

State of California



SECRETARY OF STATE

RESCISSION AND WITHDRAWAL OF APPROVAL OF THE ELECTION SYSTEMS AND SOFTWARE INKAVOTE PLUS PRECINCT BALLOT COUNTING SYSTEM, VERSION 2.1, AS APPROVED ON APRIL 21, 2006

Whereas, pursuant to Elections Code section 19201, no voting system, in whole or in part, may be used unless it has received the approval of the Secretary of State; and

Whereas, Elections Code section 19222 requires that I, as Secretary of State for the State of California, conduct periodic reviews of voting systems to determine if they are defective, obsolete, or otherwise unacceptable; and

Whereas, at my inauguration as Secretary of State on January 8, 2007, I announced my intention to conduct a top-to-bottom review of voting systems approved for use in California; and

Whereas, on March 22, 2007, I circulated for public comment draft criteria for a review of voting systems approved for use in California, covering system security issues, access for voters with disabilities, access for minority language voters, and usability for elections officials and poll workers; and

Whereas, on March 26, 2007, pursuant to my statutory obligations and to the conditions set forth in the approval, dated April 21, 2006, for use of the InkaVote Plus Precinct Ballot Counting System ("InkaVote Plus"), a copy of which is attached and incorporated herein by reference, I gave Election Systems and Software, Inc. ("ES&S"), written notice that it must provide within thirty days a working version of the InkaVote Plus voting system, including the source code for any software or firmware contained in the voting system and payment for the reasonable costs associated with the review of the source code; and

Whereas, on May 7, 2007, I gave ES&S written notice that all of the items previously requested must be delivered no later than May 11, 2007, followed by further written and oral demands on June 8, 2007, and June 15, 2007; and

Whereas, the review of voting systems approved for use in California commenced on May 31, 2007, with a scheduled completion date of July 20, 2007, pursuant to a contract with the Regents of the University of California and conducted by experts selected and supervised by principal investigators from the computer science faculties of the Berkeley and Davis campuses, to determine if the voting systems are defective, obsolete, or otherwise unacceptable for use in the February 5, 2008, Presidential Primary Election and subsequent elections in California; and

Whereas, ES&S did not agree until June 25, 2007, to participate in the review, and did not provide all of the items requested for the review until June 26, 2007, when insufficient time remained to test the InkaVote Plus voting system; and

Whereas, on July 30, 2007, a duly noticed public hearing was held to give interested persons an opportunity to express their views regarding the InkaVote Plus voting system; and

Whereas, pursuant to Elections Code section 19222, I, as Secretary of State, am authorized to withdraw approval previously granted of any voting system or part of a voting system if I determine that voting system or any part of that voting system to be defective or otherwise unacceptable; and

Whereas, I have reviewed the InkaVote Plus voting system and I have reviewed and considered the public testimony presented at the duly noticed public hearing held on July 30, 2007, and comments submitted by letter, facsimile transmission, and electronic mail; and

Whereas, pursuant to Elections Code section 19222, six months' notice must be given before withdrawing approval previously granted of any voting system or part of a voting system unless I, as Secretary of State, for good cause shown, make a determination that a shorter period is necessary; and

Whereas, pursuant to Elections Code section 19222, any withdrawal by the Secretary of State of the previous approval of a voting system or part of a voting system is not effective as to any election conducted within six months of that withdrawal; now

Therefore, I, Debra Bowen, Secretary of State for the State of California, find and determine, pursuant to Division 19 of the Elections Code, as follows:

1. As set forth above, ES&S has failed to comply with the conditions set forth in the approval of the ES&S InkaVote Plus Precinct Ballot Counter voting system, dated April 21, 2006; and
2. By preventing the Secretary of State from conducting a periodic review of a voting system as mandated by statute, a vendor's failure to cooperate in the review of a voting system renders the voting system unacceptable pursuant to Elections Code section 19222;

Therefore, I, Debra Bowen, Secretary of State for the State of California, hereby order, pursuant to Division 19 of the Elections Code and Section 12172.5 of the Government Code, that:

1. For the reasons set forth above, the ES&S InkaVote Plus Precinct Ballot Counter voting system, as approved on April 21, 2006, is unacceptable, and approval for its use in the February 5, 2008, Presidential Primary Election and all subsequent elections in California is withdrawn, effective immediately; and
2. For the reasons set forth above, the approval of the ES&S InkaVote Plus Precinct Ballot Counter voting system, dated April 21, 2006, is hereby rescinded for noncompliance with the conditions set forth therein, with respect to the February 5, 2008, Presidential Primary Election and all subsequent elections.

Therefore, I, Debra Bowen, Secretary of State for the State of California, further find and determine that:

Pursuant to Elections Code section 19222, based on the late date at which it became apparent that the non-cooperation of ES&S would preclude review of the InkaVote Plus voting system, good cause exists establishing the need to shorten the six months' notice requirement for the withdrawal of approval of the ES&S InkaVote Plus Precinct Ballot Counter voting system, as specified above. I also find and determine that good cause exists to require such notice and rescission of the approval to be effective immediately in order to provide sufficient time for conducting subsequent elections in California fairly and efficiently, and to ensure the integrity of the elections process.

It is so found, determined, and ordered.

IN WITNESS WHEREOF, I execute this
Certificate and affix the Great Seal of the
State of California this 3rd day of August, 2007.





DEBRA BOWEN
Secretary of State



DEBRA BOWEN | SECRETARY OF STATE | STATE OF CALIFORNIA
1500 11th Street, 6th Floor | Sacramento, CA 95814 | Tel (916) 653-7244 | Fax (916) 653-4620 | www.sos.ca.gov

March 26, 2007

Steve Pearson
Vice President, Certification
Election Systems & Software, Inc.
11208 John Galt Blvd.
Omaha, NE 68137

Fax: 402-975-1275
smpearson@essvote.com

Via Facsimile, First Class Mail and E-mail

Re: Request for Submission of Working Models and Source Code

Dear Mr. Pearson:

Secretary of State Bowen will soon begin a "top to bottom" review of all electronic voting systems currently certified for use in California. To facilitate this review, please submit to this office a working model of each of your company's electronic voting systems that is currently in use by any county or city and county in California, including central tally computers and software. If more than one certified version of a voting system is currently in use, a working model of each version will be required. Please submit the requested items no later than 30 days following your receipt of this letter.

For each voting system and version of a voting system, please submit a true copy of all firmware and software used in any component of the voting system, including source codes, and any commercial off-the-shelf software or firmware, including source codes, that is available to and disclosable by your company. Finally, please submit all specifications, technician manuals, user manuals, technical data packages and other documentation associated with each submitted voting system and version.

Enclosed please find two versions of an "Agreement Between the California Secretary of State and Election Systems & Software, Inc. Regarding Voting System Documentation and Equipment" ("Agreement"), each of which includes as Attachment "A" a "Confidentiality and Other Restrictions Agreement Between the California Secretary of State and Providers and/or Examiners of Voting System Hardware, Firmware and/or Software of Election Systems & Software, Inc." ("Provider Agreement"). One version is for the Ink-A-Vote system and the other is for the AutoMARK system. I have executed the Agreements on behalf of the State of California. Please have the Agreements executed by a duly authorized officer and return it to this office no later than April 25, 2007.

Your execution of the Agreements is an express condition of the certification documents for the two systems, issued by this office on August 3, 2005 (Automark) and April 21, 2006 (Ink-A-Vote), respectively. Copies of the certification documents are attached; I direct your attention to paragraph 5(e) of the Automark certification document and paragraph 4(e) of Ink-A-Vote certification document.

Please feel free to contact me if you have any questions concerning these requests.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lowell Finley', with a large, stylized flourish at the end.

Lowell Finley
Deputy Secretary of State
Voting Systems Technology and Policy

cc: Aldo Tesi
Encls: (3)

**Agreement Between the California Secretary of State
and Election Systems & Software, Inc.
Regarding Voting System Documentation and Equipment**

I. Introduction

a. This Agreement ("Agreement") is entered into this _____ day of _____, 2007, between the California Secretary of State ("State") and Election Systems & Software, Inc. ("Vendor"). This Agreement pertains to the voting system described as follows:

ELECTION SYSTEMS & SOFTWARE, INC. Unisyn Voting Solution Election Management System Version 1.1, Inkavote Precinct Ballot Counter Version 1.10

b. This Agreement is intended to accomplish each and all of the following:

1. Protect the intellectual and other property of Vendor from unauthorized disclosures and misuse.
2. Provide the Secretary of State with tools, including the analysis of source codes used in voting systems manufactured by the Vendor and other documentation and components of Vendor's voting system, to help ensure that voting systems approved for use in California elections are accurate, reliable, secure and protect the voters' secret ballot from unauthorized disclosure. In this regard, it also the intent of this Agreement to:
 - A. Permit the State, or through a designee ("Provider") that agrees to and does fully protect the intellectual property of Vendor of the described voting system from unauthorized disclosures and misuses, to fully analyze on behalf of the State, if requested by the State, the source codes used in the described voting system and other documentation and components regarding the voting system to ensure that the voting system is accurate, reliable, secure and protects the voters' secret ballot from unauthorized disclosure and is suitable for use in California elections, subject to the provisions of Paragraph III.b of this Agreement, relating to a non-disclosure agreement.
 - B. Permit persons ("Examiners") to examine the voting system described above, except for source codes, to assist in determining whether the voting system is accurate, reliable, secure and protects the voters' secret ballot

from unauthorized disclosure and is suitable for use in California elections, subject to the provisions of Paragraph III.b of this Agreement, relating to a non-disclosure agreement.

- c. This Agreement shall be effective upon execution by both parties and shall remain in effect until it is terminated by the written agreement of both parties to this Agreement.
- d. Capitalized terms have the meanings as provided in this agreement.

II. Vendor Obligations

a. The Vendor agrees as follows:

1. To provide to the State, or to the State's Provider or Providers, within 30 (thirty) days of the State's written demand for such, a working version of the voting system described above, subject to the provisions of Paragraph III.b of this Agreement, relating to a non-disclosure agreement;
2. To provide to the State, or to the State's Provider or Providers, within 30 (thirty) days of the State's written demand for such, a true copy of all firmware and software used in any component of the voting system described above, including source codes and any commercial off-the-shelf software or firmware, including sources codes, that is available and disclosable by the vendor, subject to the provisions of Paragraph III.b of this Agreement, relating to a non-disclosure agreement. If so requested by the State, the firmware and software provided shall include a non-exclusive, non-transferable royalty free license, without the right of sublicense, for the State's Provider or Providers to possess and utilize the source code, object code, and any associated materials and hardware, subject to the provisions of Paragraph III.b of this agreement, relating to a non-disclosure agreement. If requested by the State, the Vendor further agrees to provide with such firmware and software, and any associated materials, ("Documentation") for the sole purpose of allowing the State or the State's Provider or Providers to conduct an analysis on behalf of the State of the security, accuracy, functionality, reliability, accessibility, privacy, usability, complexity, manageability, dependence on commercial off-the-shelf ("COTS") software, programming style, documentation adequacy, and/or other engineering properties of the voting system described above, subject to the provisions of Paragraph III.b of this agreement, relating to a non-disclosure agreement;
3. To pay for any reasonable cost associated with the review of the source code of any software or firmware that is provided pursuant to Paragraph II.a.2, above, subject to the provisions of Paragraph III.b of this agreement, relating to notice to Vendor.

b. Vendor acknowledges that no voting system described above, or any component thereof not previously approved for general use in California, shall be approved for use in California until this Agreement is executed by it and by the State.

III. State Obligations

- a. The State agrees to maintain fully the confidentiality of the contents of the voting system described above, including the hardware, firmware and software, and the related Documentation, provided to it or to the State's Provider or Providers or Examiners, so as to protect the proprietary interests of Vendor from unauthorized disclosure or misuse.
- b. No Provider or Examiner of the State, in the absence of specific authorization by Vendor in writing, shall be permitted by State to analyze or examine any of the engineering or design features of the voting system, including hardware, firmware or software, including source codes, unless the person has executed and delivered to the State a Non-Disclosure Agreement, a copy of which is attached hereto as Attachment "A" and incorporated herein by reference.
- c. Vendor may, in writing, authorize exceptions to any of these obligations.

IV. Miscellaneous Provisions.

- a. Notices under this Agreement shall be given in writing and delivered by overnight courier or other method that provides proof of receipt. Notices will be effective when delivered to the addresses set forth below. Any party may change its address for purposes of giving notice by providing notice in the manner stated herein to the other parties.
- b. This Agreement states the entire agreement of the parties concerning the subject matter hereof, and supersedes all prior agreements concerning such subject matter, whether oral or written. This Agreement may be modified only in a written document that is signed by the duly authorized representatives of all parties and which expressly indicates that it amends this Agreement.
- c. This Agreement shall be governed and construed under the laws of the State of California.

THE PARTIES INDICATE THEIR INTENTION TO BE BOUND BY THIS AGREEMENT THROUGH THE SIGNATURES OF THEIR DULY AUTHORIZED REPRESENTATIVES SET FORTH BELOW.

VENDOR

By: _____
(Signature)

Name and Title: _____
(Printed or Typed)

Address: _____

STATE OF CALIFORNIA

By:  _____
(Signature)

Lowell Finley
Deputy Secretary of State
Voting Systems Technology and Policy
1500 11th Street, 6th Floor
Sacramento, CA 95814

Attachment "A"

Confidentiality and Other Restrictions Agreement Between the California Secretary of State and Providers and/or Examiners of Voting System Hardware, Firmware and/or Software of Election Systems & Software, Inc.

This Agreement ("Agreement") is entered into this ____ day of _____, 2007, between the California Secretary of State ("State") and _____ ("Provider" or "Examiner"). For purposes of this Agreement, a "Provider" is an individual or entity that has access to source codes of Vendor pursuant to an agreement between Vendor and State. For purposes of this Agreement, an "Examiner" is a person or entity that examines the engineering and design features of the voting system subject to this Agreement without access to or using the voting system's source codes. It is the intent of the parties to this Agreement that the intellectual properties of Vendors of voting systems that are analyzed or examined on behalf of the State be fully protected from unauthorized disclosures and misuse, but that the Provider or Examiner be able to fully analyze, on behalf of the State, the voting system of Vendor to ensure that it is accurate, reliable, secure and protects the voters' secret ballot from unauthorized disclosure and is suitable for use in California elections. This Agreement shall be effective upon execution by both parties and shall remain in effect until it is terminated by the written agreement of both parties to this Agreement. Capitalized terms have the meanings as provided in this agreement.

1. Receipt of Documentation by Provider.

Provider agrees that any license it receives pursuant to a separate agreement between Election Systems & Software, Inc. ("Vendor") and the State with respect to a voting system, shall be a non-exclusive, non-transferable royalty free license, without the right of sublicense, to possess and utilize the source code, object code, and any associated materials, for each of the Vendor's products listed below ("Documentation") for the sole purpose of analysis, on behalf of the State, of security, accuracy, functionality, reliability, accessibility, privacy, usability, complexity, manageability, dependence on commercial off-the-shelf ("COTS") software, programming style, documentation adequacy, and/or other engineering properties of the voting system described herein as the Purpose of Agreement (the "Purpose"). The Documentation is defined to include all hardware, firmware, and software relative to the voting system described as follows, and materials provided by Vendor associated with the software, source code, and object code of the voting system described above. The voting system subject to this Agreement is described as follows:

ELECTION SYSTEMS & SOFTWARE, INC. Unisyn Voting Solution Election Management System Version 1.1, Inkavote Precinct Ballot Counter Version 1.10

2. **Restrictions on Use of Documentation by Provider.**

- (a) The Documentation shall be licensed to Provider solely and exclusively to carry out the purpose set forth below and for no other activities. The purpose is to test and analyze the Documentation provided in conjunction with the Vendor's devices in which the executable form of software code corresponding to the Documentation is intended to be operated. Nothing in this paragraph precludes Provider from conducting a manual line-by-line review of the source code.
- (b) Provider and State acknowledge that the Documentation provided is the strictly-confidential trade secret information of Vendor. Provider shall not disclose or release the provided Documentation or any information therein, to any third party other than Provider's regular employees or agents who have a need to access the provided Documentation for carrying out the purpose, and to the State as results in accordance with this Agreement. Provider shall limit the installation of the provided Documentation to computer workstations within its facility that are not connected to any internal or external network. Provider shall not reproduce, perform, distribute or prepare works derivative of the provided Documentation and, for purposes of this Agreement.
- (c) The licenses granted to Provider under any Agreement between State and Vendor are not transferable or assignable in whole or in part without the express prior written consent of Vendor, and any unauthorized assignment or transfer shall be null and void for all purposes. No other or implied licenses are granted. Provider's license rights are limited solely to Provider's internal activities related to the Purpose and do not extend to any other entity or activity.
- (d) Notwithstanding the foregoing, Residuals shall not be subject to restrictions on disclosure or use. "Residuals" means intangible ideas, concepts, know-how, and/or techniques that are retained solely in human memory by Provider's employees or agents who access the Documentation in the normal course of carrying out the purpose and who have made no effort to either memorize information in the Documentation or to refresh their recollection by reviewing any documentation in anticipation of or in conjunction with the use of Residuals.

3. **Restrictions on Use of Information by Examiners.**

An Examiner who is a party to this Agreement agrees to protect the proprietary interests of Vendor from unauthorized disclosure or misuse.

4. **Breach of Agreement.**

It is understood and agreed by Provider or Examiner that any material breach of this Agreement by Provider or Examiner, its employees or agents constitutes a breach of State's Agreement with Vendor and that Provider shall hold State harmless for any such breach.

STATE OF CALIFORNIA

By _____
(Signature)

Lowell Finley
Deputy Secretary of State
Voting Systems Technology and Policy
1500 11th Street, 6th Floor
Sacramento, CA 95814
916-653-7244
Lowell.Finley@sos.ca.gov

PROVIDER OR EXAMINER
[INSERT NAME]

By: _____
(Signature)

Name and Title: _____
(Printed or Typed)

Address: _____

Telephone: _____

E-mail: _____

State of California

SECRETARY OF STATE

APPROVAL OF USE OF *ELECTIONS SYSTEMS AND SOFTWARE* INKAVOTE PLUS PRECINCT BALLOT COUNTER VOTING SYSTEM, VERSION 2.1

I, BRUCE McPHERSON, Secretary of State of the State of California, do hereby certify that:

1. Elections Systems and Software, Inc. (ES&S) of Omaha, Nebraska ("Vendor"), has requested approval for use in California elections of its InkaVote Plus Precinct Ballot Counter Voting System, version 2.1, comprised of the InkaVote Plus Precinct Ballot Counter with ADA unit, firmware version 1.10 and the Unisyn Election Management System, version 1.1, which includes Ballot Generation, version 1.1, Election Converter, version 1.1, Election Loader, version 1.1, Vote Converter, version 1.1, and Vote Tabulation, version 1.1, submitted on or about January 6th, 2006.
2. The voting system described above has been federally qualified as evidenced by the federal Independent Testing Authority reports and the assigned NASED Number # N-1-17-22-22-002, dated March 15, 2006.
3. The request for approval of the voting system as described in Paragraph 1, was considered at a duly noticed public hearing held March 1, 2006, at Sacramento, California.
4. ES&S InkaVote Plus Precinct Ballot Counter Voting System, version 2.1, comprised of the InkaVote Plus Precinct Ballot Counter with ADA unit, firmware version 1.10 and the Unisyn Election Management System, version 1.1, which includes Ballot Generation, version 1.1, Election Converter, version 1.1, Election Loader, version 1.1, Vote Converter, version 1.1, and Vote Tabulation, version 1.1, are hereby approved for use subject to the following terms and conditions:

- a. No additional software developed by the Vendor other than that specifically listed in this certificate shall be installed on a computer running any version 2.1 software;
- b. No substitution or modification of the voting systems shall be made with respect to any component of the voting systems, including the Procedures, until the Secretary of State has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval;
- c. The Secretary of State reserves the right, with reasonable notice to Vendor and to the counties using any of the voting systems, to modify the Procedures used with any of the voting systems and to impose additional requirements with respect to the use of any of the systems if the Secretary of State determines that such modifications or additions are necessary to enhance the accuracy, reliability or security of any of the voting systems. Such modifications or additions shall be deemed to be incorporated herein as if set forth in full;
- d. Any county using any voting system shall, prior to such use, file with the California Secretary of State a copy of its Election Observer Panel plan;
- e. The vendor agrees in writing to provide, and shall provide, to the Secretary of State, or to the Secretary of State's designee, within 30 (thirty) days of the Secretary of State's demand for such, a working version of the voting system, including all hardware, firmware and software of the voting system, as well as the source code for any software or firmware contained in the voting system, including any commercial off the shelf software or firmware that is available and disclosable by the vendor, provided that the Secretary of State first commits to the vendor in writing to maintain the confidentiality of the contents of such voting system or source code so as to protect the proprietary interests of the vendor in such voting system or source code. The terms of the commitment to maintain confidentiality shall be determined solely by the Secretary of State, after consultation with the vendor. The voting system shall not be installed in any California jurisdiction until the vendor has signed such an agreement. Any reasonable costs associated with the review of the source code for any software or firmware contained in the voting system shall be born by the vendor;
- f. A final version of use procedures must be submitted to and approved by the Secretary of State prior to sale or use of the system in California.

- g. The Secretary of State reserves the right to monitor activities before, during and after an election at any precinct or registrar of voters' office, and may, at his or her discretion, conduct a random parallel monitoring test of voting equipment.
- h. Pursuant to this application and by order of the Secretary of State, voting systems certified for use in California shall comply with all applicable state and federal 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. Further, voting systems shall also comply with all state and federal voting system guidelines, standards, regulations and requirements that derive authority from or are promulgated pursuant to and in furtherance of California Elections Code and the Help America Vote Act of 2002 or other applicable state or federal law when appropriate.
- i. Voting system manufacturers or their agents shall assume full responsibility for any representation that a voting system complies with all applicable state and federal 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. 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 otherwise not in compliance.
- j. 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.



IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California, this 21st day of April, 2006.

BRUCE McPHERSON
Secretary of State

**Agreement Between the California Secretary of State
and Election Systems & Software, Inc.
Regarding Voting System Documentation and Equipment**

I. Introduction

a. This Agreement ("Agreement") is entered into this _____ day of _____, 2007, between the California Secretary of State ("State") and Election Systems & Software, Inc. ("Vendor"). This Agreement pertains to the voting system described as follows:

AutoMARK Voter Assist Terminal, version 1.0 AutoMARK Information Management System, v 1.0 MDB, version 1.0.40 Model 100 Precinct Scanner, v 5.0.0.0 Model 550 Central Scanner, v 2.1.1.0 Model 650 Central Scanner, v 1.2.0.0 UNITY Election Management System, version 2.4.3

b. This Agreement is intended to accomplish each and all of the following:

1. Protect the intellectual and other property of Vendor from unauthorized disclosures and misuse.
2. Provide the Secretary of State with tools, including the analysis of source codes used in voting systems manufactured by the Vendor and other documentation and components of Vendor's voting system, to help ensure that voting systems approved for use in California elections are accurate, reliable, secure and protect the voters' secret ballot from unauthorized disclosure. In this regard, it also the intent of this Agreement to:
 - A. Permit the State, or through a designee ("Provider") that agrees to and does fully protect the intellectual property of Vendor of the described voting system from unauthorized disclosures and misuses, to fully analyze on behalf of the State, if requested by the State, the source codes used in the described voting system and other documentation and components regarding the voting system to ensure that the voting system is accurate, reliable, secure and protects the voters' secret ballot from unauthorized disclosure and is suitable for use in California elections, subject to the provisions of Paragraph IIIb of this Agreement, relating to a non-disclosure agreement.
 - B. Permit persons ("Examiners") to examine the voting system described above, except for source codes, to assist in determining whether the voting system is accurate, reliable, secure and protects the voters' secret ballot

from unauthorized disclosure and is suitable for use in California elections, subject to the provisions of Paragraph III.b of this Agreement, relating to a non-disclosure agreement.

c. This Agreement shall be effective upon execution by both parties and shall remain in effect until it is terminated by the written agreement of both parties to this Agreement.

d. Capitalized terms have the meanings as provided in this agreement.

II. Vendor Obligations

a. The Vendor agrees as follows:

1. To provide to the State, or to the State's Provider or Providers, within 30 (thirty) days of the State's written demand for such, a working version of the voting system described above, subject to the provisions of Paragraph III.b of this Agreement, relating to a non-disclosure agreement;
2. To provide to the State, or to the State's Provider or Providers, within 30 (thirty) days of the State's written demand for such, a true copy of all firmware and software used in any component of the voting system described above, including source codes and any commercial off-the-shelf software or firmware, including sources codes, that is available and disclosable by the vendor, subject to the provisions of Paragraph III.b of this Agreement, relating to a non-disclosure agreement. If so requested by the State, the firmware and software provided shall include a non-exclusive, non-transferable royalty free license, without the right of sublicense, for the State's Provider or Providers to possess and utilize the source code, object code, and any associated materials and hardware, subject to the provisions of Paragraph III.b of this agreement, relating to a non-disclosure agreement. If requested by the State, the Vendor further agrees to provide with such firmware and software, and any associated materials, ("Documentation") for the sole purpose of allowing the State or the State's Provider or Providers to conduct an analysis on behalf of the State of the security, accuracy, functionality, reliability, accessibility, privacy, usability, complexity, manageability, dependence on commercial off-the-shelf ("COTS") software, programming style, documentation adequacy, and/or other engineering properties of the voting system described above, subject to the provisions of Paragraph III.b of this agreement, relating to a non-disclosure agreement;
3. To pay for any reasonable cost associated with the review of the source code of any software or firmware that is provided pursuant to Paragraph II.a.2, above, subject to the provisions of Paragraph III.b of this agreement, relating to notice to Vendor.

b. Vendor acknowledges that no voting system described above, or any component thereof not previously approved for general use in California, shall be approved for use in California until this Agreement is executed by it and by the State.

III. State Obligations

- a. The State agrees to maintain fully the confidentiality of the contents of the voting system described above, including the hardware, firmware and software, and the related Documentation, provided to it or to the State's Provider or Providers or Examiners, so as to protect the proprietary interests of Vendor from unauthorized disclosure or misuse.
- b. No Provider or Examiner of the State, in the absence of specific authorization by Vendor in writing, shall be permitted by State to analyze or examine any of the engineering or design features of the voting system, including hardware, firmware or software, including source codes, unless the person has executed and delivered to the State a Non-Disclosure Agreement, a copy of which is attached hereto as Attachment "A" and incorporated herein by reference.
- c. Vendor may, in writing, authorize exceptions to any of these obligations.

IV. Miscellaneous Provisions.

- a. Notices under this Agreement shall be given in writing and delivered by overnight courier or other method that provides proof of receipt. Notices will be effective when delivered to the addresses set forth below. Any party may change its address for purposes of giving notice by providing notice in the manner stated herein to the other parties.
- b. This Agreement states the entire agreement of the parties concerning the subject matter hereof, and supersedes all prior agreements concerning such subject matter, whether oral or written. This Agreement may be modified only in a written document that is signed by the duly authorized representatives of all parties and which expressly indicates that it amends this Agreement.
- c. This Agreement shall be governed and construed under the laws of the State of California.

THE PARTIES INDICATE THEIR INTENTION TO BE BOUND BY THIS AGREEMENT THROUGH THE SIGNATURES OF THEIR DULY AUTHORIZED REPRESENTATIVES SET FORTH BELOW.


VENDOR

By: _____
(Signature)

Name and Title: _____
(Printed or Typed)

Address: _____

STATE OF CALIFORNIA

By:  _____
(Signature)

Lowell Finley
Deputy Secretary of State
Voting Systems Technology and Policy
1500 11th Street, 6th Floor
Sacramento, CA 95814

Attachment "A"

Confidentiality and Other Restrictions Agreement Between the California Secretary of State and Providers and/or Examiners of Voting System Hardware, Firmware and/or Software of Election Systems & Software, Inc.

This Agreement ("Agreement") is entered into this ____ day of _____, 2007, between the California Secretary of State ("State") and _____ ("Provider" or "Examiner"). For purposes of this Agreement, a "Provider" is an individual or entity that has access to source codes of Vendor pursuant to an agreement between Vendor and State. For purposes of this Agreement, an "Examiner" is a person or entity that examines the engineering and design features of the voting system subject to this Agreement without access to or using the voting system's source codes. It is the intent of the parties to this Agreement that the intellectual properties of Vendors of voting systems that are analyzed or examined on behalf of the State be fully protected from unauthorized disclosures and misuse, but that the Provider or Examiner be able to fully analyze, on behalf of the State, the voting system of Vendor to ensure that it is accurate, reliable, secure and protects the voters' secret ballot from unauthorized disclosure and is suitable for use in California elections. This Agreement shall be effective upon execution by both parties and shall remain in effect until it is terminated by the written agreement of both parties to this Agreement. Capitalized terms have the meanings as provided in this agreement.

1. Receipt of Documentation by Provider.

Provider agrees that any license it receives pursuant to a separate agreement between Election Systems & Software, Inc. ("Vendor") and the State with respect to a voting system, shall be a non-exclusive, non-transferable royalty free license, without the right of sublicense, to possess and utilize the source code, object code, and any associated materials, for each of the Vendor's products listed below ("Documentation") for the sole purpose of analysis, on behalf of the State, of security, accuracy, functionality, reliability, accessibility, privacy, usability, complexity, manageability, dependence on commercial off-the-shelf ("COTS") software, programming style, documentation adequacy, and/or other engineering properties of the voting system described herein as the Purpose of Agreement (the "Purpose"). The Documentation is defined to include all hardware, firmware, and software relative to the voting system described as follows, and materials provided by Vendor associated with the software, source code, and object code of the voting system described above. The voting system subject to this Agreement is described as follows:

AutoMARK Voter Assist Terminal, version 1.0, AutoMARK Information Management System, v 1.0, MDB, version 1.0.40, Model 100 Precinct Scanner, v 5.0.0.0, Model 550 Central Scanner, v 2.1.1.0, Model 650 Central Scanner, v 1.2.0.0 and UNITY Election Management System, version 2.4.3

2. **Restrictions on Use of Documentation by Provider.**

- (a) The Documentation shall be licensed to Provider solely and exclusively to carry out the purpose set forth below and for no other activities. The purpose is to test and analyze the Documentation provided in conjunction with the Vendor's devices in which the executable form of software code corresponding to the Documentation is intended to be operated. Nothing in this paragraph precludes Provider from conducting a manual line-by-line review of the source code.
- (b) Provider and State acknowledge that the Documentation provided is the strictly-confidential trade secret information of Vendor. Provider shall not disclose or release the provided Documentation or any information therein, to any third party other than Provider's regular employees or agents who have a need to access the provided Documentation for carrying out the purpose, and to the State as results in accordance with this Agreement. Provider shall limit the installation of the provided Documentation to computer workstations within its facility that are not connected to any internal or external network. Provider shall not reproduce, perform, distribute or prepare works derivative of the provided Documentation and, for purposes of this Agreement.
- (c) The licenses granted to Provider under any Agreement between State and Vendor are not transferable or assignable in whole or in part without the express prior written consent of Vendor, and any unauthorized assignment or transfer shall be null and void for all purposes. No other or implied licenses are granted. Provider's license rights are limited solely to Provider's internal activities related to the Purpose and do not extend to any other entity or activity.
- (d) Notwithstanding the foregoing, Residuals shall not be subject to restrictions on disclosure or use. "Residuals" means intangible ideas, concepts, know-how, and/or techniques that are retained solely in human memory by Provider's employees or agents who access the Documentation in the normal course of carrying out the purpose and who have made no effort to either memorize information in the Documentation or to refresh their recollection by reviewing any documentation in anticipation of or in conjunction with the use of Residuals.

3. **Restrictions on Use of Information by Examiners.**

An Examiner who is a party to this Agreement agrees to protect the proprietary interests of Vendor from unauthorized disclosure or misuse.

4. **Breach of Agreement.**

It is understood and agreed by Provider or Examiner that any material breach of this Agreement by Provider or Examiner, its employees or agents constitutes a breach of

State's Agreement with Vendor and that Provider shall hold State harmless for any such breach.

STATE OF CALIFORNIA

PROVIDER OR EXAMINER
[INSERT NAME]

By _____
(Signature)

By: _____
(Signature)

Lowell Finley
Deputy Secretary of State
Voting Systems Technology and Policy
1500 11th Street, 6th Floor
Sacramento, CA 95814
916-653-7244
Lowell.Finley@sos.ca.gov

Name and Title: _____
(Printed or Typed)

Address: _____

Telephone: _____

E-mail: _____

State of California

SECRETARY OF STATE

CONDITIONAL APPROVAL OF USE OF *ELECTION SYSTEM AND SOFTWARE, INC.* OPTICAL SCAN VOTING SYSTEM

I, BRUCE McPIERSON, Secretary of State of the State of California, do hereby certify that:

1. *Election System and Software, Inc.* of Omaha, Nebraska ("Vendor"), has requested approval for use in California elections of its voting system comprised of AutoMARK Voter Assist Terminal version 1.0, AutoMARK Information Management System version 1.0, Model 100 Precinct Scanner version 5.0.0.0, Model 550 Central Scanner version 2.1.1.0, Model 650 Central Scanner version 1.2.0.0 and UNITY Election Management System version 2.4.3, submitted on or about February 1, 2005.
2. The voting system described above has been federally qualified as evidenced by the federal Independent Testing Authority reports and the assigned NASED Number # N-1-16-22-12-001, dated June 1, 2005.
3. The request for approval of the voting system as described in Paragraph 1, was considered at a duly noticed public hearing held June 16, 2005, at Sacramento, California.
4. The Voting Systems Panel has recommended that the request for approval be granted, with certain conditions.
5. Election System and Software, Inc.'s AutoMARK Voter Assist Terminal version 1.0, AutoMARK Information Management System version 1.0, Model 100 Precinct Scanner version 5.0.0.0, Model 550 Central Scanner version 2.1.1.0, Model 650 Central Scanner version 1.2.0.0 and UNITY Election Management System version 2.4.3 optical scan voting systems, are hereby approved for use subject to the following terms and conditions:

- a. No additional software developed by the Vendor other than that specifically listed in this certificate shall be installed on a computer running Unity version 2.4.3
- b. No substitution or modification of the voting systems shall be made with respect to any component of the voting systems, including the Procedures, until the Secretary of State has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval;
- c. The Secretary of State reserves the right, with reasonable notice to Vendor and to the counties using any of the voting systems, to modify the Procedures used with any of the voting systems and to impose additional requirements with respect to the use of any of the systems if the Secretary of State determines that such modifications or additions are necessary to enhance the accuracy, reliability or security of any of the voting systems. Such modifications or additions shall be deemed to be incorporated herein as if set forth in full;
- d. Any county using any voting system shall, prior to such use, file with the California Secretary of State a copy of its Election Observer Panel plan;
- e. The vendor agrees in writing to provide, and shall provide, to the Secretary of State, or to the Secretary of State's designee, within 30 (thirty) days of the Secretary of State's demand for such, a working version of the voting system, including all hardware, firmware and software of the voting system, as well as the source code for any software or firmware contained in the voting system, including any commercial off the shelf software or firmware that is available and disclosable by the vendor, provided that the Secretary of State first commits to the vendor in writing to maintain the confidentiality of the contents of such voting system or source code so as to protect the proprietary interests of the vendor in such voting system or source code. The terms of the commitment to maintain confidentiality shall be determined solely by the Secretary of State, after consultation with the vendor. The voting system shall not be installed in any California jurisdiction until the vendor has signed such an agreement. Any reasonable costs associated with the review of the source code for any

software or firmware contained in the voting system shall be born by the vendor;

- f. A final version of use procedures must be submitted to and approved by the Secretary of State prior to sale or use of the system in California. These procedures must include requirements for use of a privacy screen and a privacy sleeve with the AutoMARK.
- g. The vendor is required to provide all users of this system with test ballots and appropriate procedures to check and assess calibration of the Model 550 and Model 650 central tabulation scanners prior to each election.
- h. Pursuant to this (application, agreement, contract) and by order of the Secretary of State, voting systems certified for use in California shall comply with all applicable state and federal 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. Further, voting systems shall also comply with all state and federal voting system guidelines, standards, regulations and requirements that derive authority from or are promulgated pursuant to and in furtherance of California Elections Code and the Help America Vote Act of 2002 or other applicable state or federal law when appropriate.
- i. Voting system manufacturers or their agents shall assume full responsibility for any representation that a voting system complies with all applicable state and federal 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. 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 otherwise not in compliance.
- j. 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.



IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California, this 3RD day of August, 2005.

A handwritten signature in cursive script, reading "Bruce McPherson".

BRUCE McPHERSON
Secretary of State

State of California

SECRETARY OF STATE

APPROVAL OF USE OF *ELECTIONS SYSTEMS AND SOFTWARE* INKAVOTE PLUS PRECINCT BALLOT COUNTER VOTING SYSTEM, VERSION 2.1

I, BRUCE McPHERSON, Secretary of State of the State of California, do hereby certify that:

1. Elections Systems and Software, Inc. (ES&S) of Omaha, Nebraska ("Vendor"), has requested approval for use in California elections of its InkaVote Plus Precinct Ballot Counter Voting System, version 2.1, comprised of the InkaVote Plus Precinct Ballot Counter with ADA unit, firmware version 1.10 and the Unisyn Election Management System, version 1.1, which includes Ballot Generation, version 1.1, Election Converter, version 1.1, Election Loader, version 1.1, Vote Converter, version 1.1, and Vote Tabulation, version 1.1, submitted on or about January 6th, 2006.
2. The voting system described above has been federally qualified as evidenced by the federal Independent Testing Authority reports and the assigned NASED Number # N-1-17-22-22-002, dated March 15, 2006.
3. The request for approval of the voting system as described in Paragraph 1, was considered at a duly noticed public hearing held March 1, 2006, at Sacramento, California.
4. ES&S InkaVote Plus Precinct Ballot Counter Voting System, version 2.1, comprised of the InkaVote Plus Precinct Ballot Counter with ADA unit, firmware version 1.10 and the Unisyn Election Management System, version 1.1, which includes Ballot Generation, version 1.1, Election Converter, version 1.1, Election Loader, version 1.1, Vote Converter, version 1.1, and Vote Tabulation, version 1.1, are hereby approved for use subject to the following terms and conditions:

- a. No additional software developed by the Vendor other than that specifically listed in this certificate shall be installed on a computer running any version 2.1 software;
- b. No substitution or modification of the voting systems shall be made with respect to any component of the voting systems, including the Procedures, until the Secretary of State has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval;
- c. The Secretary of State reserves the right, with reasonable notice to Vendor and to the counties using any of the voting systems, to modify the Procedures used with any of the voting systems and to impose additional requirements with respect to the use of any of the systems if the Secretary of State determines that such modifications or additions are necessary to enhance the accuracy, reliability or security of any of the voting systems. Such modifications or additions shall be deemed to be incorporated herein as if set forth in full;
- d. Any county using any voting system shall, prior to such use, file with the California Secretary of State a copy of its Election Observer Panel plan;
- e. The vendor agrees in writing to provide, and shall provide, to the Secretary of State, or to the Secretary of State's designee, within 30 (thirty) days of the Secretary of State's demand for such, a working version of the voting system, including all hardware, firmware and software of the voting system, as well as the source code for any software or firmware contained in the voting system, including any commercial off the shelf software or firmware that is available and disclosable by the vendor, provided that the Secretary of State first commits to the vendor in writing to maintain the confidentiality of the contents of such voting system or source code so as to protect the proprietary interests of the vendor in such voting system or source code. The terms of the commitment to maintain confidentiality shall be determined solely by the Secretary of State, after consultation with the vendor. The voting system shall not be installed in any California jurisdiction until the vendor has signed such an agreement. Any reasonable costs associated with the review of the source code for any software or firmware contained in the voting system shall be born by the vendor;
- f. A final version of use procedures must be submitted to and approved by the Secretary of State prior to sale or use of the system in California.

- g. The Secretary of State reserves the right to monitor activities before, during and after an election at any precinct or registrar of voters' office, and may, at his or her discretion, conduct a random parallel monitoring test of voting equipment.
- h. Pursuant to this application and by order of the Secretary of State, voting systems certified for use in California shall comply with all applicable state and federal 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. Further, voting systems shall also comply with all state and federal voting system guidelines, standards, regulations and requirements that derive authority from or are promulgated pursuant to and in furtherance of California Elections Code and the Help America Vote Act of 2002 or other applicable state or federal law when appropriate.
- i. Voting system manufacturers or their agents shall assume full responsibility for any representation that a voting system complies with all applicable state and federal 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. 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 otherwise not in compliance.
- j. 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.



IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California, this 21st day of April, 2006.

BRUCE McPHERSON
Secretary of State