

## **Brookings County Finance Office**

520 3<sup>rd</sup> Street, Suite 100

Brookings, SD 57006

Phone: 605-696-8250

[www.brookingscountysd.gov](http://www.brookingscountysd.gov)



June 22, 2020

Commissioners-

Brookings County currently has a 3-Year Agreement with ES&S (Election Systems & Software, LLC). This is the company who provides us our Ballot Layout, Coding and Programming.

Attached for you is the Agreement that was approved in 2017. What you will be taking action on is the First Amendment to the Agreement, which extends the Agreement for another 3 years. The Agreement would take effect April 18, 2020.

States Attorney Dan Nelson has reviewed the Agreement. My recommendation would be to continue with ES&S for another 3 years.

Thank you,

A handwritten signature in black ink that reads "Jenna Byrd". The signature is written in a cursive, flowing style.

Jenna Byrd  
Senior Finance Assistant  
Brookings County

**FIRST AMENDMENT TO AGREEMENT**

This First Amendment ("Amendment") shall be deemed a material part of that certain Election Services Agreement by and between Election Systems & Software, LLC, a Delaware limited liability company ("ES&S") and **Brookings County, South Dakota** ("Customer") dated **April 18, 2017** ("Agreement"). The terms of this Amendment shall modify and supersede any and all inconsistent terms of the Agreement. Capitalized terms not otherwise defined herein shall have the same meanings ascribed to them in the Agreement.

**RECITALS**

WHEREAS, ES&S and Customer entered into the Agreement under which ES&S will be performing certain services for Customer;

WHEREAS, both ES&S and Customer wish to amend the Agreement with respect to said services in order to extend the Term of the Agreement.

WHEREAS, the Agreement is a valid and subsisting agreement between ES&S and Customer and both parties shall continue to be bound by the terms and conditions of the Agreement not otherwise amended herein.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. **Incorporation of Recitals.** The foregoing recitals are hereby specifically incorporated into, and deemed a material part of, this Amendment.

2. **Term; Termination.** Section 6 of the Agreement is hereby deleted in its entirety and replaced with the following:

6. **Term; Termination.** This Agreement shall be in effect for a **Three (3) Year Period beginning on April 18, 2020** (the "Term"). This Agreement may be terminated, in writing, at any time by either party if the other party breaches any material provision hereof and does not cure such breach within thirty (30) days after it receives written notification thereof from the non-breaching party.

3. **Continuing Validity of Agreement.** Except as specifically set forth in this Amendment, all remaining terms and conditions of the Agreement shall remain in full force and effect.

EXECUTED as of the \_\_\_\_\_ day of \_\_\_\_\_, 2020.

ELECTION SYSTEMS & SOFTWARE, LLC

BROOKINGS COUNTY, SOUTH DAKOTA

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

#17-27

ELECTION SYSTEMS & SOFTWARE, LLC  
ELECTION SERVICES AGREEMENT

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

BETWEEN: ELECTION SYSTEMS & SOFTWARE, LLC, a Delaware Limited Liability Company ("ES&S")

AND: BROOKINGS COUNTY, SOUTH DAKOTA ("Customer")

RECITALS:

A. Customer has agreed to purchase certain election-related services from ES&S for use in (the "Jurisdiction"). The terms and conditions under which such services shall be provided are set forth in the GENERAL TERMS attached hereto.

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

X  Exhibit A Summary of Services)

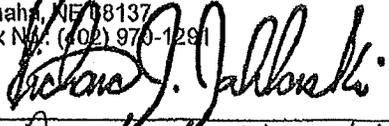
X  Exhibit B (Ballot Layout, Coding, and Voice File Services)

X  Exhibit C (Ballot Printing Services)

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, each of the parties hereto:

- Agrees to the GENERAL TERMS and the terms and conditions set forth in each Exhibit.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota.
- Represents and warrants to the other party that as of its signature date indicated below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, LLC  
1208 John Galt Boulevard  
Omaha, NE 68137  
Fax No.: (402) 970-1291

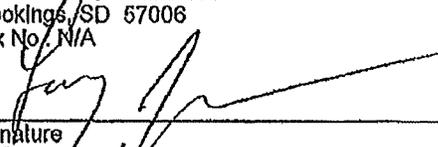
  
\_\_\_\_\_  
Signature

Richard J. Jablonski  
\_\_\_\_\_  
Name (Printed or Typed)

VP of Finance  
\_\_\_\_\_  
Title

4/18/17  
\_\_\_\_\_  
Date

BROOKINGS COUNTY, SOUTH DAKOTA  
520 3<sup>rd</sup> Street - Suite 100  
Brookings, SD 57006  
Fax No. N/A

  
\_\_\_\_\_  
Signature

Larry Jensen  
\_\_\_\_\_  
Name (Printed or Typed)

Chairman  
\_\_\_\_\_  
Title

4-18-17  
\_\_\_\_\_  
Date

**ARTICLE I  
GENERAL TERMS AND CONDITIONS**

1. **Consideration.** The consideration to be paid by Customer to ES&S for the services provided hereunder is set forth on the accompanying exhibits.

2. **Limitation of Liability.** Neither party shall be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or relating to this Agreement. Neither party shall be liable for the other party's negligent or willful misconduct. ES&S' total liability to Customer arising out of or relating to this Agreement shall not exceed the aggregate amount to be paid to ES&S hereunder. Any action by Customer against ES&S must be commenced within one (1) year after the cause of action has accrued. By entering into this Agreement, Customer agrees to accept responsibility for (a) the selection of the services to achieve Customer's intended results; and (b) user errors, voter errors or problems encountered by any individual in voting that are not otherwise a result of the failure of ES&S to perform.

3. **Taxes; Interest.** Customer will provide ES&S with proof of its tax-exempt status. If Customer does not provide such proof, it shall pay, or shall reimburse ES&S for, all sales and use, excise or other similar taxes imposed on the transactions contemplated by this Agreement, but shall in no event be liable for taxes imposed on or measured by ES&S' income. If Customer disputes the applicability of any tax to be paid pursuant to this Section 3, it shall pay the tax and may thereafter seek a refund. Any disputed or undisputed payment which is past due to ES&S will bear interest at the rate of one and one-half percent per month (or such lesser amount as may be permitted by applicable law) for each month or portion thereof during which it remains unpaid.

4. **Excusable Nonperformance.** Except for obligations to make payments hereunder, if either party is delayed or prevented from performing its obligations under this Agreement as a result of any cause beyond its reasonable control, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent necessary to allow performance after the cause of delay has been removed. ES&S agrees to work with Customer, at Customer's request, to develop mutually agreeable alternatives in order to minimize the negative impact of any such delay.

5. **Exclusive Service Provider.** Customer hereby agrees to purchase the products and services set forth on Exhibits B-C attached hereto from ES&S for the Term of this Agreement at the pricing set forth on each applicable Exhibit. Customer's agreement to purchase all of such products and services from ES&S for the entire Term entitles Customer to receive the preferred pricing for each product or service as provided herein. Customer understands, acknowledges and agrees that ES&S' fees for the services as set forth on the accompanying exhibits are based upon a contractual commitment by Customer to subscribe for and purchase such services for the entire Term and (b) the descriptions of such services in the accompanying exhibits. In the event that Customer changes its commitment to a period that is less than the Term of this Agreement for any reason other than a termination for cause pursuant to Article I, Section 6, of this Agreement, or purchases any such products or services from a provider other than ES&S, or does not pay for such products or services provided by ES&S pursuant to the payment terms in Exhibit A during the Term, Customer hereby agrees to promptly pay a balance due charge using the Non-Discounted Fees applied to the Ballot Layout, Coding and Voice File Services provided to the Customer up through the date of such early termination.

6. **Term; Termination.** This Agreement shall be in effect for a **Three (3) Year Period** beginning on the Effective Date, covering all elections within the Jurisdiction beginning sixty (60) days after the Effective Date (the "Term"). This Agreement may be terminated, in writing, at any time by either party if the other party breaches any material provision hereof and does not cure such breach within thirty (30) days after it receives written notification thereof from the non-breaching party.

7. **Assignment.** Except in the case of a sale, transfer or assignment of all or substantially all of the assets of ES&S to a successor who has asserted its intent to continue the business of ES&S, neither party may assign or transfer this Agreement or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld or conditioned, nor unduly delayed. ES&S may assign its right to receive payments under this Agreement to such third party(ies) as ES&S may desire without the prior consent of Customer, provided that ES&S provides written notice (including evidence of such assignment) to Customer thirty (30) days in advance of any payment(s) so assigned..

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

9. **Disputes.**

a. **Remedies for Past Due Payments.** If any payment to ES&S is past due more than five (5) days, ES&S may suspend performance under this Agreement until such amount is paid.

b. **Dispute Resolution Process.** Time is of the essence in resolving disputes. The initiating party shall notify the responding party of any dispute, including all relevant information (e.g., the nature of the dispute, dates, times, persons involved). The responding party shall respond to the notification within five (5) business days. Thereafter, the parties shall use their good faith efforts to resolve the dispute within a reasonable period of time. Notwithstanding anything in this Section 9 to the contrary, either party may apply to any court having jurisdiction over the subject matter of the dispute for a temporary restraining order, preliminary injunction, or other appropriate legal remedy at any time.

10. **Entire Agreement.** This Agreement, including all exhibits hereto, shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and assigns. This Agreement, including all exhibits hereto, contains the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior or contemporaneous discussions, negotiations, agreements or understandings between the parties, whether written or oral, regarding the subject matter hereof. Any provision of any purchase order, form or other agreement which conflicts with or is in addition to the provisions of this Agreement shall be of no force or effect. In the event of any conflict between a provision contained in an exhibit to this Agreement and these General Terms, the provision contained in the exhibit shall control. No waiver, amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No consent by either party to, or waiver of, a breach by either party shall constitute a consent to or waiver of any other different or subsequent breach by either party. This Agreement shall be governed by and construed in accordance with the laws of the State in which the Customer resides, without regard to its conflicts of laws principles. The parties agree that venue for any dispute or cause of action arising out of or related to this Agreement shall be in the state and federal courts of the United States located in the State in which the Customer resides. ES&S is providing Equipment, Software and services to Customer as an independent contractor, and shall not be deemed to be a "state actor" for purposes of 42 U.S.C. § 1983. ES&S may engage subcontractors to provide certain of the Equipment, Software or services, but shall remain fully responsible for such performance. The provisions of Sections 1-5, 7, 8 and this Section 10 shall survive the termination of this Agreement, to the extent applicable.

11. **Counterparts; Execution By Facsimile.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but which together shall constitute one

and the same instrument. The parties may execute this Agreement and exchange counterparts of the signature pages by means of facsimile transmission, and the receipt of such executed counterparts by facsimile transmission shall be binding on the parties. Following such exchange, the parties shall promptly exchange original versions of such signature pages.

**[END OF GENERAL TERMS]**

**EXHIBIT A  
SUMMARY OF SERVICES**

<b>Sale Summary:</b>	
<b>Description</b>	<b>Refer to</b>
Ballot Layout, Coding, and Voice File Services	Exhibit B
Ballot Printing Services	Exhibit C
<b>Terms &amp; Conditions:</b>	
<b>Note 1:</b> Any applicable state and local taxes are not included, and are the responsibility of Customer.	
<b>Note 2: Invoicing and Payment Terms are as Follows:</b>	
<p>Ballot Layout, Coding, Voice File, and Ballot Printing will be invoiced as services are provided. 100% of Order Total due Thirty (30) Calendar Days after Receipt of Corresponding ES&amp;S Invoice.</p>	
<b>Note 3:</b> Customer understands, acknowledges and agrees that ES&S' fees for the services as set forth on the accompanying exhibits are based upon (a) a contractual commitment by Customer to subscribe for and purchase such services for the entire Term of the Agreement and (b) the descriptions of such services in the accompanying exhibits. In the event that Customer changes its commitment to a period of less than the Term of the Agreement for any reason other than a termination for cause pursuant to Article I, Section 5, of this Agreement, Customer hereby agrees to promptly pay a balance due charge using the Non-Discounted Fees applied to the Ballot Layout, Coding and Voice File Services provided to the Customer up through the date of such early termination.	
<b>Note 4:</b> The Customer acknowledges and agrees that the pricing set forth herein for certain services is based on information provided by the Customer ("Customer Data") and that such Customer Data is accurate and complete. In the event the Customer requests any changes to the Customer Data (including but not limited to, changes as a result of Customer errors, Customer requested modifications, court orders or other changes not otherwise caused by ES&S) which requires additional services to be performed by ES&S, the Customer shall be subject to additional fees for such services at ES&S' then current rates.	

**EXHIBIT B  
BALLOT LAYOUT, CODING, AND VOICE FILE SERVICES**

<b>Description</b>	<b>Non-Discounted Fees</b>	<b>Discounted Fees</b>
<b>Paper Ballot Layout (Price per Ballot Face)</b>		
<b>English and Spanish (combined):</b>		
1 to 500 Faces	\$36.75	\$27.56
501 or more Faces	\$31.50	\$23.63
<b>Languages other than English/Spanish</b>		
1 to 500 Faces, per Language	\$73.50	\$55.13
501 or more Faces, per Language	\$63.00	\$47.25
<b>Base Charge for Ballot On Demand (BOD)</b>	<b>\$561.91</b>	<b>\$421.43</b>

<b>Electronic Screen Layout - AutoMARK or iVotronic</b>		
<b>English and Spanish (combined):</b>		
Per Ballot Style, or precinct, whichever is greater	\$23.10	\$17.33
<b>Languages other than English/Spanish</b>		
Per Ballot Style, or precinct, whichever is greater	\$42.00	\$31.50

**Notes:**

1. Electronic Screen Layout does NOT apply to AutoMARK customers when ES&S performs paper ballot layout and voice file services.

<b>Programming Services</b>		
<b>Base Charge per Equipment Type</b>	<b>\$525.00</b>	<b>\$393.75</b>
<b>Base Charge for ERM file set-up</b>	<b>\$525.00</b>	<b>\$393.75</b>
<b>Ballot types created</b> (open primary or multiple-page ballots)	\$78.75	\$59.06
<b>Precincts</b> (for every precinct in the election)	\$9.45	\$7.09
<b>Splits</b> (for every additional ballot style within a precinct. )	\$9.45	\$7.09
<b>Ballot Face Configurations</b> (every unique ballot face in the election)	\$16.80	\$12.60
<b>Contest / Issue Entries</b> (total number of contests, referenda, questions, and/or propositions in the election)	\$18.50	\$13.88
<b>Candidate / Response Entries</b> (total number of candidates &/or responses, including referenda and all write-ins for each contest/issue)	\$8.00	\$6.00
<b>Headers</b> (Central Tabulators)	\$2.10	\$1.58
<b>Re-Coding Fees</b>	\$525.00 + applicable fee for each changed element	\$393.75 + applicable fee for each changed element

<b>Voice Files per Equipment Type</b>		
Language Setup Charge - English	\$350.00	\$262.50
Language Setup Charge - Spanish	\$350.00	\$262.50
Language Setup Charge - All Other languages	\$525.00	\$393.75
Political Parties	\$5.25	\$3.94
Ballot Faces	\$15.75	\$11.81
Contests / Issues	\$17.00	\$12.75
Candidates / Yes-No Responses	\$10.25	\$7.69

Description	Non-Discounted Fees	Discounted Fees
Propositions / Amendments / Instructions	\$21.00	\$15.75
Price per word in excess of 1200 total words (Instructions / Propositions / Amendments)	\$0.40	\$0.30
Resubmission	\$350.00 for English & Spanish and \$525.00 (for each additional language), plus the applicable fee for each element changed for each language	\$262.50 for English & Spanish and \$393.75 (for each additional language), plus the applicable fee for each element changed for each language

<del>Other Services (Standard Overnight Delivery Charges Will Apply and Will Be Billed Separately)</del>		
Media burn (Flash / PCMCIA Cards, Mem Packs, PEBs, and Jump Drives)	\$12.50	\$12.50
Electronic transfer files (per county, per election)	\$125.00	\$125.00
SOS Media	\$75.00	\$75.00
.pdf File Extraction (per Style)	\$1.50	\$1.50
Sample Ballot Creation	\$40.00	\$40.00
Publication Ballot Creation (Ballot Layout As Is)	\$185.00	\$185.00
Custom Publication Ballot Creation	\$350.00	\$350.00
ESSIM Test Deck Creation (does not include print costs)	\$325.00	\$325.00
Auto Test Deck PDF Creation (\$20.00 per Style. Minimum Charge of \$200.00)	\$200.00	\$200.00
Ballot Assignment Chart	\$399.50	\$399.50
Download Results From Media	\$65.00	\$65.00
ERM State Utility File	\$425.00	\$425.00

Note 1: All prices are exclusive of freight which will be billed separately.

[END OF EXHIBIT B]

**EXHIBIT C  
BALLOT PRINTING SERVICES**

Description	Price per Ballot
<b>14" and 17" Ballots:</b>	
Base ballot charge	\$0.25
Backside of ballot	\$0.03
Stub and / or numbering	\$0.03
Folding	\$0.02
Scoring	\$0.02
Packaging	\$0.01
Color requirements – defined as a color bar on the ballot. Other designs or methods will be subject to a separate quote.	\$0.03
<b>Prices are exclusive of freight, which will be billed separately.</b>	
<b>19" ballots are quoted separately.</b>	

**Note 1:** Special requests, including watermarking, unique packaging requirements and expedited delivery requirements are not included in the table above, and will be priced separately.

**Note 2:** The above pricing assumes the use of ES&S partner printers. The use of a Customer requested printer may result in a change in the fees outlined above.

**Note 3:** Unexpected and material changes in costs such as paper may result in changes to the fees reflected above.

**Note 4:** Ballots are to be ordered in increments of 25 with a minimum order value of \$100.00.

**Note 5:** Expedite Fee of \$150.00 will be assessed to each order that is required to be SHIPPED within Three (3) business days from time of order.

[END OF EXHIBIT C]