



cityofnovi.org

# CITY of NOVI CITY COUNCIL

Agenda Item H  
June 9, 2008

**SUBJECT:** Approval to purchase election equipment in the amount of \$20,972.00 from Election Systems and Software for additional precincts.

**SUBMITTING DEPARTMENT:** City Clerk *m.c.*

**CITY MANAGER APPROVAL:**

### BACKGROUND INFORMATION:

The City Council approved the addition of 4 voting precincts in December of 2007. The proposed changes were submitted to the State Bureau of Elections and once approved, new voter identification cards were issued in early May 2008. The contract for purchasing additional election equipment (3 M-100's and 1 Automark) in the amount of \$20,972.00 from Election Systems and Software (sole source provider) for these precincts has been reviewed by the City Attorney's office and is the same format as the agreements approved by the State Bureau of Elections.

**RECOMMENDED ACTION:** Approval to purchase election equipment in the amount of \$20,972.00 from Election Systems and Software for additional precincts.

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Capello				
Council Member Crawford				
Council Member Gatt				

	1	2	Y	N
Council Member Margolis				
Council Member Mutch				
Council Member Staudt				

May 30, 2008

31983 Northwestern Highway  
P.O. Box 3049  
Farmington Hills, MI 48333-3040  
Tel: 248-851-9500  
Fax: 248-851-2158  
www.secretwardle.com

KRISTIN BRICKER KOLB  
Direct: 248-539-2837  
kkolb@secretwardle.com

Maryanne Cornelius, City Clerk  
City of Novi  
45175 West Ten Mile Road  
Novi, Michigan 48375

***Re: Review of Election Systems and Software Sales Order Agreement***

Dear Ms. Cornelius:

Pursuant to your request, we have reviewed the proposed Sales Order Agreement ("Agreement") from Election Systems and Sales ("ES&S"). The Agreement appears to be a boilerplate contract, and as a general proposition, we find the language to be unobjectionable. However, there are a couple of provisions you should be aware of.

Under Section 5, "Delivery; Risk of Loss," the City is required to name ES&S as an additional insured on any policy covering the equipment, should be the City not have paid its balance in full prior to receiving delivery of the equipment.

Section 6.b. disclaims all express and implied warranties, other than as set forth in the Agreement, including the warranty of merchantability or fitness for a particular purpose. This broad disclaimer is a concern, as the City will have limited recourse against ES&S, should the equipment fail of its essential purpose.

Furthermore, Section 7 limits ES&S's liability to any amounts paid to it by the City. This is extremely narrow and leaves the City vulnerable to full responsibility for damages, even if the source of the failure is ES&S's equipment and/or software. ES&S also waives any liability for the City failing to timely or property install and use the most recent update or second most recent update provided to it by ES&S.

Under Section 13, the City will be liable to pay its pro-rata share of any future state certification or recertification of the equipment, as well as any third party equipment that will be necessary for ES&S's equipment to remain certified. The City's pro-rata share is determined by the formula set forth in this Section of the Agreement.

Maryanne Cornelius, City Clerk  
May 30, 2008  
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Exhibit A to the Agreement outlines the maintenance services to be provided by ES&S in the post-warranty period, for which the City pays a separate fee. If the City allows the maintenance agreement to lapse (for hardware or software), it may only be reinstated upon the City paying ES&S any amounts that would have been paid to ES&S, had the City not allowed the Agreement to lapse.

Other than the disclaimer warranties and limitation on liability, we are satisfied with the language of this Agreement. We would suggest requesting some relief on those two provisions.

If you need anything further from us on this matter, please feel free to contact me.

Very truly yours,



Kristin Bricker Kolb

KBK:jw

cc: Thomas R. Schultz, Esq.

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11208 JOHN GALT BLVD  
 OMAHA, NE 68137-2364  
 (402) 593-0101

# Sales Order Agreement

Customer P.O. #: \_\_\_\_\_  
 1st Election Date: To be Agreed Upon by the Parties  
 Estimated Delivery Date: To be Agreed Upon by the Parties  
 Phone Number: (248) 347-0456  
 Fax Number: (248) 347-0577

Customer Contact, Title: Maryanne Cornelius - City Clerk  
 County Name City of Novi, Michigan

Type of Sale:  NEW  
 Type of Equip:  NEW  USED

Bill To: \_\_\_\_\_  
City of Novi, Michigan  
Maryanne Cornelius - City Clerk  
45175 W. Ten Mile Road  
Novi, MI 48375

Ship To: \_\_\_\_\_  
City of Novi, Michigan  
Maryanne Cornelius - City Clerk  
45175 W. Ten Mile Road  
Novi, MI 48375

Item	Description	Qty	Price	Total
1	15" IVotronic			-
2	ES&S AutoMARK ES&S AutoMARK Voter Assist Terminal with Transport Case, Ink Cartridge, 256mb Flashcard, Headset, Two (2) Ballot Secrecy Sleeves, and Shipping with 3-Year Warranty	1	5,717	5,717.00
3	DS200			-
4	M100 Model 100 Precinct Scanner with Steel Ballot Box with Divorter, PCMCIA Card, and Start-Up Kit	3	5,000	15,000.00
5	M650			-
6	Software			-
7	Installation			-
8	Services			-
9	Other			-
10	Supplies			-
11	Shipping ES&S AutoMARK Voter Assist Terminal	1		Included in Unit Price
12	Shipping Model 100 Precinct Scanner	3	85	255.00

Annual Firmware Maintenance	Annual Hardware Maintenance	Annual Software Maintenance
Included in Annual Hardware Maintenance	303	
180	585	
		N/A
180	888	N/A

Freight Billable: yes  no

Order Subtotal \$ 20,972.00  
 Discount \$ -  
 Order Total \$ 20,972.00

Gene Seets  
 Sales Rep / Account Manager \_\_\_\_\_ Customer Signature \_\_\_\_\_ Date \_\_\_\_\_  
 CFO \_\_\_\_\_ Date \_\_\_\_\_ Title \_\_\_\_\_

Special Notes :

**Payment Terms** 100% of Order Total Due Thirty (30) Calendar Days after the later of (a) Equipment Delivery, or (b) Receipt of Corresponding ES&S Invoice.  
 Note: In no event shall Customer's payment obligations hereunder, or the due dates for such payments, be contingent or conditional upon Customer's receipt of federal and/or state funds.

**Warranty Period (Years):** Three (3) Years After Delivery of ES&S AutoMARK Terminal.  
 One (1) Year After Delivery of Model 100 Scanners.

## GENERAL TERMS

1. **Purchase/License Terms.** Subject to the terms and conditions of this Agreement, ES&S agrees to sell and/or license, and Customer agrees to purchase and/or license, the ES&S Equipment and ES&S Software described on the reverse side. The payment terms for the ES&S Equipment and ES&S Software are set forth on the reverse side. Title to the ES&S Equipment shall pass to Customer when Customer has paid ES&S the total amount set forth on the reverse side for the ES&S Equipment. The consideration for ES&S' grant of the license for the ES&S Firmware is included in the cost of the ES&S Equipment.
  2. **Grant of Licenses.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer nonexclusive, nontransferable licenses to use the ES&S Software, described on the reverse side, and ES&S' firmware, which is delivered as part of the ES&S Equipment ("ES&S Firmware"), and related Documentation in the Jurisdiction while Customer is using the ES&S Equipment. The licenses allow Customer to use and copy the ES&S Software and ES&S Firmware (in object code only) and the Documentation, in the course of operating the ES&S Equipment and solely for the purposes of defining and conducting elections and tabulating and reporting election results in Customer's jurisdiction. The licenses granted in this Section 2 do not permit Customer to use the source code for the ES&S Software or ES&S Firmware.
  3. **Prohibited Uses.** Customer shall not take any of the following actions with respect to the ES&S Software or the Documentation:
    - a. Reverse engineer, decompile, disassemble, re-engineer or otherwise create, attempt to create, or permit, allow or assist others to create, the source code or the structural framework for part or all of the ES&S Software;
    - b. Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software or Documentation, in whole or in part, to or by any third party without ES&S' prior written consent; or
    - c. Cause or permit any change to be made to the ES&S Software without ES&S' prior written consent; or
    - d. Cause or permit any copying, reproduction or printing of any output generated by the ES&S Software in which ES&S owns or claims any proprietary intellectual property rights (e.g., copyright, trademark or patent), including, but not limited to, any ballots, ballot shells or code stock.
  4. **Term of Licenses.** The licenses granted in Section 2 shall commence upon the delivery of the ES&S Software described in Section 2. The licenses shall survive the termination of all other obligations of the parties under this Agreement, provided, however, that ES&S may terminate either license if Customer fails to pay the consideration due for, or breaches Sections 2 or 3 with respect to, such license. Upon the termination of either of the licenses granted in Section 2 for ES&S Software or upon Customer's discontinuance of the use of any ES&S Software, Customer shall immediately return such ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.
  5. **Delivery; Risk of Loss.** The Estimated Delivery Dates set forth on the reverse side are merely estimates and may be revised by ES&S because of delays in executing this Agreement, changes requested by Customer and other events. ES&S will notify Customer of revisions to the Estimated Delivery Dates as soon as ES&S becomes aware of such revisions. Risk of loss for the Equipment and Software shall pass to Customer when such items are delivered to Customer's designated location. Upon transfer of risk of loss to Customer, Customer shall be responsible for obtaining and maintaining sufficient casualty insurance on the Equipment and Software and shall name ES&S as an additional insured thereunder until all amounts payable to ES&S under this Agreement have been paid by Customer.
  6. **Warranty.**
    - a. **ES&S Equipment/ES&S Software.** ES&S warrants that for a 1-year period (the "Warranty Period"), it will repair or replace any component of the Equipment or Software which, while under normal use and service: (i) fails to perform in accordance with its Documentation in all material respects, or (ii) is defective in material or workmanship. The Warranty Period will commence upon delivery. Any repaired or replaced item of Equipment or Software shall be warranted only for the unexpired term of the Warranty Period. All replaced components of the Equipment or Software will become the property of ES&S. This warranty is effective provided that (i) Customer promptly notifies ES&S of the failure of performance or defect and is otherwise in compliance with its obligations hereunder, (ii) the Equipment or Software to be repaired or replaced has not been repaired, changed, modified or altered except as authorized or approved by ES&S, (iii) the Equipment or Software to be repaired or replaced is not damaged as a result of accident, theft, vandalism, neglect, abuse, use which is not in accordance with instructions or specifications furnished by ES&S or causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, and (iv) Customer has installed and is using the most recent update, or the second most recent update, provided to it by ES&S. This warranty is void for any units of equipment which: (i) have not been stored or operated in a temperature range according their specifications, (ii) have been severely handled so as to cause mechanical damage to the unit, or (iii) have been operated or handled in a manner inconsistent with reasonable treatment of an electronic product. The terms of post-warranty maintenance and support are set forth on Exhibit A
    - b. **Exclusive Remedies.** IN THE EVENT OF A BREACH OF SUBSECTION 6(a), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.
  7. **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. By entering into this Agreement, Customer agrees to accept responsibility for (a) the selection of the Equipment and Software to achieve Customer's intended results; (b) the use of the Equipment and Software; (c) the results obtained from the use of the Equipment and Software; (d) the selection of, use of and results obtained from any equipment, software or services not provided by ES&S and used with the Equipment or Software; or (e) 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. ES&S shall not be liable under this Agreement for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee that is caused by (y) Customer's failure to timely or properly install and use the most recent update, or the second most recent update, provided to it by ES&S or (z) Customer's election not to receive, or to terminate, the Hardware Maintenance Services or the Software Maintenance and Support.
  8. **Proprietary Rights.** Customer acknowledges and agrees as follows:

ES&S owns the Software, all Documentation and training materials provided by ES&S, the design and configuration of the Equipment and the format, layout, measurements, design and all other technical information (except for Customer supplied information such as election information) associated with the ballots to be used with the Equipment. Customer has the right to use the aforementioned items to the extent specified in this Agreement. ES&S also owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned items. The aforementioned items also contain confidential and proprietary trade secrets of ES&S that are protected by law and are of substantial value to ES&S. Customer shall keep the Software and related Documentation free and clear of all claims, liens and encumbrances and shall maintain all copyright, trademark, patent or other intellectual or proprietary rights notices that are set forth on the Equipment, the Software, the Documentation, training materials and ballots that are provided, and all permitted copies of the foregoing.
  9. **Indemnification.** Customer shall indemnify and hold harmless ES&S from and against any and all adverse consequences arising out of or relating to the following:
    - a. Any Third Party Infringement Claim resulting from (i) Customer's failure to timely or properly install and use any update provided to it by ES&S; (ii) the use of any Equipment or Software in combination with other equipment, hardware or software not meeting ES&S' specifications for use with such Equipment or Software; or (iii) Customer's modification or alteration of any item of Equipment or Software without the prior written consent of ES&S;
    - b. Any claims by third parties arising out of or relating to the use or misuse by Customer, its employees and any other persons under its authority or control ("Customer's Representatives") of any third party items;
    - c. Personal injury (including death) or property damage that is caused by any negligent or willful act, error or omission of one or more of Customer's Representatives; and
    - d. Customer's election not to receive, or to terminate, Hardware Maintenance Services or Software Maintenance and Support.ES&S shall notify Customer immediately if it becomes aware of any claim for which it may be entitled to indemnification under this Section 10, and hereby gives Customer full and complete authority, and shall provide such information and assistance as is necessary (at Customer's expense with respect to reasonable out-of-pocket costs), to enable Customer to defend, compromise or settle any such claim.
  10. **Termination.** 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 30 days after it receives written notification thereof from the non-breaching party.
  11. **Disputes.**
    - a. **Payment of Undisputed Amounts.** In the event of a dispute between the parties regarding (1) a product or service for which payment has not yet been made to ES&S, (2) the amount due ES&S for any product or service, or (3) the due date of any payment, Customer shall nevertheless pay to ES&S when due all undisputed amounts. Such payment shall not constitute a waiver by Customer or ES&S of any of its rights and remedies against the other party.
    - b. **Remedies for Past Due Undisputed Payments.** If any undisputed payment to ES&S is past due more than 30 days, ES&S may suspend performance under this Agreement until such amount is paid. If Customer's payment is past due for more than 60 days and is undisputed, ES&S may declare the total amount remaining due under this Agreement to be immediately due and payable, enter the premises where the Equipment is located and remove it. Any disputed or undisputed payment not paid by Customer to ES&S when due shall bear interest from the due date at a rate equal to the lesser of one and one-half percent per month or the maximum amount permitted by applicable law for each month or portion thereof during which it remains unpaid.
  12. **Compliance with Laws.** In performing its obligations or enjoying its rights under this Agreement, each party shall comply with all applicable laws and regulations. In addition, ES&S warrants to Customer that, at the time of delivery, the Equipment and Licensed Software sold and licensed under this Agreement will comply with all applicable requirements of state election laws and regulations that are mandatory and effective as of the Effective Date and will have been certified by the appropriate state authorities for use in Customer's state. ES&S further warrants that during the Warranty Period and thereafter so long as Customer is subscribing and paying for Maintenance and Support Services, the Equipment and Licensed Software shall be maintained or upgraded by ES&S in such a way as to remain compliant with all applicable state election laws and regulations. "Maintained or upgraded" shall mean only such changes to individual items of the Licensed Software (but not Equipment) as are technologically feasible and commercially reasonable. Customer shall be solely responsible for the cost of any replacements, retrofits or modifications to the Equipment contracted for herein that may be developed and offered by ES&S in order for such Equipment to remain compliant with applicable laws and regulations. Customer shall also be solely responsible for the cost of any third party items that are required in order for the Equipment and/or Licensed Software to remain compliant with applicable laws and regulations.
  13. **State Recertifications.** In the event that any future state certifications or recertifications are required that are not otherwise required as a result of any changes or modifications voluntarily made by ES&S to the Licensed Software and/or Equipment licensed and sold hereunder, Customer shall be responsible for:
    - (i) the total cost of any third party items that are required in order for the Equipment and/or Licensed Software to remain certified,
    - (ii) Customer's pro-rata share of such future state certification or recertification costs; and
    - (iii) Customer's pro-rata share of the costs of designing, developing, manufacturing and/or certification by applicable federal and state authorities of any mandated modifications to the Equipment and/or Licensed Software that may result from such future state certifications or recertifications.
- Customer's pro-rata share of the costs included under subsections X.X(ii) and X.X(iii) above shall be determined at the time by dividing the number of registered voters in Customer's jurisdiction by the total number of registered voters in all counties in Customer's state to which ES&S has sold and/or licensed the Equipment and/or Licensed Software purchased and licensed by Customer under this Agreement.

**EXHIBIT A  
MAINTENANCE SERVICES  
(POST-WARRANTY PERIOD)**

**ARTICLE I  
GENERAL**

1. **Term; Termination.** This Exhibit A shall be in effect from the date on which the Warranty Period expires until the first anniversary thereof (the "Hardware Maintenance Term"). The Hardware Maintenance Term shall automatically renew for an unlimited number of successive one year periods until this Exhibit A is terminated by the first to occur of (a) either party's election to terminate it upon expiration of the Hardware Maintenance Term or any renewal thereof, written notice of which election shall be given to the other party at least sixty (60) calendar days prior to such annual expiration date, (b) the date that is 30 days after either party notifies the other that the other has materially breached this Exhibit A, and the breaching party fails to cure such breach within such 30-day period, or (c) the date that is 30 days after Customer fails to pay any amount due ES&S under this Exhibit A. The termination of this Exhibit A shall not relieve Customer of its liability to pay any amounts due ES&S hereunder.

2. **Fees.** In consideration for ES&S' agreement to provide Hardware Maintenance Services and Software Maintenance and Support under this Exhibit A, Customer shall pay to ES&S the Hardware Maintenance and Software Maintenance Fees set forth on Schedule A1 for the initial Term. The Hardware Maintenance and Software Maintenance Fees for the initial Term are due on the date of the expiration of the Warranty Period. The Hardware Maintenance and Software Maintenance Fees for any renewal period shall be the then current fees in effect and are due and payable no later than 30 days prior to the beginning of such renewal period. The Software Maintenance Fee shall be comprised of (i) a fee for the Software Maintenance and Support provided for the ES&S Firmware, and (ii) a fee for the Software Maintenance and Support provided for all other ES&S Software, and shall be in addition to any fees or charges separately referred to in any Section of this Exhibit A or the Agreement. If Customer elects to receive Software Maintenance and Support for an Add-On or New Product during the Term or any renewal thereof, ES&S will charge an incremental Software Maintenance Fee for such services. In the event Customer terminates this Agreement through no fault of ES&S and later desires to subscribe for a maintenance and support plan, or otherwise changes its maintenance and support plan with ES&S during the Initial Maintenance Term or any renewal thereof, ES&S will charge the Customer its then current contract administration fee in order to process such new subscription for, or change in, maintenance and support coverage.

**ARTICLE II  
HARDWARE**

1. **Maintenance Services.** The Hardware Maintenance Services to be provided to Customer under this Exhibit A for the ES&S Equipment listed on Schedule A1 (the "Products") shall be subject to the following terms and conditions:

a. **Inspection.** If the Hardware Maintenance Term or any renewal thereof expires without being renewed, Customer may thereafter resume receiving Hardware Maintenance Services under this Exhibit A upon (a) notification to ES&S, (b) payment of all fees which would have been due to ES&S had the Maintenance Term or any renewal thereof not expired, and (c) the granting to ES&S of access to inspect the Products. The purpose of such inspection shall be to determine whether or not the Products are fit for the ordinary purposes for which they are to be used, normal wear and tear excepted ("Normal Working Condition"). The cost of such inspection will be at the current published ES&S rate plus ES&S' Out-of-Pocket Expenses, and shall be due from Customer within 30 days of its receipt of ES&S' invoice therefore. If any of the Products is not in Normal Working Condition, ES&S, at the option of Customer, (i) shall provide such repairs and replacements as ES&S deems reasonable and necessary to restore such Product(s) to Normal Working Condition, at Customer's expense with respect to the cost of any parts used in such repairs or replacements, or (ii) shall not provide any Hardware Maintenance Services with respect to such Product(s). For purposes of this Exhibit A, "Out-Of-Pocket Expenses" shall mean all travel, meal and lodging expenses incurred by ES&S employees or authorized representatives ("ES&S Representatives") who are required to travel to Customer's Designated Location to provide services. Customer's "Designated Location" shall mean Customer's owned or leased facility at which Customer desires ES&S to perform the Hardware Maintenance Services. Customer's Designated Location is specified on Schedule A1.

b. **Routine Maintenance Services.** An ES&S Representative shall provide such services as may be necessary to keep the Products in Normal Working Condition ("Routine Maintenance Services") once each 12 months during the Hardware Maintenance Term or any renewal thereof. Customer may request that Routine Maintenance Services be performed more than once during any such 12-month period. Any such request shall be made at least 60 days before the Routine Maintenance Services are desired. The per-unit fee for such additional Routine Maintenance Services is set forth on Schedule A1 and shall be due within 30 days after invoice. Routine Maintenance Services shall include cleaning, lubrication and calibration services. At the request of Customer, ES&S shall provide a reasonably detailed record of all Routine Maintenance Services performed with respect to one or more Products. The Routine Maintenance Services will be provided either at Customer's Designated Location or at an ES&S-designated depot facility ("Depot"), as elected by Customer on Schedule A1. Customer shall pay all costs associated with shipping Product(s) to a Depot, including insurance.

c. **Remedial Maintenance Services.**

i. **Defects Under Normal Use and Service.** If a defect or malfunction occurs in any Product while it is under normal use and service, Customer shall promptly notify ES&S, and ES&S shall use reasonable efforts to restore the Product to Normal Working Condition as soon as practicable. The services provided by ES&S pursuant to this Subsection 2(c)(i) are referred to herein as “Remedial Maintenance Services”. ES&S shall provide the Remedial Maintenance Services at its Depot; provided, however, that if Remedial Maintenance Services are required for 10 or more Products at any given time, Customer may elect to have them provided at its Designated Location; provided, further, that all Remedial Maintenance Services provided for central count equipment shall be provided at Customer’s Designated Location. Customer acknowledges that Product(s) identified on Schedule A1 as “depot repair only” may only be repaired at a Depot.

ii. **Defects Due to Customer Actions or Omissions.** If a defect or malfunction occurs in any Product as a result of (1) repairs, changes, modifications or alterations not authorized or approved by ES&S, (2) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S or (3) causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations, and utility or communication interruptions, or if Customer does not notify ES&S within 24 hours after it knows of the defect or malfunction or is otherwise not in compliance with its obligations hereunder, Customer shall pay ES&S for the Remedial Maintenance Services at ES&S’ then-current rates, as well as for the cost of all parts used in connection with such Remedial Maintenance Services.

iii. **Timing.** The date(s) on which any Remedial Maintenance Services shall be provided shall be mutually agreed upon by ES&S and Customer. If Customer requires ES&S to provide “emergency” Remedial Maintenance Services (which shall be defined as Remedial Maintenance Services that are provided within 48 hours after Customer notifies ES&S of the need therefor), and such emergency Remedial Maintenance Services are not needed as a result of an action, error or omission by ES&S, Customer shall pay a surcharge, as set forth on Schedule A1.

iv. **Loaner Unit.** At Customer’s request, ES&S shall use reasonable efforts to promptly make available to Customer a product that is the same as, or substantially similar to, the Product for which Remedial Maintenance Services are being performed (a “Loaner Unit”). If the Remedial Maintenance Services are being performed pursuant to Subsection 2(c)(ii) above, Customer shall pay ES&S for the use of the Loaner Unit at ES&S’ then-current rates including the cost of shipping.

d. **Exclusions.** ES&S has no obligation under this Exhibit A to (i) assume the obligations under any existing or expired warranty for a Third Party Item; (ii) repair or replace Product components that are consumed in the normal course of operating the Product, including printer ribbons, paper rolls, batteries, removable memory packs, cancellation stamps, ink pads or red stripe pens, or (iii) repair any Product from which the serial number has been removed or altered. In addition, ES&S may, at any time in its discretion, determine that any Product is no longer fit for Hardware Maintenance Services because it is in such poor condition that it cannot practically be restored to Normal Working Condition, or cannot be restored to Normal Working Condition at an expense that is less than the then-current value of the Product. If such a determination is made, ES&S shall no longer be required to provide Hardware Maintenance Services for such Product. ES&S shall also refund to Customer an amount equal to (1) that portion of the most recent fee paid for Hardware Maintenance Services that is attributable to such Product, multiplied by (2) a fraction, the numerator of which is the remaining number of days in the Hardware Maintenance Term or renewal period for which such fee was paid and the denominator of which is the total number of days in such Hardware Maintenance Term.

e. **Sole Provider; Access.** Customer shall not permit any individual other than an ES&S Representative to provide maintenance or repairs with respect to the Products for so long as a Hardware Maintenance Term is in effect. Customer shall provide ES&S Representatives with all information necessary to enable them to provide Hardware Maintenance Services. Customer shall likewise provide full access to the Products and adequate working space for all Hardware Maintenance Services performed at its Designated Location, including sufficient heat, lights, ventilation, electric current and outlets.

f. **Storage.** When not in use, Customer shall properly store the Products in accordance with the storage requirements established in the Documentation.

### **ARTICLE III SOFTWARE**

1. **Services Provided.** ES&S shall provide maintenance and support services for the ES&S Software (“Software Maintenance and Support”), to enable it to perform in accordance with its Documentation in all material respects, and to cure any defect in material or workmanship.

2. **Updates.** During the Software Maintenance Term and any renewals thereof, ES&S shall continue to provide updates in accordance with any update schedule determined by ES&S.

3. **Reinstatement of Software Maintenance and Support.** If the Software Maintenance Term or any renewal thereof expires without being renewed, Customer may thereafter resume receiving Software Maintenance and Support upon (a) notification to ES&S, (b) payment of all fees which would have been due to ES&S had the Software Maintenance Term not expired, and (c) the granting to ES&S of access to the ES&S Software, so that ES&S may analyze it and perform such maintenance as may be necessary before resuming the Software Maintenance and Support.

4. **Conditions.** ES&S shall provide Software Maintenance and Support for any item of ES&S Software if such item requires such services as a result of (a) repairs, changes, modifications or alterations not authorized or approved by ES&S, (b) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S, (c) causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, (d) Customer's failure to timely and properly install and use the most recent Update, or the second most recent Update, provided to it by ES&S, (e) Customer's failure to notify ES&S within 24 hours after Customer knows of the need for such services, or (f) if Customer is otherwise not in compliance with its obligations under this Agreement. However, such Software Maintenance and Support shall not be provided at the Software Maintenance Fees outlined in Section 5(b), but shall be provided at the fees to be agreed upon by the parties if and when the need for such Software Maintenance and Support arises.

5. **Proprietary Rights.** ES&S shall own the entire right, title and interest in and to all corrections, programs, information and work product conceived, created or developed, alone or with Customer or others, as a result of or related to the performance of this Exhibit A, including all proprietary rights therein or based thereon. Subject to the payment of all Software Maintenance Fees, ES&S hereby grants to Customer a non-exclusive license to use that portion of such corrections, programs, information and work product that ES&S actually delivers to Customer pursuant to this Exhibit A. All licensed items shall be deemed to be ES&S Software for purposes of this Agreement. Except and to the extent expressly provided herein, ES&S does not grant to Customer any right, license, or other proprietary right, express or implied, in or to any corrections, programs, information, or work product covered by this Agreement.



**Schedule A1**

**DESCRIPTION OF PRODUCTS**

**HARDWARE**

<b>Quantity</b>	<b>Description (Note: *** indicates Depot Repair Only Products)</b>	<b>Initial Maintenance Fee Per Unit</b>	<b>Initial Maintenance Fee In Total</b>
1	***ES&S AutoMARK Voter Assist Terminal	\$303	\$303
3	***Model 100 Precinct Scanner	\$195	\$585
	Total Hardware Maintenance Fees Due for the Initial Hardware Maintenance Term		\$888

**Note 1: The Per-Unit Fees if Customer requests more than one Routine Maintenance visit in a 12-month period shall be 90% of the then current maintenance fee per unit.**

**Note 2: The Surcharge for Emergency Remedial Maintenance Services shall be 150% of the then current maintenance fee per unit.**

**Note 3: Customer's Designated Location: City of Novi, Michigan**

**Note 4: Location of Services**

- Customer's Designated Location
- Depot

**Note 5: Per Unit Surcharge for performance of Routine Maintenance visit at more than one Customer Designated Location shall be \$25.00 per unit for all units located at second or more locations.**

**SOFTWARE**

<b>Year</b>	<b>First Month Applicable</b>	<b>Fee –ES&amp;S Firmware</b>	<b>Fee- All Other ES&amp;S Software</b>
AutoMARK-2011	TBD	Included in Annual Hardware Maintenance	N/A
M100-2009	TBD	\$180	N/A