

**ELECTION SYSTEMS & SOFTWARE, INC.
ELECTION SERVICES AGREEMENT**

This Agreement is made effective as of January 1, 2010 (the "Effective Date"), unless both parties fail to sign before that time.

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

AND: State of North Dakota, acting through the Secretary of State ("Customer")

RECITALS:

- A. Customer has agreed to purchase certain election-related services from ES&S for use in North Dakota's 53 Counties (the "Jurisdiction"). The terms and conditions under which such 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 (Ballot Layout, Coding, and Voice File Services)

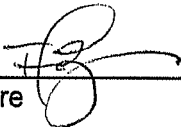
 Exhibit B (Ballot Printing Services)

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

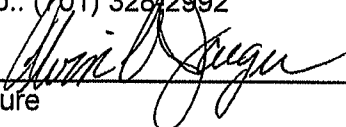
- Agrees to the **GENERAL TERMS** and the terms and conditions set forth in each Exhibit.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the **State of North Dakota**.
- Represents and warrants to the other party that as of its signature date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

ELECTION SYSTEMS & SOFTWARE, INC.
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1291

STATE OF NORTH DAKOTA, ACTING
THROUGH THE SECRETARY OF STATE
600 East Boulevard Avenue, Dept. 108
Bismarck, ND 58505-0500
Fax No.: (701) 328-2992



Signature



Signature

THOMAS O'BRIEN

Name (Printed or Typed)

Alvin A. Jaeger

Name (Printed or Typed)

CEO

Title

Secretary of State

Title

12/18/09

Date

12/30/09

Date

GENERAL TERMS AND CONDITIONS

1. **Consideration.** The consideration to be paid by Customer to ES&S for the services provided hereunder is set forth on the accompanying Exhibits.

2. **Limitation of Liability.** Except for claims for direct loss resulting from personal injury (including death) and damage to real property and tangible personal property, ES&S' total liability to Customer arising out of or relating to this Agreement will not exceed the aggregate amount paid under this Agreement. Neither party will be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or relating to this Agreement. Any action by Customer against ES&S shall be commenced within the applicable statutory period of limitations after the cause of action has accrued. By entering into this Agreement, Customer agrees to accept responsibility for the selection of, use of and results obtained from any services not provided by ES&S.

3. **Excusable Nonperformance.** Except for a delay or failure in the payment of money, if either party is delayed or prevented from performing its obligations under this Agreement due to any cause beyond its reasonable control, including natural disaster, fire, flood, unusually severe weather, terrorism, insurrection, war, Acts of God, labor disputes and governmental regulations, 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.

4. **Exclusive Service Provider.** Customer hereby agrees to purchase the products and services set forth on Exhibits A and B attached hereto from ES&S for the Term of this Agreement at the pricing set forth on each applicable Exhibit. Customer's agreement to purchase all of such products and services from ES&S for the entire Term entitles Customer to receive the preferred pricing for each product or service as provided herein. In the event that Customer terminates its purchase commitment for one or more of the products and services set forth on Exhibits A and B prior to expiration of the Term of this Agreement for any reason other than for cause pursuant to Section 5 of this Agreement, or purchases any such products or services from a provider other than ES&S during the Term, or fails to pay for such products or services provided by ES&S pursuant to the payment terms in Exhibit A and B, during the Term, Customer shall no longer be entitled to receive the pricing set forth on Exhibits A and B, as applicable, and shall pay ES&S its then current rates for such product and services. As of the Effective Date of the Agreement, pursuant to the request and approval of the State, ES&S has engaged Synergy Graphics, Inc. ("Synergy") as its subcontractor to perform some or all of the Services set forth hereunder. ES&S shall use commercially reasonable efforts to continue to engage Synergy to perform such Services; however, ES&S will not guarantee that Synergy will provide some or all of the Services throughout the entire Term of the Agreement. ES&S, in consultation with Customer

may, determine who will provide the Services contemplated hereunder to the Customer. In the event that ES&S determines it is necessary to engage an alternative subcontractor to perform some or all of the Services performed by Synergy, ES&S agrees to notify the State of such action and work with the State to attempt to identify a mutually acceptable alternative subcontractor. In the event that ES&S reasonably determines it is necessary to terminate the engagement of Synergy, such termination shall not be a default under this Agreement.

5. **Term; Termination.** This Agreement shall be in effect for a four-year period commencing on the Effective Date, provided that the parties execute this Agreement with an Effective Date that is on or before January 1, 2010. In the event the parties are unable to execute this Agreement with an Effective Date that is on or before January 1, 2010, this Agreement shall be void and neither party shall have any obligations with respect to the subject matter herein. In accordance with the foregoing, this Agreement shall apply to all elections within the Jurisdiction beginning sixty (60) days after the Effective Date (the "Term") through December 31, 2013. 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 thirty (30) days after it receives written notification thereof from the non-breaching party. Customer may terminate this Agreement effective upon delivery of written notice to ES&S, or on any later date stated in the notice, under any of the following conditions:

- a. If funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for purchase of the services or supplies in the indicated quantities or term; provided, however, that this Section 5.a shall not be construed so as to permit Customer to terminate this Agreement in order to acquire some or all of the services provided hereunder from a third party. The Agreement may be modified by agreement of the parties in writing to accommodate a reduction in funds.
- b. If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this Agreement or are no longer eligible for the funding proposed for payments authorized by this Agreement.
- c. If any license, permit or certificate required by law or rule, or by the terms of this Agreement, is for any reason denied, revoked, suspended or not renewed.

Termination of this Agreement under this subsection is without prejudice to any obligations or liabilities of either party already accrued prior to termination. Upon termination, Customer shall pay ES&S for all services performed pursuant to Exhibits A and B up to the date of termination. The amount of such payment may be paid from any appropriations available for such purposes, and Customer's highest-ranking officer or official shall use his/her best efforts to timely and sufficiently request the appropriation necessary to pay such amount.