

ELECTION SYSTEMS & SOFTWARE, INC.  
VOTER TABULATION SYSTEM AND SERVICES AGREEMENT

This Agreement is made as of the date it is executed by the last of the parties named below (the "Effective Date"),

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

AND: Broadwater County, MT ("Customer").

RECITALS:

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

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

XX Exhibit A (Pricing Summary)

XX Exhibit B (ES&S Equipment Description and Pricing)

       Exhibit C (ES&S Software Description and Pricing)

XX Exhibit D (Election Support Services)

XX Exhibit E (Hardware and Software Maintenance and Support Services (Post-Warranty Period))

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 attached hereto and incorporated herein.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the **State of Montana**, without regard to conflicts of law principles that would require the application of the laws of any other state.
- Represents and warrants to the other party that as of the date of its signature below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, INC.  
11208 John Galt Boulevard  
Omaha, NE 68137  
Fax No.: (402) 970-1276

[Signature]  
Signature

Tom O'Brien  
Name (Printed or Typed)

Chief Financial Officer  
Title

March 24, 2004  
Date

BROADWATER COUNTY, MONTANA  
515 Broadway St.  
Townsend, MT 59644  
Fax No.: (406) 266-3674

[Signature]  
Signature

James V. Hahn  
Name (Printed or Typed)

Chairman BOCC  
Title

3-30-04  
Date

**GENERAL TERMS  
ARTICLE 1  
DEFINITIONS**

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

- a. "Documentation" means the operating instructions, user manuals or training materials for the Equipment and Software.
- b. "Equipment" means ES&S Equipment.
- c. "ES&S Equipment" means ES&S' proprietary hardware or other equipment.
- d. "ES&S Hardware Maintenance Services" and "ES&S Software Maintenance and Support" means those services described on Exhibit E.
- e. "ES&S Software" means ES&S' proprietary election software (including the ES&S Firmware), all Updates and items delivered to Customer under this Agreement, unless licensed pursuant to a separate written agreement.
- f. "Software" means ES&S Software.

**ARTICLE 2  
SALE OF ES&S EQUIPMENT AND LICENSE OF ES&S SOFTWARE**

2.1 **Purchase Terms.** Subject to the terms and conditions of this Agreement, ES&S agrees to sell, and Customer agrees to purchase, the ES&S Equipment described on Exhibit B. The payment terms for the ES&S Equipment are set forth on Exhibit A. Title to the Equipment shall pass to Customer when Customer has paid ES&S the total amount set forth on Exhibit A for the ES&S Equipment, ES&S Software.

2.2 a. **Grant of Licenses.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer nonexclusive, nontransferable licenses to use the ES&S Software, described on Exhibit C, and ES&S' firmware, which is delivered as part of the ES&S Equipment ("ES&S Firmware"), and related Documentation in the Jurisdiction while Customer is using the ES&S Equipment. The licenses allow Customer to use and copy the ES&S Software and ES&S Firmware (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 the Jurisdiction. The licenses granted in this Section 2.2 do not permit Customer to use the source code for the ES&S Software or ES&S Firmware.

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

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

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

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

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

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

2.4 **Term of Licenses.** The licenses granted in Section 2.2(a) shall commence upon the delivery of the ES&S Software described in Section 2.2(a). The licenses shall survive the termination of all other obligations of the parties under this Agreement and the termination of all Exhibits; provided, however, that ES&S may terminate either license if Customer fails to pay the consideration due for, or breaches Sections 2.2(b), 2.3, or 3.6 with respect to, such license. Upon the termination of either of the licenses granted in Section 2.2 for ES&S Software or upon Customer's discontinuance of the use of any ES&S Software, Customer shall immediately return such ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

2.5 **Updates.** During the Warranty Period (as defined in Section 3.2(a) below), ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software, 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) install the Updates or (ii) 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. Upon termination of the Warranty Period, Customer shall be entitled to receive the Software Maintenance and Support described on Exhibit E if it has so elected in Section B of the signature page to this Agreement.

### ARTICLE 3 MISCELLANEOUS

3.1 **Delivery; Risk of Loss.** ES&S anticipates shipping the Equipment and Software identified on Exhibits B-C to Customer on or before the "Estimated Delivery Dates" listed on Exhibit A. The Estimated Delivery Dates 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 Equipment and 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 Equipment and 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.

### 3.2 Warranties.

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 shall not include the repair or replacement of any ES&S Equipment components that are consumed in the normal course of operating the Equipment including printer ribbons, paper rolls, batteries, consumables.

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

3.12 **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 them.

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

[END OF GENERAL TERMS]

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P. 1

### **ARTICLE III SOFTWARE**

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

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

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

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

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

**EXHIBIT A  
PRICING SUMMARY**

<b>Sale Summary:</b>						
Description	Refer to	Amount				
ES&S Equipment	Exhibit B	\$26,395				
ES&S Software License Fees	Exhibit C	N/A				
Election Support Services	Exhibit D	\$1,300				
Shipping and Handling	Note 1	Included				
Discounts		(\$1,195)				
<b>Total Net Sale</b>		<b>\$26,500</b>				
<b>Terms &amp; Conditions:</b>						
<p><b>Note 1:</b> Any applicable state and local taxes are not included, and are the responsibility of Customer. See Section 3.5. The cost of Shipping and Handling is included. Premium or rush transportation services requested by Customer are additive and will be billed as incurred.</p>						
<p><b>Note 2:</b> <u>Payment terms are as follows:</u>                      Within 10 Business Days After Contract Signing: 25% of Total Net Sale: <b>\$6,625</b>                      30 Calendar Days after Equipment Delivery: <b>\$18,375</b>                      Final Payment of <b>\$1,500 Due by July 31, 2004.</b></p>						
<p><b>Note 3:</b> Services in excess of those set forth in <u>Exhibit D</u> shall be charged at the rate of \$1,500 per day, including expenses.</p>						
<p><b>Note 4:</b> ES&amp;S anticipates delivering the Equipment and Software in accordance with Section 3.1 as follows:</p> <table border="1"> <thead> <tr> <th><u>Equipment/Software</u></th> <th><u>Estimated Delivery Date</u></th> </tr> </thead> <tbody> <tr> <td>ES&amp;S Equipment</td> <td>May 1, 2004</td> </tr> </tbody> </table>			<u>Equipment/Software</u>	<u>Estimated Delivery Date</u>	ES&S Equipment	May 1, 2004
<u>Equipment/Software</u>	<u>Estimated Delivery Date</u>					
ES&S Equipment	May 1, 2004					
<b>Warranty:</b>						
ES&S Equipment and ES&S Software – Warranty Period:	1 year					
Anticipated Warranty Period: May 2004 – April 2005						
<b>Ongoing Services:</b>						
Description	Refer to	Annual Fee				
Routine Maintenance Services during Warranty Period; Payment is due 30 days after invoice.	Section 3.3	N/A				
Post Warranty Hardware Maintenance Services	Exhibit E	\$975				
Services commence in May 2005. Fees reflect a one-year term. Payment is due at the start of the maintenance period.						
Post Warranty Software Maintenance & Support Services						
- ES&S Firmware	Exhibit E	\$125				
- All Other ES&S Software	Exhibit E	N/A				
Services commence in May 2005. Fees reflect a one-year term. Payment is due at the start of the maintenance period.						

**Schedule E1**

**DESCRIPTION OF PRODUCTS**

**HARDWARE**

Quantity	Description (Note: *** indicates Depot Repair Only Products)	Initial Maintenance Fee Per Unit	Initial Maintenance Fee In Total
5	M100 Precinct Scanner	\$195	\$945
	Total Hardware Maintenance Fees Due for the Initial Hardware Maintenance Term		\$975

**Per-Unit Fees if Customer requests more than one Routine Maintenance visit in a 12-month period: \$107.50 per Model 100 unit.**

**Surcharge for Emergency Remedial Maintenance Services: \$292.50 per Model 100 unit.**

**Customer's Designated Location: Townsend, MT**

**Location of Services**

Customer's Designated Location

Depot

**Per Unit Surcharge for performance of Routine Maintenance visit at more than one Customer Designated Location: \$10.00 per unit for all units located at second or more locations.**

**SOFTWARE**

Year	First Month Applicable	Fee -ES&S Firmware	Fee- All Other ES&S Software
2005	May	\$125	N/A

