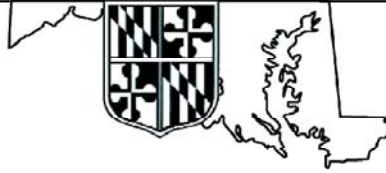


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**Memorandum**

**To:** Offerors

**From:** Donna Wiltshire, Procurement Director  
Ross Goldstein, Deputy Administrator

**Date:** May 11, 2009

**Subject:** Determination of Commercial Availability & Cancellation of Solicitation #D38B9200010

**Part I. Determination of Commercial Availability**

In 2007, the General Assembly passed Chapters 547 and 548, Laws of Maryland 2007, which directed the State Board of Elections (SBE) to certify, for use in elections after January 1, 2010, a voting system that provides a "voter-verifiable paper record." Under this law, SBE was to procure an optical scan voting system, together with ballot marking devices for use by voters with disabilities. The 2007 law also outlined voting system standards that must be met before SBE could select the system. The General Assembly recently enacted House Bill 893 as emergency legislation, which the Governor signed on May 7<sup>th</sup>, that provides alternative accessibility standards to be used "if, at the time of the procurement of a voting system, there is not a commercially available system that satisfies all the requirements" of § 9-102 of the Election Law Article of the *Annotated Code of Maryland*. If this contingency is met, House Bill 893 directs SBE to implement an optical scan voting system but authorizes the agency to forgo procuring ballot marking devices and instead deploy the existing touchscreen voting units to provide access for voters with disabilities.

**Threshold Requirements**

Accordingly, SBE must decide whether there is a commercially available voting system that meets the requirements of § 9-102 of the Election Law Article. There are two threshold certification requirements that must be established.

1. § 9-102(d)(2) - whether there is an optical scan voting system with a ballot marking device that has been examined by an independent testing laboratory that was approved by the Election Assistance Commission (EAC) and has been shown by that laboratory to meet either the Federal Election Commission's 2002 Voting System Standards or the EAC's 2005 Voluntary Voting System Guidelines.
2. § 9-102(f)(3) and (h)(1) - whether the voting system complies with the accessibility standards established in the 2005 Voluntary Voting System Guidelines.

**Evidentiary Standard**

In considering these requirements, it is important to set out the evidentiary standard that will be used to determine whether the above requirements have been met. With regard to the first requirement under § 9-102(d)(2), it has been SBE's longstanding and consistent administrative practice to accept only a laboratory finding that has been formally reviewed and approved by the certifying entity (formerly the National Association of State Election Directors (NASED) and now the EAC). While a strict reading of § 9-102 does not explicitly require such approval, SBE's administrative practice meets the intent of the law and provides the highest level of assurance that the laboratory report is correct, official, conclusive, and complete.

The requirements under § 9-102(f)(3) and (h)(1) are distinct from the § 9-102(d)(2) requirement in that it does not require an independent testing laboratory to examine the system and show that it meets the applicable standards. However, in order to provide a clear standard for vendors to meet as well as a clear evidentiary standard for SBE to apply, a laboratory finding that the system has been formally reviewed and certified by the EAC under its Voting System Testing and Certification Program is required by SBE.

#### Analysis

Based on information received from the EAC, there are, as of the date of this memorandum, no voting systems that meet the first requirement. However, the EAC anticipates that, within the next 30 to 60 days, one or more systems will have completed the laboratory review and be presented to the EAC for final approval.

Assuming that the first requirement could be met in a timely manner, the next determination is whether the second requirement can be met. According to the EAC, the systems that may be certified within the next 30 to 60 days are all being certified to the Federal Election Commission's 2002 Voting System Standards – not the EAC's 2005 Voluntary Voting System Guidelines as required under § 9-102(f)(3) and (h)(1). Accordingly, applying the evidentiary standard discussed herein, there is **no** voting system that currently has or will in the near future receive final approval from the EAC confirming that a laboratory has found the system to meet the 2005 Voluntary Voting System Guidelines.

Moreover, even if SBE accepted something less than its administrative practice of using EAC certification as the qualifying standard to make a determination of the second requirement, in our opinion, there is not a ballot marking device that meets the accessibility standards of the 2005 Voluntary Voting System Guidelines, which includes the following standard (Vol. I, Sec 3.2.3e):

If the normal procedure is for voters to submit their own ballots, then the accessible voting station shall provide features that enable voters who lack fine motor control or the use of their hands to perform this submission.

Ballot marking devices require the voter to handle the paper ballot in order to insert it into the optical scan reader after it is marked. We are aware of an adaptation to the AutoMARK ballot marking device that, instead of giving the ballot back to the voter, it is automatically deposited into a bin attached to the unit. However, the EAC has informed us that this solution has not been submitted for laboratory testing, thus, it does not meet the first requirement above.

#### Conclusion – Determination of Commercial Availability

SBE, in consultation with the Office of the Attorney General, concludes that there is no system that is currently commercially available that satisfies the requirements of § 9-102 of the Election Law Article. As such, SBE will **not** be implementing ballot marking devices for the 2010 election. Instead, SBE will deploy optical scan voting units and its current touchscreen voting units.

## **Part II. Cancellation**

Based on the above conclusion that there is no commercially available voting system that meets the standards of § 9-102 of the Election Law Article, SBE will not be seeking to procure ballot marking devices.

SBE has considered either amending the current solicitation to remove the requirement to propose a ballot marking device and any associated requirements or cancel the solicitation and reissue it at a later date. SBE is aware that there were vendors who did not respond to the current solicitation because they did not have a ballot marking device to offer. Further, SBE believes that a solicitation for only an optical scan voting system will create an opportunity for more offerors to respond, which in turn will lead to more competition and ultimately a more favorable contract for the State. **Accordingly, SBE is canceling the current solicitation.**