

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

AVANTE INTERNATIONAL TECHNOLOGY INC.,

Petitioner

-against-

NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL
SERVICES,

Respondents.

VERIFIED PETITION

Index #

PARTIES

1. Petitioner Avante International Technology Inc. is a designer and vendor of electronic voting machines and brings this proceeding pursuant to CPLR Article 78.
2. Respondents Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher, and Helena Moses Donohue are the Commissioners of the New York State Board of Elections and are named as respondents in their official capacity.
3. Respondent New York State Board of Elections is a New York State Agency and is, among other things, responsible for administration and enforcement of all laws relating to elections in the State of New York.
4. Respondent New York State Office of General Services is a New York State Agency and is responsible for preparing and awarding certain bids to vendors doing business with the State of New York.

FACTUAL BACKGROUND

5. In 2002, Congress enacted the Help America Vote Act ("HAVA") as a result of difficulties experienced in the 2000 presidential election. Section 301 of HAVA mandated that, by January 1, 2006, all states have in place voting systems that fully comply with the technical requirements of HAVA. All states other than New York are now in compliance with HAVA.

6. With respect to the disabled, HAVA (42 USC 15481(a)(1)(A)(i)) requires that all voting systems "permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted." A copy of a Department of Justice Memorandum analyzing HAVA in the context of the disabled is attached as Exhibit "A".

7. Avante is a company which designs and manufacturers electronic voting systems. Petitioner wishes to market its voting system to counties in New York State.

8. Numerous counties in New York are already using Avante machines for HAVA compliance. Counties currently using Avante machines include all five New York City counties, Suffolk, Nassau, Westchester, Rockland, Putnam, Orange, Dutchess, Sullivan, and many upstate counties. Absent relief from this Court, those counties will not have the option of purchasing petitioner's voting machine going forward.

9. In July 2005, in order to implement HAVA, New York adopted "the New York Voting Systems Reform Act" (L. 2005, ch. 181). In response to this law, Avante modified its proposed voting system to incorporate those requirements, including but not limited to, a voter

verified paper audit trail provision, and an audio verification device which can be used by the visually impaired.

10. After passage of New York's implementing law in July 2005, the New York State Board of Elections did not adopt a revised version of New York's voting system standards until May 2006 (9 NYCRR 6209 et. seq.). Avante subsequently submitted its voting system for approval by the New York State Board of Elections. The Board designated Ciber Laboratories to conduct testing on petitioner's proposed voting systems.

11. In February of 2007, the Board advised petitioner that it was discontinuing use of Ciber Laboratories as an accredited laboratory. The Board advised that it would, in due course, designate a new laboratory to provide those services and that petitioner would be notified when the decision regarding the identity of the new laboratory was made. On or about December 7, 2007 the Board certified Systest Laboratories ("Systest") as the new entity to determine a voting system's compliance.

12. New York State is the only state in the country that is not in compliance with HAVA. Because of this fact the Justice Department has proceeded against the Board in Federal Court for the Northern District of New York on at least two occasions seeking to compel New York's compliance. On January 16, 2008, the Honorable Gary L. Sharpe, United States District Judge for the Northern District of New York, issued a Supplemental Remedial Order compelling New York to be in full compliance with HAVA for the 2009 elections and to be at least partially compliant for the 2008 elections.

13. Pursuant to Judge Sharpe's rulings, New York is attempting to become fully compliant with HAVA for the 2009 elections. This is known as "Plan A". With respect to

2008, Judge Sharpe ordered New York to comply with the HAVA provisions pertaining to access to the disabled. This is known as "Plan B".

14. With respect to Plan B, Judge Sharpe's order states that the Board shall "make all possible efforts to provide for certification of a [HAVA compliant] voting system(s) in time for use of such system(s) in the fall of 2008 federal primary and general elections by such counties as wish to utilize fully HAVA-compliant voting systems in such elections."

15. On October 17, 2007, the Office of General Services ("OGS") published bid specifications for companies to bid on a ballot marking device for temporary use in the 2008 election. A ballot marking device is a sophisticated device with the object to allow voters with disabilities to vote. A ballot marking device is not defined in HAVA, New York State Law, or New York State regulations.

16. On October 17, 2007, the Office of General Services ("OGS") published bid specifications for companies to bid on a ballot marking device ("BMD") to assist people with disabilities to vote independently beginning with the 2008 fall primary and general election. Those bid specifications include, among other things, that the bidder demonstrate (1) the ability of a voter to mark a ballot using the ballot marking device, (2) the ability of the ballot marking device to accurately mark a ballot, and (3) the ability of the voter to verify his or her ballot and to change his or her vote, where necessary, after the machine has already marked the ballot. Avante's machines fully comply with these requirements. Pertinent portions of the bid specifications are attached as Exhibit "B".

17. The Board of Elections is required under Election Law § 7-202(4) to submit approved choices to County Boards of Elections as to which machine each county chooses to purchase.

18. In response to the Bid request, Avante submitted four machines for consideration. A copy of the Board of Elections Web page reflecting its receipt of all four machines is attached as Exhibit "C".

VOTE-TRAKKER EVC 308-BMD-FFP

19. The first machine is a "VOTE-TRAKKER", model number EVC308 SPR BMD. A copy of Avante's application for this machine to the Board of Elections is attached as Exhibit D.

20. This machine has a 15 inch screen, whereby voters make choices by pressing on a touchscreen or by using An accessibility keyboard and/or audio assistance. Initially, the machine displays a full face ballot. Then, the voter can enlarge sections of the ballot for review during the voting process. For example, the voter can enlarge the candidates in each separate contest, so that he or she can focus specifically on the candidates for each office. After the voter completes his or her choice for all the offices, the machine will print out a full face paper ballot reflecting the voter's choices.

21. This machine is fully equipped for use by the visually impaired. For example, the voter can use headphones to have the machine audibly state the options and vote through a voice activation method. After voting, the machine will read back the voter's choices so that it can be reviewed and confirmed. The machine also prints a bar code on the paper record that can be scanned and read to further independently verify the vote.

22. This machine was rejected by the Board, apparently on the basis that the machine did not electronically display a full face ballot. However, the Board disregarded the fact that this machine prints out a full face ballot for the voter to verify, thereby satisfying the legal requirement of a full face ballot contained in 9 NYCRR 6209.2. Pertinent copies of the transcript are attached as Exhibit "E."

23. Additionally, Election Law § 7-104(1) states that "All ballots shall be printed and/or displayed in a format and arrangement, of such uniform size and style as will fit the ballot frame, and shall be in as plain and clear a type or display as the space will reasonably permit."

24. Nothing in this section, or any other section of the Election Law, requires that the electronic screen display a fully legible full face ballot. This requirement has been unlawfully grafted onto the statute by the Board in excess of its authority.

25. Even 9 NYCRR 6209.2 requires only "a ballot display on a single surface". It does not, as Respondents maintain, require both a legible full face printed ballot and electronic ballot.

VOTE-TRAKKER EVC 308 FF 42

26. The second machine, is a VOTE-TRAKKER EVC 308 FF 42. The application for this machine submitted to the Board of Elections is attached as Exhibit "F".

27. This machine involves a 42 inch screen, with a touchscreen method of voting, where the full face ballot is displayed. After the voter makes his or her selections on this machine, the machine prints out a paper record verifier for the voter to review and confirm his

or her vote. The machine can also be adapted for use with a printer which can print an 11" x 17" full face paper ballot.

28. This machine is also fully equipped for use by the visually impaired and those with other disabilities.

29. Two commissioners (Kelleher and Donohue) voted in favor of approving the 308 FF 42 Avante machine as in compliance with the bid requirements and one (Kellner) voted against. One Commissioner (Aquila) was absent. On that basis, the machine was rejected, as the affirmative vote of three Board members is required for passage. Pertinent copies of the transcript are attached as Exhibit "G".

30. Commissioner Kellner voiced two objections. First, he asserted that the machine was required presumably by section 7-104 of the Election Law to, and did not, produce a full face paper ballot, which could be reviewed and verified by a disabled person. However, his objection overlooks the fact there is no legal requirement for a full face paper ballot, or for a paper ballot at all.

31. Second, he asserted that disabled people will not have the ability to verify their votes in the same manner as everyone else. This objection, however, overlooks the fact that disabled people, through the machines audio functions, are fully able to review and verify their votes as required by Election Law § 7-202(1)(e), which provides that a machine must "provide the voter an opportunity to privately and independently verify votes selected and the ability to privately and independently change such votes or correct any error before the ballot is cast and counted." The machine also prints a bar code on the paper record that can be scanned and read to further independently verify the vote. Avante's machines are in full compliance with section

7-202(1)(e). To the extent that Commissioner Kellner is seeking to impose a stricter voter verification requirement than that contained in this statute, the Board has acted without authority and its actions must be annulled.

VOTE-TRAKKER EVC 308-FF-BMD

32. Avante's third machine is a "VOTE-TRAKKER" model number EVC308-FF BMD. A copy of the application submitted to the Board of Elections is attached as Exhibit "H".

33. Apparently, the Board did not consider this machine. No evidence appears to exist pertaining to the Board's approval or rejection of this machine.

34. Nevertheless, this machine was duly submitted to the Board and it satisfies all legal requirements. The machine displays a full-face legible electronic ballot on its 42 inch screen.

35. After the voter makes his or her selections, the machine will then print out a full face 11" x 17" paper ballot.

36. Additionally, for the disabled, the machine uses audio and voice technology so that the machine is fully usable by the visually impaired and people with other disabilities. The machine also prints a bar code on the paper record that can be scanned and read to further independently verify the vote. Therefore, even under the most stringent tests voiced by Commissioner Kellner, this machine satisfies all legal requirements and should have been approved. The Board's failure to consider this machine constituted an abdication of its statutory duty.

37. Because this machine satisfies all legal requirements, Avante is entitled to a declaration that this machine is suitable for use by counties throughout the State and that this machine must be included on any list sent to the counties.

VOTE-TRAKKER OVT-EVC-308

38. Avante's fourth machine is an optical "VOTE-TRAKKER" model number OVT-EVC308. This machine is an optical scanner, rather than a BMD and was not submitted for consideration for "Plan B."

The Avante Machines Must be Certified

39. In summary, Avante's machines satisfy all legal requirements, and should have been approved for the bid under "Plan B."

40. As detailed below, the actions of the Board circumvented the process and arbitrarily and capriciously excluded Avante's machines from consideration. We are asking that the Avante machines be added to the list of approved machines to be examined by Systest and included in the vendor selection process.

41. The respondents published a list of vendors approved and have demanded counties to rank and select those vendors on or about February 8, 2008. Absent court intervention, Avante's voting systems will not be on that list for examination and the final vendor selection process. If this occurs, counties will make their selections without Avante as a possibility. Therefore, Avante will be essentially shut out of the process and will not be able to sell its machines in New York State.

42. As a result, Avante will suffer immediate, severe and irreparable financial harm. Accordingly, petitioner requests that this Court issue a temporary restraining order and

preliminary injunction, directing respondents to include Avante's ballot marking devices on the list of machines to be tested by Systest and available to the counties to rank.

**AS AND FOR A FIRST CAUSE OF ACTION FOR A DECLARATION THAT
AVANTE'S 308 SPR BMD FULLY COMPLIES WITH ALL LEGAL
REQUIREMENTS AND RESPONDENT'S REJECTION WAS ARBITRARY AND
CAPRICIOUS AND CONTRARY TO LAW**

43. Petitioner repeats and realleges all foregoing allegations as if fully restated herein.

44. No lawful basis exists for the Board's determination that Avante's EVC 308 SPR BMD 15 inch screen fails to comply with all legal requirements.

45. The reason given for the Board's rejection of this machine was that the full face electronic ballot was not easily readable to the naked eye.

46. However, the Board ignored the fact that after the voter has made his initial choices, the machine prints out a full face paper ballot. This is clearly sufficient to satisfy the full face ballot requirement in 9 NYCRR 6209.2.

47. Additionally, this machine allows the voter to enlarge the display for each separate contest so that the voter can still easily read the ballot for each office on the machine.

48. The Board also ignored or overlooked the fact that this machine has a completely private audio component, which makes it fully accessible to the visually impaired. The board also overlooked that the machine prints a bar code on the paper record that can be scanned and read back.

49. Moreover, Election Law § 7-104 does not require a full face electronic paper ballot.

50. For the foregoing reasons, the Board's actions with respect to this machine must be annulled and the Court should order the Board to place this machine on its list of approved machines for sale to New York counties.

**AS AND FOR A SECOND CAUSE OF ACTION DECLARING THAT AVANTE'S EVC
308 FF 42 BALLOT MARKING DEVICE FULLY COMPLIES WITH ALL LEGAL
REQUIREMENTS AND THAT RESPONDENT'S REJECTION WAS ARBITRARY
AND CAPRICIOUS AND CONTRARY TO LAW**

51. Petitioner repeats and realleges all foregoing allegations as if fully restated herein.

52. No lawful basis exists for Respondents' determination that Avante's 308 FF 42 machine fails to conform with all legal requirements.

53. First of all, the screen on the 308 FF 42 displays an easily readable full face electronic visual display of the ballot as required by 9 NYCRR 6209.2. Contrary to Commissioner Kellner's view, nothing in this regulation, or elsewhere, requires that the full face ballot be in paper form.

54. Secondly, the machine prints out an easily readable voter verifiable paper trail as required by Election Law § 7-202(1)(j). The voter can review this paper and, if he or she so chooses, change his vote upon inspection of the paper verifier.

55. Third, the machine can be easily used by the visually impaired through its audio functions, which allows a voter to use a headset to ensure privacy. The board also overlooked that the machine prints a bar code on the paper record that can be scanned and read back.

Therefore, Avante's machines fully comply with Election Law § 7-202(1)(e), insofar as it

applies to the disabled. In sum, none of Commissioner Kellner's objections to this machine have any basis in law or fact.

AS AND FOR A THIRD CAUSE OF ACTION DECLARING THAT AVANTE'S EVC 308-FF-BMD BALLOT MARKING DEVICE FULLY COMPLIES WITH ALL LEGAL REQUIREMENTS AND THAT RESPONDENTS' FAILURE TO PASS ON THIS WAS ARBITRARY AND CAPRICIOUS

56. Petitioner repeats and realleges the foregoing allegations as if fully restated herein.

57. No lawful basis exists for respondents' failure or refusal to determine that Avante's 308-FF-BMD machine conforms to all legal requirements.

58. The 42" screen on the 308-FF-BMD displays a full form electronic visual display of the ballot.

59. The machine also prints out a full face ballot.

60. The machine can easily be used by the visually impaired through its audio functions, which allows a voter to use a headset to insure privacy. The machine also prints a bar code on the paper ballot that can be scanned and read back for further verification.

AS AND FOR A FOURTH CAUSE OF ACTION FOR VIOLATION OF ELECTION LAW § 7-201

61. Petitioner repeats and realleges all foregoing allegations as if fully restated herein.

62. Election Law § 7-201 states that

"Any person or corporation owning or being interested in any voting machine or system may apply to have the state board of elections examine such machine or system. * * * the state board of elections shall cause the machine or system to be examined and a report of the examination to be made and filed in the office of the state board. Such

examination shall include a determination as to whether the machine or system meets the requirements of section 7-202 of this title and a thorough review and testing of any electronic or computerized features of the machine or system. * * * The voting machine or system shall be examined by examiners or testing laboratories to be selected for such purpose by the state board." (Emphasis added).

63. This section clearly requires two things. The first requirement is an examination of the machine at issue by a testing laboratory. In this case, that is Systest. Then, after receiving the report from the examination, the Board must determine whether the machine is in compliance with Election Law § 7-202.

64. In this case, the Board did not wait for the report from Systest prior to making its determination. Had it done so, the report, which still has not been issued, would have demonstrated to the Board that the Avante machines in fact complied with all legal requirements by being accessible to the visually impaired and by displaying a full face ballot.

65. Additionally, this testing is conducted at Avante's sole expense. Therefore, no pecuniary interest of the State is at issue in allowing further testing to continue.

66. Accordingly, the Board's rejection of Avante's bid prior to the completion of testing by Systest is in violation of Election Law § 7-201 and must be annulled.

**AS AND FOR A FIFTH CAUSE OF ACTION DECLARING
THAT AVANTE HAS THE RIGHT TO REBID**

67. Petitioner repeats and realleges all foregoing allegations as if fully stated herein.

68. The machines of two vendors were conditionally approved and such Vendors were granted leave to modify their machines (Premier Automark and ES&S Automark) at a later date, but Avante was not accorded such opportunity. Moreover, the purported objections

of the Board could easily be addressed by modification. This disparate treatment of petitioner is violative of the Procurement Stewardship Act, due process and equal protection.

69. Given that the Board must treat all similarly situated vendors equally, it must therefore grant permission to Avante to modify its bid to conform to the Board's specifications.

70. Additionally, to the extent that the bid requirements fail to conform with New York law and were a basis for the Board's rejection of Avante's bid, those requirements are invalid and render the rejection of Avante's bid a nullity.

71. Accordingly, the aforesaid determinations of the respondents should be annulled or modified so that Avante's machines be approved and may be used in the 2008 elections in New York State. Until an order is obtained herein to that effect, respondents ought to be enjoined from taking any actions that would prejudice petitioner's rights such as the release of an approved list of systems which omits Avante's products.

**AS AND FOR A SIXTH CAUSE OF ACTION NULLIFYING THE BOARD'S
INTERPRETATION OF 9 NYCRR 6209.2 ON THE GROUND THAT AVANTE'S
MACHINES FULLY COMPLIED WITH ELECTION LAW 7-104**

72. Petitioner repeats and realleges all foregoing allegations as if fully restated herein.

73. Election Law § 7-104 requires that a ballot be "printed and/or displayed in a format and arrangement, of such uniform size and style as will fit the ballot frame, and shall be in as plain and clear a type or display as the space will reasonably permit."

74. Nothing in this statute, or any other statute provides for a full face ballot requirement. That requirement is first contained in a regulation, 9 NYCRR 6209.2(a)(1).

75. That regulation states that voting systems must "provide a full ballot display on a single surface, except that proposals may appear on the reverse side of any paper ballot, and that such ballot display is easily visible under typical lighting found in a poll site."

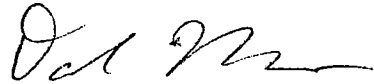
76. This regulation clearly goes beyond the ballot display requirement of section 7-104. Nothing in that statute mentions the "single surface" or "full ballot display" requirement found in the regulation.

77. To the extent the Board has interpreted this regulation as going beyond the limitations contained in the statutory language of section 7-104, it is unlawful and must be annulled.

WHEREFORE, petitioner demands judgment annulling or modifying the aforesaid administrative determinations of respondents so that (1) Avante's three BMD voting machines, (i) EVC308 SPR BMD; (ii) EVC 308 FF 42; (iii) EVC308-FF BMD, are contained on the approved list of Ballot Marking Devices that may be used in 2008 elections in New York State, and (2) respondents be enjoined from releasing a list of approved systems that does not contain Avante's three BMD products, and (3) directing the respondents to forward to the Office of State Comptroller a contract for petitioner Avante in accordance with proper procedures, and (4) directing respondents to immediately distribute all petitioner's bid information to all County boards of elections relevant to support the selection of their preferred Ballot Marking Device for use in the 2008 elections, (5) suspend for one week, until February 15, 2008, the Board's requirement for counties to rank for purchase by the counties, (6) allowing all counties to

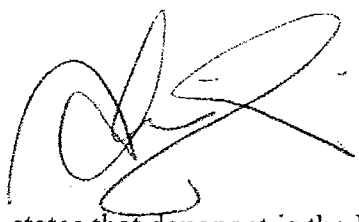
change their choice in the event that Avante is determined at a date after the initial list is sent out, and (7) such other relief the Court deems just and proper.

Dated: February 6, 2008



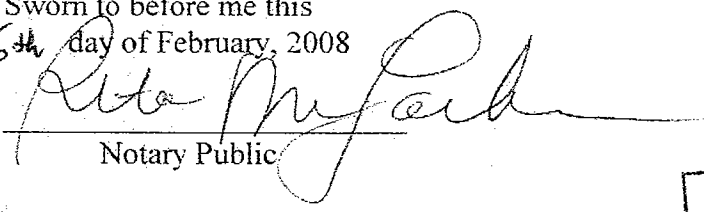
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STATE OF NEW JERSEY)
) ss.:
COUNTY OF *Mercer*



Kevin Chung, being duly sworn, states that deponent is the President of Avante International Technology, Inc the petitioner herein; that deponent has read the foregoing and the same is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Sworn to before me this
6th day of February, 2008


Notary Public

RITA McLACHLAN
Notary Public
New Jersey
My Commission Expires July 21, 2009

Exhibit A

**WHETHER CERTAIN DIRECT RECORDING ELECTRONIC VOTING SYSTEMS
COMPLY WITH THE HELP AMERICA VOTE ACT AND THE AMERICANS
WITH DISABILITIES ACT**

A direct recording electronic voting system that produces a contemporaneous paper record, which is not accessible to sight-impaired voters but which allows sighted voters to confirm that their ballots accurately reflect their choices before the system officially records their votes, would be consistent with the Help America Vote Act and with Title II of the Americans with Disabilities Act, so long as the voting system provides a similar opportunity for sight-impaired voters to verify their ballots before those ballots are finally cast.

October 10, 2003

**MEMORANDUM OPINION FOR THE
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION**

This memorandum responds to your Office's request of August 12, 2003, for our opinion on whether a direct recording electronic ("DRE") voting system may, consistent with the Help America Vote Act and the Americans with Disabilities Act, produce a contemporaneous paper record, not accessible to sight-impaired voters, that allows voters to confirm that their ballots accurately reflect their choices before the system officially records their votes. Based on the information you have provided us, we conclude that this proposed voting system would be consistent with both Acts, so long as the DRE voting system provides a similar opportunity for sight-impaired voters to verify their ballots before those ballots are finally cast. ⁽¹⁾

I

Many states are expanding the use in elections of DRE voting systems, which allow voters to enter their choices on an electronic screen in the voting booth. The DRE machines also allow a voter to confirm his ballot before it becomes an officially recorded vote by providing a "summary screen" listing all of the voter's choices. After viewing the summary screen, the voter may either cast his ballot or else go back and make corrections. On newer DRE machines, an auditory component announces the ballot choices and the contents of the electronic summary screen, allowing sight-impaired voters to verify and cast their ballots without assistance and in complete privacy.

In response to concerns that the DRE voting systems may be vulnerable to tampering, the State of California is considering adopting DRE machines that would produce a contemporaneous paper record for each voter in addition to the electronic summary screen. See Letter from Randy Riddle, Chief Counsel, California Secretary of State, to Joseph Rich, Voting Section Chief, Civil Rights Division (July 8, 2003). This paper record would summarize the voter's choices, and would be printed before the voter finally casts his ballot. In some cases, the paper record might also be preserved as a means to count votes in case of a recount or election contest. But in other cases, the paper record would serve solely to inform the voter of his choices before finally casting his ballot - serving the same function as the DRE electronic summary screen.

II

Because the paper record produced by the DRE machines in question will not be produced in a format accessible to sight-impaired voters, you have asked for our opinion whether such a voting system would violate either the Help America Vote Act or Title II of the Americans with Disabilities Act. We will address each statute in turn.

A

Under the Help America Vote Act of 2002 ("HAVA"), all "voting systems" used in an election for federal office must meet specified federal requirements by January 1, 2006. *See* 42 U.S.C.A. §§ 15481-85 (West Supp. 2003). One of these requirements is that voting systems "shall . . . permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted." 42 U.S.C.A. § 15481(a)(1)(A)(i). DRE voting systems comply with this mandate by providing a final summary screen before the voter asks the machine to officially record his vote, as well as an auditory component that informs sight-impaired and illiterate voters of the summary screen's contents. The production of a contemporaneous paper record is not necessary for the voting system to comport with section 15481(a)(1)(A)(i), but it does afford an additional means for a voter to verify his choices before casting his vote.

HAVA further provides that "[t]he voting system shall . . . be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides *the same opportunity for access and participation* (including privacy and independence) as for other voters." § 15481(a)(3)(A) (emphasis added). Some may object that sight-impaired voters will have no opportunity to access or use the contemporaneous paper records generated by DRE machines, as the paper record is not produced in Braille, and the DRE systems do not currently convert the paper into an audible format accessible to the sight impaired. We do not, however, believe that this feature contravenes section 15481(a)(3)(A).

What section 15481(a)(3)(A) requires is that each "voting system" be accessible to disabled persons in a manner that provides "the same opportunity" for access and participation that other voters have. We will assume for the sake of argument that the paper record produced by DRE machines is included as part of the "voting system" as defined in section 15481(b),⁽²⁾ although we note that this is not entirely clear and may depend on precisely what functions the paper record serves beyond providing a means for voters to verify their ballots before they are cast.⁽³⁾ But even if one indulges this assumption, the statutory issue would not be whether the *paper record* is accessible to the sight-impaired, but whether the *entire DRE voting system* is accessible in a manner that provides disabled voters "the same opportunity for access and participation" that other voters enjoy. § 15481(a)(3)(A). We must therefore evaluate a disabled person's opportunity to participate in the voting system holistically, rather than scrutinizing his opportunity to access the system's discrete components or parts.

Furthermore, the use of the word "same" in section 15481(a)(3)(A) does not mean "identical"; if HAVA were read to require an identical opportunity for access and participation among non-disabled voters and voters with every type of disability, it would mandate the impossible. A serious disability will *necessarily* result in a voting experience that differs in some manner from that enjoyed by non-disabled voters. Nothing can be done,

for example, to enable blind voters to visually interact with their ballot as sighted voters can. And we do not read HAVA to force all sighted persons to use voting technology with no visual dimension whatsoever (such as a voice-activated box that navigates voters through the ballot via a series of audible commands). That approach would not comply with section 15481(a)(3)(A) because such a voting system, in its efforts to produce "identical" opportunities among the sighted and the blind, would be entirely inaccessible to the hearing-impaired. What is more, equating the word "same" in section 15481(a)(3)(A) with "identical" would prohibit the very audio components in DRE voting systems that enable the sight-impaired to vote in privacy, because voters with other types of disabilities, such as the hearing-impaired, could not access these accommodations and would therefore lack an identical "opportunity" to participate in the voting system. We therefore construe the word "same" to mean "similar in kind, quality, quantity, or degree." See American Heritage Dictionary of the English Language 1539 (4th ed. 2000). So long as a disabled person can access and participate in the *essentials* of a voting system -- such as the ability to cast a ballot in privacy with a full opportunity to review the ballot before casting it -- his opportunity to access and participate in the voting system is sufficiently "similar in kind, quality, quantity, or degree" to that enjoyed by non-disabled persons. The fact that the precise *means* by which he may access and participate in those essentials differs from those available to non-disabled persons does not deprive him of the "same opportunity" to participate in the voting system -- if it did, no voting system could ever comply with HAVA.

So long as DRE voting systems provide sight-impaired voters with audio equipment that enables them to verify their ballots before they are cast, we conclude that the provision of a contemporaneous paper record to assist sighted voters in verifying their ballots does not run afoul of HAVA.⁽⁴⁾ The essentials of such a voting system -- including the ability to verify one's ballot -- are available to disabled and non-disabled voters alike, giving them the "same opportunity" for access and participation under section 15481(a)(3)(A). Knowledge of the contents of the paper record is simply one of the *means* by which a sighted voter may verify his ballot before casting it, and DRE voting systems satisfy section 15481(a)(3)(A) so long as they provide a comparable means for sight-impaired voters to achieve this essential end.

It is true that sighted voters will have more than one method by which they may verify their ballot before casting it: they can view both the electronic summary screen as well as the paper record produced by the DRE machine. Sight-impaired voters, by contrast, can only listen to an audio description of the summary screen, and have no independent way of knowing the contents of the paper record before casting their vote. Nevertheless, we do not believe that providing a greater number of methods by which sighted voters can verify their ballots deprives blind voters of the "same opportunity" for access and participation in the voting system, so long as the means available to such disabled persons are adequate to ensure similar access to and participation in the essentials of the voting system. The ability to verify one's ballot before casting it *is* essential, *cf.* § 15481(a)(1)(A)(i), but the availability of multiple techniques by which to do so is not. Disability accommodations often result in a greater range of methods by which non-disabled persons can accomplish their goals, yet such accommodations are not deemed to deny equal opportunities for disabled persons for that reason alone. Consider a building that provides both a set of stairs and a wheelchair ramp to its outdoor entrance. Non-disabled persons have more means to enter the building (they can use either the stairs or the ramp), while the wheelchair-bound person can use only the ramp. But no one would contend that such a building has deprived disabled persons of the "same opportunity" to access the building. That is because the essential requirement of access -- the ability to get to the front door -- is available to all. The

means to achieve that end differ, and non-disabled persons have a greater number of options, but provision of the ramp suffices to provide disabled persons with a similar (though not "identical") opportunity. So too with the DRE voting systems, as you have described them.

B

Title II of the Americans with Disabilities Act ("ADA") provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2000). Only a "qualified individual with a disability" ("QID") -- defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity," § 12131 (2) -- is protected by Title II.

The first task is to identify the relevant "service," "program," or "activity" at issue. This step is essential, because one cannot be a QID under section 12131(2) except in relation to a specific "service," "program," or "activity." A Title II complainant must show that he meets the essential eligibility requirements either to receive a "service," or to participate in a "program" or "activity," provided by a public entity. Without such a showing, there can be no violation of section 12132.⁽⁵⁾

A Title II complainant could plausibly assert that the paper record itself is a "service" that blind individuals are eligible to "receive." (The ADA does not define the term "services," but we will assume *arguendo* that "services . . . provided by a public entity" encompass the paper record produced by the DRE voting system.) All voters, disabled or not, receive the paper record any time they vote on a DRE machine, so there is no need to explore whether accommodations beyond the realm of reason are necessary to make such persons "eligible" to receive the paper record. *See* § 12131(2). This suffices to establish a sight-impaired voter as a QID under § 12131(2), but Title II is not breached unless the sight-impaired person is either denied the benefits of the paper record, or is subjected to discrimination by a public entity. *See* § 12132.

To the extent the paper record provides sighted voters with an opportunity to check their ballots, this does not deny a benefit to sight-impaired voters, because the DRE machines' auditory component already provides a means for such voters to verify their ballots before casting them. But more importantly, given that *all* voters were fully capable of confirming their ballot before the advent of paper-producing DRE machines (either by viewing the summary screen, or using the machine's audio capacity), we do not think the paper record provides any "benefit" at all in this regard. *See* American Heritage Dictionary 168 (defining "benefit" as "an advantage; help; aid"). We reject any construction of the term "benefit" in section 12132 that includes the provision of a means to accomplish a task that all persons could fully and effectively perform without such provision. In cases where the paper record is used by election officials for auditing purposes, this "benefit" of the paper record is not withheld from sight-impaired voters -- all paper records, regardless of the voter's disability status, would be used in the event of a recount or election challenge and would protect the integrity of that voter's ballot.

A sight-impaired voter could also claim that voting is a "program" or "activity" in which he is eligible to participate. *See* § 12131(2). But however one defines the "benefits" of voting, we cannot see how the provision of a paper record denies these "benefits" to sight-impaired QIDs. Even if the paper record is utterly useless to sight-impaired voters, those voters still enjoy every "benefit" of voting that they would have had under the non-paper-producing DRE machines. One might contend that our understanding of the "benefits" of voting should vary depending on the technology employed, and that the "activity" of voting on a paper-producing DRE machine includes added "benefits" unknown to those voting on other equipment. But even under this approach, the only conceivable "benefit" that one might claim is denied to sight-impaired voters is the provision of multiple means by which to verify one's ballot. For the reasons explained above, we do not regard this as a "benefit" under section 12132. The Attorney General has emphasized that section 12132 does not require a public entity to make each of its existing facilities accessible to individuals with disabilities when administering a service, program, or activity, *see* 28 C.F.R. § 35.150(a)(1) (2003), which confirms our view that the failure to make each and every means of access or participation available to disabled persons is not the "denial of a benefit" under section 12132.

As to whether sight-impaired voters are "subject to discrimination" by a public entity that uses the DRE voting system: the DRE machines indeed treat sight-impaired voters differently, as they must engage an auditory component while voting, while sighted persons can simply look at the screen. Mere dissimilar treatment, however, does not by itself constitute "discrimination" under Title II. All disability accommodations treat the disabled differently than non-disabled persons, but section 12132 does not prohibit the very accommodations mandated by the ADA. *See* 28 C.F.R. § 35.130(c) ("Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities"). Rather, to be "subjected to discrimination" under section 12132, a QID must not only be treated differently, but the discrimination must also leave the QID worse off than if the dissimilar treatment had never occurred. *See Olmstead v. Zimring*, 527 U.S. 581, 599-601 (1999) (concluding that unjustified institutional isolation of persons with disabilities is "discrimination" under section 12132 because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes the everyday life activities of individuals"). We think that any dissimilar treatment of QIDs resulting from a public entity's decision to use handicapped-accessible voting equipment falls into the category of permissible accommodation, rather than impermissible "discrimination," under Title II of the ADA.

Sheldon Bradshaw
 Deputy Assistant Attorney General
 Office of Legal Counsel

1. In so concluding, we are not sanctioning the use of any particular DRE voting system. Indeed, our understanding of how such systems will actually work is necessarily limited by the fact that most of them are still at the design stage. The addition (or elimination) of certain features, or their use in particular ways, may result in a voting system that does not provide a similar opportunity for disabled voters to access and participate in the voting system. As explained in greater detail below, such a system would be inconsistent with the Help America Vote Act.

2. Section 15481(b) provides:
 In this section, the term "voting system" means--

(1) *the total combination of* mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used--

- (A) to define ballots;
- (B) to cast and count votes;
- (C) to report or display election results; and
- (D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used--

- (A) to identify system components and versions of such components;
- (B) to test the system during its development and maintenance;
- (C) to maintain records of system errors and defects;
- (D) to determine specific system changes to be made to a system after the initial qualification of the system; and
- (E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

42 U.S.C.A. § 15481(b) (emphasis added).

3. Paper would appear not to be "mechanical, electromechanical, or electronic equipment." While 42 U.S.C. § 15481(b)(1) includes in its reach all "documentation" used to "support" such equipment, we do not think it likely that a paper record whose *sole* function is to allow voters to verify their choices would be "used" for any of the purposes delineated in section 15481(b)(1)(A)-(D). Another possible category for such a paper record is section 15481(b)(2)(E), but it is important to emphasize that the "notices, instructions, forms, or paper ballots" referred to in section 15481(b)(2)(E) are not *themselves* part of the "voting system"; rather, the "practices and associated documentation" used to make these materials available to the voter are part of the voting system.

A paper record that would also be used for auditing purposes in the event of a recount or election challenge is more likely to be part of the "voting system" in section 15481(b)(1), because it would be used to "count votes," § 15481(b)(1)(B), as well as "to maintain and produce any audit trail information," § 15481(b)(1)(D).

This threshold issue will depend on the precise facts of each voting system, so we leave it for another day and assume, *arguendo*, that the paper record can be pigeonholed into one of the nine categories listed in 42 U.S.C. § 15481(b)(1)-(2).

4. This analysis assumes, of course, that the audio device, the summary screen, and the paper record are all reliable methods of verification.

5. At least one decision from a court of appeals has disclaimed any need to determine whether a government function can be characterized as a "service," "program," or "activity" when adjudicating Title II claims. *See Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) ("Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into 'needless hair-splitting arguments.'") (citation omitted). For the reasons explained above, this approach cannot be reconciled with the text of Title II. Nor can it be reconciled with *Zimmerman v. Oregon Department of Justice*, 170 F.3d 1169, 1174-76 (9th Cir. 1999), which *Barden* did not cite.

Exhibit B

**STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES (OGS)**

CONTINUOUS RECRUITMENT
FOR THE CENTRALIZED NEGOTIATED CONTRACT FOR THE ACQUISITION OF
VOTING SYSTEMS AND BALLOT MARKING OR OTHER VOTING DEVICES ACCESSIBLE TO
INDIVIDUALS WITH DISABILITIES AND RELATED SERVICES

New York State Contract #

Contractor Reference #

[INSERT: CONTRACTOR NAME]

DESIGNATED STATE CONTACTS: OGS Procurement Services Group		
Lori L. Bahan Purchasing Officer I Telephone No. (518) 474-5535 E-mail: lori.bahan@ogs.state.ny.us	Jamie Nusbaum Team Leader Telephone No. (518) 474-2387 Email: jamie.nusbaum@ogs.state.ny.us	Michele Reale Senior Attorney Telephone No. (518) 474-5607 Email: michele.reale@ogs.state.ny.us
DESIGNATED STATE CONTACTS: New York State Board of Elections		
Anna Svizzero Director of Election Operations Telephone No. (518) 473-5086 E-mail: asvizzero@elections.state.ny.us	Allison Carr Deputy Director of Election Operations Telephone No. (518) 473-5086 E-mail: acarr@elections.state.ny.us	Tarry Breads Administrative Project Manager Telephone No. (518) 473-5086 E-mail: tbreads@elections.state.ny.us
Robert Warren Certification Project Manager Telephone No. (518) 473-5086 E-mail: rwarren@elections.state.ny.us	John Ferri Voting Equipment Specialist II Telephone No. (518) 473-5086 E-mail: jferri@elections.state.ny.us	

The bid must be fully and properly executed by an authorized person. By signing you certify your express authority to sign on behalf of yourself, your company, or other entity and full knowledge and acceptance of this INVITATION FOR BIDS, Appendix A (Standard Clauses For New York State Contracts), Appendix B (OGS General Specifications), and State Finance Law §139-j and §139-k (Procurement Lobbying), and that all information provided is complete, true and accurate. By signing, bidder affirms that it understands and agrees to comply with the OGS procedures relative to permissible contacts as required by State Finance Law §139-j (3) and §139-j (6) (b). Information may be accessed at:
 Procurement Lobbying: <http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html>

THIS CONTRACT is for the acquisition (purchase or lease) of Voting Systems and Ballot Marking or Other Voting Devices Accessible to Individuals with Disabilities and Related Services and accessories, consumables, training, maintenance and other related services (including, but not limited to, consulting and training), made between the People of the State of New York, acting by and through the Commissioner of the Office of General Services (hereinafter "State" or "OGS") whose principal place of business is the 41st Floor, Corning Tower, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12242, pursuant to authority granted under New York State Finance Law, § 163, and _____ (hereinafter "Contractor"), with its principal place of business at:

LOT 2: BALLOT MARKING OR OTHER VOTING DEVICES ACCESSIBLE TO INDIVIDUALS WITH DISABILITIES:

The following are a portion of the specifications that bidders shall comply with when bidding on Lot II. Additional specifications will be provided through an addendum to this solicitation when they become available.

INSTRUCTION OF PERSONNEL:

At the time the bid is submitted, the vendor shall provide detailed information regarding in-person training as follows:

- The maximum number of participants per training session.
- The duration of training based on vendor-recommended roles and responsibilities.
- The cost and terms for training to include both regionalized and on-site county training
- The cost and terms for training in the procedures to be used to accomplish ballot configuration and ballot programming.

Within ten business days of acceptance by the Contractor of a Purchase Order, the Contractor and the Authorized User shall agree upon mutually-acceptable training dates for the contractor to provide live instruction by qualified personnel sufficient to ensure that the product is operating correctly and operator-maintained so as to perform to the full extent of its design capabilities. The Authorized Users shall designate personnel to receive instruction.

In addition, Contractors of BMDs shall, prior to delivery, provide training for Authorized User personnel in the following areas:

- Training on unpacking, assembling and acceptance testing of the equipment.
- Training for proper use of the equipment, including maintenance, storage and transportation procedures.
- Instruction on procedures to be followed by inspectors at polling places.

INSTRUCTION MATERIALS:

Prior to the commencement of any training, the Contractor(s) shall furnish to the Authorized User complete instruction materials, (video, graphics, audio or text) for the BMD and all accessibility features. These instruction materials shall include the following:

- Training on unpacking, assembling and acceptance testing of the equipment.
- Training on adjusting and aligning the equipment.
- Training for proper use of the equipment, including maintenance, storage and transportation procedures.
- Training in the procedures to be used to accomplish ballot face layout and ballot programming.
- Training on operating the product (including layout and interconnection diagrams and schematic and wiring diagrams).
- Training on preventive and corrective maintenance procedures (including complete part lists, manufacturer's catalog numbers, and ordering information, if applicable).
- Training on voter education on the use of the BMD and any accessibility devices (including methods to be used by eligible voters to mark a ballot).
- Training on procedures to be followed by inspectors at polling places.

All training materials shall also be provided to the Authorized Users at no additional cost in electronic version to enable the Authorized User to incorporate the training material in the Authorized User's training procedures and training manuals and outreach materials.

This requirement is separate from, and in addition to, any materials otherwise provided with the bid.

When any change is made in the operation or material of any feature or component of any BMD which has been approved pursuant to the provisions of this section, such BMD must be submitted for such re-examination and re-approval pursuant to the provisions defined herein as the state board of elections deems necessary.

If at any time after any BMD has been approved pursuant to the provisions of the Election Law, the State Board of Elections has any reason to believe that such BMD does not meet all the requirements for BMDs, it shall forthwith cause such BMD to be examined again in the manner prescribed herein. If the opinions in the report of such examinations do not state that such BMD can safely and properly be used by voters at elections, the NYSBOE shall forthwith rescind its approval of such BMD. After the date on which the approval of any BMD is rescinded, no BMD of such type may be used or purchased for use in this state. The NYSBOE may examine all BMDs of such type which were previously purchased, to determine if they may continue to be used in elections in this state.

Examination will have the following principal objectives:

- To demonstrate the ability of a voter to mark a ballot using the BMD.
- To demonstrate the ability of the BMD to mark a ballot accurately.
- To demonstrate the ability of the voter to verify their ballot, to include notification of any undervote(s), and/or overvote(s), if any and that the BMD allows the voter to correct same; if they choose.
- To demonstrate the ability of the voter to independently verify their ballot after the BMD has marked the ballot.
- To demonstrate that the BMD's hardware and software operate in a manner consistent with a voter's ability to mark a ballot.
- To demonstrate that the BMD's vendor-provided security requirements and security provisions are identified for each system function and operating mode, and that all features function as described.
- Independently identify any additional security procedures, tasks or features which the BMD shall accommodate, and verify that such additional requirements are in place and function as required.

Whenever the NYSBOE is satisfied that a BMD has been proven to meet or exceed these requirements and the vendor is able to provide documentation for the state board to establish that those requirements have been met, then the NYSBOE may, in its discretion, accept such documentation as satisfaction of the required tests.

Exhibit 5 contains samples of one (1) general election ballot, and three (3) primary ballots.

Source Code Escrow for Licensed Products and/or Services

Vendors shall be required to comply with the source code escrow provisions of the Election Law (Section 7-208) and Regulations (Section 6209.6(F)(10) and as set forth by the New York State Board of Elections.

TRAINING OF PERSONNEL:

Within ten business days of the acceptance by the contractor of a purchase order, the contractor shall provide training by qualified personnel sufficient to ensure that the product is operated and operator-maintained, so as to perform to the full extent of its design capabilities. The Purchaser shall designate personnel which are to receive instruction.

Contractors of Voting Systems and Ballot Marking or Other Voting Devices Accessible to Individuals with Disabilities and Related Services shall, prior to delivery, provide training for boards of elections personnel in the following areas:

- training on unpacking, assembling and acceptance testing of the equipment;
- training for proper use of the equipment, including maintenance, storage and transportation procedures;
- training in the procedures to be used to accomplish ballot face layout and ballot programming; and,
- provide instruction materials which include procedures to be followed by inspectors at polling places.

The vendor shall allow duplication of these materials, or shall supply sufficient copies for distribution to all elections inspectors.

(Continued)

Exhibit No. 1
New York State Election Law
Article 7
Title II

The New York State Election Law can be found at:
http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_8424:35_8445&_dad=portal&_schema=PORTAL

Exhibit No. 2

The New York State Code Rules and Regulations Regarding Voting System Standards can be found at:

<http://www.elections.state.ny.us/NYSBOE/law/6209Regulations.pdf>

New York State Office Of General Services
Procurement Services Group
Corning Tower Building
Empire State Plaza
Albany, New York 12242
<http://www.ogs.state.ny.us>

PURCHASING MEMORANDUM

CENTRALIZED CONTRACTS FOR THE ACQUISITION OF VOTING SYSTEMS AND BALLOT MARKING DEVICES

PR NUMBER: 21231

DATE: November 14, 2007

GROUP: 22300 - VOTING SYSTEMS & RELATED
SERVICES AND BALLOT MARKING OR
OTHER VOTING DEVICES ACCESSIBLE
TO INDIVIDUALS WITH DISABILITIES

**PLEASE ADDRESS INQUIRIES TO
DESIGNATED CONTACTS:**

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BID OPENING: Continuous Recruitment

Jamie Nusbaum
Team Leader
(518) 474-2387
jamie.nusbaum@ogs.state.ny.us

SUBJECT: Response To Questions Submitted On PR#21231

TO PROSPECTIVE BIDDERS:

In an effort to expedite matters we are providing the following answers to questions posed by the bidders. Please be advised that some additional questions are still being addressed and those answers will be provided through a subsequent purchasing memorandum as soon as possible.

Question 1:

Question: When will the number of Lot I devices required by the State be determined? The current bid states a maximum of 6,500 but no minimums are stated. (*Voting System Plan Document, paragraph 1*)

A: *Lot I systems are estimated at 20,000, in Voting System Plan Document, paragraph 1. Lot II is estimated at a maximum of 6,500. The numbers of devices will differ from county to county, and decisions of the Board, orders of the Court, and County Boards of Elections compliance plans will establish those numbers at a future date.*

Question 2:

Question: When will the additional Lot I requirements be distributed? (*Contract Template, page 17, paragraph 1*)

A: *Page 17, paragraph 1 indicated that additional specifications would be provided for Lot II not Lot I. Those specifications were provided through a Purchasing Memorandum on November 6, 2007.*

(continued)

A: a. *The vendor is required to maintain the bond as required by Section 7-204 of the Election Law and should work with their surety company to achieve compliance.*

b. *The vendor is required to maintain the bond as required by Section 7-204 of the Election Law and should work with their surety company to achieve compliance.*

Question 16:

Question: Page 15-Contract Template: Detailed Specifications, Lot 1, Voting Systems and Related Services - Does OGS require the vendor to respond to each requirement in Exhibit 1 and 2? (i.e., NYS Election Law 7-200 and NYS Code Rules and Regulations 6209)?

A: Yes

Question 17:

Question: Page 17-Contract Template: Detailed Specifications, Lot 2, Ballot Marking or Other Voting Device Accessible to Individuals with Disabilities-What is the OGS schedule for releasing the Addendum containing additional specifications for BMD?

A: *The Addendum was released through a Purchasing Memorandum on November 6, 2007.*

Question: Once released, does OGS require the vendor to respond to each specification included in the Addendum?

A: Yes.

Question 18:

Question: Page 18-Contract Template: Submission, Testing and Examination of BMDs Requirement States: "The vendor shall submit with the bid, completed ballot configuration and ballot coding based upon the pre-qualification test data as defined in Exhibit A?"

A: *Exhibit A is referred to as Exhibit 5 in the solicitation.*

Question 19:

Question: Page 19-Contract Template: Submission, Testing and Examination of BMDs-Submission to the NYSBOE Requirement States: "Media containing the test general election and test primary election ballot definition code in all required audio translations of alternative languages, including English."

Is the referenced test code to be based on the test ballot included as Exhibit 5?

A: Yes

Question 20:

Question: Page 19-Contract Template: Submission, Testing and Examination of BMDs-Examination. Requirement States: "The BMD shall be examined by examiners or testing laboratories to be selected for such purpose by the NYSBOE....." Are the testing requirements specified in this IFB referencing official NYS election system certification, or is the specified test a separate vendor qualification test?

A: *Testing is expected to be a certification to the ballot marking device requirements as provided, rather than a voting system certification.*

(continued)

New York State Office Of General Services
Procurement Services Group
Corning Tower Building
Empire State Plaza
Albany, New York 12242
<http://www.ogs.state.ny.us>

PURCHASING MEMORANDUM

CENTRALIZED CONTRACTS FOR THE ACQUISITION OF VOTING SYSTEMS AND BALLOT MARKING DEVICES

PR NUMBER: 21231

DATE: November 6, 2007

GROUP: 22300 - VOTING SYSTEMS & RELATED SERVICES AND BALLOT MARKING OR OTHER VOTING DEVICES ACCESSIBLE TO INDIVIDUALS WITH DISABILITIES

PLEASE ADDRESS INQUIRIES TO DESIGNATED CONTACTS:

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BID OPENING: Continuous Recruitment

Jamie Nusbaum
Team Leader
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SUBJECT: Additional Lot II Specifications, the Extension of the Deadline for Letters of Intent to Bid and the Submission of Questions, Revised Calendar of Events, and Information on the Procedure to be Followed in the Event of a Discrepancy Between Pricing Information Submitted With the Solicitation; and Clarification of Exhibits:

TO PROSPECTIVE BIDDERS:

The following are the additional specifications for Lot II which should be added to page 17 of the solicitation under the heading: Lot 2: BALLOT MARKING OR OTHER VOTING DEVICES ACCESSIBLE TO INDIVIDUALS WITH DIASBILITIES. These specifications and the other Lot II specifications that were included in the solicitation constitute the complete specifications for Lot II.

The NYSBOE intends to approve for use at elections in New York State conducted after September 1, 2008, ballot marking devices (BMD) that meet the accessibility provisions of the Help America Vote Act of 2002 (Public Law 107-252) and the provisions contained herein.

In order for a BMD to be considered for approval by the NYSBOE for use, it shall comply with the minimum requirements stated herein:

All capabilities to electronically record or tabulate a vote must be inoperable or absent. The intention of this requirement is to preclude the use of the BMD as an electronic vote recording or tallying system until such time, if any, as those features of such BMD are certified for use by the NYSBOE.¹

¹ Examples of what would not be acceptable are: The printing or displaying of the election results when the polls are closed for the day, or Allowing a poll worker to have the ability to view or manipulate electronically recorded vote information.

(continued)

Accessibility provisions for usability by voters who are disabled:

- Be constructed to allow a voter with disabilities to mark his or her vote choices.
- Permit inspectors of elections to easily and safely place the BMD in an accessible position.
- Be equipped with a voting device with tactile discernible controls, designed pursuant to Election Law Section 7-202 to meet the needs of voters with limited reach and/or hand dexterity, allow them the ability to mark their ballot, and shall include, for example: raised buttons of different shapes and colors, large or raised numbers or letters, and light pressure switches.
- Be equipped with an audio voting feature, pursuant to Election Law Section 7-202. The audio feature shall be able to be used either independently or simultaneously with the on-screen display. The audio voting feature shall allow for the complete content of the ballot in all required languages, to be communicated to the voter in a voice which permits a voter who is blind or visually impaired to mark a secret ballot using voice-only or tactile discernible controls. The audio voting feature shall include a feature that, if selected, will allow a voter to control the volume of the voice within the ranges contained in the 2005 Voluntary Voting System Guidelines.
- Be equipped with a pneumatic switch voting attachment which can be operated orally by gentle pressure or the creation of a vacuum through the inhalation or exhalation of air by the voter including, but not limited to, a sip-and-puff switch voting attachment.

Bidders shall provide documentation, cost information and sources for any additional accessibility devices which may work in conjunction with their proposed system, including but not limited to rocker paddles, if available.

Ballot provisions:

- As to the printing and arrangement of ballots, all ballots shall meet the requirements as to form and content provided in the Election Law.
- Ballots shall be printed in black print on a white background and, in the case of a primary, allow for only the identification portion of the ballot to appear in different colors to identify each political party according to the color assigned to such party pursuant to law.
- Ballots shall include machine-readable code and also human-readable code, to identify different ballot styles.

The types of ballots used and their form, type size and arrangement must be approved by the NYSBOE.

Provisions for noise level:

- BMDs shall be constructed in a manner so that noise levels of the system or equipment during operation will not interfere with the duties of the election inspectors or the voting public.
- The noise level of write-in components of the BMD shall be so minimal that it will be virtually impossible under normal conditions for someone at the table used by the inspectors of elections to determine that a write-in vote is being marked or has been marked.

(continued)

Provisions for voter privacy:

- The BMD shall be constructed so that no one within the polling site will be able to see how a voter is marking their ballot.
- The BMD shall be provided with a curtain, screen, shield or other privacy device, which shall allow voters with a range of disabilities to, either electronically or manually, open, close or otherwise use the device with ease when entering and exiting the BMD.
- The privacy and anonymity of all voters shall be preserved during the process of marking and verifying ballot choices.
- The privacy and anonymity of all voters whose paper records contain any of the alternative languages chosen for making ballot selections shall be maintained.
- Information for the purposes of auditing paper records that may permit a voter to reveal his or her ballot choices shall be displayed so as not to be memorable to the voter.

Ballot Marking Device integrity and security:

- The BMD shall not include any device or functionality potentially capable of externally transmitting or receiving data via the internet or via radio waves or via other wireless means.
- The BMD must be secure against attempts to interfere with correct system operation. The bidder shall identify each potential point of attack. For each potential point of attack, the bidder shall identify the technical safeguards embodied in the BMD to defend against attack, and the procedural safeguards that the vendor has recommended be followed by the election administrators to further defend against that attack. Each defense shall be classified as preventative, if it prevents the attack in the first place; detective if it allows detection of an attack; or corrective if it allows correction of the damage done by an attack. Security requirements and provisions shall include the ability of the system to detect, prevent, log and recover from the broad range of security risks identified. These procedures shall also examine system capabilities and safeguards claimed by the vendor to prevent interference with correct system operations. The NYSBOE, with the assistance of a contractor(s), shall conduct tests to confirm that the security requirements defined herein have been completely addressed. Notwithstanding any other provisions of these requirements, the NYSBOE shall determine whether all or a portion of such security requirements and security provisions shall be available for public inspection, but shall exclude any information which compromises the security of the BMD.
- The BMD shall contain software and hardware required to perform a diagnostic test of system status, to demonstrate that the system is fully operational and that all voting positions are operable.
- The BMD printers shall be physically secure from tampering.
- The BMD shall communicate with its printers over a standard, publicly documented printer port using a standard communication protocol.
- The printer shall not be permitted to communicate with any other system or machine other than the single BMD to which it is connected.
- The printer shall only be able to function as a printer: it cannot store information or contain or provide any services that are not essential to system function, (e.g., provide copier or fax functions) or have network capability.

(continued)

- The BMD shall provide for the ability for poll workers, prior to the opening of polls on election day, to demonstrate that the ballot storage devices are empty.
- Tamper-evident seals or physical security measures shall protect the connection between the printer and the BMD, so that the connection cannot be broken or interfered with without leaving extensive and obvious evidence.
- The BMD's printers shall be highly reliable and easily maintained.
- The BMD should include a printer port to which a commercial off-the-shelf printer could be attached for the purposes of printing paper records and any additional records.
- The BMD shall detect errors and malfunctions such as paper jams or low supplies of consumables such as paper and ink that may prevent paper records from being correctly displayed and printed.
- If an error or malfunction occurs, the BMD attached to the malfunctioning printer shall suspend ballot marking operations and shall present a clear indication to the voter and election workers of the error or malfunction.
- The bidder shall provide at the time of the bid, estimated quantities of supplies of consumable items such as paper and printer ink necessary to operate from opening to closing of polls for each fifty (50) ballots voted.
- The bidder shall also include on its price lists submitted and the completed price list for Lot II provided in the solicitation price list cost information and shall also provide contact information for procurement of supplies of consumable items necessary to operate the device.
- Printing devices should contain paper and ink of sufficient capacity so as not to require reloading or opening equipment covers or enclosures and circumventing security features, or reloading shall be able to be accomplished with minimal disruption to voting and without circumvention of security features such as seals.
- Bidder documentation shall include specifications regarding the temperature and humidity ranges specified by the manufacturer for the storage of printer consumables.
- Bidder documentation shall include procedures for investigating and resolving malfunctions including but not limited to unreadable paper records, paper jams, low ink, misfeeds and power failures.
- Bidder documentation shall include procedures for ensuring, in the case of malfunctions, that paper records are correctly marked.
- Protective coverings intended to be transparent on BMDs shall be maintainable via a predefined cleaning process.
- The paper record shall be sturdy, clean, and of sufficient durability to be used for manual tabulation. The paper record shall be able to be stored and remain fully readable without degradation for 22 months within the temperature and humidity ranges specified by the manufacturer, but at a minimum temperature range of at least from -20 degrees to 140 degrees Fahrenheit, and at humidity as high as 98%.

(continued)

In addition to the requirements above, a BMD shall meet the following provisions:

- The BMD shall be constructed so as to allow for a voter to vote for all candidates who may be nominated and on all ballot proposals which may be submitted.
- The BMD shall provide a method for a voter to vote indicating their selection for any person for any office, whether or not nominated as a candidate (write-in) by any party or independent body.
- The BMD shall be constructed so that a voter cannot mark a ballot for a candidate or for a ballot proposal for whom or on which he or she is not lawfully entitled to vote.
- The BMD must prevent voters from over-voting and indicate to the voter specific contests or ballot issues for which no selection or an insufficient number of selections has been made, and provide the voter with the opportunity to correct the ballot before the ballot is marked.
- The BMD shall provide an opportunity such that any voter, including voters who are blind or visually impaired, may privately and independently verify their selections and the ability to privately and independently change such selections or correct any error before the ballot is marked.
- The BMD shall provide a feature to permit a voter to independently verify their paper ballot after it has been marked, including voters who are blind or visually impaired.
- The BMD shall provide a lock or locks, or other device or devices, the use of which, immediately after the polls are closed or the operation of the BMD for such election is completed, will absolutely secure the BMD and prevent the marking of additional ballots.
- The BMD shall provide sufficient space to display the ballot configuration provided, however, in the alternative, such information may be displayed within the official ballot.
- The BMD shall retain all paper produced in a manner intended and designed to protect the privacy of the voter. Votes shall allow for manual tabulation and shall be preserved in accordance with the provisions of Section 3-222 of the Election Law.
- The BMD shall provide sufficient illumination to enable the voter to see the ballot.
- The BMD shall contain a device which enables all the election inspectors and poll watchers at such polling place to determine when the BMD has been activated for voting and when the voter has completed marking his or her ballot.
- The BMD shall permit the primaries of at least five parties to be conducted at a single election utilizing the BMD, and accommodate such number of different ballot styles at a single election as may be required by the NYSBOE and/or the county board of elections.
- The BMD shall be capable of conducting both pre-election and post-election testing of the BMD that demonstrates accurate ballot layout presentation and the ability to accurately mark ballots reflecting the choices made by voters.

(continued)

- The BMD shall permit alternative language accessibility pursuant to the requirements of section 203 of the Voting Rights Act of 1965 (42 U.S.C. 1973aa-1a) such that it must have the capacity to display the full ballot in the alternative languages required by the federal Voting Rights Act if such BMD is to be used where such alternative languages are required or where the local board deems such feature necessary.
- The bidder shall provide at the time of the bid documentation information and shall include on the price lists submitted and the completed price list for Lot II provided in the solicitation costs related to the addition of new language capabilities which may be required by reason of demographic changes identified by the decennial federal census.
- The BMD shall provide a battery power source in the event that the electric supply used to make the BMD function is disrupted. The battery power source shall operate the device and allow for the marking of ballots for a period not less than 2 hours to ensure that the device can shut down prior to the battery power failure, and can resume functionality when power is provided or restored without significant or intrusive power-up procedures. Such batteries must be rechargeable and have a minimum five-year life when used under normal conditions. In the event of a power failure, the device shall perform a normal shut-down not less than one hour before battery power is depleted, and shall notify the election inspector that the system will do so.
- The BMD shall make a paper record which shall allow for a manual tabulation and allow for preservation in accordance with the provisions of Election Law, Section 3-222.
- The BMD shall be capable of showing the information on both the display screen and the paper in a font size of 3.0 mm, and should be capable of showing the information in at least two font ranges, a) 3.0-4.0 mm and b) 6.3-9.0 mm, under control of the voter. The voter shall also be able to control the contrast of the display screen.
- The BMD shall be accompanied by instructions for performing the verification process made available to the voter, in accessible formats, in a location on or near the BMD.
- The BMD shall display and print a paper record in any of the alternative languages chosen for making ballot selections. Candidate names and other markings not related to the ballot selection on the paper record shall appear in English.
- The BMD shall allow the voter to approve or reject the paper record.
- Bidder documentation shall include procedures for returning a BMD to correct operation after a voter has used it incompletely or incorrectly.
- The bidder shall, without additional cost, provide to the purchaser a five-year guarantee of parts and service that such BMD equipment shall be kept in good working order. Shipping costs for any factory repairs or part replacement will be incurred by the bidder.
- The BMD shall provide a means by which the ballot configuration may be positively verified to ensure that it corresponds to the format of the ballot face and the election configuration.
- The bidder shall include on its price lists submitted and the completed price list for Lot II provided in the solicitation cost terms and shall provide documentation to include alternative options for BMD printers that are capable of printing ballots in a size where the measurement of the smallest width of such ballot is greater than 8-1/2 inches.

(continued)

Please be advised that Letters of Intent can now be submitted by Bidders on or after November 8, 2007. In addition, Bidders will now have until Thursday November 8, 2007 to submit Questions. Accordingly, the Calendar of Events and Letters of Intent sections on page 2 are revised as follows.

CALENDAR OF EVENTS:

The list below outlines a preliminary schedule for important action dates. The remaining dates will be provided through a separate Purchasing Memorandum. In addition, if OGS and the New York State Board of Elections (NYSBOE) find it necessary to change the dates, notification will be accomplished through an addendum to the IFB. Dates after the submission deadline are tentative.

Advertisement in Contract Reporter	September 24, 2007
Distribution of Solicitation	October 17, 2007
Letter of Intent (Mandatory)	On or After November 8, 2007
Receipt of Proposals and Continuous Recruitment	On or After November 23, 2007
Completion of Negotiations	
Vendor Responsibility Review (Estimated)	TBD
Submittal of Draft Award Document to BOE for Review (Estimated)	TBD
BOE Review (Estimated)	TBD
Approval by OSC (Estimated)	TBD

LETTER OF INTENT TO BID

Vendors planning to submit a proposal in response to this IFB must indicate their intent to do so by sending a Letter of Intent to Bid to the OGS' Designated Contacts named below. This letter must specify the name of the company, the name of the company's primary contact person for the purposes of all future communication regarding the IFB and bidder's proposal, and the contact person's address, telephone number, fax number and e-mail address. This letter must specifically reference the IFB # and state whether they intend to bid on Lot, Lot II or both.

The Letter of Intent to Bid may be e-mailed or faxed. Letters must be received on or after **November 8, 2007** by:

Designated Contact:

Jamie Nusbaum
Team Leader

OGS Procurement Services Group
NYS Office of General Services
Corning Tower, 38th Floor
Empire State Plaza
Albany, New York 12242
(518) 474-2387

Fax: (518) 474-5052

Email: jamie.nusbaum@ogs.state.ny.us

In addition, page 4 of the solicitation is revised as follows:

INQUIRIES/ISSUING OFFICE:

All inquiries concerning this solicitation shall be addressed to the following designated contacts:

PRIMARY CONTACT SECONDARY CONTACT SECONDARY CONTACT

Lori L. Bahan NYS Office of General Services Procurement Services Corning Tower - 38th Floor Empire State Plaza Albany, New York 12242 Phone No.: (518) 474-5535 FAX No. (518) 474-5052 E-Mail:lori.bahan@ogs.state.ny.us	Jamie Nusbaum NYS Office of General Services Group Procurement Services Group Corning Tower - 38th Floor Empire State Plaza Albany, New York 12242 Phone No.: (518) 474-2387 FAX No. (518) 474-5052 E-Mail:jamie.nusbaum@ogs.state.ny.us	Michele Reale NYS Office of General Services Legal Services Corning Tower - 41st Floor Empire State Plaza Albany, New York 12242 Phone No.: (518) 474-5607 FAX No. (518) 473-4973 E-Mail:michele.reale@ogs.state.ny.us
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(continued)

All questions should be submitted in writing no later than two weeks prior to the date on which **Proposals and Continuous Recruitment Begins (November 23, 2007)** citing the particular bid section and paragraph number. The prospective bidder should notify the DESIGNATED CONTACT of any term, condition, etc., that precludes the vendor from submitting a compliant, responsive bid. Bidders are cautioned to read this document thoroughly to become familiar with all aspects of the bid. Prospective Bidders should note that all clarifications and exceptions including those relating to the terms and conditions of the contract are to be resolved prior to the submission of a bid. Bidders entering into a contract with the State are expected to comply with all the terms and conditions contained herein. Answers to all questions of a substantive nature will be given to all Prospective Bidders in the form of a formal addendum which will become part of the ensuing contract.

Finally, the following sentence is added to the PRICELISTS AND CATALOGS paragraph on page 11 of the solicitation :

Please be advised that in the event that there is a discrepancy between the price lists submitted and the complete pricing forms provided in the solicitation on pages 28 through 37, unless obviously erroneous, the lower price will prevail.

In addition, please be advised of the following revision to the solicitation:

Page 18:
Submission with Bid.

The vendor shall submit with the bid, completed ballot configuration and ballot coding based upon the prequalification test data as defined in **Exhibit 5**.

Any questions should be directed to the Purchasing Officer listed on this announcement.

All other terms and conditions of the bid solicitation remain unchanged. All bids shall be considered on the basis of this amendment.

If submitting a bid, this letter should be signed, attached to, and made a part of your bid.

BID OF (COMPANY): _____

ADDRESS: _____

CITY, STATE, ZIP: _____

SIGNATURE OF BIDDER: _____

PRINTED COPY OF SIGNATURE: _____ DATE: _____

(continued)

Exhibit C


[CONTACT US](#)

BOARD OF ELECTIONS

[Home](#)
[Public](#)
[Information](#)
[Voting](#)
[Help America](#)
[Vote Act](#)
[Campaign](#)
[Finance](#)
[Running](#)
[For Office](#)
[Enrollments](#)
[Election Results](#)
[Federal & State Statutes](#)
[Voting Systems](#)
[Ballot Marking Devices](#)
[Statewide Database](#)

TOPICS

- [Public Comment](#)
- [Voting System Law, Regulations, and Proposed Regulations](#)
- [Voting Machine Replacement Project Task List](#)
- [Electronic Voting Machine Implementation - Timeline Analysis](#)
- [Vendor Applications for Certification](#)
- [Voting Systems Test Documents](#)
- [User Rate Assessment Study](#)
- [Citizen's Election Modernization Advisory Committee - CEMAC](#)

Public Comment

Email Public Comments to the [Public Information Officer](#).

- [Proposed Resolution Concerning Fees for Testing of Open Source Software \(PDF\)](#)
- [Open Source Code Review - NYSTEC Draft](#)
- [California Report](#)

Voting System Law, Regulations, and Proposed Regulations

Part 6210:

- [Proposed Regulations - Minimum Number of Voting Machines \(PDF\)\(Updated 11/07/2007\)](#)
 - Public comment period for these regulations ends at the close of business on January 22, 2008. Please send any comments to Lee Daghlian at ldaghlian@elections.state.ny.us.

Part 6209:

- [Rules and Regulations Part 6209 Voting Systems Standards \(PDF\) \(Revised-2007\)](#)

Voting Machine Replacement Project

- [Project Task List - 11/06 \(PDF\) \(Subject to Change\)](#)

Voting Machine Implementation

- [Analysis Report - 11/06 \(PDF\)](#)

Voting Systems Test Documents

- [Master Test Plan - Draft 08/06 \(PDF\)](#)
- [Security Requirements Test Matrix - Draft 09/06 \(PDF\)](#)
- [Independent Review of Master & Security Master Test Plan 09/06 \(PDF\)](#)
- [Independent Review - Functional Security Test Plans 12/06 \(PDF\)](#)
- [Security Requirements Test Plan 09/06 \(PDF\)](#)
- [Independent Review - Security Master Test Plan 10/06 \(PDF\)](#)
- [Independent Review - Source Code Test Plan 11/06 \(PDF\)](#)
- [2nd Independent Review - Source Code Test Plan 12/06 \(PDF\)](#)
- [Digital Signatures & Electronic Records Requirements 08/07 \(PDF\)](#)
- [Understanding the 2005 COTS Standards 12/06 \(PDF\)](#)

User Rate Assessment Study

- [AIR Voter Machine Rate Assessment Study - Technical Proposal \(PDF\)](#)
- [AIR Voter System User Rate Assessment Study - Draft \(PDF\)](#)

Citizen's Election Modernization Advisory Committee

- [Member Names and Addresses \(PDF\)](#)

Vendor Applications

VENDOR	SYSTEM TYPE	NAME	APPLICATION	TESTING
Avante	Ballot Marking Device	Vote Trakker EVC308 SPR BMD	Avante Vote Trakker EVC308 SPR Application (PDF)	Pending
Avante	Ballot Marking Device	Vote Trakker EVC308-FF BMD	Avante Vote Trakker EVC308-FF Application (PDF)	Pending
Avante	DRE	Vote Trakker EVC308-FF-42	Avante Vote Trakker EVC308-FF-42 Application (PDF)	Pending

Avante	Precinct Based Opscan	Vote Trakker OVT-EVC308	<u>Avante Vote Trakker OVT-EVC308 Application (PDF)</u>	Pending
ES&S	Ballot Marking Device	AutoMARK 1.3	<u>ES&S AutoMARK1.3 Application (PDF)</u>	Pending
ES&S	Precinct Based Opscan	Unity New York 2.0.0.0 with AutoMark 1.4	<u>ES&S Unity New York 2.0.0.0 with AutoMark 1.4 Application (PDF)</u>	Pending
Liberty Election Systems	Ballot Marking Device	LibertyMark EPU 1	<u>Liberty Election Systems LibertyMark EPU 1 Application (PDF)</u>	Pending
Liberty Election Systems	DRE	LibertyVote ESU 1	<u>Liberty Election Systems LibertyVote ESU 1 Application (PDF)</u>	Pending
Premier Election Solutions	Ballot Marking Device	Automark VAT	<u>Premier Automark VAT Application (PDF)</u>	Pending
Premier Election Solutions	Central Count Absentee	Premier Central Scan	<u>Premier Central Count Absentee Application (PDF)</u>	Pending
Premier Election Solutions	Precinct Based Opscan	AccuVote OSX	<u>Premier AccuVote OSX Application</u>	Pending

			(PDF)	
Sequoia	Ballot Marking Device	Sequoia Democracy Suite 2.0 with ImageCast	<u>Sequoia Democracy Suite 2.0 Application (PDF)</u>	Pending
Sequoia	Precinct Based Opscan	Sequoia Democracy Suite 2.0	<u>Sequoia Democracy Suite 2.0 Application (PDF)</u>	Pending

2007 NYSBOE Application for Certification [DOC](#) [PDF](#)

2007 NYSBOE Application for Modification of Certified Voting System [DOC](#) [PDF](#)

Exhibit D

NEW YORK STATE BOARD OF ELECTIONS
ELECTION OPERATIONS UNIT - ATTN: TARRY A. BREADS
40 STEUBEN STREET
ALBANY, NEW YORK 12207

APPLICATION FOR CERTIFICATION OF VOTING SYSTEM

NAME OF VENDOR: Avante International Technology, Inc.
CONTACT PERSON: Rick Gleim
ADDRESS OF COMPANY: 70 Washington Road Princeton Junction, NJ
TELEPHONE NUMBER: (609) 799-8896 FAX NUMBER: (609) 799-9308
E-MAIL ADDRESS: rgleim@aitechnology.com CELL PHONE:
[REDACTED]

2007 DEC 20 PM 3:10

FILED
NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK

DESCRIPTION OF VOTING SYSTEM

UPDATE APPLICATION INFORMATION. CHECK ALREADY SUBMITTED

Ballot marking device (BMD) composed of a touchscreen, printer, UPS and accessible voting capabilities. Optional choice printers may produce marked ballots of sizes either 8.5"x14" or 11"x17". Pressing choices on a touchscreen or using an accessible keyboard and audio assist accomplishes voters' choices.

VOTING SYSTEM HARDWARE INFORMATION

SELECT ONE: Per Solicitation 21231

LOT I

LOT II XXX

(SUBMIT SEPARATE APPLICATIONS FOR EACH SYSTEM)

NAME OF SYSTEM: VOTE-TRAKKER
MODEL NUMBER: EVC308 SPR BMD

TYPE OF SYSTEM
(Select one)

DIRECT RECORD ELECTRONIC (DRE)
PRECINCT (OPTICAL SCAN)

CENTRAL COUNT ABSENTEE
OTHER: (PLEASE DESCRIBE BELOW)XXX

DESCRIPTION (IF OTHER)

Ballot Marking system providing accessibility to sighted and handicapped voters. Voters make choices by pressing on a touchscreen or making choices with a special keyboard and audio assistance. COTS printers capable of printing 8.5x11" or 11x17" full-face ballots may be attached. Two duplex printers have been submitted with the system.

FIRMWARE AND SOFTWARE RELEASE INFORMATION

FIRMWARE RELEASE #: AMVT 1.1.0

EMS BALLOT DEFINITION SOFTWARE RELEASE #: EMS 5.4.0

EMS ACCUMULATION SOFTWARE RELEASE #: EMS 5.4.0

(USE ADDITIONAL SHEETS IF NECESSARY)

CONDITIONAL CERTIFICATION

IF SEEKING CONDITIONAL CERTIFICATION, WHICH LANGUAGES IN ADDITION TO ENGLISH WILL BE ACCOMMODATED BY THIS SYSTEM: Spanish, Korean, Mandarin, and Cantonese

GENERAL INFORMATION

DO YOU OWN ALL RIGHTS TO THIS EQUIPMENT? **YES** XX **NO**

IF NOT, PLEASE EXPLAIN:

DATE VOTING SYSTEM AND USER DOCUMENTATION WILL BE DELIVERED TO THE NEW YORK STATE BOARD OF ELECTION FOR EXAMINATION: Revised system approximately 01/03/08

TYPE OF BUSINESS\ORGANIZATION: **CORPORATION** XX **PARTNERSHIP** **INDIVIDUAL**

IF A CORPORATION, STATE OF INCORPORATION:

1)	AUTHORIZED TO DO BUSINESS IN NYS?	YES	XX	NO
2)	MAINTAIN AN OFFICE IN NYS?	YES		NO XX
3)	INDEPENDENTLY OWNED?	YES	XX	NO

IF NOT INDEPENDENTLY OWNED, NAME AND ADDRESS OF PARENT COMPANY:

IS ANY PART OF THE SYSTEM MANUFACTURED OR ASSEMBLED BY ANOTHER COMPANY? ****YES** **NO**

IF "YES," NAME & ADDRESS: **** Arrow Electronics Melville, New York may handle Assembly depending on volume**

APPLICATION REQUIREMENTS

A check made payable to the STATE BOARD OF ELECTIONS in the amount of \$5,000 to cover the cost of certification shall be deposited in a State Special Revenue Account. Notice shall be provided to vendor when additional funds are required to be deposited. Vendor must submit full face ballot with the application: For a DRE submit a screen shot showing the ballot layout; for Op-Scan submit a paper ballot. Vendor shall also submit all attestations on their company letterhead. The attestations shall meet the following requirements of New York regulations: 6209.4(H) 1-4, 6209.4(J) and 6209.5(G).

ATTESTATIONS

I HEREBY AGREE TO PROVIDE THE VOTING SYSTEM AND TO FURNISH ALL DOCUMENTATION REQUIRED BY PART 6209 OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE BOARD OF ELECTIONS OR ITS DESIGNEE UPON DEMAND AND FURTHER AGREE TO REIMBURSE THE STATE BOARD FOR THE COST OF EXAMINATION WITHIN THIRTY (30) DAYS OF RECEIPT OF NOTIFICATION OF SUCH COST. I UNDERSTAND THAT I MAY BE REQUIRED TO PLACE THE VOING SYSTEM IN THE STATE BOARD'S POSSESSION FOR AS LONG AS SUCH SYSTEM IS IN USE IN NEW YORK STATE.

I HEREBY AFFIRM THE FOLLOWING OBLIGATIONS UNDER SECTION 6209.4:

THE SUBMITTED VOTING SYSTEM COMPLIES WITH ALL APPLICABLE RULES ADOPTED BY THE STATE BOARD, AND WITH ALL APPLICABLE 2005 VOTING SYSTEM GUIDELINES NOT INCONSISTENT WITH STATE LAW OR THESE REGULATIONS, AND IS SUITABLE FOR USE BY VOTERS.

THE VENDOR WILL QUOTE AND PROVIDE A STATEWIDE, UNIFORM PRICE FOR EACH UNIT OF THE VOTING SYSTEM'S EQUIPMENT.

THE SUBMITTED VOTING SYSTEM'S SOFTWARE DOES NOT CONTAIN ANY CODE, PROCEDURES OR OTHER MATERIAL WHICH MAY DISABLE, DAMAGE, DISARM OR OTHERWISE AFFECT THE PROPER OPERATION OF THE VOTING SYSTEM, ANY HARDWARE, OR ANY COMPUTER SYSTEM OR OTHER PROPERTY OF THE STATE BOARD OR COUNTY BOARD.

ANY SUBMITTED VOTING SYSTEM PROVIDES METHODS THROUGH SECURITY SEALS OR DEVICE LOCKS TO PHYSICALLY SECURE AGAINST ATTEMPTS TO INTERFERE WITH CORRECT SYSTEM OPERATIONS. SUCH PHYSICAL SECURITY SHALL GUARD ACCESS TO MACHINE PANELS, DOORS, SWITCHES, SLOTS, PORTS, PERIPHERAL DEVICES, FIREWARE AND SOFTWARE.

ALL VENDORS SHALL SUBMIT WITH THEIR APPLICATION FORMS, INFORMATION REGARDING PAST OR PENDING COURT CASES INVOLVING THEIR VOTING SYSTEMS OR ITS MAJOR COMPONENTS, ANY EVIDENCE OF FRAUD, FAULTY SYSTEMS, OR FAILURE TO CORRECT PAST PROBLEMS.

I HEREBY AFFIRM ALL OBLIGATIONS UNDER SECTION 6209.5, INCLUDING THE REQUIREMENT FOR DISCLOSURE OF ANY PECUNIARY INTEREST IN OR ANY DIRECT OR INDIRECT CONTROL OVER ANY TESTING LABORATORY WHICH MAY BE USED IN CONNECTION WITH THE CERTIFICATION OR ACQUISITION OF ANY VOTING SYSTEM.

12/17/07

DATE



SIGNATURE OF APPLICANT

President/CEO

TITLE

Exhibit E

read the full face ballot, but a blind voter will not be able to see a full face ballot on the screen either.

And the Automark ends with a full face ballot that has been marked by the ballot marking device.

So that it is my view that that device does comply with that particular statutory requirement.

I will leave it to my Republican colleagues to make the arguments to the contrary if they choose to do so.

Certainly unofficially that was what the Republican staff at the board indicated on Friday.

On the other side we have two submissions from Avante and we have the submission from Liberty.

Both submissions from Avante I feel fall woefully short.

First of all, the Avante machines themselves are prototype models.

They are not fully developed.

And just as we looked at them on Friday, we could see lots of kinks in the machines.

One of the machines crashed as we were doing a fairly normal voter transaction on the machine.

The machines start out by flashing what purports to be a full face ballot.

But if you freeze frame the --

Freeze the frame on the machine that is displayed, the screen is so small that even if you take a magnifying device and magnify what is displayed, it does not display the actual names of the candidates or the political parties of the candidates.

So that that screen which flashes when it is initially started in any view does not comply with section seven-104.

Again I leave it to my Republican colleagues on whether they disagree with me.

I think informally and certainly I don't bind them to that, but informally on Friday they indicated that they were disinclined to approve either of those Avante machines for selection by the counties.

And that leaves us with the Liberty machine which many of us have been familiar with for many years.

Oh, and before I move on to Liberty, I just want to say that I do find it disappointing that we are taking Avante out of the ballot.

Avante is a small company based in Princeton with the highest integrity.

They tried to be as responsive as they can.

I cannot stop giving them credit that they were the first vendor anywhere in the country to actually develop and create a voting machine that used a voter verifiable paper audit trail.

They did that in 2001, 2002.

You may recall the first time it was ever displayed was at the winter conference in 2002.

And up until the time that Avante actually made the machine and showed that a vote verifiable audit paper trail was possible, other vendors were saying that it was not possible and they could not do it.

Once Avante created that machine, Avante basically forced other vendors to follow suit so that thousand 35 states including New York provide for a voter verifiable audit paper trail whenever a direct recording electronic voting machine is used.

I give them credit for that.

I wish they could have been able to meet our deadlines and stay in the competition.

And it is with regret that they have been unable to do that in my view.

So that leaves us with the Liberty machine.

The Liberty machine has two problems as a ballot marking device.

The first problem is that it doesn't create a ballot.

New York law defines a ballot in three places.

And in section 110118 and then I think it's eight and 18 are the subdivisions that define the ballot in the definitions section and then again we've election law seven-104, the full face ballot requirement.

That says what a ballot is.

Now, the Liberty machine does print out a voter verifiable paper audit trail, but it does

Therefore, I'm encouraging my Commissioners to vote yes.

>> NEIL KELLEHER: Don't you wish you had the opportunity to vote on this yourself?

(Chorus of yes and no.)

>> NEIL KELLEHER: But it's going to be taken away from you.

I vote aye.

>> HELENA MOSES DONOHUE: Aye.

And the fifth one.

>> DOUGLAS KELLNER: Let me announce the result.

Two votes in favor, one oppose the.

It fails to gain the required three votes.

>> HELENA MOSES DONOHUE: The last one is ES and S Automark with modification.

>> DOUGLAS KELLNER: All right.

I have the same remarks as with respect to the Premiere Automark, that the

It's my opinion that the system as originally submitted did comply with the help America vote act and New York legal requirements.

I have no objection to the modification and so I will vote aye.

>> ALLISON: With the modifications, vote yes with the modifications.

>> HELENA MOSES DONOHUE: With the modifications.

>> NEIL KELLEHER: And I vote aye with modifications.

>> HELENA MOSES DONOHUE: I'm sorry, there is one more.

The Avante ballot marking device ops scan.

>> ALLISON: No on that one.

>> DOUGLAS KELLNER: So, with respect to the Avante optical scan ballot marking device, it's the same issues that it presented what purported

to be a full face ballot for three seconds.

But if you actually freeze frame it and magnify it it's illegible because the pixels are so small that when they are magnified, they are not legible.

So it did not comply with the ballot requirements 7- 104 and then in addition there was no adequate means of independent verification

as required by election law 7- 2021E and did not comply with the help America vote act disabilities requirements.

>> HELENA MOSES DONOHUE: Just for interests sake, I agree with Doug and will also vote no.

(Laughter.)

>> HELENA MOSES DONOHUE: I want you to know there is an open minded person hanging out up here.

(Applause.)

>> NEIL KELLEHER: In case you're wondering which one of us up here has a closed mind, I guess it's me.

Because I'm on your side.

>> DOUGLAS KELLNER: So how are you voting?

>> NEIL KELLEHER: Vote no.

>> DOUGLAS KELLNER: That fails.

A no vote in favor.

Any other business?

We need to set our next meeting date.

>> HELENA MOSES DONOHUE: We may have to do that ...

>> ALLISON: Set your next meeting.

>> NEIL KELLEHER: Recess?

NEW YORK STATE BOARD OF ELECTIONS
ELECTION OPERATIONS UNIT – ATTN: TARRY A. BREADS
40 STEUBEN STREET
ALBANY, NEW YORK 12207

APPLICATION FOR CERTIFICATION OF VOTING SYSTEM

NAME OF VENDOR: Avante International Technology, Inc.
CONTACT PERSON: Rick Gleim
ADDRESS OF COMPANY: 70 Washington Road Princeton Junction, NJ
TELEPHONE NUMBER: (609) 799-8896 FAX NUMBER: (609) 799-9308
E-MAIL ADDRESS: rgleim@altechnology.com [REDACTED]
[REDACTED]

DESCRIPTION OF VOTING SYSTEM

The system presents a column and row full-face ballot on a 42" touch screen. Voters make their choices by touching the screen or pressing on an accessible keyboard with audio assist. The jurisdiction may choose through the EMS to print full-face column and row results up to 11"X17"(on optional printer). After reviewing and accepting the printed ballot, the voter drops the ballot into a secure receptacle.

VOTING SYSTEM HARDWARE INFORMATION

SELECT ONE: Per Solicitation 21231

LOT I XXX

LOT II

(SUBMIT SEPARATE APPLICATIONS FOR EACH SYSTEM)

NAME OF SYSTEM: VOTE-TRAKKER

MODEL NUMBER: EVC308-FF-42

TYPE OF SYSTEM
(Select one)

DIRECT RECORD ELECTRONIC (DRE) · XXX

CENTRAL COUNT ABSENTEE

PRECINCT (OPTICAL SCAN)

OTHER: (PLEASE DESCRIBE BELOW)

DESCRIPTION (IF OTHER)

2008 JAN 15 PM 2:55

FILED
NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK

FIRMWARE AND SOFTWARE RELEASE INFORMATION

FIRMWARE RELEASE #: 1.3.0

EMS BALLOT DEFINITION SOFTWARE RELEASE #: 5.4.0

EMS ACCUMULATION SOFTWARE RELEASE #: 5.4.0

(USE ADDITIONAL SHEETS IF NECESSARY)

CONDITIONAL CERTIFICATION

IF SEEKING CONDITIONAL CERTIFICATION, WHICH LANGUAGES IN ADDITION TO ENGLISH WILL BE ACCOMMODATED BY THIS SYSTEM: Spanish, Korean, Mandarin, and Cantonese

2008 JAN 15 1 PM 21 55

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NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK

GENERAL INFORMATION

DO YOU OWN ALL RIGHTS TO THIS EQUIPMENT?

YES XX

NO

IF NOT, PLEASE EXPLAIN:

DATE VOTING SYSTEM AND USER DOCUMENTION WILL BE DELIVERED TO THE NEW YORK STATE BOARD OF ELECTION FOR EXAMINATION: Approximately 01/03/08

TYPE OF BUSINESS\ORGANIZATION: **CORPORATION** XX **PARTNERSHIP** **INDIVIDUAL**

IF A CORPORATION, STATE OF INCORPORATION:

1) AUTHORIZED TO DO BUSINESS IN NYS?	YES	XX	NO
2) MAINTAIN AN OFFICE IN NYS?	YES		NO XX
3) INDEPENDENTLY OWNED?	YES	XX	NO

IF NOT INDEPENDENTLY OWNED, NAME AND ADDRESS OF PARENT COMPANY:

IS ANY PART OF THE SYSTEM MANUFACTURED OR ASSEMBLED BY ANOTHER COMPANY? ****YES** **NO**

IF "YES," NAME & ADDRESS: **** Arrow Electronics Melville, New York may handle Assembly depending on volume**

APPLICATION REQUIREMENTS

A check made payable to the STATE BOARD OF ELECTIONS in the amount of \$5,000 to cover the cost of certification shall be deposited in a State Special Revenue Account. Notice shall be provided to vendor when additional funds are required to be deposited. Vendor must submit full face ballot with the application: For a DRE submit a screen shot showing the ballot layout; for Op-Scan submit a paper ballot. Vendor shall also submit all attestations on their company letterhead. The attestations shall meet the following requirements of New York regulations: 6209.4(H) 1-4, 6209.4(J) and 6209.5(G).

ATTESTATIONS

I HEREBY AGREE TO PROVIDE THE VOTING SYSTEM AND TO FURNISH ALL DOCUMENTATION REQUIRED BY PART 6209 OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE BOARD OF ELECTIONS OR ITS DESIGNEE UPON DEMAND AND FURTHER AGREE TO REIMBURSE THE STATE BOARD FOR THE COST OF EXAMINATION WITHIN THIRTY (30) DAYS OF RECEIPT OF NOTIFICATION OF SUCH COST. I UNDERSTAND THAT I MAY BE REQUIRED TO PLACE THE VOING SYSTEM IN THE STATE BOARD'S POSSESSION FOR AS LONG AS SUCH SYSTEM IS IN USE IN NEW YORK STATE.

I HEREBY AFFIRM THE FOLLOWING OBLIGATIONS UNDER SECTION 6209.4:

THE SUBMITTED VOTING SYSTEM COMPLIES WITH ALL APPLICABLE RULES ADOPTED BY THE STATE BOARD, AND WITH ALL APPLICABLE 2005 VOTING SYSTEM GUIDELINES NOT INCONSISTENT WITH STATE LAW OR THESE REGULATIONS, AND IS SUITABLE FOR USE BY VOTERS.

THE VENDOR WILL QUOTE AND PROVIDE A STATEWIDE, UNIFORM PRICE FOR EACH UNIT OF THE VOTING SYSTEM'S EQUIPMENT.

THE SUBMITTED VOTING SYSTEM'S SOFTWARE DOES NOT CONTAIN ANY CODE, PROCEDURES OR OTHER MATERIAL WHICH MAY DISABLE, DAMAGE, DISARM OR OTHERWISE AFFECT THE PROPER OPERATION OF THE VOTING SYSTEM, ANY HARDWARE, OR ANY COMPUTER SYSTEM OR OTHER PROPERTY OF THE STATE BOARD OR COUNTY BOARD.

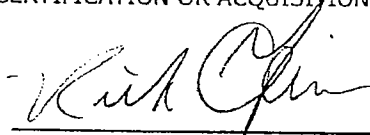
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ALL VENDORS SHALL SUBMIT WITH THEIR APPLICATION FORMS, INFORMATION REGARDING PAST OR PENDING COURT CASES INVOLVING THEIR VOTING SYSTEMS OR ITS MAJOR COMPONENTS, ANY EVIDENCE OF FRAUD, FAULTY SYSTEMS, OR FAILURE TO CORRECT PAST PROBLEMS.

I HEREBY AFFIRM ALL OBLIGATIONS UNDER SECTION 6209.5, INCLUDING THE REQUIREMENT FOR DISCLOSURE OF ANY PECUNIARY INTEREST IN OR ANY DIRECT OR INDIRECT CONTROL OVER ANY TESTING LABORATORY WHICH MAY BE USED IN CONNECTION WITH THE CERTIFICATION OR ACQUISITION OF ANY VOTING SYSTEM.

1/14/08

DATE



SIGNATURE OF APPLICANT

Vice President

TITLE

2008 JAN 15 PM 2:55

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NEW YORK STATE
BOARD OF ELECTIONS
ALBANY NEW YORK

Exhibit G

>> HELENA MOSES DONOHUE: The first one I have here and it is by no coincidence or anything else how they got here.

It ain't political.

(Chuckles.)

>> HELENA MOSES DONOHUE: Avante DRE.

Should we vote as we go along or put them all up at once?

>> DOUGLAS KELLNER: No, I think we should do each one of them.

I think we should do each one of them and on the Avante DRE, maybe I should call on staff to go through the report on the legal issues

>> HELENA MOSES DONOHUE: I think they all know this.

>> DOUGLAS KELLNER: I'm trying to make a record, too, in case a vendor objects.

>> HELENA MOSES DONOHUE: Just vote.

>> DOUGLAS KELLNER: Well

I'm just going to state for the record that the Avante DRE did not comply with election law 7 104,

did not comply with the accessibility provisions of the help America vote act with respect to the independent verification.

Did not comply with the election law 7 2021e with respect to the verification requirement.

I add that I have nothing against it because it's a direct recording electronic machine.

It's just that it fails to comply with those legal requirements.

>> ALLISON: We have a statement.

>> TODD VALENTINE: You want to say it?

>> ALLISON: On the other hand, our position on the Avante DRE is that it does comply with New York State's election law.

It displays a full face ballot in the entirety.

They brought in a scanner for the independent verification when Kellner was referring to 7 2021e.

That's why we're voting yes.

>> HELENA MOSES DONOHUE: You want to call the vote?

>> DOUGLAS KELLNER: Okay.

We'll call a vote on the motion.

Those in favor?

Commissioner Donohue?

>> HELENA MOSES DONOHUE: Aye.

>> DOUGLAS KELLNER: Commissioner Kelleher?

>> NEIL KELLEHER: Let me just for a moment reiterate what I said a few moments ago.

That is, you heard Commissioner Kellner make some decisions having to do with whether or not this machine meets the legal requirements.

That's not our job to decide whether or not it meets legal requirements.

Our decision is to meet with you people and find out just exactly what your problems are and what we can do to help solve them.

And the most important one, as I say I'll be glad to listen to any one of you or all of you telling me I'm wrong.

I guess I have a respect for your people's ability to make sure it meets the legal requirements and everything else.

And I'm glad and I'm happy and I trust you enough to let these decisions be made by you.

But I guess up here we're going to have some people who do not want you to make your own choice.

The choice is going to be made by the State board and that's not

As a matter of fact, we may not even be legal in doing so, in preventing you from having the opportunity to vote or make the decision on more machines.

I'm not going to tell you you haven't got legal brain enough to make a decision on these machines.

I'm going to tell you as I told you yesterday and the last couple of weeks, let's have at least four or five machines.

We finally got there and now we are going to start tearing them apart because we are not going to

So up here we're going to have people not only going to do their job as Commissioners, but they're going to do your job.

They're going to make a decision as to what you should have the opportunity to inspect and review and make a decision

on because you don't have the ability, apparently, to perform accordingly.

I'm going to vote on this thing because we've got to take something home.

But I want to keep reminding you that my decision was to make sure that you were able to show just what kind of ability and talent,

legal or otherwise, that you people have got.

It's a real sad day when we have taking this kind of action after all the effort you put into trying to make this possible

and to move along with our responsibilities.

Aye.

>> DOUGLAS KELLNER: All right.

I vote no.

Therefore, the motion fails to attain a majority.

Want to do the next one, Commissioner?

>> HELENA MOSES DONOHUE: The second one that I would like to put up for a vote is the Premiere Automark.

Supposedly it is in the process of being delivered with the full face quality.

I put that up for a vote.

Exhibit H

NEW YORK STATE BOARD OF ELECTIONS
ELECTION OPERATIONS UNIT – ATTN: TARRY A. BREADS
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VOTING SYSTEM HARDWARE INFORMATION

SELECT ONE: Per Solicitation 21231

LOT I

LOT II XXX

(SUBMIT SEPARATE APPLICATIONS FOR EACH SYSTEM)

NAME OF SYSTEM: VOTE-TRAKKER
MODEL NUMBER: EVC308-FF-BMD

TYPE OF SYSTEM
(Select one)

DIRECT RECORD ELECTRONIC (DRE)
PRECINCT (OPTICAL SCAN)

CENTRAL COUNT ABSENTEE
OTHER: (PLEASE DESCRIBE BELOW)XXX

DESCRIPTION (IF OTHER)

BMD as described above. For BMD (LOT 2) use, the system capability to tally is disabled, the ballot is displayed on a full-face screen and a printer capable of printing up to 11x17" full-face ballot is attached.

2008 JAN -9 PM 2:46

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NEW YORK STATE
BOARD OF ELECTIONS
ALBANY NEW YORK

ATTESTATIONS

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12/17/07

DATE



SIGNATURE OF APPLICANT

President/CEO

TITLE

HINMAN STRAUB

ATTORNEYS FOR

Office and Post Office Address

121 STATE STREET
ALBANY, NEW YORK 12207-1693
(518) 436-0751

Due and timely service of a copy of the within is hereby admitted on

Signature (Rule 130-1.1-a)

Attorney(s) for

PRINT NAME

NOTICE OF ENTRY

Please take notice that the within is a true copy of a
duly entered in the office of the clerk of the within named court on

NOTICE OF SETTLEMENT

Please take notice that an order of which the within is a true copy will be presented for settlement to the
Hon. one of the judges of the within named Court

at
on at M.
Dated Yours, etc

HINMAN STRAUB

ATTORNEYS FOR

Office and Post Office Address

121 STATE STREET
ALBANY, NEW YORK 12207-1693
(518) 436-0751

To

Attorney(s) for