

Addendum to Memorandum regarding Determination of Commercial Availability and Cancellation of Solicitation
#D38B9200010 (dated May 11, 2009)

Distributed only to ES&S' Representative for Procurement

ES&S and their counsel submitted letters to Attorney General Douglas Gansler in which they state that their voting system meets the requirements of § 9-102 of the Election Law Article. The primary basis for ES&S' assertion that the voting system they are proposing meets the § 9-102 requirements is that it was examined by an independent testing laboratory that has been approved by the EAC.

Analysis of the Laboratory Report

The laboratory, SysTest Labs, Inc., was contracted by the New York State Board of Elections (NYSBOE) to perform a limited test on the AutoMARK Ballot Marking Device. Following the testing, SysTest Labs Inc. issued a report of its findings (Report number V-NY-ESS_ATS-Lot2-TR01 dated February 22, 2008). According to Section 1 – Introduction of the report, the goal of this limited testing was to give the NYSBOE a minimal level of satisfaction that the AutoMARK and its associated software meet the requirements of HAVA section 301(a) and (b), as well as the usability and accessibility requirements of section 3, Volume I of the 2005 Voluntary Voting System Guidelines.

The AutoMARK firmware submitted to New York is a different version than the version submitted to the EAC for certification (evidenced by a different version number). The initial firmware submitted did not function correctly, and it appears four iterations of the firmware were tested before it was determined to be functioning to the minimum standards required (*See* Table 6 of the report). The software submitted is called AutoMARK Information Management System (AIMS). The AIMS software does not run on the AutoMARK unit but on a standard Windows PC and is used to define the election data. Several iterations of this software were also used to correct discrepancies (*See* Table 6 of the report). It appears that none of these versions have been submitted for federal certification and that neither the firmware nor software was subject to a source code review.

In addition, ES&S modified the hardware of the AutoMARK (*See* Table 4 of the report). The test report does not reveal the extent to which the unit was modified but does state that one of the three modifications was unsuccessful, and the unit was removed from testing (*See* Section 3.2 of the report).

The AutoMARK, in general, passed the parts of Section 3, Volume I of the 2005 Voluntary Voting System Guidelines, although it appears that not every requirement was tested and the results published (*See* "Lot 1" references in Appendix C of the report). While SysTest Labs, Inc. determined that the AutoMARK met the required acceptance criteria to which it was tested (*See* Section 6 of the report), the testing and subsequent report was not part of the EAC's Voting System Testing and Certification Program and therefore, does not in anyway grant any kind of certification of the AutoMARK system (*See* Section 1 of the report).

Analysis of ES&S' Assertion

The first threshold requirement that must be established is whether the *voting system* (optical scan with ballot marking device) has been examined by an independent testing laboratory that was approved by the 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. In this case, ES&S is presenting a laboratory report for only one component of the system (the ballot marking devices) and that report only examines that one component for limited aspects of compliance with the 2005 Voluntary Voting System Guidelines. Accordingly, this submission fails to meet the first requirement.

Even if SBE accepted that ES&S' pending EAC certification to the 2002 Voting System Standards meets the first requirement, the second requirement must still be met. The SysTest Labs, Inc.'s report to the NYSBOE does not, in our view, meet the second threshold requirement, because the system reviewed by SysTest Labs, Inc. is **not** the system submitted to the EAC for approval under the 2002 Voting System Standards. To meet the first threshold requirement, ES&S would have to propose the same system being certified to the 2002 Voting System Standards. Thus, even assuming the SysTest Labs, Inc.'s report shows compliance with the 2005 Voluntary Voting System Guidelines and thus, meets the second requirement, that ballot marking device would not meet the first threshold requirement.