acrobat 6.0	1
Norton AntiVirus 2005	1
Energy Star Label	1
PS2 Serial port adapter, full height	1
DVI Adaptor Card (Digital)	1
Integrated Sound Blaster Compatible	1
3Yr Parts + Onsite Labor (Next Business Day)	1
Belkin SurgeMaster 7-Outlet	1
APC Back-UPS ES 725 Battery Backup	1
U.S. Robotics 56K External Modem & Cable	1
pcAnywhere Communications Software	1
SeaLevel 4 Port Multi Modem Adapter	1
<b>TOTAL THIRD PARTY ITEMS:</b>	<b>\$2,566</b>

**Note 1:**

The configuration and specification of Third Party Items as per this Exhibit D are subject to change by ES&S and/or the manufacturer. Should the actual configuration and specifications differ from those set forth herein, ES&S agrees to provide, and Customer agrees to accept, Third Party Items that are comparable to those described above.

**EXHIBIT E  
ELECTION SUPPORT SERVICES**

1. **Term.** The services described herein shall be provided for the following elections (the "Elections"):

<b>June 2006</b>
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2. **Services.** The election support services to be provided by ES&S, a description of such services and total fees are described below. Customer acknowledges that ES&S' fees for election support services are based on the descriptions listed in the table below, and that a change in the descriptions may require ES&S to change the fees charged to Customer. For purposes of ES&S' provision of Election Support Services under this Agreement, a "Service Day" shall mean the performance of any agreed upon Election Support Services on or off of Customer's facilities, as applicable, by one (1) ES&S employee, contractor or agent on any one (1) calendar day or portion thereof. By way of example, "ten Service Days" could be used by Customer through the provision of Election Support Services by one (1) ES&S employee, contractor or agent on each of ten (10) different calendar days, two (2) ES&S employees, contractors or agents on each of five (5) different calendar days, or ten (10) ES&S employees, contractors or agents on one (1) calendar day.

3. ES&S will provide a letter of assurance naming the Project Manager for Marin County. If ES&S removes or replaces the assigned Project Manager during the term of this Agreement, ES&S will provide to Customer experience statements of proposed replacements. Customer's approval of any replacement Project Manager proposed by ES&S shall not be unreasonably withheld or conditioned, nor unduly delayed. ES&S will not charge Customer for the transition time required to bring the new project manager up to speed on the project, not to exceed 5 service days.

4. The Service Days listed below may be exchanged for other services listed below at Customer's request. ES&S will provide a monthly accounting of Service Days provided.

Role/Function	Area of Work or Description	Primary Responsibility	Service Days Provided
<b>Project Management</b>	A project manager appointed by ES&S shall be responsible for the overall planning, communication, management and coordination of ES&S Services. This person shall be the liaison for Customer with ES&S as it pertains to all products, services and obligations set forth in the contract.	ES&S	11 Days
<b>Shipping Material</b>	Dispose of shipping materials (boxes, packaging, etc.)	Customer	
<b>Ballot Layout/Coding Services</b>	Gather and provide all necessary election data for preparation of election data files.  Assist Customer staff in creating election ballot layouts and coding files using Unity software.	Customer  ES&S	See Fee Schedule below

<b>Role/Function</b>	<b>Area of Work or Description</b>	<b>Primary Responsibility</b>	<b>Service Days Provided</b>
<b>Training – AutoMARK</b>	ES&S will provide classroom-style training with hands-on practice with the AutoMARK. General operations, ballot tabulation procedures, log audit capability, reporting, backups and general maintenance procedures will be covered. Course participant manuals are included. Class size limited to 20.	ES&S	1 days
<b>Training – Poll Worker Train – The-Trainer</b>	ES&S agrees to conduct Poll Worker “Train the Trainer” classes. Class size is limited to 20. Manuals are provided (up to 20), and a master template for duplication for Poll Workers is included. ES&S training staff will attend 2 days of poll worker training classes to observe the trainers and provide support.	ES&S	2 Days
<b>Election Day Support</b>	ES&S will provide software accumulation assistance on Election Day/Night of each contracted election.	ES&S	3 days
	<b>Total Election Support Service Days: 17</b> <b>Total Fees: \$22,100</b>		

### Installation

<b>Role/Function</b>	<b>Area of Work or Description</b>	<b>Primary Responsibility</b>
<b>Installation – AutoMARK Voter Assist Terminal</b>	ES&S will work with the County to inspect the Voter Assist Terminal at the customer’s delivery location to make sure it is operating properly and is within specifications for tabulating election day ballots.	ES&S
	<b>Total Installation Fees: \$9,350</b>	

### Coding, Voice File, and Ballot Layout Fee Schedule

<b>Election Definition - M100, M650, AutoMARK</b>	<b>Fee</b>
Base Charge per CENTRAL Tabulator Type	\$350.00
Base Charge per PRECINCT Tabulator Type	\$350.00
Base Charge for additional Languages	\$350.00
Base Charge for ERM/ERS file set-up	\$350.00
Rotations (one charge per election)	\$50.00
Ballot types	\$50.00
Precincts	\$5.00
Splits	\$5.00
Ballot faces	\$10.00
Contests / Issues	\$12.00
Candidate / Responses	\$5.00
Polling Places	\$10.00
Media burn	\$10.00
Electronic transfer files (one charge per election)	\$17.00
Reburns	\$100.00
Back-Up / SOS Media	\$40.00
Headers (Central Tabulators)	\$1.00
<b>ADA Voice Files - AutoMARK</b>	
<b>Language Base Charge (English)</b>	
Language Setup Charge	\$250.00
Political Parties	\$5.00
Ballot Styles (total number of style in the election)	\$10.00
Contests / Issues	\$10.00
Candidates / Yes-No Responses	\$7.00

Propositions / Amendments / Instructions	\$15.00
Price per word in excess of 1200 total words (Instructions / Propositions / Amendments)	\$0.15
<b>Non-English Language Base Charge</b>	
Spanish Language Base Charge = Language Base Charge (English)	\$250.00
Non-Spanish Language Base Charge = 150% of Language Base Charge (English)	\$375.00
<b>Ballot Layout - \$10 per Style or Precinct, whichever is greater</b>	
1 to 100 Styles / Precincts	\$10.00
101 to 500 Styles / Precincts (10% discount)	\$9.00
501 or greater Styles / Precincts (7% discount)	\$7.00
<b>Charges for Language other than English/Spanish</b>	
1 to 100 Styles / Precincts = \$500 per language	\$500.00
101 to 500 Styles / Precincts = \$1000 per language	\$1,000.00
501 or greater Styles / Precincts = \$1500 per language	\$1,500.00
<b>Base Charge for Ballot On Demand (BOD)</b>	<b>\$350.00</b>

[END OF EXHIBIT E]

**EXHIBIT F  
MAINTENANCE SERVICES  
(POST-WARRANTY PERIOD)**

**ARTICLE I  
GENERAL**

1. **Term; Termination.** This Exhibit F shall be in effect from the date on which the Warranty Period expires until the first anniversary thereof (the "Hardware Maintenance Term"). The Hardware Maintenance Term shall automatically renew for an unlimited number of successive one year periods until this Exhibit F is terminated by the first to occur of (a) Customer's election to terminate it at any time, notice of which election shall be given to ES&S at least 60 days prior to the termination date, (b) the date that is 30 days after either party notifies the other that the other has materially breached this Exhibit F, and the breaching party fails to cure such breach within such 30-day period, or (c) the date that is 30 days after Customer fails to pay any amount due ES&S under this Exhibit F. The termination of this Exhibit F shall not relieve Customer of its liability to pay any amounts due ES&S hereunder. In the event that this Exhibit F is terminated due to a material breach and subsequent failure to cure by ES&S and ES&S has not already performed the relevant Routine Maintenance Services for the ensuing Hardware Maintenance Term, ES&S shall refund a prorata portion of the hardware maintenance fee paid by Customer based upon the number of months remaining in such ensuing Hardware Maintenance Term.

2. **Fees.** In consideration for ES&S' agreement to provide Hardware Maintenance Services and Software Maintenance and Support under this Exhibit F, Customer shall pay to ES&S the Hardware Maintenance and Software Maintenance Fees set forth on Schedule F1 for the initial Term and each renewal period. The Hardware Maintenance and Software Maintenance Fees for the initial Term are due on the date of the expiration of the Warranty Period. ES&S may increase the Hardware Maintenance and Software Maintenance Fees for a renewal period by not more than 5% of the amount of the most recent Fees paid by Customer. The Hardware Maintenance and Software Maintenance Fees for any renewal period shall be due and payable no later than 30 days prior to the beginning of such renewal period. The Software Maintenance Fee shall be comprised of (i) a fee for the Software Maintenance and Support provided for the ES&S Firmware, and (ii) a fee for the Software Maintenance and Support provided for all other ES&S Software, and shall be in addition to any fees or charges separately referred to in any Section of this Exhibit F or the Agreement. If Customer elects to receive Software Maintenance and Support for an Add-On or New Product during the Term or any renewal thereof, ES&S will charge an incremental Software Maintenance Fee for such services.

**ARTICLE II  
HARDWARE**

1. **Maintenance Services.** The Hardware Maintenance Services to be provided to Customer under this Exhibit F for the ES&S Equipment listed on Schedule F1 (the "Products") shall be subject to the following terms and conditions:

a. **Inspection.** If Customer has elected not to receive Hardware Maintenance Services under this Exhibit F for a period of 12 months or more, ES&S may require Customer to allow it to inspect the Products before it provides any Hardware Maintenance Services. The purpose of such inspection shall be to determine whether or

not the Products are fit for the ordinary purposes for which they are to be used, normal wear and tear excepted ("Normal Working Condition"). The cost of such inspection will be at the current published ES&S rate plus ES&S' Out-of-Pocket Expenses, and shall be due from Customer within 30 days of its receipt of ES&S' invoice therefore. If any of the Products is not in Normal Working Condition, ES&S, at the option of Customer, (i) shall provide such repairs and replacements as ES&S deems reasonable and necessary to restore such Product(s) to Normal Working Condition, at Customer's expense with respect to the cost of any parts used in such repairs or replacements, or (ii) shall not provide any Hardware Maintenance Services with respect to such Product(s). For purposes of this Exhibit F, "Out-Of-Pocket Expenses" shall mean all travel, meal and lodging expenses incurred by ES&S employees or authorized representatives ("ES&S Representatives") who are required to travel to Customer's Designated Location to provide services. Customer's "Designated Location" shall mean Customer's owned or leased facility at which Customer desires ES&S to perform the Hardware Maintenance Services. Customer's Designated Location is specified on Schedule F1.

b. **Routine Maintenance Services.** An ES&S Representative shall provide such services as may be necessary to keep the Products in Normal Working Condition ("Routine Maintenance Services") once each 12 months during the Hardware Maintenance Term or any renewal thereof. Customer may request that Routine Maintenance Services be performed more than once during any such 12-month period. Any such request shall be made at least 60 days before the Routine Maintenance Services are desired. The per-unit fee for such additional Routine Maintenance Services is set forth on Schedule F1 and shall be due within 30 days after invoice. Routine Maintenance Services shall include cleaning, lubrication and calibration services. At the request of Customer, ES&S shall provide a reasonably detailed record of all Routine Maintenance Services performed with respect to one or more Products. The Routine Maintenance Services will be provided either at Customer's Designated Location or at an ES&S-designated depot facility ("Depot"), as elected by Customer on Schedule F1. Customer shall pay all costs associated with shipping Product(s) to a Depot, including insurance.

c. **Remedial Maintenance Services.**

i. **Defects Under Normal Use and Service.** If a defect or malfunction occurs in any Product while it is under normal use and service, Customer shall promptly notify ES&S, and ES&S shall use reasonable efforts to restore the Product to Normal Working Condition as soon as practicable. The services provided by ES&S pursuant to this Subsection 2(c)(i) are referred to herein as "Remedial Maintenance Services". ES&S shall provide the Remedial Maintenance Services at its Depot; provided, however, that if Remedial Maintenance Services are required for 10 or more Products at any given time, Customer may elect to have them provided at its Designated Location; provided, further, that all Remedial Maintenance Services provided for central count equipment shall be provided at Customer's Designated Location. Customer acknowledges that Product(s) identified on Schedule F1 as "depot repair only" may only be repaired at a Depot.

ii. **Defects Due to Customer Actions or Omissions.** If a defect or malfunction occurs in any Product as a result of (1) repairs, changes, modifications or alterations not authorized or approved by ES&S, (2) accident,

theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S or (3) causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations, and utility or communication interruptions, or if Customer does not notify ES&S within 24 hours after it knows of the defect or malfunction or is otherwise not in compliance with its obligations hereunder, Customer shall pay ES&S for the Remedial Maintenance Services at ES&S' then-current rates, as well as for the cost of all parts used in connection with such Remedial Maintenance Services.

iii. **Timing.** The date(s) on which any Remedial Maintenance Services shall be provided shall be mutually agreed upon by ES&S and Customer. If Customer requires ES&S to provide "emergency" Remedial Maintenance Services (which shall be defined as Remedial Maintenance Services that are provided within 48 hours after Customer notifies ES&S of the need therefor), and such emergency Remedial Maintenance Services are not needed as a result of an action, error or omission by ES&S, Customer shall pay a surcharge, as set forth on Schedule F1.

iv. **Loaner Unit.** At Customer's request, ES&S shall use reasonable efforts to promptly make available to Customer a product that is the same as, or substantially similar to, the Product for which Remedial Maintenance Services are being performed (a "Loaner Unit"). If the Remedial Maintenance Services are being performed pursuant to Subsection 2(c)(ii) above, Customer shall pay ES&S for the use of the Loaner Unit at ES&S' then-current rates including the cost of shipping.

d. **Exclusions.** ES&S has no obligation under this Exhibit F to (i) assume the obligations under any existing or expired warranty for a Third Party Item; (ii) repair or replace Product components that are consumed in the normal course of operating the Product, including printer ribbons, paper rolls, batteries, removable memory packs, cancellation stamps, ink pads or red stripe pens, or (iii) repair any Product from which the serial number has been removed or altered. In addition, ES&S may, at any time in its discretion, determine that any Product is no longer fit for Hardware Maintenance Services because it is in such poor condition that it cannot practically be restored to Normal Working Condition, or cannot be restored to Normal Working Condition at an expense that is less than the then-current value of the Product. If such a determination is made, ES&S shall no longer be required to provide Hardware Maintenance Services for such Product. ES&S shall also refund to Customer an amount equal to (1) that portion of the most recent fee paid for Hardware Maintenance Services that is attributable to such Product, multiplied by (2) a fraction, the numerator of which is the remaining number of days in the Hardware Maintenance Term or renewal period for which such fee was paid and the denominator of which is the total number of days in such Hardware Maintenance Term.

e. **Sole Provider; Access.** Customer shall not permit any individual other than an ES&S Representative to provide maintenance or repairs with respect to the Products for so long as a Hardware Maintenance Term is in effect. Customer shall provide ES&S Representatives with all information necessary to enable them to provide Hardware Maintenance Services. Customer shall likewise provide full access to the Products and adequate working space for all Hardware Maintenance Services



performed at its Designated Location, including sufficient heat, lights, ventilation, electric current and outlets.

f. **Storage.** When not in use, Customer shall properly store the Products in accordance with the storage requirements established in the Documentation.

### **ARTICLE III** **SOFTWARE**

1. **Services Provided.** ES&S shall provide maintenance and support services for the ES&S Software (“Software Maintenance and Support”), to enable it to perform in accordance with its Documentation in all material respects, and to cure any defect in material or workmanship.

2. **Updates.** During the Software Maintenance Term and any renewals thereof, ES&S shall continue to provide updates in accordance with any update schedule determined by ES&S.

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

4. **Conditions.** ES&S shall provide Software Maintenance and Support for any item of ES&S Software if such item requires such services as a result of (a) repairs, changes, modifications or alterations not authorized or approved by ES&S, (b) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S, (c) causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, (d) Customer’s failure to timely and properly install and use the most recent Update, or the second most recent Update, provided to it by ES&S, (e) Customer’s failure to notify ES&S within 24 hours after Customer knows of the need for such services, or (f) if Customer is otherwise not in compliance with its obligations under this Agreement. However, such Software Maintenance and Support shall not be provided at the Software Maintenance Fees outlined in Section 5(b), but shall be provided at the fees to be agreed upon by the parties if and when the need for such Software Maintenance and Support arises.

5. **Proprietary Rights.** ES&S shall own the entire right, title and interest in and to all corrections, programs, information and work product conceived, created or developed, alone or with Customer or others, as a result of or related to the performance of this Exhibit F, including all proprietary rights therein or based thereon. Subject to the payment of all Software Maintenance Fees, ES&S hereby grants to Customer a non-exclusive license to use that portion of such corrections, programs, information and work product that ES&S actually delivers to Customer pursuant to this Exhibit F. All licensed items shall be deemed to be ES&S Software for purposes of this Agreement. Except and to the extent expressly provided herein, ES&S does not grant to Customer any right, license, or other proprietary right, express or implied, in or to any corrections, programs, information, or work product covered by this Agreement.

**Schedule F1**

**DESCRIPTION OF PRODUCTS**

**STANDARD HARDWARE MAINTENANCE PROGRAM**

If the Customer elects to pay annual maintenance fees for the period 2007 through 2010 at the start of the 2007 maintenance period, ES&S will provide a net present value discount to Customer in the amount of \$11,039. If the Customer does not pay the annual maintenance fees in advance, the following annual license fees will be in effect.

<b>Quantity</b>	<b>Description (Note: *** indicates Depot Repair Only Products)</b>	<b>Year</b>	<b>Initial Maintenance Fee Per Unit</b>	<b>Initial Maintenance Fee In Total</b>
130	AutoMARK Assist Terminal	<b>2007</b>	\$280	\$36,400
130	AutoMARK Assist Terminal	<b>2008</b>	\$291	\$37,830
130	AutoMARK Assist Terminal	<b>2009</b>	\$303	\$39,390
130	AutoMARK Assist Terminal	<b>2010</b>	\$315	\$40,950

**Per-Unit Fees if Customer requests more than one Routine Maintenance visit in a 12-month period, Customer shall pay 90% of the then current maintenance fee per unit.**

**Surcharge for Emergency Remedial Maintenance Services: 150% of the then current maintenance fee per unit**

## OPTIONAL HARDWARE MAINTENANCE PROGRAM

If the Customer elects to pay annual maintenance fees for the period 2007 through 2010 at the start of the 2007 maintenance period, ES&S will provide a net present value discount to Customer in the amount of \$8,471. If the Customer does not pay the annual maintenance fees in advance, the following annual license fees will be in effect.

As an option, Customer may purchase an “Even Year Only” Hardware Maintenance Plan. Under this Plan ES&S is obligated to provide one (1) on-site preventative maintenance service in an even-numbered year only. The rates for this option are as follows:

Quantity	Description (Note: *** indicates Depot Repair Only Products)	Year	Initial Maintenance Fee Per Unit	Initial Maintenance Fee In Total
130	AutoMARK Assist Terminal	<b>2007</b>	\$100	\$13,000
130	AutoMARK Assist Terminal	<b>2008</b>	\$291	\$37,830
130	AutoMARK Assist Terminal	<b>2009</b>	\$108	\$14,040
130	AutoMARK Assist Terminal	<b>2010</b>	\$303	\$39,390

**Note 1:** Firmware upgrades will be installed in conjunction with the even numbered year maintenance visit.

**Note 2:** If Customer requires an on-site preventative or remedial maintenance service during an odd numbered year, the following per unit rates will apply:

**2007 Odd-Year Preventative or Remedial Maintenance Service Per Unit Rate:**  
 ES&S AutoMARK \$ 180

**2009 Odd-Year Preventative or Remedial Maintenance Service Per Unit Rate:**  
 ES&S AutoMARK \$ 195

**Customer’s Designated Location: Marin County, California**

**Location of Services**

**Customer's Designated Location**

**Depot**

**Per Unit Surcharge for performance of Routine Maintenance visit at more than one Customer Designated Location: \$25.00 per unit for all units located at second or more locations.**

## **SOFTWARE MAINTENANCE**

If the Customer elects to pay annual maintenance fees for the period 2007 through 2010 at the start of the 2007 maintenance period, ES&S will provide a net present value discount to Customer in the amount of \$1,439. If the Customer does not pay the annual license fees in advance, the following annual license fees will be in effect.

<b>Year</b>	<b>First Month Applicable</b>	<b>Fee –ES&amp;S Firmware</b>	<b>Fee- All Other ES&amp;S Software</b>
2007	January 2007	\$3,900	\$1,500
2008	January 2008	\$4,030	\$1,560
2009	January 2009	\$4,160	\$1,622
2010	January 2010	\$4,290	\$1,687

**EXHIBIT G**  
**ACCEPTANCE CRITERIA**  
**AutoMARK Voter Assist Terminal**

**Inspector:**\_\_\_\_\_

**Serial Number:**\_\_\_\_\_ **Date:**\_\_\_\_\_

**Acceptance Q.C. Testing:**

**Setup**

- Place AutoMARK on firm surface
- Connect AC cord to machine and wall outlet
- Connect headphones
- Insert key

**Visual Inspection**

- Verify sample ballot compact flashcard installed
- Verify battery installed
- Verify top and rear clean-out trays installed
- Verify print cartridge installed
- Inspect all fasteners and plastic parts

**Print Testing**

- Turn key switch to Test
- Wait for machine to boot
- Press Test Ballot Print on Test Mode screen
- Insert sample ballot and wait to print
- Repeat procedure in all orientations
- Press Done
- Calibrate as required

**Keypad/Audio Testing**

- Turn key switch to On
- Verify "Insert Ballot" audio prompt
- Cycle Display Screen (diamond button)
- Verify Repeat Key functionality
- Verify Tempo rocker key functionality
- Verify Volume rocker key functionality

**Voting Process**

- Insert sample ballot
- Complete voting process using touch screen
- Print Ballot
  
- Insert sample ballot
- Complete voting process using key pad
- Print Ballot
  
- Insert previously printed ballot
- Verify that AutoMARK correctly identifies votes

**EXHIBIT G  
ACCEPTANCE CRITERIA**

***CERTIFICATE OF ACCEPTANCE***

The undersigned do hereby certify that the Equipment listed below has been tested and accepted under the criteria specified in the Agreement. Serial Numbers of respective Equipment are attached.

Firmware Version: \_\_\_\_\_

Customer: \_\_\_\_\_

Representative: \_\_\_\_\_  
(Printed Name & Title)

\_\_\_\_\_  
(Signature)

ES&S  
Representative: \_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
(Signature)

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

**[END OF EXHIBIT G]**

**EXHIBIT H1**  
**CERTIFICATE OF INSURANCE**

## EXHIBIT H2

ES&S, at its sole cost and expense, shall purchase and maintain the insurance policies set forth below on all of its operations under this Agreement. Such policies shall be maintained for the full term of this Agreement and the related warranty period (if applicable) and shall provide products/completed operations coverage for four (4) years following completion of ES&S' work under this Agreement and acceptance by the County. Any failure to comply with reporting provisions(s) of the policies referred to above shall not affect coverage provided to the County, its officers, employees, volunteers and agents. For purposes of the insurance policies required hereunder, the term "County" shall include officers, employees, volunteers and agents of the County of Marin, California, individually or collectively.

### 1. **MINIMUM SCOPE AND LIMITS OF REQUIRED INSURANCE POLICIES**

The following policies shall be maintained with insurers authorized to do business in the State of California and shall be issued under forms of policies satisfactory to the County:

#### a. **COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ("CGL")**

Policy shall include coverage at least as broad as set forth in Insurance Services Office (herein "ISO") Commercial General Liability coverage. (Occurrence Form CG 0001) with policy limits not less than the following:

- \$1,000,000 each occurrence (combined single limit);
- \$1,000,000 for personal injury liability;
- \$1,000,000 aggregate for products-completed operations; and
- \$1,000,000 general aggregate.

The general aggregate limits shall apply separately to ES&S' work under this Agreement.

#### b. **BUSINESS AUTOMOBILE LIABILITY POLICY ("BAL")**

Policy shall include coverage at least as broad as set forth in Insurance Services Office Business Automobile Liability Coverage, Code 1 "Any Auto" (Form CA 0001). This policy shall include a minimum combined single limit of not less than One-million (\$1,000,000) dollars for each accident, for bodily injury and/or property damage. Such policy shall be applicable to vehicles used in pursuit of any of the activities associated with this Agreement. ES&S shall not provide a Comprehensive Automobile Liability policy which specifically lists scheduled vehicles without the express written consent of County.

#### c. **WORKERS' COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE POLICY ("WC / EL")**

This policy shall include at least the following coverages and policy limits:



1. Workers' Compensation insurance as required by the laws of the laws of the State of California; and
2. Employer's Liability Insurance Coverage B with coverage amount not less than one-million (\$1,000,000) dollars each accident / Bodily Injury (herein "BI"); one-million (\$1,000,000) dollars policy limit BI by disease; and, one-million (\$1,000,000) dollars each employee BI disease.

d. **PROFESSIONAL LIABILITY INSURANCE POLICY ("PL") (OPTIONAL)**

This policy shall cover damages, liabilities, and costs incurred as a result of ES&S' professional errors and omissions or malpractice. This policy shall include a coverage limit of at least One-Million Dollars (\$1,000,000) per claim, including the annual aggregate for all claims (such coverage shall apply during the performance of the services under this Agreement and for two (2) years thereafter with respect to incidents which occur during the performance of this Agreement). ES&S shall notify the County if any annual aggregate is eroded by more than seventy-five percent (75%) in any given year.

2. **DEDUCTIBLES AND SELF-INSURANCE RETENTIONS**

Any deductibles and/or self-insured retentions which apply to any of the insurance policies referred to above shall be declared in writing by ES&S and approved by the County before work is begun pursuant to this Agreement. At the option of the County, ES&S shall either reduce or eliminate such deductibles or self-insured retentions as respect the County, its officers, employees, volunteers and agents, or shall provide a financial guarantee satisfactory to the County guaranteeing payment of losses and related investigations, claim administration, and/or defense expenses.

3. **ENDORSEMENTS**

All of the following clauses and endorsements, or similar provisions, are required to be made a part of insurance policies indicated in parentheses below:

- a. A "Cross Liability", "Severability of Interest" or "Separation of Insureds" clause (CGL & BAL);
- b. The County of Marin, its officers, employees, volunteers and agents are hereby added as additional insureds with respect to all liabilities arising out of ES&S' performance of work under this Agreement (CGL & BAL);
- c. If the insurance policy covers an "accident" basis, it must be changed to "occurrence" (CGL & BAL)
- d. This policy shall be considered primary insurance with respect to any other valid and collectible insurance County may possess, including any self-insured retention County may have, and any other insurance County does possess shall be considered excess insurance only and shall not be called upon to contribute to this insurance (CGL, BAL, & PL);

- e. No cancellation or non-renewal of this policy, or reduction of coverage afforded under the policy, shall be effective until written notice has been given at least thirty (30) days prior to the effective date of such reduction or cancellation to County at the address set forth below (CGL, BAL, WC /EL & PL);
- f. ES&S and its insurers shall agree to waive all rights of subrogation against the County, its officers, employees, volunteers and agents for any loss arising under this Agreement (CGL); and
- g. Deductibles and self-insured retentions must be declared (All Policies).

4. **ABSENCE OF INSURANCE COVERAGE**

County may direct ES&S to immediately cease all activities with respect to this Agreement if it determines that ES&S fails to carry, in full force and effect, all insurance policies with coverages at or above the limits specified in this Agreement. Any delays or expense caused due to stopping of work and change of insurance shall be considered ES&S' delay and expense. At the County's discretion, under conditions of lapse, the County may purchase appropriate insurance and charge all costs related to such policy to ES&S.

1. **PROOF OF INSURANCE COVERAGE AND COVERAGE VERIFICATION**

Prior to commencement of work under this Agreement, and annually thereafter for the term of this Agreement, Consultant, or each of ES&S' insurance brokers or companies, shall provide County a current copy of a Certificate of Insurance, on an Accord or similar form, which includes complete policy coverage verification, as evidence of the stipulated coverages. All of the insurance companies providing insurance for ES&S shall have, and provide evidence of, a Best Rating Service rate of A VI or above. The Certificate of Insurance and coverage verification and all other notices related to cancellation or non-renewal shall be mailed to:

## EXHIBIT I

### ADDITIONAL TERMS AND CONDITIONS

1. **Compliance with Additional Terms & Conditions.** ES&S agrees to be bound by the following additional terms and conditions.
2. **Right to Audit:** Customer reserves the right to verify, by examination of ES&S' records, all invoiced amounts when firm prices are not set forth in the Agreement.
3. **Assignment:** In submitting a response to a public purchasing body, the responder offers and agrees that if the response is accepted, it will assign to the purchasing body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 [commencing with Section 16700] of part 2 of Division 7 of the Business and Professions Code), arising from the purchases of goods, materials, or services by the quoter for sale to the purchasing body pursuant to the quote. Such assignment shall be made and become effective at the time the purchasing body tenders final payment to the responder.
4. **Year 2000 Compliance:** All products offered by ES&S as well as third party components of the solution must be Year 2000 compliant. The software and/or hardware design to ensure Year 2000 compliance shall include, but not be limited to, century recognition of date, calculations that correctly compute same century. None of these products should require any modification because of date issues arising between now and the next one hundred years into the future. If any changes are required the vendor will make the changes at no cost and in a time frame that is acceptable to Customer.