

Abstract Memo I
The Voting Vendors Scheduled for Certification Testing Are Ineligible to Contract with New York State

In a free government, our elected representatives as well as public officials, must strive for the highest "*moral and ethical standards which are worthy and warrant the confidence of the people. The people are entitled to expect from their public servants a set of standards above the morals of the market place. A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.*"

McKinney's Public Officers Law, § 74,
Declaration of Intent: **Code of Ethics**

We are entitled to expect that the laws, which have presumably been made in the people's interest, are faithfully executed and that our public officials and elected representatives will provide for the greatest degree of transparency and openness so that we the people may hold them accountable to us. It is within that context I have examined the right which protects all other rights: The right to vote and have that vote counted as cast.

With regard to ethics and transparency, Governor Spitzer has made ethics reform and open government the hallmark of his governorship:

Because I believe that the governor - and I was elected for this purpose - is uniquely accountable for the ethics and the function of the state agencies, the state authorities...I expect to be held accountable, and I want to be held accountable.

Among the many laws we expect to be abided are the State's Procurement laws which prohibit our state agencies from doing business with unsavory contractors. The rules prescribing a state agency's behavior in contracting with contractors are intended to insure that our tax dollars are being spent appropriately. Accordingly the State is enjoined from doing business with vendors who lack integrity or whose past business practices are wanting. The criteria for determining whether a vendor is sufficiently "responsible" for the State to contract with include consideration of the vendor's "ethical violations", "criminal convictions", "civil fines", "determinations of breach of contract", "reports of less than satisfactory performance".

Lack of Integrity/Unethical Violations Prohibiting the State Board of Elections from Contracting with Any of the Voting Vendors

The five voting vendors the State Board of Elections (SBOE) is considering doing business with, ES&S, Diebold, Sequoia, Liberty and Avante, have exhibited a myriad of violations of New York's Procurement laws and are therefore ineligible to do business in New York State.

All of the vendors have been guilty of a significant number of some or all of the disqualifying factors listed below:

- Charges of fraud, lying, bribery, bid rigging, securities violations, false claims, kickback scandals to state or county officials, misrepresentation – which have resulted in pleas or convictions and payment of large fines/damages;
- Unethical revolving door business policies;
- Unethical conflicts of interest:
- Hiring and promoting of convicted felons or those charged with crimes (convicted for falsifying computer records, computer aided embezzlement and other forms of stealing money by tampering with computer records, bribery, kickbacks to public officials, money laundering, to name a few);
- Failing to inform officials of known software bugs or other defects in their systems which could affect the outcome of the election;
- Payment of millions of dollars in settlement of litigation claims for breach of contract, failure to timely deliver equipment , misleading county and state officials, lying about installing uncertified software, failing to provide working voting equipment, failure to meet deadlines, refusal to comply with agreed to contract terms.

In addition to the above, there are increasing reports of these vendors unethically exploiting and mistreating the counties who have purchased their voting systems. Just a few examples:

- This past week a Director of Elections in a Pennsylvania county sent an open letter to state officials decrying "the mix of deception this company promulgates" and the "unsavory business practices that vendors, such as ES&S, seemingly have a deep commitment to employing"¹. ES&S was demanding a usurious price to extend a warranty for their newly installed machines which the county couldn't afford. The elections official implored the state to help ensure "that voting system vendors doing business here do not have the opportunity to threaten the democratic process with such unsavory business practices."
- In 2004, the Indiana Election Commission, after discovering ES&S had installed uncertified firmware in some of their voting machines, complained to the vendor: "I just think I was absolutely lied to by your CEO ... I sat in this room and you all lied to me. You're so derelict in your duties ...". Indiana sued ES&S over their lies and misrepresentations, settling the litigation for \$1.2 million.
- In 2006 the Oregon Secretary of State (SOS) sued ES&S when they threatened to withhold delivery of newly purchased voting machines if the SOS did not agree to

¹ Citizens Voice,
http://www.citizensvoice.com/site/news.cfm?newsid=18619928&BRD=2259&PAG=461&dept_id=455154&rfti=6.

alter the terms of the contract and meet ES&S's new demands. A furious SOS responded: " We will not leave our elections in the hands of companies that do not follow through on their obligations, and we will not be coerced into altering our contracts."

The vendors' unethical conduct and lack of integrity is compounded by the bullying behavior frequently employed in response to citizens' or officials' efforts to reveal the threats to democracy these insecure and highly vulnerable voting machines present:

- In 2003 a cadre of computer scientists demonstrated how easily Diebold's machines could be hacked and published those findings on various web sites. Desperate to cover up, Diebold sent cease-and-desist letters and shut down their sites.
- In 2006, in response to the revelation of how easily Liberty's DRE could be hacked, the CEO of the Netherlands based company threatened to sue the Dutch television station that had aired the hack. He also wrote to Dutch election officials suggesting the hacker, be arrested and detained stating "After all, his activities are destabilizing society and are as such comparable to terrorism." He further threatened to stop "cooperating" with the Dutch government if they did not accede to the company's demands. The Dutch government is dependent on the vendor for its elections because 90% of its software is supplied by them.
- After a Florida elections commissioner arranged for independent testing of its Diebold Scanner, revealing how easily the machine could be hacked, Diebold, along with the other major vendors, reacted with a collective temper tantrum. The county still needed to acquire voting systems for the disabled community and the vendors refused to do further business with this county unless the elections supervisor promised not to have outsiders reveal the machine's flaws through any more independent testing.

Still other examples of unethical conduct are the vendors' efforts to strong arm the states' to reinterpret or rewrite their statutes in the vendors' interest.

- Sequoia regularly employs its own regulators, a revolving door practice Governor Spitzer has expressly outlawed. In Palm Beach County, Florida it was revealed that under the county's purchase contract with Sequoia, disclosure of any specifications of how the DREs operate was a third degree felony!
- In 2005 Diebold sued North Carolina seeking to evade its statute that required all vendors to escrow their software source codes, offering to revise the state's legislation in the interests of Diebold and the other vendors.
- Avante has now lifted Diebold's arguments in the North Carolina litigation, arguing in a recent email that New York's escrow statute should be rewritten or reinterpreted in Avante's interest. This past June Avante commenced a campaign to persuade New York's election commissioners to ignore New York's law, just as Avante had done. Waiting until the 11th hour to make the case, just the way Diebold did in N. Carolina,

the vendor hopes the state will have no choice but to capitulate to its demands because it's too late for the vendors to comply with the law and thus forcing the state to bend to the will of the vendor.

– In June, 2007, Microsoft, whose software is used by all the vendors except the one vendor who uses open source software and therefore is the only one who can comply with New York's law, tried to rewrite New York's legislation in order to permit the vendors to continue using secret proprietary software and be able to conceal the information the public is entitled to know.

These above represent only a few examples. All vendors have behaved similarly as detailed in the memo. This is an industry that brings the understanding of "integrity" and "moral worth" and "accountability" (all criteria articulated in the Procurement guidelines) to a new low.

Failed Performance of These Poorly Made Voting Machines

Aside from the high degree of immoral and unethical conduct these vendors have shown, the products they are offering are inferior and shoddy. As is documented in this paper these machines have been the subject of thousands of complaints: excessive breakdowns, vote flipping, machines counting backwards, machines not counting the votes at all, misprogrammed machines, jamming printers, phantom votes (counting thousands of votes for voters that don't exist and didn't vote), computers crashing, the list is long and documented in the memo.

The voting systems offered by these vendors are so poorly made and so unreliable that the vote count produced by these machines cannot be relied on. There is no way voters can have any assurance that their votes are being accurately counted as cast. Thus these machines have the effect of potentially disenfranchising millions of voters and thwarting the will of the people.

The worst of the performance violations of course is the extreme vulnerability to manipulation of these voting systems. All computerized voting systems can be rigged without detection, as established in numerous government and university reports. It is not just that all of the voting systems are capable of being, but the ease with which these systems are broken into. In fact, most of the voting machine models the SBOE is slated to start testing for New Yorkers use have already been readily hacked by independent testers or computer scientists. Other models the SBOE plans on testing have been the subject of numerous security reports in other states which have either exposed a myriad of unacceptable security flaws or already rejected these machines.

All the Voting Systems Being Tested in New York Are Too Insecure to Entrust Our Sacred Ballot To

– The Sequoia Advantage DRE, the model the SBOE will be testing, was recently hacked in February, 2007. It took a professor of computer science at Princeton University only seconds to hack a Sequoia Advantage DRE, the very model our tax payers' dollars will be used to test for certification in New York. The Princeton professor revealed not only that the machine could be hacked "in seven seconds" but that Sequoia's software could be programmed to perform fine during testing and count and rig an election on election day, without detection! Sequoia relies on Microsoft for its operation and election management system.

– The Avante DRE the SBOE is planning on testing is problematic because Avante, like Sequoia, chose to use Microsoft software in its operating system. It also relied on Microsoft for its election management system. As revealed in numerous security reports, Microsoft software is not secure and remains untested. Microsoft refuses to escrow its source coding, which is why Avante has been attacking New York's escrow requirement rather than changing its system to comply with NY's law. It would rather keep the security problems a secret, but have the public continue to use these machines.

– The ES&S Unity software, used by the Unity 3.0.1 OpScan the SBOE is scheduled to test, has been the subject of official review in Connecticut. The report found the Unity software was responsible for causing the mistabulating of votes in numerous states. The software is responsible for causing optical scanners to malfunction. Because Unity is a Microsoft Windows application it is even less secure. The report found: "In Unity it is possible to insert or alter unofficial vote totals manually. These operations are logged. However, it is possible to modify the logs to eliminate any trace of the modification, making it impossible to audit the election or explain irregularities.... Unity's log files are unprotected and can be modified easily using Windows accessories.....Unity provides insufficient security for election and log files. They are too easy to modify outside Unity using Windows."

–The Liberty DRE New York will be testing has also been hacked easily by a Dutch group in the Netherlands. A report published by the group revealed how open these DREs were to undetectable control. After a commission in Ireland studied this same model DRE it concluded that the results obtained from this voting system could not be considered accurate and that there's no way to insure the integrity of the software installed. A review of the Irish security reports noted that the insecurity of this machine was complicated by the fact that it is dependent on Microsoft, noting " The fact that a company with the resources of Microsoft has not been able to guarantee the security of its own web browser (let alone the entire Windows operating system) despite years of effort and large incentives, suggests that a fully secure and trustworthy electronic voting system may be an unattainable goal."

– The SBOE is also planning on testing the Diebold Accu Vote optical scanner; a machine that has been the subject of numerous security reports. This was the machine that was first revealed to be capable of being hacked without detection by Harry Hursti in 2005. Hursti showed how memory cards on the opscan could be changed. Before the Hursti Hack, the

RABA Report from Maryland had found Diebold's election management software lacked several critical security updates from Microsoft. One can insert a CD that will automatically upload malicious software, modify or delete elections.

In February, 2006 the state of California examined this same Accuvote Optical Scanner New York wants to test and confirmed Hursti's findings and more, stating:

"successful attacks can only be detected by examining the paper ballots. There would be no way to know that any of these attacks occurred; the canvass procedure would not detect any anomalies, and would just produce incorrect results. The only way to detect and correct the problem would be by recount of the original paper ballots."

In October, 2006 the University of Connecticut examined this same Diebold optical scanner and identified a number of new vulnerabilities, which if exploited maliciously can invalidate the results of an election process.

Notwithstanding the proven unreliability of these five voting machines, the SBOE plans to start testing each of them next month and possibly certifying all or some of them by the year's end. The county election commissioners would then be free to purchase these theft-enabling devices unless the State acts responsibly and recognizes it is prohibited from contracting with these vendors pursuant to any reasonable interpretation of its procurement guidelines.

New York State Cannot Permit Private Interests to Conflict with its Official Duties to Hold Free and Fair Elections

Not only is the SBOE enjoined from contracting with these vendors due to their lack of qualification under the State's Procurement laws, but because of these vendors' conflict of interest, New York must eschew any private vendor from running elections in New York. Given the level of control these vendors exercise over the running of elections, election officials can not fulfill their legal and ethical duties to the people who:

are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.

McKinney's Public Officers Law, Declaration of Intent § 74, Code of Ethics