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November 21, 2008

**BY COURIER**

Ms. Donna Wiltshire, Procurement Director  
State Board of Elections  
P.O. Box 6486  
Annapolis, Maryland 21401-0486

**BY OVERNIGHT DELIVERY**

Mr. Dave Byrd  
President, Premier Election Solutions  
1253 Allen Station Pkwy  
Allen, TX 75002-2692

Re: *Procurement Agency's Claim: Premier Election Solutions (f/k/a Global Election Systems, Inc. and Diebold Elections Systems, Inc.) contract for hardware, software and support services dated December 12, 2001 (SBE 2002-01) and subsequent modifications and options*

Dear Ms. Wiltshire and Mr. Byrd:

This letter is submitted on behalf of the Maryland State Board of Elections ("SBE") under the above-referenced contracts for equipment and services, and is SBE's notice of claim pursuant to Annotated Code of Maryland, State Finance & Procurement Article ("SF&P") § 15-219.1, and COMAR 21.10.04.05.

**I. Overview**

Diebold Election Systems, Inc., previously named Global Election Systems, Inc. and subsequently renamed Premier Election Systems, Inc. ("Diebold") has been under contract to SBE since December 12, 2001, to provide, in part, a touch screen voting system, including hardware, software, documentation, and support services (collectively, the "DRE system"). The contract (number SBE-2002-01) and the subsequent modifications to the contract require Diebold to provide for the purchase, acceptance testing, and delivery to the State of touch screen and optical scan voting systems, maintenance of those systems, and expanded management

services specified in the modification documents necessary to maintain the integrity of State and local primary, general, and special elections.

After SBE's initial acceptance of products and services provided by Diebold, expert investigation — particularly including reports by Science Applications Internal Corporation (“SAIC”) and RABA Technologies (“RABA”) — revealed flaws in the DRE system as provided by Diebold.<sup>1</sup> In response to the reports, SBE sought to identify and implement measures to ensure that the Diebold DRE system meets its needs as set forth in the contract. Despite SBE's efforts and expense, a lawsuit (*Schade v. State Board of Elections*) was filed, alleging that flaws in the DRE system undermined the reliability of Maryland's election system as administered by SBE. SBE, at its own expense, defended the Diebold-supplied DRE system against this suit.

SBE succeeded in defending its administration of elections, including the DRE system, in part because SBE implemented, largely at its own expense, measures that cured or coped with the potential vulnerabilities that were identified. As a result of SBE's implementation of these measures, Maryland's overall election system is accurate, reliable, and secure. SBE, however, has not been reimbursed by Diebold for the expenses it incurred, and continues to incur, to correct the deficiencies in the DRE system as it was supplied by Diebold.

Maryland's voting system is accurate, reliable, and secure, in part because of expenses the State of Maryland has borne and the measures SBE has taken. Diebold is obligated under its contract with SBE to pay these expenses, which Diebold made necessary.

## **II. Facts Giving Rise to the Claim**

SBE is responsible for supervising elections conducted by the 24 Local Boards of Election (“LBEs”) in Maryland and ensuring compliance with the requirements of Maryland and federal election laws. In addition to fulfilling federal election responsibilities, SBE and the LBEs work cooperatively to serve State government, approximately 3.3 million registered voters in Maryland and over 1,700 political campaigns.

As a consequence of the national debate over election outcomes, the Governor of Maryland issued Executive Order .01.01.2000.25 on December 4, 2000, establishing a Special Committee to review Maryland's voting systems and election procedures. The committee issued a report in February 2001, stating a preference for a direct recording electronic system for voting in polling places, and an optical scan system for absentee ballots.

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<sup>1</sup> Only the DRE system is at issue in this Notice of Claim. The Diebold optical scan system is not.

In considering election events and the recommendations of the Special Committee, the General Assembly passed and the Governor signed into law Md. Code Ann., Elec. Law (“EL”) § 9-101, requiring all 24 Maryland jurisdictions to implement a statewide, electronic voting system in polling places and a uniform, statewide, optical scan voting system for absentee and provisional ballots by July 1, 2006. The purchase of equipment and services necessary to accomplish this was done in a three-phase program, initially covering four Maryland counties in Phase I, then the 19 other Maryland counties in Phase II, and concluding with Baltimore City in Phase III.

On July 17, 2001, in part to meet the requirements of EL § 9-101 and the federal Help America Vote Act, SBE issued a Request for Proposals (“RFP”) seeking a contractor to provide, for use in the four counties in Phase I (Montgomery, Prince George’s, Allegheny and Dorchester Counties), “a Direct Recording Electronic (DRE) Voting System, with audio interface for non-visual access, in polling places or an Optical Scan Absentee Balloting System, or both.” Diebold submitted a responsive bid and, on November 19, 2001, a best and final offer for Phase I priced at \$16,763,433.70. The base term of the contract began December 12, 2001, and ran until December 31, 2004, with four additional, successive one-year renewal options, to be exercised in the State’s sole discretion.

Effective July 18, 2003, this initial contract was modified to include Phase II, thus adding 19 additional counties to the scope of the contract. The total value of the contract increased with this modification (and with interim adjustments to the cost of Phase I), to a not-to-exceed amount of \$74,154,554. Phase III, effective July 29, 2005, together with revisions to the cost of Phases I and II, brought the total contract value to \$90,917,987.70 for all years through December 31, 2008.

On July 23, 2003, Tadayoshi Kohno, Adam Stubblefield, Avriel D. Rubin, and Dan S. Wallach, professors at Johns Hopkins and Rice Universities, published a paper raising concerns about Diebold’s DRE system. In response to this paper, the Governor commissioned SAIC to perform a risk assessment of the DRE system. The SAIC assessment evaluated the DRE system for threats, vulnerabilities, security controls, and other risks with possible impact on the integrity of the State’s elections process.

SAIC identified several vulnerabilities that, if exploited, could impact the accuracy, integrity, and availability of election results. SAIC also recommended implementation of a list of mitigation strategies, which it enumerated in its report. SAIC specifically identified a list of vulnerabilities it rated as “high-risk,” meaning that, if exploited, they could have a significant impact upon the DRE system. The high-risk vulnerabilities included but were not limited to:

- ▶ The DRE system was not compliant with the State’s information Security Policy & Standards;

- ▶ There was need for a complete, integrated process to be put in place to ensure the integrity of the DRE system;
- ▶ The DRE system did not provide for election vote totals to be transmitted with cryptographic protocols with 100% verification of the transmitted results;
- ▶ The DRE system required a risk assessment of its operation, and every significant modification of the DRE system requires a new risk assessment be performed;
- ▶ The DRE system lacked adequate access controls;
- ▶ The DRE system lacked provisions to assure that only Independent Testing Authority (“ITA”) certified software and firmware was loaded; and
- ▶ The GEMS server audit logs were not properly configured and the DRE system necessitates that event logs be reviewed on a regular basis.

In addition to the Governor’s commissioning of the SAIC report, the General Assembly of Maryland asked the Department of Legislative Services (“DLS”) to conduct a review of the issues flowing from the purchase and implementation of Diebold’s DRE system. To facilitate its review, DLS engaged the services of RABA Technologies, which issued a report on January 20, 2004. RABA reviewed the Rubin and SAIC reports, as well as the Federal Election Commission, Maryland, and National Institute of Science and Technology standards for electronic and voting systems. In addition, it performed a so-called red team exercise that simulated potential attacks on the system, in order to test and stress the DRE. RABA concluded that additional precautions were necessary to ensure the security and reliability of Diebold’s DRE system. RABA identified vulnerabilities consistent with SAIC’s findings.

SBE determined to bring the DRE system into compliance with the recommendations made in the SAIC report and with all of RABA’s recommended actions that SBE found appropriate. Accordingly, SBE instituted a variety of new or modified practices, largely at its own expense, which collectively cured the security vulnerabilities in the Diebold system.

The cost of these measures is outlined in Part IV, below.

### **III. Statement of SBE’s Claim**

Diebold is required by its contract with SBE to provide equipment and software that complies with the Federal Election Commission’s voting system standards and is certified by an independent testing authority that is itself certified by the National Association of State Election

Directors. (RFP §§ 2.1-2.2 (incorporated as a part of the contract).) Diebold is also required to support and warranty the DRE system for the duration of the contract. (RFP §§ 3.3.11, 3.3.14.) This requirement includes both hardware and software and prohibits any charge to SBE for any support or patch. (RFP § 3.3.11.) Diebold has further warrantied that, in addition to any other representations or warranties, whether express or implied, it will provide hardware and software that functions properly in elections situations in accordance with the RFP and Diebold's proposal, and that Diebold will replace, at no additional cost to the State, any hardware or software that does not function properly. (Contract SBE-2002-01 § 30.)

Diebold was to provide SBE with a DRE system that, as delivered and without any need for adaptation or additional measures: is 100% accurate; detects and provides a correction method for errors; maintains the integrity and security of data according to the time frame for federal, state, and local elections; prevents unauthorized functions in an improper sequence; includes security provisions compatible with administrative set up and operational use; provides for programmable memory devices to be in a sealed unit with a means of tamper detection; provides for security procedures system-wide, from turn-on to turn-off; prevents tampering or destruction of information through the introduction of a magnetic device or system; and provides safeguards against tampering, theft, or damage. (RFP §§ 3.3.1-3.3.7; *see also* Diebold's Technical Proposal-DRE §§ 3.3.1-3.3.7 (incorporated into the contract).) Diebold contracted to provide a system with "all the security measures necessary for complete system security" and an "extensive password protected audit trail and security system." (Technical Proposal-DRE, §§ 3.3.2.6 & 3.3.2.8.) Diebold further contracted to provide a "secure enterprise class operating system . . . able to deliver the . . . security capabilities required in today's election environment." (Technical Proposal-DRE § 3.3.2.6.)

The contract as modified also included a provision making Diebold liable to SBE for the cost of services that SBE procures to assure that election-related services are performed in a satisfactory and timely manner. (Contract Modification II, dated July 16, 2003.) The contract permits SBE to be reimbursed for these costs either by withholding payments due to Diebold, or by recovering the costs from Diebold if the costs exceed the value of payments due to Diebold. (Contract Modification II.)

As described in Part II, above, both SAIC and RABA concluded that the DRE system as supplied by Diebold had vulnerabilities, the correction of which would be necessary for the security of the system. In order to address the issues identified by SAIC and RABA and comply with the State's information technology security policy, SBE took actions, including reexamining all security procedures and processes and adding appropriate new measures, developing and implementing a new Information System Security Plan, and implementing an Action Plan consisting of three phases of tasks with 23 actions required. (State of Maryland Diebold AccuVote-TS Voting System Security Action Plan.) SBE's consequential expenses fell into three general categories: consulting services to assess and address security risks; additional SBE

personnel and overhead; and purchase of new software and security materials. Diebold confirmed its obligation to pay for the needed adaptations by guaranteeing that, “[i]n addition to [Diebold’s] commitment to correct the thirteen vulnerabilities identified in the Security Analysis, [Diebold] shall incorporate the standards set forth in the Information Technology Security Plan and Standards . . . at no additional charge.” (Contract Modification III, dated September 12, 2003.)

As a result of Diebold’s failure to provide a DRE system that was fully secure in the absence of SBE’s costly measures, SBE has incurred, and will continue to incur during any future use of the Diebold DRE system, the additional expense of the above-listed adaptations necessary to secure the DRE system. In accordance with § 4.3 of the Phase I contract and the Phase II and III modification requirement that Diebold reimburse SBE for the cost of any services SBE procures to cure a failure or defect in Diebold’s performance of the contract, SBE is entitled to recover reimbursement from Diebold.

**IV. Summary of Claimed Costs and Expenses**

The cost of SBE’s corrective actions for FY 04-09 (July 1, 2003-June 30, 2008) are as follows:

Consulting and technical services:	\$6,876,380
Includes additional independent validation and verification and acceptance testing expenses; security consulting; and testing.	
Personnel and logistics:	\$1,191,694
Includes SBE Chief Information System Security Officer; support personnel; and additional office space.	
Materials and supplies:	\$403,102
Includes tamper tape and software	
<b><u>Total:</u></b>	<b><u>\$8,471,176</u></b>

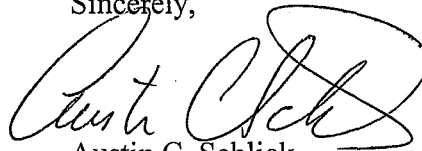
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**V. Relief Requested**

The services and equipment provided to SBE by Diebold failed to conform to the contract requirements. This failure resulted in SBE incurring the costs of acquiring additional goods and services necessary for the DRE system as supplied to meet the terms of the contract and SBE's needs. The costs of these additional goods and services, which SBE has paid and will have to continue paying so long as the Diebold DRE system remains in use, are costs that SBE would not have incurred if Diebold had met all of the terms of the contract and the agreed modifications to the contract. Accordingly, SBE requests that Diebold pay to SBE \$8,471,176 in reimbursement for the aforementioned costs and expenses incurred by SBE to meet the contract specifications.

In accordance with SF&P § 15-219.1(a)(iii) and COMAR 21.10.04.07A, Diebold shall submit to the procurement officer a written response to SBE's claim within 30 days of receipt of this notice. As required under COMAR 21.10.04.07B, the written response shall state whether Diebold denies SBE's claim or the relief sought in whole or in part, the basis of any denial, and the factual areas of agreement and disagreement. Upon receipt of SBE's claim, the Procurement Officer shall investigate the claim in accordance with SF&P § 15-219.1(a)(2) and COMAR 21.10.04.06. Copies of the above-mentioned provisions of SF&P and COMAR are attached.

Sincerely,



Austin C. Schlick  
Chief of Litigation

cc: W. Warren Hamel, Esq. (by email)  
Thomas M. Henry III, Esq. (by email)

MD Code, State Finance and Procurement, § 15-219.1

**C** West's Annotated Code of Maryland Currentness

State Finance and Procurement

Division II. General Procurement Law [Titles 11-END] (Refs & Annos)

Title 15. Procurement Contract Administration and Dispute Resolution (Refs & Annos)

▣ Subtitle 2. Dispute Resolution (Refs & Annos)

▣ Part III. Procedures for Dispute Resolution (Refs & Annos)

→ § 15-219.1. Unit claims

Written notice

(a)(1) A unit may assert a contract claim against a contractor by sending written notice to the contractor and the procurement officer that states:

(i) the basis for the contract claim;

(ii) to the extent known, the amount, or the performance or other action, requested by the unit in the contract claim; and

(iii) the date by which the contractor is required to provide a written response to the contract claim.

(2) On receipt of a contract claim from a unit, a procurement officer:

(i) shall review the substance of the contract claim;

(ii) may request additional information or substantiation through an appropriate procedure; and

(iii) may discuss or, if appropriate, negotiate the contract claim with the unit or contractor.

(3) The procurement officer shall proceed under subsection (b) of this section if the contractor fails to respond, provides an inadequate response, or denies the contract claim or the relief sought by the unit in whole or in part.

Proposed decisions

(b)(1) If the contractor and the unit do not resolve the contract claim, the procurement officer shall prepare a proposed decision on the contract claim, including:

(i) a description of the contract claim;

(ii) references to pertinent contract provisions;

(iii) a statement of factual areas of agreement or disagreement; and

(iv) a statement in the proposed decision wholly or partly granting or denying the relief sought, with supporting

MD Code, State Finance and Procurement, § 15-219.1

rationale.

(2) Unless otherwise provided by regulation, the procurement officer shall submit the contract claim and proposed decision to:

(i) the head of the unit; and

(ii) the head of the principal department or other equivalent unit of which the unit is a part.

(3)(i) The reviewing authority shall approve, modify, or disapprove the proposed decision.

(ii) In disapproving a proposed decision, the reviewing authority may remand the contract claim with instructions to the procurement officer.

(iii) On remand, the procurement officer shall proceed as required under this subsection and in accordance with the instructions of the reviewing authority.

(4) The decision of the reviewing authority is the final action of the unit.

CREDIT(S)

Added by Acts 2004, c. 373, § 1, eff. Oct. 1, 2004.

#### LIBRARY REFERENCES

States  107.

Westlaw Key Number Search: 360k107.

C.J.S. States §§ 291 to 294.

#### RESEARCH REFERENCES

##### Encyclopedias

Maryland Law Encyclopedia State Government § 59, Procurement--Suits on Payment Security Under Maryland Little Miller Act.

MD Code, State Finance and Procurement, § 15-219.1, MD STATE FIN & PROC § 15-219.1

Current through all chapters of the 2008 Regular Session of the General Assembly.

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END OF DOCUMENT

MD Procure. Regs. 21.10.04.05

C  
CODE OF MARYLAND REGULATIONS  
TITLE 21 STATE PROCUREMENT REGULATIONS  
SUBTITLE 10 ADMINISTRATIVE AND CIVIL REMEDIES  
CHAPTER 04 CONTRACT CLAIMS AND DISPUTES  
Complete through Maryland Register Vol. 35, Issue 22,  
dated October 24, 2008.

.05 Filing of Claim by Procurement Agency.

A. A claim by a procurement agency shall be asserted by written notice to the contractor and the procurement officer explaining:

- (1) The basis for the claim;
- (2) To the extent known, the amount of claim or performance or other action required of the contractor; and
- (3) The time within which the contractor shall provide a written response.

B. If appropriate, the procurement officer may conduct discussions or negotiations with the contractor.

C. If the contractor fails to respond, provides an inadequate response, or denies the claim or the relief sought by the procurement agency in whole or in part, the procurement officer shall proceed in accordance with Regulation .08 of this chapter.

D. The provisions of §§A, B, and C of this regulation do not apply if notice of claim is not required under the terms of the contract or under the circumstances, in which case the procurement officer shall proceed in accordance with Regulation .08 of this chapter.

<General Materials (GM) - References, Annotations, or Tables>

COMAR 21.10.04.05, MD ADC 21.10.04.05

MD ADC 21.10.04.05  
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Westlaw

MD ADC 21.10.04.06  
COMAR 21.10.04.06  
MD Procure. Regs. 21.10.04.06

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**C**

CODE OF MARYLAND REGULATIONS  
TITLE 21 STATE PROCUREMENT REGULATIONS  
SUBTITLE 10 ADMINISTRATIVE AND CIVIL REMEDIES  
CHAPTER 04 CONTRACT CLAIMS AND DISPUTES  
Complete through Maryland Register Vol. 35, Issue 22,  
dated October 24, 2008.

.06 Review and Investigation of Procurement Agency Claim.

Upon receipt of a procurement agency's claim, the procurement officer:

- A. Shall investigate and review the facts pertinent to the claim;
- B. May request additional information or substantiation through any appropriate procedure; and
- C. Unless clearly inappropriate, may seek the advice of the Office of the Attorney General.

<General Materials (GM) - References, Annotations, or Tables>

COMAR 21.10.04.06, MD ADC 21.10.04.06

MD ADC 21.10.04.06  
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MD Procure. Regs. 21.10.04.07

CODE OF MARYLAND REGULATIONS  
TITLE 21 STATE PROCUREMENT REGULATIONS  
SUBTITLE 10 ADMINISTRATIVE AND CIVIL REMEDIES  
CHAPTER 04 CONTRACT CLAIMS AND DISPUTES  
Complete through Maryland Register Vol. 35, Issue 22,  
dated October 24, 2008.

.07 Contractor's Response to Procurement Agency Claim.

A. The contractor shall submit a written response to the procurement agency claim within 30 days of the receipt of the written notice. This period may be extended at the discretion and with the written consent of the procurement officer.

B. The written response shall state:

- (1) Whether the contractor denies the procurement agency claim or the relief sought in whole or in part;
- (2) The basis of any denial; and
- (3) The factual areas of agreement or disagreement.

<General Materials (GM) - References, Annotations, or Tables>

COMAR 21.10.04.07, MD ADC 21.10.04.07

MD ADC 21.10.04.07  
END OF DOCUMENT