

A RESOLUTION APPROVING THE PURCHASE OF ELECTION EQUIPMENT AND SERVICES AND HARDWARE MAINTENANCE AND SOFTWARE LICENSE TO BE PROVIDED FOR BY ELECTION SYSTEM AND SOFTWARE, LLC

25 January 2017

Resolution No. 2017-01

RECITALS

WHEREAS, the Aurora Election Commission (“ELECTION COMMISSION”) is a body politic and corporate, organized and existing pursuant to the Election Code, 10 ILCS 5/1-1, *et seq.*; and

WHEREAS, the ELECTION COMMISSION is authorized and empowered, pursuant to the Illinois Election Code, 10 ILCS 5/1-1, *et seq.*, to pass resolutions for the purpose of carrying out its statutorily enumerated duties and responsibilities and those powers reasonably inferred therefrom; and

WHEREAS, the ELECTION COMMISSION desires to purchase election equipment, hardware and software, along with election, including hardware maintenance and software license; and

WHEREAS, the ELECTION COMMISSION solicited bids for said services and supplies; and

WHEREAS, the ELECTION COMMISSION received a Purchase Proposal Quote for said services and supplies from Election System and Software, LLC (“ES&S”) for a total amount of \$477,271.05; and

WHEREAS, the ELECTION COMMISSION has determined that ES&S Purchase Proposal Quote for said services and supplies is reasonable and acceptable;

WHEREAS, the ELECTION COMMISSION has determined that ES&S has the experience and expertise to provide said services and supplies; and

WHEREAS, the ELECTION COMMISSION desires to enter into an agreement with ES&S for said services and supplies and as quoted in the Purchase Proposal Quote, dated November 30, 2016; and

WHEREAS, the ELECTION COMMISSION finds and determines that entry into an agreement with ES&S for services and supplies is in the best interest of the ELECTION COMMISSION and the citizens of the City of Aurora.

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the Election Commission, as follows:

1. That the recitals set forth above are incorporated herein and made a part hereof.
2. That the Board of Commissioners hereby authorizes the acceptance of the Purchase Proposal Quote from ES&S for the services and supplies set forth therein, for a total amount not to exceed \$477,271.05, as quoted in the Sales Order Agreement, a copy of the Purchase Proposal Quote and the related Sales Order Agreement are attached hereto and incorporated herein by reference as Exhibit "A."
3. That the Executive Director is hereby authorized to enter into an agreement with ES&S, on behalf of the ELECTION COMMISSION, for said services and supplies, as provided for in Exhibit "A", subject to final review and approval by the ELECTION COMMISSION'S Attorneys.
4. That all Resolutions, or parts thereof, in conflict with the provisions of this Resolution are, to the extent of such conflict, hereby repealed.
5. That this Resolution shall be in full force and effect from and after its passage, approval and publication, in the manner provided for by law.

APPROVED:

BY:

Leah Anderson

Leah Anderson, Chairman

Mike McCoy

Mike McCoy, Vice Chair

Lillian Perry, Secretary

ATTEST:

BY:

Lillian Perry, Secretary

AYES: _____

NAYS: _____

ABSENT: _____

CERTIFICATION

I, the undersigned, do hereby certify that I am the Secretary of the Aurora Election Commission, Aurora, Illinois, and that the foregoing is a true, complete and exact copy of Resolution No. 2017-01, passed and approved on January 25, 2017, as the same appears from the official records of the Aurora County Election Commission.

Lillian Perry, Secretary

GENERAL TERMS

Purchase/License Terms. Subject to the terms and conditions of this Agreement, ES&S agrees to sell and/or license and Customer agrees to purchase and/or license, the ES&S Equipment, ES&S Software and ES&S Firmware described on the reverse side. The ES&S Firmware and ES&S Software are collectively referred to hereinafter as the "ES&S Software". The payment terms for the ES&S Equipment and ES&S Software are set forth on the reverse side. Title to the ES&S Equipment shall pass to Customer when Customer has paid ES&S the total amount set forth on the reverse side for the ES&S Equipment. The consideration for ES&S' grant of the license during the Initial Term for the ES&S Firmware is included in the cost of the ES&S Equipment.

2 Grant of Licenses. Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer nonexclusive, nontransferable licenses for its bona fide full time employees to use the ES&S Software and related Documentation in the Jurisdiction while Customer is using the ES&S Equipment and timely pays the applicable annual ES&S Software License, Maintenance and Support Fees set forth on Schedule A1. The licenses allow such bona fide employees to use and copy the ES&S Software (in object code only) and the Documentation, in the course of operating the ES&S Equipment and solely for the purposes of defining and conducting elections and tabulating and reporting election results in Customer's jurisdiction. The licenses granted in this Section 2 do not permit Customer to access or in any way use the source code for the ES&S Software.

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

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

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

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

d Allow a third party to cause or permit any copying, reproduction or printing of any output generated by the ES&S Software in which ES&S owns or claims any proprietary intellectual property rights (e.g. copyright, trademark, patent pending or patent), including, but not limited to, any ballot shells or ballot code stock.

4 Term of Licenses. The licenses granted in Section 2 shall commence upon the delivery of the ES&S Software described in Section 2 and shall continue for a one-year period (the "Initial License Term"). Upon expiration of the Initial License Term, the licenses shall automatically renew for an unlimited number of successive one-year periods (each a "License Renewal Term") upon the payment by Customer of the annual software license and software maintenance and support fee as set forth on the reverse side. ES&S may terminate either license if Customer fails to pay the consideration due for, or breaches Sections 2, 3, or 9 with respect to such license. Upon the termination of either of the licenses granted in Section 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 such destruction has occurred.

Updates. During the Initial License Term or any License Renewal Term, ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software, 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) deliver the Updates to the Customer, (ii) train Customer on Updates, if such training is requested by Customer, (iii) install the Updates or (iv) 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. Customer shall be responsible for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee which is caused by Customer's failure to install and use the most recent Update provided to it by ES&S. 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 reference or compensation to Customer or any third party. ES&S represents to Customer that the Updates will comply with all applicable state law requirements at the time of delivery. Customer shall be responsible to ensure that it has installed and is using only certified versions of ES&S Software in accordance with applicable law. Customer shall pay ES&S for any Update which is required due to a change in state or local law.

6 Delivery; Risk of Loss. The Estimated Delivery Dates set forth on the reverse side are merely estimates and may be revised by ES&S because of delays in executing this Agreement, changes requested by Customer and other events. ES&S will notify Customer of revisions to the Estimated Delivery Dates as soon as ES&S becomes aware of such revisions. Risk of loss for the ES&S Equipment and ES&S Software shall pass to Customer when such items are delivered to Customer's designated location. Upon transfer of risk of loss to Customer, Customer shall be responsible for obtaining and maintaining sufficient casualty insurance on the ES&S Equipment and ES&S Software and shall name ES&S as an additional insured thereunder until all amounts payable to ES&S under this Agreement have been paid by Customer.

7 Warranty.

a ES&S Equipment/ES&S Software. ES&S warrants that for a 1-year period (the "Warranty Period"), it will repair or replace any component of the ES&S Equipment or ES&S Software which, while under normal use and service (i) fails to perform in accordance with its Documentation in all material respects, or (ii) is defective in material or workmanship. The Warranty Period will commence upon delivery. 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 ES&S Equipment, including printer ribbons, printer cartridges, paper rolls, batteries, removable media storage devices, PCMCIA cards or marking devices. Any repaired or replaced item of ES&S Equipment or ES&S Software shall be warranted only for the unexpired term of the Warranty Period. 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 in part 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. This warranty is void for any units of equipment which (i) have not been stored or operated in a temperature range according their specifications, (ii) have been severely handled so as to cause mechanical damage to the unit, or (iii) have been operated or handled in a manner inconsistent with reasonable treatment of an electronic product. The terms of post-warranty license, maintenance and support are set forth on Exhibit A.

b Exclusive Remedies/Disclaimer. IN THE EVENT OF A BREACH OF SUBSECTION 7(a), 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. FURTHER, IN THE EVENT CUSTOMER DECLINES ES&S' INSTALLATION AND ACCEPTANCE TESTING SERVICES OR IN ANY WAY AT ANY TIME ALTERS, MODIFIES OR CHANGES ANY EQUIPMENT, SOFTWARE, THIRD PARTY ITEMS AND/OR NETWORK (COLLECTIVELY "SYSTEM") CONFIGURATIONS WHICH HAVE BEEN PREVIOUSLY INSTALLED BY ES&S OR WHICH ARE OTHERWISE REQUIRED IN ACCORDANCE WITH THE CERTIFIED VOTING SYSTEM CONFIGURATION, ALL WARRANTIES OTHERWISE PROVIDED HEREUNDER WITH RESPECT TO THE SYSTEM PURCHASED, LEASED, RENTED AND/OR LICENSED UNDER THIS AGREEMENT SHALL BE VOID AND OF NO FURTHER FORCE AND EFFECT.

8 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. 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 ES&S Equipment and ES&S Software to achieve Customer's intended results, (b) the use of the ES&S Equipment and ES&S Software, (c) the results obtained from the use of the ES&S Equipment and ES&S 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 ES&S Equipment or ES&S Software, or (e) 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 (y) 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 (z) Customer's election not to receive, or to terminate, the Hardware Maintenance Services or the ES&S Software Maintenance and Support.

9 Proprietary Rights. Customer acknowledges and agrees as follows:

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 associated with the ballots to be used with the ES&S Equipment. Customer has the right to use the aforementioned items to the extent specified in this Agreement. 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. 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.

10 Indemnification. Intentionally Omitted.

11 Termination. This Agreement may be terminated, in writing, at any time by either party if the other party breaches any material provision hereof and does not cure such breach within 30 days after it receives written notification thereof from the non-breaching party.

12 Disputes.

a 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.

b 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. If Customer's payment is past due for more than 60 days and is undisputed, ES&S may declare the total amount remaining due under this Agreement to be immediately due and payable, enter the premises where the ES&S Equipment is located and remove it. 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, unless such dispute is resolved in favor of Customer. In the event either party pursues litigation to resolve a dispute, the parties agree that such litigation shall be prosecuted in the Circuit Court for the 16th Judicial Circuit, Kane County, Illinois. The parties hereby stipulate that Kane County, Illinois shall be the appropriate venue for resolution of any dispute between the parties. The parties further agree that the prevailing party in any litigation shall be entitled to the recovery of reasonable attorney's fees.

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.

14 Compliance with Laws. 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 warrants to Customer that, at the time of delivery, the ES&S Equipment and ES&S Software sold and licensed under this Agreement will comply with all applicable requirements of state election laws and regulations that are mandatory and effective as of the Effective Date and will have been certified by the appropriate state authorities for use in Customer's state. ES&S further warrants that during the

Warranty Period and thereafter so long as Customer is subscribing and paying for Maintenance and Support Services, the ES&S Equipment and ES&S Software shall be maintained or upgraded by ES&S in such a way as to remain compliant with all applicable state election laws and regulations. "Maintained or upgraded" shall mean only such changes to individual items of the ES&S Software (but not ES&S Equipment) as are technologically feasible and commercially reasonable. Customer shall be solely responsible for the cost of any replacements, retrofits or modifications to the ES&S Equipment contracted for herein that may be developed and offered by ES&S in order for such ES&S Equipment to remain compliant with applicable laws and regulations. Customer shall also be solely responsible for the cost of any third party items that are required in order for the ES&S Equipment and/or ES&S Software to remain compliant with applicable laws and regulations.

15. **State Recertifications.** In the event that any future state certifications or recertifications are required that are not otherwise required as a result of any changes or modifications voluntarily made by ES&S to the ES&S Software and/or ES&S Equipment licensed and sold hereunder, Customer shall be responsible for

- (i) the total cost of any third party items that are required in order for the ES&S Equipment and/or ES&S Software to remain certified;
- (ii) Customer's pro-rata share of such future state certification or recertification costs; and
- (iii) Customer's pro-rata share of the costs of designing, developing, manufacturing and/or certification by applicable federal and state authorities of any mandated modifications to the ES&S Equipment and/or ES&S Software that may result from such future state certifications or recertifications.

Customer's pro-rata share of the costs included under subsections 15(ii) and 15(iii) above shall be determined at the time by dividing the number of registered voters in Customer's jurisdiction by the total number of registered voters in all counties in Customer's state to which ES&S has sold and/or licensed the ES&S Equipment and/or ES&S Software purchased and licensed by Customer under this Agreement.

16. **Entire Agreement.** This Agreement, including all exhibits hereto, shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and assigns. This Agreement, including all Exhibits hereto and that certain Purchase Proposal Quote, dated November 30, 2015, contains 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 which 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. This Agreement shall be governed by and construed in accordance with the laws of the State in which the Customer resides, without regard to its conflicts of law principles. The parties agree that venue for any dispute or cause of action arising out of or related to this Agreement shall be in the state and federal courts of the United States located in the State in which the Customer resides. 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 Sections 1-5, 7(b), 8-10, 12(b), 13-16 these General Terms shall survive the termination of this Agreement, to the extent applicable.



11208 JOHN GALT BLVD
 OMAHA, NE 68137 2364
 (402) 593-0101

Sales Order Agreement

Customer P O # _____

1st Election Date To be Agreed Upon by the Parties

Estimated Delivery Date To be Agreed Upon by the Parties

Phone Number (630) 897-4030

Fax Number (630) 897-4060

Customer Contact, Title Linda Fechner -Executive Director

Customer Name City of Aurora, Illinois

Type of Sale NEW

Type of Equip NEW REFURBISHED

Bill To
 City of Aurora, Illinois
 Linda Fechner -Executive Director
 323 W Galena Blvd.
 Aurora, IL 60506

Ship To
 City of Aurora, Illinois
 Linda Fechner -Executive Director
 323 W Galena Blvd
 Aurora, IL 60506

Item	Description	Qty	Price	Total
1	DS200 Model DS200 Digital Image Scanner with Plastic Ballot Box with Steel Door and e-Bin, Reverse Wound Paper Roll, and 4GB Jump Drive	50	\$5,750.00	\$287,500.00
2	ExpressVote ExpressVote BMD Terminal with Internal Backup Battery, Power Supply with AC Cord, ADA Keypad, Headphones, and 4GB Flash Drive	80	\$3,325.00	\$266,000.00
3	Other Soft-Sided Case	80	\$175.00	\$14,000.00
4	Software ElectionWare - Reporting Only	1	\$4,200.00	\$4,200.00
5	Equipment Installation Model DS200 Scanners	50	\$115.00	\$5,750.00
6	Equipment Installation ExpressVote BMD Terminals	80	\$105.00	\$8,400.00
7	Services Software Training Day	1	\$1,650.00	\$1,650.00
8	Trade-in Allowance Equipment Being Traded-In by Customer Includes: 80 - AccuVote OS Scanner with Ballot Box 73 - AccuVote TSX Terminal	1	(\$13,475.00)	(\$13,475.00)
9	Shipping Shipping & Handling	1	\$6,750.00	\$6,750.00
			Order Subtotal	\$ 580,775.00
			Discount	(\$103,503.95)
			Order Total	\$ 477,271.05

Freight Billable: yes no

 Judd Ryan
 Regional Sales Manager

 Customer Signature Date

 V.P. of Finance Date

 Title

Trade-In Equipment:
 Customer is responsible for preparing and packaging the trade-in equipment for shipment. ES&S will coordinate and pay for the pickup of the trade-in equipment from Customer's site on a date to be mutually agreed upon by the parties.

Special Notes: The Order Total does not include 3rd Party Items and Operations Training Services. Customer may purchase these items from ES&S under a separate agreement.

Payment Terms: 100% of Order Total due Thirty (30) Calendar Days after the later of (a) Equipment Delivery or (b) Receipt of Corresponding ES&S Invoice.
 Note 1: Any applicable state and local taxes are not included, and are the responsibility of the Customer.
 Note 2: In no event shall Customer's payment obligations hereunder, or the due dates for such payments, be contingent or conditional upon Customer's receipt of federal and/or state funds.

Warranty Period (Years): One (1) Year After Equipment Delivery

Hardware Maintenance and Software License, Maintenance and Support Services (Post-Warranty Period)
 The terms, conditions, and pricing for the Hardware Maintenance and Software License, Maintenance and Support Services (Post-Warranty Period) are set forth in Exhibit A attached hereto.

SEE GENERAL TERMS AND CONDITIONS