

**COPY**

ATTACHMENT #1

Kern County

Agt. # 1021-2607

**PURCHASE AGREEMENT BETWEEN**

**DIEBOLD ELECTION SYSTEMS, INC.**

**AND**

**KERN COUNTY**

**FOR THE PURCHASE OF**

**TOUCH SCREEN PRECINCT AND EARLY VOTING SYSTEM,  
AND OPTICAL SCAN MAIL AND ABSENTEE VOTING SYSTEM**

**Kern**

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## PURCHASE AGREEMENT

This Agreement is made and entered into this 12<sup>th</sup> day of November, 2002, by and between Diebold Election Systems, Inc. (hereinafter referred to as "CONTRACTOR"), a Delaware corporation having its offices at 1611 Wilmet Road, McKinney, Texas 75089-8250, and the County of Kern, a political subdivision of the State of California, (hereinafter referred to as "COUNTY"), as represented by the Auditor-Controller-County Clerk, having its offices at 1115 Truxtun Ave., Bakersfield, CA, 93301. The term "CONTRACTOR" shall refer to the company, its agents, and its sub-contractors.

### RECITALS

**WHEREAS**, COUNTY has a punch card voting system; and

**WHEREAS**, COUNTY has investigated various electronic voting and tabulation systems in order to ascertain which would best serve its need to automate these functions and has determined by means of a request for proposal process that CONTRACTOR's system best meets the voting needs of COUNTY; and

**WHEREAS**, COUNTY desires to contract with CONTRACTOR to obtain the Equipment, licenses to the Software, and System maintenance and other services described in Riders to this Agreement and CONTRACTOR desires to contract with COUNTY to provide said Equipment, licenses to the Software, hardware warranty/maintenance, and Software maintenance and those services described in Riders to this Agreement;

**NOW THEREFORE**, in consideration of the mutual covenants, promises and undertakings contained herein, the parties agree as follows:

#### 1. FURNISHING OF EQUIPMENT AND SOFTWARE

Subject to the terms and conditions set forth herein, CONTRACTOR agrees to provide at locations specified by COUNTY, and COUNTY hereby agrees to purchase:

- A. the Equipment listed on Rider B hereto (collectively the "Equipment") at the price listed on Rider B.
- B. a license for the use of the computer software programs and related documentation listed on Rider C hereto (collectively "the Software") at the price specified on Rider C.
- C. the CONTRACTOR services listed on Rider D at the prices specified on Rider D.
- D. the warranty and support/maintenance services listed in Riders J and M according to the payment schedule set out in Riders B and C.

CONTRACTOR hereby designates COUNTY as a most favored customer and agrees to give COUNTY prices, warranties, support terms, benefits and license terms that are equivalent to or better than those CONTRACTOR offers to its other customers of similar size and configuration as COUNTY with 200,000 to 350,000 registered voters for a period of five (5) years from contract signing. If within five (5) years CONTRACTOR enters into a future agreement providing another customer of similar size and configuration with more favorable terms, CONTRACTOR agrees this Agreement will be amended, pursuant to Section 32, to provide the same terms to COUNTY to include any refunds or credits thereby created.

## 2. CONTRACT DOCUMENTS AND TERM

The contract documents are:

A. This Agreement, including the following Riders attached hereto:

Rider A.	Schedule of Activities
Rider B.	Equipment List, Prices
Rider C.	Software List, Prices
Rider D.	Contractor Services and Supplies, Prices
Rider E.	Price Summary
Rider F.	Payment Schedule and Contract Milestones
Rider G.	Not in Use
Rider H.	Hardware and System Functionality Tests
Rider I.	Not in Use
Rider J.	Software/Equipment Support/Maintenance Agreement
Rider K.	Taxes
Rider L.	Source Code Escrow Agreement
Rider M.	Software License and Warranty Agreement
Rider N.	Connelly Asbestos Notice
Rider O.	Site and Warehouse Specifications
Rider P.	Amendment Requirements

Each of these documents is incorporated herein by this reference as if set forth in full, and shall constitute a part of this Agreement. The terms and conditions stated in this Agreement shall take precedence over any such conflicting terms and conditions, except the terms of license to Third Party Software, which constitute independent agreements between the Third Party Software provider and the end user, and which are not subject to alteration by this Agreement. In the event of any conflict in obligations pursuant to the above documents, except a conflict with a Third Party Software license, control shall be determined in the following order:

1. This Agreement
2. Riders attached hereto
3. Exhibits to Riders attached hereto

The failure of the body of this Agreement to include reference to any matter contained in the Riders and their Exhibits shall not be deemed to constitute a conflict.

B. This Agreement shall become effective upon the date COUNTY obtains a signed funding agreement from the Voting Modernization Board for a minimum of \$3.4 million ("Effective Date") and the term shall continue thereafter through the 2004 General Election certification of election results which shall occur no later than November 30, 2004, providing however, that the License and Warranty Agreement may extend beyond the end of the term of this Agreement. After the term of this Agreement and for a cumulative period of at least ten (10) years from the Effective Date, for the purpose of maintaining State certification and for Software and Equipment support, the License and Warranty Agreement shall be continued on an annual basis, at COUNTY's request, subject to COUNTY's payment of an Annual License Fee and an Annual Warranty Fee provided that COUNTY has not breached this Agreement or the License and Warranty Agreement. Subject to the same foregoing conditions, at COUNTY's request, CONTRACTOR also agrees to maintain the System Equipment for no less than ten (10) years following the Effective Date pursuant to Rider M.

If CONTRACTOR chooses not to continue any portion of the License and Warranty Agreement at any time following the tenth anniversary of the Effective Date, CONTRACTOR must notify COUNTY in writing at least 180 days prior to the expiration date of such Agreement(s). After the tenth anniversary of the Effective Date, COUNTY may extend the License and Warranty Agreement annually for up to a cumulative period of twenty (20) years, so long as the COUNTY has not materially breached the terms of this Agreement or the License and Warranty Agreement and has paid the annual Warranty and/or License Fees, and CONTRACTOR has not notified COUNTY that it intends to terminate the License

and Warranty Agreement as stated immediately above. During this period, COUNTY may choose to renew the Software License without renewing the Hardware Warranty. If COUNTY chooses not to renew the License or Warranty portions of the License and Warranty Agreement, COUNTY must notify CONTRACTOR in writing at least 30 days prior to the expiration date that the applicable portion of the License and Warranty Agreement will not be renewed. If the Warranty is terminated, COUNTY shall be responsible for maintenance of all non-Software portions of the System. Any termination, other than a termination for breach, shall not be effective until the end of that term of the License and Warranty Agreement.

### **3. DEFINITION OF TERMS**

- A. "AccuVote-OS Software," the optical scanning and tabulation software designed for use with the AccuVote-OS Unit.
- B. "AccuVote-OS Tabulation Device" means the dedicated hardware used with the AccuVote-OS Software.
- C. "AccuVote-OS Unit" means the combination of one AccuVote-OS Tabulation Device with one copy of the AccuVote-OS Software.
- D. "AccuVote-TS Ballot Station" means the dedicated hardware used with the AccuVote-TS Software
- E. "AccuVote-TS Software," the ballot station software designed for use with the AccuVote-TS Unit.
- F. "AccuVote-TS Unit" means the combination of one AccuVote-TS Ballot Station with one copy of the AccuVote-TS Software.
- G. "Agreement" has the meaning set forth in the recitals.
- H. "DESI Application Software" means licensed information processing programs owned by CONTRACTOR, including firmware, and the associated documentation which are specified in Riders C and D to this Agreement.
- I. "DESI Application Software Module" means one copy of the object code of any of AccuVote-OS Software, AccuVote-TS Software, GEMS Software, or other application software module designed by or for CONTRACTOR and licensed pursuant to this Agreement.
- J. "DESI Hardware" means the dedicated hardware manufactured by CONTRACTOR and provided by CONTRACTOR to COUNTY for use as a voting, scanning, or vote tabulation device in conjunction with DESI Application Software.
- K. "Effective Date" has the meaning set forth in Subsection 2.B.
- L. "Equipment" means the items listed on Rider B, including the hardware and the hardware manufacturer's software.
- M. "GEMS Software," CONTRACTOR's election management software.
- N. "License" has the meaning set forth in Section 16 and Riders C and M hereto.
- O. "License Agreement(s)" means the licensing provisions of the Software License and Warranty Agreement set forth in Rider M, and Third Party Licenses, some of which are attached thereto and identified in Rider C.
- P. "License and Warranty Agreement" means the Software License and Warranty Agreement set forth in Rider M.

- Q. "Licensed Software" (or "Software") means each (or all) software product(s) listed in Rider C., including machine-readable object code (not source code) for such product, any user documentation for such product, and any other related materials which are furnished to COUNTY by CONTRACTOR or its subcontractors for use in connection with such product.
- R. "Non-DESI Hardware" means all hardware as specified in Rider B to this Agreement, which are off-the-shelf products or produced or manufactured by other than CONTRACTOR, which are provided by CONTRACTOR pursuant to this Agreement as part of the System.
- S. "Party" and "Parties" mean COUNTY and CONTRACTOR.
- T. "State" means the State of California, United States of America.
- U. "System" means the total complement of DESI Application Software, Third Party Software, DESI Hardware and Non-DESI Hardware, furnished by CONTRACTOR.
- V. "System Acceptance" (or "Acceptance") means the successful completion of the applicable acceptance testing performed pursuant to Sections 8 and 9 of this Agreement.
- W. "Third Party Software" means Non-OEM Software, Manufacturer Supplied Software, including firmware, or other software owned by third parties as specified in Rider C, which CONTRACTOR provides to COUNTY pursuant to sublicenses or end user License Agreements with the owners of such Third Party Software as part of the System. Third Party Software includes, but is not limited to, various operating systems, software drivers, and report writing subroutines.
- X. "Use" means to cause the System to execute any machine-readable portion of the Software or to make use of any documentation or related materials in connection with the execution of any machine-readable portion of the Software.

#### **4. PROJECT SCHEDULING**

COUNTY shall have the right, up through thirty (30) days prior to ship date of the Equipment, to defer the delivery schedule set forth in Rider A without penalty. By mutual agreement with CONTRACTOR, agreement not to be withheld unreasonably, said delivery schedule may be deferred up to sixty (60) days. CONTRACTOR shall provide written notice of projected Equipment ship date at the earliest possible date and in no event later than thirty (30) days prior to delivery. If COUNTY delays delivery beyond sixty (60) days, COUNTY will pay CONTRACTOR all out of pocket expenses that are specifically incurred due to the delay.

COUNTY and CONTRACTOR acknowledge that each must carefully coordinate project schedules, people, and other resources to successfully meet the installation requirements. COUNTY and CONTRACTOR further acknowledge that significant delays in the schedule adversely affect both parties and may cause significant loss of revenues by CONTRACTOR and significant costs to COUNTY. Therefore, the COUNTY and CONTRACTOR acknowledge that the following milestone events shall be completed within the periods stated herein below:

**Implementation Plan Completed** – within thirty (30) days of the effective date of this Agreement. The Implementation Plan will be incorporated herein by a written Amendment, pursuant to Section 32.

**System turned Over to COUNTY for Final Acceptance testing** in accordance with Rider H no later than June 1, 2003 and Final Acceptance testing shall be completed no later than July 1, 2003.

**Final Payment** – final payment shall occur upon successful completion of the UDEL election on November 4, 2003 and certification of the election results for that election.



5. **SITE PREPARATION**

CONTRACTOR will provide site specifications for all Equipment set forth in Rider B.

COUNTY will, at its own expense, prepare the site or sites for installation of Equipment to comply with the requirements set forth in the CONTRACTOR site specifications, including providing adequate space, air conditioning, electrical power and telephone lines, as specified in Rider O, for CONTRACTOR to carry out its obligations under this Agreement, and providing adequate work space including desks, chairs, telephones, and other related facilities as may be reasonably required by CONTRACTOR to carry out its obligations under this Agreement. Prior to commencing installation, CONTRACTOR shall inspect the computer site and provide a written report certifying compliance or indicating any deficiencies in the site. Should subsequent modifications be required of COUNTY due to incomplete or inaccurate specifications from CONTRACTOR, CONTRACTOR shall bear the cost of such modifications at no charge to COUNTY. Notwithstanding any provision of this Agreement to the contrary, CONTRACTOR shall be deemed to have accepted the site preparation for each phase of installation as being in full compliance with its site specifications upon commencement of installation of the Equipment as provided in Section 6.B. herein.

6. **TRANSPORTATION AND INSTALLATION OF EQUIPMENT**

A. **TRANSPORTATION**

All shipping and insurance to and from the installation site(s) are the responsibility of CONTRACTOR, with costs to be paid by COUNTY as listed in Rider D.

1. Upon written notification by COUNTY that the site(s) have been or shall by a specified date be prepared for installation, CONTRACTOR shall arrange for transportation of Equipment to the site(s) according to Rider A.
2. Shipments by the parties to and from the installation site(s) shall be made by commercial carrier and/or by vehicle properly constructed for shipment of electronic and computer equipment.
3. All Equipment shall be delivered as "inside deliveries" to the location specified by COUNTY. Delivery shall not be deemed complete until it is on the site designated by COUNTY.
4. Equipment shall be preserved, packed and marked in accordance with standard shipping practices.
5. COUNTY shall receive all Equipment shipments and care for the same in a prudent manner until it is unpacked jointly by CONTRACTOR and COUNTY.

B. **INSTALLATION**

CONTRACTOR shall furnish all necessary labor, materials, and other services listed on Rider D, Schedule 3 required to accomplish installation. Worksite shall be kept clean and clear of all debris. All debris generated in the performance of work during installation shall be removed by CONTRACTOR at no additional cost to COUNTY. Installation shall be performed during normal business hours, and COUNTY shall make all the necessary arrangements to allow CONTRACTOR personnel sufficient work space and access to the installation locations during normal business hours or at such other times as may be mutually agreed upon.

When the System has passed the Hardware Functionality Test, CONTRACTOR shall certify to COUNTY that the installation is complete.

C. **PREVAILING WAGE**

To the extent required by law and pursuant to Chapter 1 of Part 7 of Division 2 of the Labor Code (commencing with Section 1720), CONTRACTOR agrees that in the on-site installation of the

proposed System, either by itself or through any subcontractor, eight hours labor shall be a day's work and forty hours labor shall be a week's work and that CONTRACTOR shall keep accurate records showing the name and actual hours worked of all workers employed in said work, and that said records shall be kept open during all reasonable hours for inspection pursuant to Section 1812 of the Labor Code.

To the extent required by law, the CONTRACTOR and all subcontractors shall pay not less than the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work to all workers employed in the on-site installation of the proposed System. The prevailing rate for each craft, classification or type of work is determined by the Director of the California Department of Industrial Relations, and his schedule of prevailing rates is on file and available for inspection in the Kern County General Services Department. The schedule is incorporated herein by this reference.

Pursuant to the conditions hereinabove, CONTRACTOR shall forfeit to COUNTY for each worker employed for each calendar day or portion thereof (a) fifty dollars (\$50) pursuant to Section 1775 of the Labor Code, per worker paid less than the amount to which he is entitled under said general prevailing rate of wages, and (b) twenty-five dollars (\$25) pursuant to Section 1813 of the Labor Code, per worker required to work more than eight (8) hours per day or more than forty (40) hours per week, except as provided in Section 1815 of the Labor Code.

**7. RISK OF LOSS**

CONTRACTOR is responsible for all risks of loss or damage to Equipment furnished under this Agreement until delivery is complete, except to the extent that loss or damage is caused by COUNTY. To retain the benefit of this clause, COUNTY shall notify CONTRACTOR of any known loss or damage or visible damage to exterior packaging within ten (10) business days of the receipt of any or all portions of the System, or such shorter period as may be required to comply with the claims requirements of the shipper, and shall cooperate in the processing of any claims made by CONTRACTOR. Thereafter COUNTY will be responsible for risks of loss or damage, except for loss or damage incurred during shipping or caused by CONTRACTOR in the process of installation.

**8. ACCEPTANCE TESTS**

The COUNTY and CONTRACTOR shall perform testing of the System in sufficient time for the System to be operational and in use for all aspects of the November 4, 2003 UDEL election in Kern County.

**A. HARDWARE FUNCTIONALITY TEST**

The purpose of the Hardware Functionality Test is to ascertain that the Equipment listed on Rider B, other than DESI Hardware, as installed is operational. The test will be performed as provided for in the Non-DESI Hardware manufacturer's acceptance testing, if provided, or as set forth in Rider H. Unless otherwise specified, DESI Hardware will be tested as indicated in Subsection 8.B.

Upon completing installation of the Equipment, and Third Party Software, CONTRACTOR will conduct the Non-DESI manufacturer's acceptance testing where applicable. Upon successfully completing this acceptance testing, a "Certificate of Hardware Acceptance" will be delivered to COUNTY and the Equipment and Third Party Software will be deemed Accepted upon signing by COUNTY, which signature shall not be unreasonably withheld.

**B. MODULE AND SYSTEM FUNCTIONALITY TEST(S)**

The purpose of the Module and System Functionality Test is to verify that the required functional capabilities of the Application Software and System have been delivered. The test will be performed as set forth in Rider H. The Software and Equipment which, combined, constitute the AccuVote-TS Unit or AccuVote-OS Unit shall be tested as a unit. Upon delivery of the final AccuVote units, successful completion of the acceptance tests, and certification of the test results by the State, COUNTY will sign off on a Certificate of Acceptance prepared by CONTRACTOR for this purpose.

C. **ON-GOING ELECTION TESTING**

To maintain State certification of the System throughout the term of this Agreement, COUNTY and CONTRACTOR shall perform pre-election testing of the System in sufficient time, as mutually agreed between the parties, to permit the timely repair of the System before each election. These tests include those components of the above specified Hardware and System Functionality tests as provided for in the on-going System support purchased pursuant to this Agreement.

9. **FINAL ACCEPTANCE**

Upon deposit with the Escrow Agent of the version of the Licensed Software source code installed on the System pursuant to Section 16.H, upon the Secretary of State or his designee having signed off approving the installation, and upon certification of election results of the November 4, 2003 UDEL Election, CONTRACTOR shall invoice COUNTY and COUNTY shall authorize the payment due for Final Acceptance as specified in Rider F. Under no circumstances, other than written agreement between the parties, shall COUNTY be responsible for making the associated payment until after receiving confirmation from the Escrow Agent of their receipt of the source code deposit and confirmation from the Secretary of State of that Office's approval of the installation.

10. **WARRANTY**

A. **SYSTEM WARRANTY**

CONTRACTOR warrants that the System provided pursuant to this Agreement will, for the term of this Agreement and each additional term purchased by COUNTY under the License and Warranty Agreement subject to the warranty limitations contained in Section 10.B.5 and 10.C, perform the functions outlined in Rider H, will remain certified by the State and will be maintained to operate in accordance with the manufacturer's specifications for the term of this Agreement and any term of the License and Warranty Agreement. On-going Election Testing pursuant to Section 8.C hereinabove and Rider H shall be used to determine whether the System meets the functional standards.

CONTRACTOR's System warranty extends to that Equipment and those Software modules, contained in the most current release at the time of acquisition of the System, and all upgrades pertaining to that Equipment and Software modules that are offered during the term of the Agreement and each additional term purchased by COUNTY under the License and Warranty Agreement.

In the event CONTRACTOR fails at any time to maintain the System requirements specified in Rider H, or maintain State certification requirements as modified from time-to-time by the State, during the initial ten (10) years under the License and Warranty Agreement, inclusive of the term of this Agreement, CONTRACTOR will provide and install at no additional cost whatsoever to COUNTY such additional hardware and software necessary to bring the System into compliance with these requirements within one hundred and twenty (120) days after written notification to CONTRACTOR by COUNTY of such failure, unless an extension is mutually agreed to in writing by CONTRACTOR and the COUNTY. During this initial ten (10) year period, should the State or federal election agencies change the certification requirements such that CONTRACTOR is unable to maintain State certification of the System, including taking all efforts to upgrade Equipment with off-the-shelf components, applying updates to the DESI Application Software and adapting to new releases of Third Party Software to comply with the mandated changes, then CONTRACTOR shall have no obligation regarding this warranty for that portion of the System which the State or federal election agency specifies in writing will no longer retain certification due to the mandated change.

Should CONTRACTOR provision of such additional hardware and software be insufficient to maintain the System requirements specified in Rider H, or maintain State certification requirements as modified from time-to-time by the State, CONTRACTOR shall facilitate and assist COUNTY to fall back, within one hundred and fifty (150) days of the original written notification to CONTRACTOR by COUNTY of the failure, to the most recent prior version of the System which operates successfully in COUNTY's environment as long as that prior version continues to conform to the Systems requirements specified in Rider H and all State certification requirements then in effect.

Should CONTRACTOR be unable to bring the System into compliance with the above requirements within 180 days, COUNTY shall be entitled to the release of the GEMS source code from escrow pursuant to Section 16.

B. OTHER WARRANTIES

1. CONTRACTOR represents and warrants that it is not currently bound by any other agreements, restrictions or obligations nor will CONTRACTOR assume any such obligations or restrictions which do or would in any way interfere or be inconsistent with the property, products, services or licenses furnished and to be furnished by CONTRACTOR to COUNTY under this Agreement and that the services and work-product provided to COUNTY are original with or owned by CONTRACTOR, or CONTRACTOR has the right to sublicense all property included in the System, and that no portion of such services or work-product, or its use by COUNTY pursuant to the terms of this Agreement, violates or is protected by the right, title, interest or similar right of any third party or entity, however organized, or infringes or misappropriates any United States or foreign patent or copyright, or any trade secret or other proprietary right. CONTRACTOR further represents and warrants that it is capable of entering into this Agreement with COUNTY in every and all respect and that COUNTY shall have quiet and peaceful enjoyment of the use of the System for the duration of this Agreement, until and unless this Agreement is properly and lawfully terminated, ended, or otherwise declared ineffective, as specified herein.
2. CONTRACTOR warrants that COUNTY shall acquire good and clear title to the Equipment, except firmware and software, being purchased hereunder, free and clear of all liens and encumbrances. All Equipment shall be new or warranted as new.
3. DESI Application Software Warranty. CONTRACTOR warrants that it is the owner of DESI Application Software or has the right to permit COUNTY to use the DESI Application Software in compliance with the express terms of Section 16 of this Agreement. CONTRACTOR also warrants that when used with the Equipment and Software configuration purchased from or approved by CONTRACTOR, the DESI Application Software Module will perform free of software defects that would prevent the System from operating in all material respects in the manner described in the User Documentation, listed in Rider D, Schedule 4. These Warranties shall begin for each DESI Application Software Module on shipment and shall continue for the term of this Agreement and any term of the License and Warranty Agreement purchased by COUNTY.
4. DESI Hardware Warranty. CONTRACTOR warrants that when used with the Equipment and Software configuration purchased through or approved by CONTRACTOR, each item of hardware will be free of defects that would prevent the System from operating in all material respects in the manner described in the DESI User Documentation, listed in Rider D, Schedule 4. These Warranties shall begin for the AccuVote-TS Ballot Station on Acceptance of the AccuVote-TS Units and for the AccuVote-OS Tabulation Device on Acceptance of the AccuVote-OS Units and for any other item of DESI Hardware on the Acceptance of that item of DESI Hardware, and shall continue for the term of this Agreement and any term of the License and Warranty Agreement purchased by COUNTY.
5. Non-DESI Hardware and Third Party Software Warranty. To the extent permitted by the manufacturer, CONTRACTOR shall pass through to the COUNTY all warranties provided to CONTRACTOR by the manufacturers of each software or hardware component of this System. Otherwise, Non-DESI Hardware and Third Party Software Warranty, including without limitation, software products of Microsoft, IBM, or BSQUARE ("the Third Party Software"), even if provided to COUNTY by CONTRACTOR, except as otherwise provided for in this Agreement, is delivered AS IS AND WITHOUT WARRANTY. CONTRACTOR MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND OR NATURE WHATSOEVER CONCERNING THE SOFTWARE, THE DOCUMENTATION OR ANY SERVICES PROVIDED HEREUNDER. CONTRACTOR DOES NOT

WARRANT UNINTERRUPTED OPERATION OR THAT THE SOFTWARE WILL BE ERROR FREE. THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.

6. The provisions of the warranty set forth in this Section shall extend only to COUNTY as an original purchaser and in no event will extend beyond repair or replacement of the defective portions of the Equipment except as otherwise provided for herein.
7. CONTRACTOR warrants that any Product furnished pursuant to this Agreement shall support a four-digit year format and be able to accurately process date and time data from, into and between the years 1999 and 2000, as well as leap year calculations. Any use of the year 2000 or beyond in the proper use of the Product will not cause incorrect scheduling, reporting, or other improper results. "Product" shall include, without limitation, any piece or component of equipment, hardware, firmware, middleware, custom or commercial software, or internal components or subroutines therein. This warranty shall survive termination or expiration of this Agreement.

In the event of any decrease in Product functionality or accuracy related to time and/or date data related codes and/or internal subroutines that impede the Product from operating correctly using dates beyond December 31, 1999, CONTRACTOR shall restore or repair the Product to the same level of functionality as warranted herein, so as to minimize interruption to COUNTY's ongoing business processes, time being of the essence. In the event that such warranty compliance requires the acquisition of additional programs, the expense for any such associated or additional acquisitions, which may be required, including, without limitation, data conversion tools, shall be borne exclusively by CONTRACTOR. Nothing in this warranty shall be construed to limit any rights or remedies the COUNTY may otherwise have under this Agreement with respect to defects other than Year 2000 performance.

8. CONTRACTOR warrants, for the term of this Agreement and any additional term purchased under the License and Warranty Agreement, that the System, including any updates, enhancements or customizations provided at COUNTY's expense, furnished pursuant to this Agreement shall conform to the accessibility standards contained in section 508 of the Americans with Disabilities Act as amended.
9. CONTRACTOR warrants that at the time of the System installation, the Software does not contain, and will not receive from any update whether by modem or magnetic medium, any virus, worm, trap door, back door, timer or clock that would erase data or programming or otherwise cause the System to become inoperable or incapable of being used in accordance with the documentation.

#### C. WARRANTY LIMITATIONS

1. To the extent allowed by law, warranty obligations of CONTRACTOR shall not extend beyond those herein stated above.
2. CONTRACTOR warranty does not cover an item of Software or Equipment (a) used in other than its normal and customary manner; (b) subjected to misuse; or (c) subjected to modifications by COUNTY or by any party other than CONTRACTOR without prior written consent of CONTRACTOR.
3. CONTRACTOR shall not be responsible for any defects resulting from COUNTY's mishandling, abuse, misuse, improper storage or improper operation, including use in conjunction with a hardware and/or software configuration other than that purchased from or approved by DESI, as well as COUNTY's failure to maintain the environmental conditions specified by the manufacturer of the System.

4. THE WARRANTIES CONTAINED IN THIS SECTION 10 ARE IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED. NEITHER CONTRACTOR NOR ANY MANUFACTURER OR SOFTWARE PROVIDER FOR THIS SYSTEM SHALL IN ANY EVENT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST INCOME, LOST REVENUE, OR LOST PROFIT, WHETHER SUCH DAMAGES WERE FORESEEABLE OR NOT AT THE TIME THAT THIS AGREEMENT WAS ENTERED INTO, AND WHETHER OR NOT SUCH DAMAGES ARISE OUT OF A BREACH OF WARRANTY, A BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY OR ANY OTHER THEORY OF LIABILITY.

## 11. PAYMENT SCHEDULE

The total amount of compensation payable by COUNTY to CONTRACTOR pursuant to this Agreement shall not exceed those amounts set forth in Rider E. The amounts paid CONTRACTOR shall include all of CONTRACTOR's salary, overhead and incidental expenses, and profit. COUNTY shall not be liable to CONTRACTOR or any of CONTRACTOR's employees for any benefits or additional compensation or payments.

- A. Except as provided in Sections 11.C and 11.D, payment is due within thirty (30) days following COUNTY authorization for successful completion of contract milestones as detailed in Rider F. Payment is calculated as a percentage of the total of the System price as listed in Rider E. With respect to any travel costs that are reimbursable by COUNTY, CONTRACTOR shall be reimbursed at the current rates applicable to COUNTY employees.
- B. Invoices shall be submitted to COUNTY at the address contained in the first paragraph of this Agreement.
- C. In the event that CONTRACTOR, acting on instructions from COUNTY that the sites are ready for installation, delivers Equipment to the site(s) and, because of acts or omissions by COUNTY or its agents, installation is delayed more than twenty-one (21) days after the date specified in the written notice as per Section 6.A.1, the following amount shall be due and payable to CONTRACTOR: 1) the contract amount for such Equipment delivered and tested as operational; 2) shipping and transportation charges for same; and 3) any applicable taxes. CONTRACTOR shall submit an invoice for the above amount along with a new payment schedule showing the immediate subsequent milestone payments reduced by the amount of the invoice.
- D. During the term of this Agreement and any term of the License and Warranty Agreement, COUNTY may withhold from any payments due CONTRACTOR the portion thereof to which COUNTY would be entitled if the grounds below are not remedied, or which the COUNTY is legally obligated to withhold, for any of the following grounds:
  - (1) Defective work not remedied.
  - (2) Third party claims or liens.
  - (3) Damage to COUNTY property caused by CONTRACTOR.
  - (4) CONTRACTOR's failure to comply with any remedy or perform any duty provided in this Agreement.

Payments shall be made for amounts withheld only after the above grounds have been removed. In the event COUNTY withholds any payment for any of the above grounds, COUNTY must so notify CONTRACTOR in writing within twenty (20) days of receipt of the invoice.

- E. Notwithstanding the provisions of subsection D above, the COUNTY grants to CONTRACTOR a continuing security interest in the System sold or licensed hereunder and any additions, replacements or proceeds thereof. However, this security interest does not give CONTRACTOR any right to enter upon COUNTY's premises, to disconnect the System, or to render it unusable without written notice to COUNTY in the event of default. If COUNTY has accepted a milestone but has not made the corresponding payment, CONTRACTOR may cease delivery or withhold any remaining portion of the System until the amount due is paid in full.

**12. TAXATION**

COUNTY acknowledges and agrees that it is subject to and obligated to pay all applicable Federal, State and Local taxes as set out in Rider K. If CONTRACTOR is required to pay any such taxes on COUNTY's behalf, COUNTY shall promptly reimburse CONTRACTOR for payment of such taxes upon receipt of CONTRACTOR's invoice.

**13. TITLE**

Title to the Equipment, except Software and firmware, shall pass from CONTRACTOR to COUNTY upon delivery. Passing of title upon delivery shall not negate CONTRACTOR's obligation to repair or replace Equipment damaged during delivery. Software, including firmware, is licensed not sold. The original and any copies of the DESI Application Software, or other software provided pursuant to this Agreement, in whole or in part, including any subsequent improvements or updates, shall remain the property of DESI, or any third party that owns such software.

**14. TRAINING**

- A. Initial Training: CONTRACTOR will provide training sessions on the operation and use of the System for COUNTY's personnel as set forth in Rider D, Schedule 2 at times to be agreed upon by CONTRACTOR and COUNTY.
- B. Future Training: Any additional training required as a result of Equipment and/or Software upgrade to the System purchased under this Agreement will be provided by CONTRACTOR on a schedule as agreed to by CONTRACTOR and COUNTY. Nothing in this paragraph shall be construed to obligate COUNTY to purchase, or CONTRACTOR to provide without additional fees, any additional training or periodic review sessions.

**15. DOCUMENTATION**

CONTRACTOR shall provide System documentation and printed training manuals for the operation and maintenance of the System. Such documentation shall include documentation, users manuals, training materials and subscriptions as detailed in Rider D, Schedule 4.

All revisions and upgrades to documentation and manuals will be supplied by CONTRACTOR at no additional cost provided that a support/maintenance agreement is in effect between COUNTY and CONTRACTOR.

COUNTY may photocopy or otherwise reproduce CONTRACTOR copyrighted documentation for the COUNTY's own use, provided that CONTRACTOR's statement of copyright is included on each copy.

**16. SOFTWARE LICENSE**

**A. GENERAL**

CONTRACTOR hereby grants to COUNTY and COUNTY accepts a nontransferable, nonexclusive software license (the "License") to use the Licensed Software as well as any additions and/or supplements thereto solely in the conduct of elections conducted by COUNTY, subject to the terms and conditions hereinafter set forth and the terms and conditions of all applicable License Agreements, including those contained in License and Warranty Agreement, Rider M, attached hereto. The first term of the Software License will begin with the installation of the System and will continue through

November 30, 2004, and thereafter for successive one-year terms, for a cumulative period not to exceed twenty (20) years, provided COUNTY pays to CONTRACTOR Annual License Fees and is not in material breach of this Agreement or the License and Warranty Agreement, and further provided that CONTRACTOR has not elected to terminate the License and Warranty Agreement, pursuant to Subsection 2.B of this Agreement. The Annual License Fees for the first term are included in the System purchase price; Annual License Fees for subsequent terms are specified in Rider C and Rider M of this Agreement.

The System includes Third Party Software, the use of which is subject to the terms and conditions imposed by the owners of such Third Party Software, copies of many of which are provided as attachments to Rider M. COUNTY consents to the terms and conditions of the Third Party License Agreements by COUNTY's first use of the System.

Licensed Software will be provided by CONTRACTOR to COUNTY pursuant to the terms of this Agreement in machine-readable object code. COUNTY acknowledges that by virtue of this License, the COUNTY acquires only the right to use the original and permitted duplicate copies of the Licensed Software as described herein and does not acquire any rights of ownership in the Licensed Software, which rights shall remain exclusively with CONTRACTOR or Third Party Software provider.

The COUNTY agrees that it will only use, or cause the DESI Application Software to be used, as permitted by this Agreement. COUNTY shall not, without CONTRACTOR's prior written consent: reproduce, sell, lease, assign, transfer, license, sublicense, share, give, or otherwise dispose of the DESI Application Software or any parts thereof; modify, reverse engineer, decompile, disassemble, translate, create derivative works based on or perform any other similar process on the DESI Application Software; use the DESI Application Software on any hardware other than the hardware provided by CONTRACTOR, the DESI Hardware on which it was pre-loaded by CONTRACTOR, or other hardware for which CONTRACTOR has granted its written approval, such approval shall not be unreasonably withheld; use the DESI Application Software outside of COUNTY's jurisdiction; act as a service bureau for other jurisdictions; or permit the DESI Application Software or any parts thereof to be used by any persons or entities other than the COUNTY's employees, agents, or consultants in the course of their employment by the COUNTY, or individuals participating in an election or voter education sponsored by COUNTY within COUNTY's jurisdiction; disclose the DESI Application Software or any parts thereof to any persons or entities except to employees, agents or consultants of the COUNTY on a need-to-know basis in performing the work under this Agreement; or permit any other persons or entity to take any of the actions described above. Disclosure of all information under this Agreement shall be governed by this Section 16 and Section 37, and Section 16 of the License and Warranty Agreement, Rider M.

In the event COUNTY's current version of the Software will no longer operate on the Equipment provided pursuant to this Agreement, or replacement hardware which was approved by CONTRACTOR, and CONTRACTOR is unable to furnish new or replacement Equipment on which COUNTY's current version of the Software will operate, or should CONTRACTOR cease to support the GEMS Software operating on the hardware platform and associated operating system purchased under this Agreement within ten (10) years of the execution of this Agreement, then in addition to other remedies available to COUNTY, CONTRACTOR shall transfer the GEMS License to a substitute system mutually acceptable to the parties with no additional license fees for the GEMS Software so long as the COUNTY has maintained a License and Warranty Agreement with CONTRACTOR and has paid the Annual License Fees throughout the preceding term of this Agreement and the applicable terms of the License and Warranty Agreement.

**B. PAYMENT OF LICENSE FEE**

COUNTY agrees to pay CONTRACTOR License Fees for the use of the Licensed Software in the amounts specified in Rider C and Rider M hereto.

**C. RIGHT TO COPY**



Unless expressly permitted by the applicable License Agreement, no portion of the Licensed Software or any updates or enhancements to the Licensed Software may be duplicated by COUNTY except that COUNTY may make one copy of the machine-readable portion thereof for normal security backup purposes, provided that COUNTY properly reproduces on each such copy all notices of CONTRACTOR's patent, copyright, trademark, or trade secret rights.

D. TITLE TO SOFTWARE

CONTRACTOR and/or Third Party Software provider(s) retain ownership of all Licensed Software and related documentation licensed under this Agreement.

Within thirty (30) days from the date of COUNTY's discontinuance of the use of any portion of the Licensed Software, COUNTY shall furnish CONTRACTOR with written notice certifying that to the best of its knowledge, all machine-readable code, user documentation or other related materials provided to COUNTY with such Licensed Software, including any copies thereof, whether in whole or in part, have been returned or destroyed as follows:

1. All documents relating to such discontinued portion of the Licensed Software shall be returned to CONTRACTOR; and
2. The originals and all copies of any machine-readable materials containing all or any portion of the discontinued Licensed Software shall be destroyed or purged so as to totally remove from such machine-readable materials all codes relating to the discontinued portion of the Licensed Software.

E. MATERIALS DEVELOPED BY CONTRACTOR OR COUNTY

Any materials, products and software developed by CONTRACTOR for COUNTY at the request of COUNTY will be provided under a separate written contract. No works made for hire shall be provided pursuant to this Agreement.

CONTRACTOR and/or Third Party Software provider(s) retain title to all updates, revisions and releases of software and related documentation provided to COUNTY and CONTRACTOR's other customers under provisions of software maintenance support.

All Software, training program and System documentation developed by COUNTY acting without CONTRACTOR shall be the exclusive property of COUNTY, so long as such work product of COUNTY does not violate the limitations and restrictions contained in this Section.

The ideas, concepts, know-how, or techniques developed during the course of this Agreement may be used by COUNTY in any way it may deem appropriate for its own use, so long as that use does not violate any term or condition in this Agreement, or the License and Warranty Agreement, or any state or federal law or regulation.

F. PROPRIETARY RIGHTS

Except as provided in 16.E hereinabove, CONTRACTOR and/or Third Party Software provider(s) retain for themselves, and COUNTY acknowledges that CONTRACTOR and/or Third Party Software provider(s) so retain, all proprietary rights in and to all designs, engineering details, and other software pertaining to the System, and any and all such systems which is original to CONTRACTOR and/or Third Party Software provider(s). The Licensed Software shall be deemed to be the trade secret of CONTRACTOR and/or Third Party Software provider(s).

Proprietary limitations placed on COUNTY do not include: (i) information which is rightfully in COUNTY's possession in a complete and tangible form before it is received from CONTRACTOR, (ii) is or becomes a matter of public knowledge, (iii) is rightfully furnished to COUNTY by a third party without restriction on disclosure or use, or (iv) is independently developed by COUNTY without use of or reference to the proprietary information.

G. PROTECTION OF PROPRIETARY INFORMATION

COUNTY recognizes and agrees that all Software and updates of Licensed Software which are provided to COUNTY:

1. are considered by CONTRACTOR to be trade secrets of CONTRACTOR and/or Third Party Software provider(s);
2. are furnished by CONTRACTOR to COUNTY in confidence; and
3. contain proprietary and confidential information.

CONTRACTOR's and/or Third Party Software provider(s)' placement of a copyright notice on any portion of any Licensed Software or any update to such Licensed Software will not be construed to mean that such portion has been published and will not derogate from any claim that such portion is a trade secret or contains proprietary and confidential information of CONTRACTOR and/or Third Party Software provider(s).

COUNTY agrees to hold all such Licensed Software and updates and enhancements to the Licensed Software in confidence at least to the extent that it protects its own similar confidential information and to take all reasonable precautions consistent with general accepted standards in the data processing industry to safeguard the confidentiality of such information. No portion of any update or enhancement to the Licensed Software may be disclosed, furnished, transferred or otherwise made available by COUNTY to any person except to those of its employees or consultants or contractors retained by or responsible to COUNTY who need to use such information in accordance with this Software License.

COUNTY agrees to take appropriate action by instruction, agreement and otherwise to inform its employees and/or agents with access to the System of the trade secret, proprietary, and confidential nature of the Licensed Software and the updates and enhancements disclosed to COUNTY under this Agreement, and to obtain their compliance with the terms hereof. COUNTY agrees that in the event of its employing any consultants or contractors who would have access to the Licensed Software, it will make all reasonable efforts to insure that such consultants or contractors execute an agreement or agreements whereby they recognize, accept, and agree to observe the protection agreements afforded to CONTRACTOR by this paragraph.

H. ACCESS TO SOURCE CODE

A copy of the Licensed Software in machine-readable source code along with necessary documentation for maintaining or modifying the Licensed Software will be deposited with an independent Escrow Agent under an Escrow Agreement for Software Program Source Code and Other Materials ("Escrow Agreement") as set forth in Rider L at no cost to COUNTY. Source code and documentation so maintained shall be kept current. Deposit shall be made no less frequently than annually. The escrow account shall remain in force through the term of this Agreement and through the term of any License Agreement purchased hereunder, and shall not be canceled or modified without written agreement of both Parties, unless the COUNTY has materially breached this Agreement or the License Agreement. In addition to those conditions defined in Rider L, COUNTY shall also have the right to acquire the source code in the event that CONTRACTOR, pursuant to Section 10, fails to maintain State certification of the System for ten (10) years and any term thereafter for which COUNTY has renewed the License and Warranty Agreement, and such failure extends for a period of 180 days after written notification to CONTRACTOR; ceases to exist for reasons other than those specified in Rider L during any term of the License and Warranty Agreement; or in the event CONTRACTOR is in material breach of Section 16 of this Agreement or the License and Warranty Agreement, which breach is not cured for a period of 120 days after written notification to CONTRACTOR; or fails to provide support/maintenance services as provided for by these Agreements. Upon release of the source code by the Escrow Agent, COUNTY shall have the right to, individually or in consortium with other CONTRACTOR clients which have each independently

obtained the release of the source code for GEMS Software, of the same or higher version number, from escrow pursuant to the terms and conditions of their individual agreements with CONTRACTOR, maintain and enhance the GEMS Software source code and obtain State certification in the name of and for the exclusive use of COUNTY or such consortium. The source code used by the consortium as that starting code for development shall be the source code for the lowest version number then licensed to any member of the consortium.

Should the Escrow Agent resign under said agreement, CONTRACTOR shall have the right to promptly designate another Escrow Agent under an Escrow Agreement substantially in the form attached hereto as Rider L.

In the event a condition defined in Rider L or one set forth hereinabove occurs, CONTRACTOR agrees to release the source code to COUNTY as provided in Rider L and to grant COUNTY a limited license to use the source code.

CONTRACTOR or any third party licensor shall retain proprietary rights of ownership in the source code, and to the extent COUNTY is in possession of the source code, COUNTY shall continue to protect such rights.

**I. OWNERSHIP OF DATA**

COUNTY retains for itself, and CONTRACTOR acknowledges that COUNTY so retains, ownership and rights of ownership to all data and associated transaction records entered into the database or created by the System. CONTRACTOR shall not, without COUNTY's written consent, copy or use such records, except to carry out contracted work, will not transfer such records to any other party not involved in the performance of this Agreement, and will return such records to COUNTY upon completion of the work hereunder.

COUNTY shall have the right, without the consent of CONTRACTOR, to extract as COUNTY's property such data using system utilities or programs written by COUNTY or its agent, and at no cost to COUNTY, provided such extraction does not violate any applicable License Agreement. CONTRACTOR agrees to assist COUNTY, if requested, in making such extracts at CONTRACTOR's then published rates.

- J.** Upon termination of this Agreement, the provisions of this Section and of Rider M hereto shall continue to survive.

**17. PATENT AND COPYRIGHT PROTECTION**

- A.** If notified promptly in writing of any action brought against COUNTY alleging that COUNTY's use of the DESI Hardware or DESI Application Software infringes upon a United States patent or copyright or trademark, CONTRACTOR will: (1) assume the defense of any suit, action, or claim brought against COUNTY for infringement of any United States or foreign patent or copyright arising from use and/or sale of the Equipment or Licensed Software under this Agreement; (2) defray the expense of such defense including costs of investigations, reasonable attorney fees, expert witness fees, damages and any other litigation-related expenses; and (3) indemnify COUNTY against any and all liability, claims, monetary damages, losses and/or costs, including attorney's fees, in such suit; provided that: (1) CONTRACTOR is given sole and exclusive control of the defense of such suit and sole and exclusive control of negotiations relative to the settlement thereof, provided CONTRACTOR agrees to consult with COUNTY during such defense or negotiations; (2) the liability claimed shall have arisen solely because of CONTRACTOR's selection as to the design or composition of the Licensed Software or the Equipment and the Licensed Software or the Equipment is used by COUNTY in the form, state or condition as delivered by CONTRACTOR; and (3) that COUNTY provides CONTRACTOR with written notice of any claim with respect to which COUNTY asserts that CONTRACTOR assumes responsibility under this Section, provided that such written notice shall occur no later than twenty (20) days prior to the date on which a response to the claim must be made.

- B. If the System is, in CONTRACTOR's opinion, likely to become or does become the subject of a claim of infringement or misappropriation of a United States or foreign patent, copyright, trade secret or other proprietary right, or if a temporary restraining order or other injunctive relief is entered against the use of part or all of the System, CONTRACTOR shall within ninety (90) days:
1. Promptly replace the System with a compatible, functionally equivalent and non-infringing system;
  2. Promptly modify the System to make it non-infringing without materially impairing COUNTY's ability to use the System as intended;
  3. Promptly procure the right of COUNTY to continue using the System; or
  4. As a last resort, if none of the foregoing alternatives are reasonably available to CONTRACTOR and COUNTY is enjoined or otherwise precluded legally from using the System, CONTRACTOR will within 120 days of the judgment or other court action promptly refund to COUNTY the fees for the System under this Agreement and amendments thereto, as depreciated based on a 10 year, straight line depreciation schedule, whereupon this Agreement will terminate. All computer hardware supplied by COUNTY will remain the property of COUNTY. All computer hardware obtained from CONTRACTOR will be returned to CONTRACTOR at CONTRACTOR's expense. At the expense of CONTRACTOR, all Licensed Software will be disposed of as ordered by the governing court or returned to CONTRACTOR.

The foregoing shall be the entire liability of CONTRACTOR with respect to alleged infringement of patents, copyrights, or trademarks by the DESI Hardware, DESI Application Software, or any part thereof.

#### **18. INDEMNIFICATION**

Each Party agrees to indemnify, defend and hold harmless the other Party and its agents, board members, elected and appointed officials and officers, employees, volunteers and authorized representatives from any and all losses, liabilities, charges, damages, claims, liens, causes of action, awards, judgments, costs, and expenses (including, but not limited to, reasonable attorneys' fees including fees of County Counsel and counsel retained by COUNTY, expert fees, costs of staff time, and investigation costs) for personal injury or death to any person or persons, and damage to any personal or real property, regardless of where located, including the property of COUNTY and CONTRACTOR, which arise out of or any negligent act or omission of the first Party or its officers, agents, employees, independent contractors, sub-contractors of any tier, or authorized representatives, in the course of performing under or otherwise related to this Agreement. CONTRACTOR further agrees to indemnify, defend and hold harmless COUNTY for any workers' compensation claim or suit arising from or connected with any services performed pursuant to this Agreement on behalf of CONTRACTOR by any person or entity.

This indemnity does not extend to modifications or additions to the System made by COUNTY or any third party without written consent of CONTRACTOR, or to any unauthorized use of the System by COUNTY.

#### **19. INSURANCE**

CONTRACTOR, in order to protect COUNTY and its board members, officials, agents, officers, and employees against all claims and liability for death, injury, loss and damage as a result of CONTRACTOR's actions in connection with the performance of CONTRACTOR's obligations, as required in this Agreement, shall secure and maintain insurance as described below. CONTRACTOR shall not perform any work under this Agreement until CONTRACTOR has obtained all insurance required under this section and the required certificates of insurance have been filed with and approved by COUNTY. CONTRACTOR shall pay any deductibles and self-insured retentions under all required insurance policies.

- A. **Workers' Compensation Insurance Requirement** – CONTRACTOR shall submit written proof that CONTRACTOR is insured against liability for workers' compensation in accordance with the provisions of section 3700 of the Labor Code.

In signing this Agreement, CONTRACTOR makes the following certification, required by section 1861 of the Labor Code:

"I am aware of the provisions of section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this Agreement."

CONTRACTOR shall require any sub-contractors to provide workers' compensation for all of the sub-contractors' employees, unless the sub-contractors' employees are covered by the insurance afforded by CONTRACTOR. If any class of employees engaged in work or services performed under this Agreement is not covered by Labor Code section 3700, CONTRACTOR shall provide and/or require each sub-contractor to provide adequate insurance for the coverage of employees not otherwise covered.

**B. Liability Insurance Requirements:**

(1) CONTRACTOR shall maintain in full force and effect, at all times during the term of this Agreement and any term of the License and Warranty Agreement, the following insurance:

- (a) Commercial General Liability Insurance, including, but not limited to, Contractual Liability Insurance (specifically concerning the indemnity provisions of this Agreement), Products-Completed Operations Hazard, Personal Injury (including bodily injury and death), and Property Damage for liability arising out of CONTRACTOR's performance of work under this Agreement. Said insurance coverage shall have minimum limits for Bodily Injury and Property Damage liability of five hundred thousand dollars (\$500,000) each occurrence and one million dollars (\$1,000,000) aggregate.
  - (b) Automobile Liability Insurance against claims of Personal Injury (including bodily injury and death) and Property Damage covering all owned, leased, hired and non-owned vehicles used in the performance of services pursuant to this Agreement with minimum limits for Bodily Injury and Property Damage liability of five hundred thousand dollars (\$500,000) each occurrence and one million dollars (\$1,000,000) aggregate. Such insurance shall be provided by a business or commercial vehicle policy.
- (2) The Commercial General Liability Insurance required in this subsection B. shall include an endorsement naming COUNTY and COUNTY's board members, officials, officers, agents and employees as additional insureds for liability arising out of this Agreement and any operations related thereto.
- (3) If any of the insurance coverages required under this Agreement is written on a claims-made basis, the insurance policy shall provide an extended reporting period of not less than four (4) years following the termination of this Agreement or completion of CONTRACTOR's work specified in this Agreement, which ever is later.
- (4) Prior to CONTRACTOR commencing any of its obligations under this Agreement, evidence of insurance in compliance with the requirements above shall be furnished to COUNTY by Certificate of Insurance. Receipt of evidence of insurance that does not comply with above requirements shall not constitute a waiver of the insurance requirements set forth above.

**C. Cancellation of Insurance —** The above stated insurance coverages required to be maintained by CONTRACTOR shall be maintained for the term of this Agreement and any term of the License and Warranty Agreement, and shall not be reduced, modified, or canceled without thirty (30) days prior

written notice to COUNTY. Also, phrases such as "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company" shall not be included in the cancellation wording of all Certificates of Insurance or any coverage for COUNTY and COUNTY's board members, officials, agents, and employees. CONTRACTOR shall immediately obtain replacement coverage for any insurance policy that is terminated, canceled, non-renewed, or whose policy limits have been exhausted or upon insolvency of the insurer that issued the policy.

- D. All insurance shall be issued by a company or companies listed in the current "Best's Key Rating Guide" publication with a minimum of a "B+; V" rating, or in special circumstances, be pre-approved by COUNTY.
- E. If CONTRACTOR is, or becomes during the term of this Agreement or any term of the License and Warranty Agreement, self-insured or a member of a self-insurance pool, CONTRACTOR shall provide coverage equivalent to the insurance coverages and endorsements required above. COUNTY will not accept such coverage unless COUNTY determines, in its sole discretion and by written acceptance, that the coverage proposed to be provided by CONTRACTOR is equivalent to the above-required coverages.
- F. All insurance afforded by CONTRACTOR pursuant to this Agreement shall be primary to and not contributing to any other insurance maintained by COUNTY.
- G. Insurance coverages in the minimum amounts set forth herein shall not be construed to relieve CONTRACTOR for any liability, whether within, outside, or in excess of such coverage, and regardless of solvency or insolvency of the insurer that issues the coverage; nor shall it preclude COUNTY from taking such other actions as are available to it under any other provision of this Agreement or otherwise in law.
- H. Failure by CONTRACTOR to maintain all such insurance in effect at all times required by this Agreement shall be a material breach of this Agreement by CONTRACTOR. COUNTY, at its sole option, may terminate this Agreement and obtain damages from CONTRACTOR resulting from said breach. Alternatively, COUNTY may purchase such required insurance coverage, and without further notice to CONTRACTOR, COUNTY shall deduct from sums due to CONTRACTOR any premiums and associated costs advanced or paid by COUNTY for such insurance. If the balance of monies obligated to CONTRACTOR pursuant to this Agreement are insufficient to reimburse COUNTY for the premiums and any associated costs, CONTRACTOR agrees to reimburse COUNTY for the premiums and pay for all costs associated with the purchase of said insurance. Any failure by COUNTY to take this alternative action shall not relieve CONTRACTOR of its obligation to obtain and maintain the insurance coverages required by this Agreement.

## **20. SYSTEM MODIFICATION**

If any modifications to the System are required, they will be performed only by CONTRACTOR unless COUNTY obtains advance written permission by CONTRACTOR to make such modifications.

## **21. SUPPORT/MAINTENANCE**

- A. For the term of this Agreement and any term of the License and Warranty Agreement, CONTRACTOR shall maintain the System under the terms and conditions described in Riders J and M, pursuant to which CONTRACTOR shall provide corrective, remedial and preventive maintenance on Equipment and Software, and Software support.
- B. Thereafter, for a period of no less than ten (10) years and no more than twenty (20) years from the Effective Date, CONTRACTOR will provide Software and Equipment support pursuant to Riders J and M, providing COUNTY is not in material breach of this Agreement or the License and Warranty Agreement, and COUNTY has paid the annual Software License and Warranty Fees. During the term of this Agreement or any term of the License and Warranty Agreement, COUNTY shall not be responsible for any additional charges, over and above the relevant normal CONTRACTOR charges, for problem resolution when it is determined that the problem actually exists with the Software or

Equipment identified in the Software and License Warranty Agreement when operating on the System configuration as recommended by CONTRACTOR. CONTRACTOR agrees to maintain the System, without additional charges over and above the relevant normal CONTRACTOR charges, as required pursuant to Section 10.A, provided that COUNTY has paid the annual License and Warranty Fees.

- C. CONTRACTOR shall, within the period provided by law, issue Software changes reflecting any new or modified legislation and/or regulation(s) which affect any portion of the Licensed Software and/or which are required to retain Secretary of State certification of the System.
- D. From time to time, CONTRACTOR may provide the COUNTY with unsolicited error corrections or changes to the DESI Application Software. These changes may be necessary for the proper operation of the System, to ensure that the operation of the System complies with changes in local, state, or federal election laws, or for other reasons CONTRACTOR deems appropriate. Such error corrections and changes shall become part of the DESI Application Software Module in which they are incorporated and their use shall be subject to the License and Warranty Agreement. COUNTY shall incorporate these corrections or changes into the System within ninety (90) days of receipt from CONTRACTOR, unless such receipt is within ninety (90) days of a State or national election in which case installation may be deferred until after the election, except when the corrections or changes are required to meet State or Federal law or regulations, or COUNTY obtains written approval to delay incorporation, which approval shall not be unreasonably withheld.
- E. CONTRACTOR may provide from time to time as part of the Support/Maintenance Agreement, modifications of the construction and/or design of the Licensed Software, hereinafter referred to as enhancements. Enhancements may involve changes to existing DESI Application Software modules, or changes to third party software. CONTRACTOR shall evaluate and estimate the impact such enhancements would have on the capacities and performance of the System. CONTRACTOR shall furnish to COUNTY this evaluation no later than the date on which the enhancements are distributed. COUNTY shall have the option of rejecting use of the hereinabove mentioned enhancements. Should COUNTY choose not to implement the enhancements, CONTRACTOR shall continue to support the remaining Software, currently licensed by COUNTY, at the same level of support CONTRACTOR would provide if the enhancements had not been supplied.

Should the enhancements necessitate additional hardware to allow the System to retain the performance requirements under this Agreement, CONTRACTOR will provide COUNTY with such equipment, if manufactured by CONTRACTOR, at the same discount level CONTRACTOR has extended to COUNTY in Rider B of this Agreement. COUNTY may obtain necessary equipment, not manufactured by CONTRACTOR, through sources other than CONTRACTOR.

Upon any modifications to the Software by CONTRACTOR, CONTRACTOR shall supply updated documentation which shall be sufficient for the installation, use and operation of the modified Software by COUNTY.

COUNTY understands that all releases must be installed separately and that new enhancements, and some "bug fixes", are not made available without accepting such releases.

## **22. COUNTY RESPONSIBILITIES**

COUNTY shall pay its bills in a timely manner as described in the payment schedule. COUNTY will provide adequate and timely support or information with regard to its administrative, operational and management procedures, and any data necessary to effectively complete installation and implementation of the System. The COUNTY will appoint a Project Manager who shall be responsible for the review and analysis of the System, and who can recommend acceptance of the System and the coordination of COUNTY personnel, equipment, and facilities. The Project Manager shall also have direct access to the COUNTY's top management at all times for purposes of problem resolution. The Project Manager will have responsibility for managing the installation of the System on behalf of the COUNTY; advise CONTRACTOR of any changes in the COUNTY's requirements; perform backup functions on an ongoing basis as specified in User Documentation; coordinate COUNTY's performance of the remaining responsibilities described in this paragraph; provide access to the COUNTY's staff to answer questions; perform pre-election testing of the System in sufficient time, as

determined by DESI, to permit the timely repair of the System before each election; and obtain all necessary permits and licenses required by any governmental authority, including paying the costs associated therewith. Once the installation has been completed, COUNTY will manage and operate the System.

**23. FOREIGN COMPONENT INTERFACE**

COUNTY may attach to the System, equipment supplied by a vendor other than CONTRACTOR, provided COUNTY seeks advanced written permission from CONTRACTOR, which permission shall not be unreasonably withheld, and provided said equipment consists of peripheral devices which will not adversely affect the operation and performance of the System. All foreign components shall be compatible with the base System.

**24. ASSIGNMENT AND SUBCONTRACTING**

- A. No assignment of this Agreement or any right, interest or obligation herein of CONTRACTOR, except the assignment of the proceeds of this Agreement to a financial institution, shall be effective unless COUNTY shall first give its written consent to such assignment. Consent may not be unreasonably withheld by COUNTY. Any assignment or delegation so permitted shall be subject to all the terms, conditions and other provisions of this Agreement, and CONTRACTOR shall remain liable to COUNTY with respect to each and every term, condition and other provision hereof to the same extent that CONTRACTOR would have been obligated if no assignment or delegation had been made. The performance of the Agreement by CONTRACTOR is the essence of this Agreement.
- B. COUNTY shall not assign any right, interest or obligation under this Agreement without the written consent of CONTRACTOR.
- C. Subcontracting: CONTRACTOR may use subcontractors in connection with the work performed under this Agreement provided that CONTRACTOR must first obtain written prior approval from COUNTY for activities or duties to take place at COUNTY sites or with COUNTY's data or indices. Such approval will not be unreasonably withheld. In using subcontractors, CONTRACTOR agrees to be responsible for all performance and obligations as required under this Agreement.

**25. SUCCESSORS AND WAIVERS**

This Agreement shall bind the successors of CONTRACTOR and COUNTY in the same manner as if they were expressly named. Waiver by either party of any default, breach or condition precedent shall not be construed as a waiver of any other default, breach, or condition precedent or any other right hereunder. Failure of either party to enforce at any time, or from time-to-time, any provision of the Agreement shall not be construed as a waiver thereof. The remedies herein reserved shall be cumulative and additional to any other remedies in law or equity.

**26. FORCE MAJEURE**

The parties will exercise every reasonable effort to meet their respective obligations hereunder but shall not be liable for delays resulting from force majeure or other causes beyond their reasonable control, including, but not limited to, compliance with any Government law or regulation, acts of God, fires, strikes, lockouts, national disasters, wars, riots, transportation problems and/or any other cause whatsoever beyond the reasonable control of the parties, provided that the party has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance. Any such cause will extend the performance of the delayed obligation to the extent of the delay so incurred. Notwithstanding the foregoing, both Parties shall use their best efforts to minimize the adverse consequences of any such circumstances. This paragraph shall not operate to excuse any Party from paying amounts that are owed pursuant to this Agreement.

**27. NOTICES**

All notices herein provided to be given or which may be given by either party to the other shall be deemed to have been fully given when made in writing and deposited in the United States mail, registered or certified, return receipt requested, and postage prepaid and addressed as shown in the first Section of this Agreement or



such other address as either party may specify in writing. Notices delivered personally shall be deemed received upon delivery.

**28. PUBLICITY**

CONTRACTOR agrees to submit to COUNTY all press releases, advertising, sales promotions, and other publicity matters related to any product furnished by CONTRACTOR to COUNTY wherein COUNTY's name is mentioned, excluding any customer list and newsletter. CONTRACTOR shall not publish nor knowingly permit to be published any such material without the prior written consent of COUNTY.

**29. SEVERABILITY**

Should any part, term, portion or provision of this Agreement be finally decided to be in conflict with any law of the United States or the State of California, or otherwise be unenforceable or ineffectual, the validity of the remaining parts, terms, portions, or provisions shall be deemed severable and shall not be affected thereby, provided such remaining portions or provisions can be construed in substance to constitute the agreement which the parties intended to enter into in the first instance. The Parties agree that any court reviewing this Agreement shall reform any illegal or unenforceable provision to carry out the express intent of the parties as set forth herein to the fullest extent permitted by law.

**30. GOVERNING LAW AND VENUE**

This Agreement shall be governed by the laws of the State of California and CONTRACTOR shall provide services in accordance with applicable Federal and State statutes, regulations and directives and any changes or amendments thereto, including those described in this Agreement.

This Agreement has been entered into and is to be performed in the County of Kern. If any party to this Agreement initiates any legal or equitable action to enforce the terms of this Agreement, to declare the rights of the parties under this Agreement or which relates to this Agreement in any manner, COUNTY and CONTRACTOR agree that the proper venue for any such action is the Superior Court of the State of California of and for the County of Kern, unless the amount in controversy falls below the jurisdiction of the Superior Court, in which case the proper venue for any such action is the Bakersfield Municipal Court.

**31. NONDISCRIMINATION**

For the term of this Agreement, and any term of the License and Warranty Agreement, CONTRACTOR agrees that it will comply with Title VII of the Civil Rights Act of 1964 and the Fair Employment and Housing Act of California. CONTRACTOR, its officers, agents, employees, servants or subcontractors shall not discriminate in the treatment or employment of an individual or groups of individuals on the grounds of race, color, religion, national origin, age, sex or physical handicap unrelated to job performance, either directly, indirectly or through contractual or other arrangements.

**32. AGREEMENT EXTENSION AND MODIFICATION CLAUSE**

The Agreement may be modified or extended only by written amendment executed by both parties. The COUNTY Auditor-Controller-County Clerk or his designee, upon advice and written approval of County Counsel, is hereby authorized to execute written amendments to this Agreement on behalf of COUNTY necessary to develop the Implementation Plan and to manage the installation, training and ongoing maintenance requirements of COUNTY; provided, however, that the Auditor-Controller-County Clerk shall not be authorized to execute an amendment to this Agreement which (i) obligates COUNTY to expend any additional money; (ii) releases CONTRACTOR from performance obligations specified herein; or (iii) increases COUNTY's performance obligations or level of liability.

Notwithstanding the above, this Agreement may be amended by CONTRACTOR and COUNTY's Board of Supervisors to include acquisition of other software licenses and services offered by CONTRACTOR. Such amendment(s) shall be subject to all terms, conditions and other provisions of this Agreement provided that the required amended portions of this Agreement, as specified in Rider P, are agreed to by both parties and incorporated into this Agreement.

### 33. TERMINATION

- A. COUNTY reserves the right to terminate this Agreement, or portion thereof as applies to the non-appropriation, in the event insufficient funds are appropriated and budgeted for this Agreement in any fiscal year. Upon such termination COUNTY will be released from any further financial obligation, for this Agreement or portion thereof, to CONTRACTOR, except for services performed prior to the date of termination or any liability due to default existing at the time this clause is exercised. CONTRACTOR will be given thirty (30) days written notice in the event that such an action is required by COUNTY. Upon such termination, all applicable portions of the System as yet unpaid for shall be returned to CONTRACTOR.
- B. In the event either Party violates any provisions of this Agreement, the injured Party may serve written notice upon the violating Party identifying the violation and a providing a reasonable cure period. Such cure period shall be at least thirty (30) days, except that either Party may immediately terminate this Agreement or the License and Warranty Agreement for a breach of any of Sections 16 or 37 of this Agreement or Section 16 of the License and Warranty Agreement and seek any legal remedy to which the injured Party may be entitled, including but not limited to injunctive relief. In the event the violating Party has not remedied the infraction at the end of the cure period, the injured Party may serve written notice upon the violating Party of its intent to terminate, and seek legal remedies for breach of contract as allowed hereunder. If the breach in the notice cannot be completely cured within the specified time period, no default shall occur if the Party receiving the notice begins curative action within the specified time period and thereafter proceeds with reasonable diligence and in good faith to cure the breach as soon as practicable. If the termination effective date is before COUNTY acceptance of the System, then at COUNTY's option: 1) CONTRACTOR shall refund to COUNTY all fees paid by COUNTY to CONTRACTOR under this Agreement and COUNTY shall return those portions of the System obtained from CONTRACTOR, or 2) CONTRACTOR and COUNTY shall mutually agree to closing fees for services rendered and completed to COUNTY through the date of termination and COUNTY shall retain the System. However, when termination is prior to final acceptance by COUNTY, in no event shall CONTRACTOR be due, nor COUNTY pay any portion of the final payment which is due upon final acceptance of the System. If termination is after COUNTY acceptance, both parties agree that any fees owed shall be for the entire System, pursuant to Rider F and for any other services requested and accepted by COUNTY as being complete.
- C. Following the initial term of this Agreement, the License and Warranty Agreement may continue, at the request of COUNTY. Termination of the Agreement, except by material breach as described in Subsection 33.B., shall not terminate COUNTY's License, which is governed by the License and Warranty Agreement, Rider M attached hereto.

### 34. PERSONNEL AND INDEPENDENT CONTRACTOR

CONTRACTOR shall make every effort in good faith consistent with sound business practices to honor the specific requests of COUNTY with regard to the assignment of its employees and retention thereof; however, subject to COUNTY's right to discontinue services as provided for herein, CONTRACTOR reserves the sole right to determine the assignment of its employees and to exercise full supervision and control of the manner and methods of providing services to COUNTY under this Agreement.

- A. CONTRACTOR (including CONTRACTOR's employees) is an independent CONTRACTOR and agrees that no relationship of employer-employee exists between the parties hereto. CONTRACTOR or CONTRACTOR's assigned personnel shall not be entitled to any benefits payable to employees of COUNTY. COUNTY is not required to make any deductions or withholdings from the compensation payable to CONTRACTOR under the provisions of this Agreement. CONTRACTOR shall be solely responsible for payment of wages, benefits and other compensation, compliance with all occupational safety, welfare and civil rights laws, tax withholding and payment of employee taxes, whether federal, state or local, and compliance with any and all other laws regulating employment. CONTRACTOR hereby indemnifies and holds COUNTY harmless from any and all claims that may be made against COUNTY based upon any contention by anyone that an employer-employee relationship exists by reason of this Agreement or the performance thereof.

- B. If, in the performance of this Agreement, any third persons are employed by CONTRACTOR, such persons shall be entirely and exclusively under the direction, supervision, and control of CONTRACTOR. All terms of employment, including hours, wages, working conditions, discipline, hiring, and discharging or any other terms of employment or requirements of law, shall be determined by CONTRACTOR.
- C. As an independent contractor and not an employee of COUNTY, neither the CONTRACTOR nor CONTRACTOR's assigned personnel is authorized to act on behalf of COUNTY in any capacity whatsoever as agent, nor to bind COUNTY to any obligation whatsoever.

**35. NON-COLLUSION COVENANT**

CONTRACTOR hereby represents and agrees that it has in no way entered into any contingent fee arrangement with any firm or person concerning the obtaining of this Agreement with COUNTY. CONTRACTOR has received from COUNTY no incentive or special payments, nor considerations not related to the provision of automation systems and services described in this Agreement.

- A. At the request of COUNTY, CONTRACTOR shall file an annual statement with COUNTY disclosing any purchases or leases of services, equipment, supplies, or real property from an entity in which any of the following persons have a substantial financial interest:
  - (1) Any person also having a substantial financial interest in the CONTRACTOR
  - (2) Any director, officer, partner, trustee, or employee of the CONTRACTOR
  - (3) Any member of the immediate family of any person designated in (1) or (2) above
- B. CONTRACTOR shall comply with federal regulations 42 CFR 455.104 (Disclosure by providers and fiscal agents: Information on ownership and control), 42 CFR 455.105 (Disclosure by providers: Information related to business transactions), and 42 CFR 455.106.
- C. CONTRACTOR has read and is aware of the provisions of Section 1090 et seq. and Section 87100 et seq. of the Government Code relating to conflict of interest of public officers and employees. No officer or employee of COUNTY or member of its governing body shall have any pecuniary interest, direct or indirect, in this Agreement or the proceeds thereof. It is further understood and agreed that if such a pecuniary interest does exist at the inception of this Agreement, COUNTY may immediately terminate this Agreement by giving written notice thereof. Neither CONTRACTOR nor CONTRACTOR's agents or employees shall serve on the COUNTY's governing body or hold any COUNTY position during the term of this Agreement or any term of the License and Warranty Agreement. CONTRACTOR shall comply with all federal, state and local conflict of interest laws, statutes and regulations, specifically including, but not limited to, the requirements of Government Code Section 87100 et seq. during the term of this Agreement and any term of the License and Warranty Agreement. At the request of COUNTY, CONTRACTOR will provide a sworn affidavit that no CONTRACTOR employee has colluded with any COUNTY employee to restrain free and competitive bidding to secure this Agreement.

**36. AUDITS, INSPECTION AND RETENTION OF RECORDS**

CONTRACTOR agrees to maintain accurate books and records relative to all its activities under this Agreement. CONTRACTOR shall on reasonable advance written notice, during normal business hours, make available to COUNTY for examination and audit such of CONTRACTOR's records and data, to the extent such examination and audit is necessary to determine the accuracy of CONTRACTOR's invoices to COUNTY, or is otherwise required by law, with respect to matters covered by this Agreement. COUNTY shall have the right to inspect and audit such records or otherwise evaluate the quality, appropriateness, and timeliness of services performed under the Agreement.

To the extent required by statute or regulation, upon written request from COUNTY, and subject to COUNTY keeping confidential any non-public Confidential Information CONTRACTOR shall also permit COUNTY to audit and inspect all invoices, materials, payrolls, conditions of employment, and other data relating to matters covered by this Agreement.

Notwithstanding the preceding, COUNTY's access CONTRACTOR's records shall be limited to access that does not constitute an unlawful invasion of the privacy rights of any employees of CONTRACTOR. Prior to any audit, COUNTY shall execute a written non-disclosure agreement pursuant to which COUNTY agrees to protect, to the extent legally permitted, CONTRACTOR's confidential and proprietary information to which COUNTY may gain access pursuant to this Section 36.

CONTRACTOR shall retain all records pertinent to this Agreement for a period of four (4) years from the date of final payment for the acquisition of the System or until after the conclusion of any audit, whichever occurs last. If at the end of four (4) years, there is litigation pending involving those records or this Agreement, CONTRACTOR shall retain the records until the resolution of such litigation. CONTRACTOR understands that the State of California, including but not limited to the State Auditor, or any Federal agency may have certain statutory and/or regulatory rights. CONTRACTOR agrees to perform any statutory and/or regulatory obligations and CONTRACTOR will cooperate with any lawful investigations by regulatory agencies, pursuant to the statutory and/or regulatory rights of such agencies.

### **37. CONFIDENTIALITY**

For purposes of this Agreement, confidential information ("Confidential Information") of CONTRACTOR is defined as those materials, documents, data, and technical information, specifications, business information, customer information, or other information that CONTRACTOR maintains as trade secrets or confidential and which are disclosed to a receiving Party in tangible form conspicuously marked as "secret," "confidential," or with words having similar meaning or which are expressly identified in this paragraph. CONTRACTOR Confidential Information includes but is not limited to: all DESI Application Software source and object code and written documentation associated therewith. Confidential Information of COUNTY shall specifically include, and COUNTY shall not be required to conspicuously mark it as "secret", "confidential", or with any other words having similar meaning, all Voter Registration files whether current or test files, actual or simulated, all Election results from past and future elections, and any COUNTY contact lists inclusive of any information specific to COUNTY employees or other COUNTY vendors and contractors.

With respect to any identifiable information concerning data, information and/or documentation that is obtained by CONTRACTOR or its subcontractors, CONTRACTOR: (1) shall not use any such information for any purpose other than carrying out the express terms of this Agreement, (2) shall promptly transmit to COUNTY all requests for disclosure of such information, (3) shall not disclose except as otherwise specifically permitted by this Agreement, any such information to any party other than COUNTY without COUNTY's prior written authorization, and (4) shall at the expiration or termination of this Agreement, or any term of the License and Warranty Agreement, return all such information to COUNTY or maintain such information according to written procedures sent to CONTRACTOR by COUNTY for this purpose.

Except as provided by subsection 16.G, neither Party shall disclose the other Party's Confidential Information to any person outside their respective organizations unless disclosure is required by law or is made in response to, or because of, an obligation to any federal, state, or local governmental agency or court with appropriate jurisdiction, or to any person properly seeking discovery before any such agency or court. Each Party shall be given the ability to defend the confidentiality of its Confidential Information to the maximum extent allowable under the law prior to disclosure by the other Party of such Confidential Information.

Upon termination of this Agreement, the provisions of this Section shall continue to survive.

### **38. CONNELLY ASBESTOS NOTICE TO EMPLOYEES**

CONTRACTOR shall require all persons coming on COUNTY's premises at CONTRACTOR's request, at locations designated in Rider N, to read and sign the Asbestos Notice found in Rider N to this Agreement. CONTRACTOR shall retain copies of all executed Notices for a period of five (5) years. CONTRACTOR shall make copies of the executed Notices available to COUNTY upon request.

**39. HEADINGS AND INTERPRETATION**

Headings and titles used in this Agreement are for reference purposes only and shall not be deemed a part of this Agreement.

No provision of this Agreement shall be interpreted for or against a party because that party or its legal representative drafted such a provision, and this Agreement shall be construed as if jointly prepared by the parties.

**40. TIME**

Time is of the essence in each and all of the provisions of this Agreement and such provision is hereby made and declared to be a material, necessary and essential part of this Agreement.

**41. ENFORCEMENT OF REMEDIES**

No right or remedy herein conferred on or reserved to COUNTY is exclusive of any other right or remedy herein or by law or equity provided or permitted, but each shall be cumulative of every other right or remedy given hereunder or now or hereafter existing by law or in equity or by statute or otherwise, and may be enforced concurrently or from time to time.

**42. SURVIVAL OF OBLIGATIONS**

The rights and obligations contained in this Agreement that are not fully satisfied as of termination shall survive termination and shall continue to bind the Parties during any term of the License and Warranty Agreement. Specifically, the provisions of this Agreement, including but not limited to, Sections 2, 3, 5, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 41, 42, 43 and Riders J, L, M, O and P shall survive the expiration or termination of this Agreement.

**43. ENTIRE AGREEMENT**

This Agreement, including the documents incorporated by reference, contains the entire understanding of the parties hereto and neither it nor the rights and obligations hereunder may be changed, modified or waived except by an instrument in writing signed by the parties hereto, in compliance with Section 32 of this Agreement.

**REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK**

IN WITNESS WHEREOF, the parties have caused this Agreement, which shall inure to the benefit of and be binding upon the successors of the respective parties, to be signed as of the date first mentioned above and will become effective as provided for in Section 2.B.

REVIEWED & RECOMMENDED  
FOR APPROVAL

By James A. Rhoades  
James A. Rhoades  
Auditor-Controller-County Clerk

COUNTY OF KERN

Steve A. Perez  
Steve A. Perez, Chairman  
Board of Supervisors  
COUNTY

APPROVED AS TO FORM  
COUNTY COUNSEL

By Karl Lubi  
Deputy

APPROVED AS TO CONTENT  
COUNTY ADMINISTRATIVE OFFICE  
INFORMATION TECHNOLOGY SERVICES DIVISION

By Bill Barnhart  
Bill Barnhart, Contracts Manager

DIEBOLD ELECTION SYSTEMS, INC.

S. Michael Rasmussen  
S. Michael Rasmussen  
Director of Finance  
Federal Tax Id: 85-0394190  
"CONTRACTOR"

## RIDER A

### SCHEDULE OF ACTIVITIES

#### 1. Implementation Plan

COUNTY and CONTRACTOR will jointly prepare and complete an implementation plan within thirty (30) days of the effective date of this Agreement.

#### 2. Beginning and Ending Dates

Delivery of Software and Equipment will not begin before January 6, 2003. By July 1, 2003, the System must have passed all acceptance testing and be ready for turnover to the COUNTY.

#### 3. Week One

- Day 1

Voting and tabulation host servers (2 Dell servers), with all appropriate Software preloaded, will be delivered. CONTRACTOR Project Manager will be on-site to test the System and to train the designated members of COUNTY's staff in computer basics and software concepts.

First delivery of AccuVote TS Electronic Tabulators and AccuVote-OS Central Count units will be unpacked, and diagnostic tests performed. Units will be made ready for operational use.

COUNTY Program Manager to coordinate with the Secretary of State a date and time for testing. The Secretary of State must certify the Equipment and Software acceptance plan.

- Day 2

GEMS training will begin by defining the jurisdiction (precincts, districts, etc.) to the System. DFM import information will be brought into GEMS. This activity may carry over to day three.

- Day 3

Completion of GEMS training and jurisdictional definition if needed.

Discussion of electronic management activities as pertains to the AccuVote System, supplies required, overview of concepts related to GEMS software and ballot design theory.

- Day 4 and 5

Using an actual ballot as a learning tool, define the election to the System and form ballot layout functions. Generate PostScript ballot artwork and file. Transmit ballot layout to a GEMS file for transfer to the printing company.

Define election reports and AccuVote parameters.

Weekly status meeting with staff and supervisors.

#### 4. Week Two

- Day 1

Create precinct data files.

Review AccuVote procedures and usage in pre-election and early voting mode.

- Day 2

Review AccuVote maintenance procedures.

Review ballot box components and usage.

Begin preparation of ballot testing procedures.

Review AccuVote procedures.

- Day 3

Test ballots.

Review and discuss GEMS test procedures and upload test results via database.

- Day 4

Review and discuss poll worker procedures and documents. Modify as needed to incorporate AccuVote into election day process.

- Day 5

Conduct review of implementation and installation as required. Learn GEMS System Administrator menu and backup procedures.

Weekly status meeting with staff and supervisors.

#### 5. Week Three

- Day 1

Prepare test election (ballot layout, database card preparation, testing procedures).

- Day 2

Test ballots database and AccuVote units.

Conduct small test election and direct upload.

- Day 3

Review election procedures and security systems.

- Day 4 and 5

Complete all work in progress as directed by the Program Manager.

Weekly status meeting with staff and supervisors.

#### 6. Week Four

- Day 1

Develop poll worker training procedures.

Continue test procedures.



- Day 2

Review Software reports.

Review and implement election day procedures.

Continue all work in progress.

- Day 3, 4 and 5

Review and implement media procedures and requirements

Complete work in progress.

Review status of all phases of operation.

7. Turnover to COUNTY for final Acceptance testing in accordance with Rider H.

8. Election Support

- Special Election(s) occurring after Final Acceptance

CONTRACTOR support as needed prior to, during and after election.

- November 2003 UDEL

CONTRACTOR support as needed prior to, during and after election.

- March 2004 Presidential Primary

CONTRACTOR support as needed prior to, during and after election.

- November 2004 Presidential Election

CONTRACTOR support as needed prior to, during and after election.

- CONTRACTOR to provide on-site poll worker training support through November 2004 Presidential Election.

## RIDER B

### EQUIPMENT LIST, PRICES

#### 1. Equipment.

Diebold Election Systems, Inc.  
1611 Wilmeth Road  
McKinney, Texas 75069-8250

<u>Description and Model Number</u>	<u>Quantity</u>	
1. AccuVote-TS Electronic Tabulator	1050	
2. AccuVote-TS VIBS Tabulator	300	
3. Modem Card	8	
4. Precinct Control Device/Accumulator	375	
5. Early Voting Card Device	20	
6. Voter Cards	4000	
7. Warehouse Cart	350	
8. PCMICA Memory Cards-Additional	270	
9. AccuVote-OS Central Count Unit	6	
10. AccuVote-OS Memory Card-Additional	6	
11. Ethernet Hub	2	
12. Dell Power Edge 4600 Server configured as follows:	2	
1. 3 year manufacture's warranty 4 hour response on 7/24 basis	3	
2. Digi Portserver II	1	
3. Digi PCI X/em controller board only (without connector boxes)	2	
4. Digi X/em connector boxes (16 ports per box) (plus cabling and supplies for central count)	2	
<b>*EQUIPMENT AND FIRST TERM WARRANTY SUBTOTAL</b>		<b>\$ 4,353,906.00</b>
<b>SHIPPING</b>		<b>28,500.00</b>
<b>SALES TAX</b>		<b><u>315,658.18</u></b>
<b>TOTAL</b>		<b>\$ 4,698,064.18</b>

Guaranteed pricing for Warranty Fees inclusive of maintenance/support on all above products for terms 2 – 5:

Second Term:	\$68,400.00
Third Term:	68,400.00
Fourth Term:	68,400.00
Fifth Term:	<u>68,400.00</u>

Equipment Warranty Fees are inclusive of manufacture recommended changes.

After the fifth term, Warranty Fees, inclusive of maintenance/support, may increase annually no more than five percent (5%).

\*Includes first term Equipment Warranty maintenance/support through November 30, 2004.

#### 2. Delivery.

Delivery Date: A date after January 6, 2003, but before May 15, 2003 that has been jointly agreed to by COUNTY and CONTRACTOR.

3. **Ship To Address.**

Company/Agency:	Kern County Elections
Address:	1115 Truxtun Avenue, 1 <sup>st</sup> Floor
City:	Bakersfield
State:	California
Zip Code:	93301
Attention:	Edward E. Johnston, Assistant Auditor-Controller-County Clerk
Phone Number:	(661) (868-3533)

## RIDER C

### SOFTWARE LIST, PRICES

1. **CONTRACTOR Package Programs in the Licensed Product, DESI Application Software:**

<b><u>Description (Including Version &amp; Release Number)</u></b>	<b><u>Price</u></b>
GEMS Application Software	\$ 75,000.00
TS Application Software (1350 seats)	\$135,000.00
VC Programmer	\$ 5,000.00
Voter Registration Interface	\$ 7,500.00
<b>*CONTRACTOR SOFTWARE TOTAL</b>	<b>\$222,500.00</b>

2. **Third Party Software being sublicensed to COUNTY by CONTRACTOR:**

<b><u>Description (Including Version &amp; Release Number)</u></b>	<b><u>Price</u></b>
Microsoft Windows CE Embedded 2.12 or 3.0	
Microsoft® Windows NT® 4.0 Server	
BSQUARE Deliverables	
<b>THIRD PARTY SOFTWARE TOTAL</b>	<b><u>Included</u></b>
<b>TOTAL SOFTWARE AND FIRST TERM LICENSE AND SUPPORT</b>	<b>\$222,500.00</b>
<b>SALES TAX (on Software only)</b>	<b><u>16,131.25</u></b>
<b>TOTAL</b>	<b>\$238,631.25</b>

**Guaranteed Pricing for Licensee Fees inclusive of Software maintenance/support on all Software products for terms 2 – 5, exclusive of applicable California sales tax:**

Second Term:	\$18,250.00
Third Term:	18,250.00
Fourth Term:	18,250.00
Fifth Term:	<u>18,250.00</u>

Software maintenance fees are inclusive of documentation updates.

After the fifth term, Licensee Fees, inclusive of Software maintenance/support, may increase annually no more than five percent (5%).

**\*Includes first term Software License and maintenance/support through November 30, 2004.**

**RIDER D**

**SCHEDULE 1**

**CONTRACTOR SERVICES AND SUPPLIES, PRICES**

**SERVICES AND SUPPLIES**

**CHARGE**

Project Coordination and Training (See Schedule 2)	\$ 55,000.00
Shipping and Installation (See Schedule 3)	2,000.00
Documentation (See Schedule 4)	0.00
Custom Programming (None)	<u>0.00</u>

**SERVICES AND SUPPLIES TOTAL:**

**\$ 57,000.00**

## RIDER D

### SCHEDULE 2

#### PROJECT COORDINATION AND TRAINING

##### 1. Installation Services

Installation and testing of all Equipment and Software for the AccuVote TS, AccuVote-OS and GEMS host software application. Additionally, will supervise and provide staff to unpack and test all AccuVote-TS units (COUNTY to assist) upon delivery. Documentation is to be kept as part of the installation audit trail.

##### 2. Staff Training and New Employee Training

Initial staff training will be on site at the Kern County Elections Office and will be provided by DIEBOLD Project Management staff in: systems administration, AccuVote-TS training, and software application. This will include all phases of election as shown below:

<b>ACCUVOTE-TS BASICS - TRAINING</b>
REVIEW SELF-DIAGNOSTICS MODE
REVIEW PRE-ELECTION MODE
PREPARING TEST DECKS
CONDUCT BALLOT CARD TEST DECK
PREPARE ACCUVOTE-TS FOR ELECTION
REVIEW ELECTION MODE
POST ELECTION MODE
REVIEW SUPERVISOR FUNCTIONS
<b>ACCUFEED BASICS - TRAINING</b>
SETUP
ROUTINE MAINTENANCE
TESTING
<b>INVENTORY -BASIC COMPONENTS</b>
EQUIPMENT
INVENTORY -UNBOX & TEST
TEST ACCUVOTE-TS TRAINING
<b>SYSTEM ADMINISTRATION</b>
ELECTION PLANNING
EQUIPMENT MANAGEMENT
DEMONSTRATION
<b>POLL WORKER TRAINING - DEVELOPMENT</b>
DEVELOP OPENING/CLOSING SHEET
CONSULTING SERVICES FOR PW MANUAL
"TRAIN THE TRAINER" PW SCHOOL

CLASS PLANNING/ DEVELOPMENT
<b>POLL WORKER SCHOOL OF INSTRUCTION</b>
DESI ON SITE FOR PW SCHOOL

<b>NT BASICS</b>
BOOTING THE SERVER
DESKTOP ENVIRONMENT
ALTERNATE SESSIONS
DIGIBOARDS & PORTS
ENABLE/DISABLE PORTS
SYSADMIN SHELL
NT SHELL
BACKUP/SHUTDOWN
<b>GEMS JURISDICTION DEFINITION</b>
OVERVIEW
DISTRICT FILE
ENTERING DISTRICTS
POLITICAL PARTY DEFINITIONS
ENTERING POLITICAL PARTIES INTO GEMS
PRECINCT FILE
ENTERING PRECINCTS INTO GEMS
PRINTING REPORTS AND PROOFING SET-UP
<b>ELECTION CREATION IN GEMS</b>
ELECTION TYPES
ACTIVATING DISTRICTS
RACE DEFINITION
CANDIDATE ENTRY
<b>BALLOT CREATION IN GEMS</b>
GENERATE BALLOT TYPES
WHAT CAN MY BALLOT LOOK LIKE
GEMS BALLOT FEATURES
TYPESETTING BALLOT HEADINGS
TYPESETTING RACE HEADINGS
TYPESETTING QUESTION TEXT
SELECTING A BALLOT STYLE
GENERATE FINAL BALLOT FORMAT
MANUAL ADJUSTMENTS

--

<b>POSTSCRIPT BALLOT GENERATION</b>
SELECTING A PRINTER DRIVER
PRINTING A BAL LOT-OPTIONS
PUTTING POSTSCRIPT BALLOT ON DISKETTE
TRANSMIT PS BALLOTS TO PRINTER VIA MODEM
BALLOT ON DEMAND
<b>MEMORY CARD CREATION</b>
DEFINE NUMBER OF SPECIAL CARDS NEEDED
UPDATE VOTER REGTOTALS (OPTIONAL)
GENERATE PRECINCT COUNTERS
SET ACCUVOTE-TS PARAMETERS
DIGIBOARD/PORTS REVIEW
LOADING/LABELING MEMORY CARDS
CREATING DUPLICATE SET OF MEMORY CARDS
<b>TELERESULTS TRAINING</b>
HOST COMPUTER SET-UP/REVIEW
ENTERING PHONE NUMBER INTO ACCUVOTE-TS
CONNECTING ACCUVOTE-TS TO PHONE LINE
ACCUVOTE-TS STEPS/MSGS TO TRANSMIT
TRANSMITTING TEST RESULTS
GEMS TEST UPLOAD SCREEN
PRECINCT SURVEY/MODEM UPLOAD TESTING
<b>CONDUCTING AN ELECTION</b>
ADMINISTRATIVE PROCEDURES- OPENING
ADMINISTRATIVE PROCEDURES -CLOSING
<b>POST ELECTION</b>
VERIFYING RESULTS
PRINTING FINAL GEMS REPORTS
ANALYSIS OF ELECTION
BACKUP ELECTION
<b>CENTRAL COUNT TRAINING</b>
ACCUFEED SET-UP, CONNECTION TO HOST
GEMS CENTRAL COUNT SCREENS



<b>EARLY VOTING TRAINING</b>
CABLING REQUIREMENTS/SET-UP
BUILD SECURITY CODES FOR SCREENS
CREATE BACKUP DATABASE
<b>GEMS ELECTION PREPARATION</b>
ELECTION NIGHT REPORTS SET-UP
ELECTION NIGHT MEDIA AREA SET-UP
ENTERING PRECINCT REGISTRATION FIGURES
PREPARING BACK-UP SERVER
<b>GEMS-CONDUCTING AN ELECTION</b>
CLEARING COUNTERS/ZERO TOTALS REPORT
STARTING MULTIPLE SESSIONS
LOADING ABSENTEE CARDS
REVIEW TELERESULTS SITUATIONS
POSTING RESULTS TO BACK-UP SERVER
MANUAL ENTRY OF RESULTS
PRINTING ELECTION NIGHT REPORTS
<b>POLL WORKER TRAINING - DEVELOPMENT</b>
DEVELOP OPENING/CLOSING SHEET
CONSULTING SERVICES FOR PW MANUAL
"TRAIN THE TRAINER" PW SCHOOL
CLASS PLANNING/ DEVELOPMENT
<b>POLL WORKER SCHOOL OF INSTRUCTION</b>
DESI ON SITE FOR POLL WORKER SCHOOL

### 3. On-site Election Preparation Coverage

On-site election preparation services for all elections through and including the November 2004 election.

**TOTAL PROJECT COORDINATION AND TRAINING COST: \*\$ 55,000.00**

\*Inclusive of all CONTRACTOR travel expenses.

## **RIDER D**

### **SCHEDULE 3**

#### **INSTALLATION SERVICES DETAIL**

##### **DESCRIPTION**

- Site visit by CONTRACTOR to review and plan necessary site modifications.
- Site visit to certify completed site preparation.
- CONTRACTOR to test and install all CONTRACTOR supplied Equipment on Rider B, and test and install all CONTRACTOR supplied Software.

##### **INSTALLATION AND SHIPPING PRICE LIST:**

Rider B, Equipment:

Equipment Installation

**\$2,000.00**

**TOTAL INSTALLATION AND SHIPPING:**

**\$ 2,000.00**

## RIDER D

### SCHEDULE 4

#### DOCUMENTATION

##### CONTRACTOR DOCUMENTATION:

<u>Description</u>	<u>No. Copies</u>
<u>User Manuals for:</u>	
Diebold Election Systems, Inc. AccuVote Hardware Guide	2
Diebold Election Systems, Inc. AccuVote Operator's Guide	2
AccuVote-TS User's Guide GEMS Touch Screen Client 4.1	2
GEMS User Guide VSU-BA19 Document Revision 1 Version 1.17.12	2

CONTRACTOR shall also provide one electronic copy of the above documentation.

Costs are included in System Purchase Price.

CONTRACTOR hereby grants COUNTY the right to duplicate CONTRACTOR documentation to the extent needed for COUNTY's employees to make full use of the System. CONTRACTOR's proprietary rights and COUNTY's obligations to protect those rights apply to all copies made by COUNTY and said copies must have CONTRACTOR's copyright notice attached thereto.

##### THIRD PARTY DOCUMENTATION:

One copy of all applicable Third Party documentation will be provided at no cost.

**RIDER E  
PRICE SUMMARY**

<u>RIDER</u>	<u>ITEM</u>	<u>PRICE</u>
B	Equipment and Warranty	\$4,698,064.18
C	CONTRACTOR & Third Party Software License	\$ 238,631.25
D	Services and Supplies	\$ 57,000.00
L	Source Code Escrow	0.00
TOTAL PURCHASE PRICE:		\$4,993,695.43

The above items from Riders B and C include California Sales Tax of 7.25%.

## RIDER F

### PAYMENT SCHEDULE AND CONTRACT MILESTONES

<u>CONTRACT MILESTONES</u>	<u>% PAYMENT</u>	<u>AMOUNT</u>
Installation and Acceptance of GEMS Software	- 20%	\$ 998,739.09
Delivery of Initial 675 AccuVote Units	- 30%	\$1,498,108.61
Delivery of final 675 AccuVote Units, Acceptance by COUNTY, and Acceptance and Certification of System By State	- 30%	\$1,498,108.61
Completion of Successful Final Acceptance Test In Accordance With Rider H	10%	\$ 499,369.56
Final Payment upon Certification of final Election Results by COUNTY of the November 4, 2003 UDEL Election	- 10%	\$ 499,369.56
<b>TOTAL:</b>	<b>100 % of costs</b>	<b>\$4,993,695.43</b>

After the initial term, Annual Software License Fees and Equipment Extended Warranty Fees for the second through fifth terms will be paid separate from above on an annual basis.

**RIDER G**

**NOT IN USE**

# RIDER H

## HARDWARE AND SYSTEM FUNCTIONALITY TESTS

TS SERIAL NUMBER: \_\_\_\_\_

ROV ID NUMBER: \_\_\_\_\_

AVTS Software Version Number: \_\_\_\_\_

TASKS		Check Off Each Task as Completed		
		OK	NOT OK	OBSERVATIONS/NOTES
<b>1</b>	<b>Unbox AVTS units</b>			
	a Inspect AccuVote-TS (AVTS) unit for physical damage such as cracks			
	b Inventory 3 items: 2 sets of keys (to key box), 1 power cord, 1 AVTS unit			
<b>2</b>	<b>Acceptance Testing</b>			
	a Plug AVTS into electrical source and raise screen			
	b Unlock PC card compartment on right side of unit			
	c Insert PC card (insert PC card into either slot, logo side up)			
	d Find Voter Access Card and insert into black card slot. Push the card all the way into the card slot and release. The Voter Access Card should spring back out towards you, allowing easy access for removal.			
	e Turn on by pressing red power switch			
	f Test the internal battery by unplugging the power cord after you turn on the AVTS unit. The unit should still continue with its startup process, using power off of its internal battery.			
	g The machine should start within 20 seconds and the Diebold corporate logo will appear. On the bottom right corner of the screen, the software version should be displayed.			
	h Write software version number on top of checklist			
	i After the initial startup, the Pre Election Test Mode screen should appear.			
<b>3</b>	<b>Diagnostic Testing</b>			
	a Insert Manager card. Touch 1111 (password) and OK			
	b Touch "System Setup" button in Supervisor Mode Screen			
<b>4</b>	<b>Checking and Verifying the System Setup information</b>			
	a The top half of the System Setup screen should have the following information; please check to ensure:			
	i. SERIAL NUMBER: (SHOULD MATCH SERIAL AVTS SERIAL NUMBER)			
	ii. SMART CARD - COM 4			
	iii. PRINTER PORT: LPT 1			
	iv. SYSTEM DIRECTORY: "FFX\ACCUVOTE-TS\"			
	v. MAIN DIRECTORY: "\STORAGE CARD\"			
	vi. BACKUP DIRECTORY: "FFX\ACCUVOTE-TS\"			
	vii. Make sure PRINT REVERSE box is unchecked			
	b Unlock printer compartment (with key) on top-right-side of unit and remove lid			

c	Paper should already be fed and attached to printer. If this is not the case, you may have to feed the printer paper into the printer.			
d	To feed the paper, flip "up" gray lever and feed paper under black roller. Turn roller with finger to advance paper. Lower gray lever to clamp and secure paper to printer.			
5	<b>Setting the correct Date and Time</b>			
a	Touch "Set Date" button			
b	Left-hand-side of window manages Month/Day/Year; verify and if necessary, use calendar selection options, to correct Month/Day/Year information.			
c	Right-hand-side of window manages time; verify time zone, using drop down list to select "Pacific Time Zone".			
d	Although we are currently observing Daylight Savings Time, in November, when the election is to occur, we will be off Daylight Savings Time. Therefore, we need to set the time that corresponds to the time in November. Please ensure that the "Daylight savings is currently in use" checkbox is NOT selected.			
e	Press the "Apply" button to apply your changes to the AVTS unit.			
f	Verify the correct time for November. Check to make sure that the AVTS clock is one hour behind the current time (if it is currently 10:00 AM, the AVTS unit should show the time as 9:00 AM). Use the up and down arrows to make Hour/Minute/Seconds selections to input correct time.			
g	When you are finished entering and verify the correct date and time, locate the small "OK" button at the top right-hand corner of the window next to the "X" button. DO NOT use the "OK" button at the bottom of the screen; that button is used for another window. Press the small "OK" button at the top right corner of the date/time window to return to the System Setup Mode.			
6	<b>Diagnostics</b>			
a	At the System Setup Mode, touch "Diagnostics" button to bring up diagnostics screen.			
b	Touch "Test Printer" and the AVTS unit will begin its print test. Check printer paper for fading, blank columns. Leave print test results attached.			
c	The message prompt "Printer passed test", should appear when the test is finished. Press "OK" to return to System Diagnostics Testing screen.			
d	Attach loop back connector to serial port keypad on right side of unit.			
e	Touch "Test Serial Port" button. A new screen should appear. Change FLOW CONTROL from "hardware" to "software".			
f	Touch "Test" button.			
g	The message prompt "Serial port test PASSED", should appear when the test is finished. Press "OK" to return to the "Serial Port Test" screen.			
h	Locate the "Done" button (next to the "Test" button – DO NOT use the "Done" button at the bottom of the screen) to return to the System Diagnostics Testing screen.			
i	Remove the loop back connector			
j	Touch "Test Card Reader" button and the Manager card will be ejected.			
k	Remove manager card. DO NOT TEST CARD OR IT WILL BE EARASED			
l	Insert Voter Access Card when prompted by "warning/test smart card" message and the test will automatically begin.			
m	When the test is finished, the Voter Access Card will be ejected. Remove Voter Access Card.			
n	Reinsert Manager Card when prompted. Press "done" to return to System Setup Screen			
o	Press OK to return to Supervisor Mode.			
p	Press "Exit Administrator" to go into Pre-Election Test Mode. The AVTS unit will eject the Manager Card. Remove the Manager Card.			
7	<b>Vote Testing</b>			
a	Press "Test Count" button to bring up the Test Ballot Screen and place the AVTS unit in test mode for the Vote Test.			
b	Check the "Not Using Voter Card" checkbox			
c	Press "Count Test" button and a new screen will appear, named "Select Precinct and Party" screen.			
d	By default, the AVTS software will select the first precinct and the first party for the test election. You can use the default precinct/party selection or select any			



	precinct/party that you desire and press "Vote" button.			
e	Voting the Test Election.			
f	The first screen that appears is the Instructions screen. Please be familiar with the voting instructions. Press "Start" button to go to the test ballot.			
g	The test ballot should be a simple election. Please vote at least one candidate (any candidate) on each race in the test election (there may only be one race). Use the "Next" button to advance through the ballot.			
h	At the end of the ballot you will encounter the summary screen which summarizes your vote selection. Press the "Cast Ballot" button to cast the test vote and finish the Vote Test.			
i	After you have cast your ballot, you should return to the "Select Precinct and Party" screen.			
8	<b>Testing the Audio System</b>			
a	Plug headphones into Audio Port			
b	Check the "VIBS" checkbox			
c	Uncheck "hide ballot" checkbox and then press "Vote" button.			
d	In this test, you are only concerned with testing that the AVTS unit is able to generate sound. Listen for sound (anything) through the headphones. It is not necessary to listen to all race and candidate information. Verify sound and advance through the ballot; cast the ballot and finish the audio test.			
9	<b>Closing and finishing Acceptance Test</b>			
a	Press the "Done" button at the "Select Precinct and Party" screen to go to "Test Ballots" screen.			
b	Press the "Done" button again to go to the "Pre-Election Testing Mode."			
c	At this point you can turn off the AVTS unit by pushing red power switch.			
d	Push black eject button to remove PC card			
e	Unplug machine and repack with power cord			
10	<b>Acceptance Testing the Voting Booth</b>			
a	Check voting booth for damage and cracks			
b	Plug power cord into voting booth			
c	Use Circuit Analyzer to test power			
d	Place unit and power cord into voting booth. Place keys in key box			
e	Place unit in box or on cart if cart is available			

**INSPECTOR:** \_\_\_\_\_

**Date:** \_\_\_\_\_

## **FINAL ACCEPTANCE TEST TEST ELECTION**

The final acceptance test will consist of a test election that will include at a minimum the following:

1. Primary type election with 3 parties plus Declined to State voters.
2. One party will allow cross over voting
3. 1 statewide race, 1 countywide race, 1 supervisor race, 3 special/school (must allow for voting for more than 1 candidate) district races, 1 statewide proposition, 1 local proposition
4. 2 mail ballot precincts
5. 10 voting precincts
6. 3 remote count sites
7. 3 early voting sites
8. Absentee voters
9. Provisional voters

The COUNTY will be responsible for supplying all data for the test. The data may be fictitious or it may be from a prior election.

The test election will follow all aspects of an election from beginning to end and will cover at least the following processes:

1. Transfer of ballot and precinct data from voter registration system to GEMS
2. Preparation and printing of mail and absentee (Optical Scan) ballots, and preparation of ballot screens for Touch Screen Units
3. Preparation and testing of Touch Screen voting units
4. Testing of logic and accuracy of GEMS software
5. Testing of logic and accuracy of Optical Scan Counters
6. Testing of logic and accuracy of Touch Screen Units
7. Early voting at main office and from 2 remote units
8. Election Day voting at precincts (set up, closing, etc.)
9. Provisional voting
10. COUNTY paper ballots and test security of access to early results
11. Collect tabulation of precinct voting results (office and remote)
12. Count provisional and late absentee ballots and include in tabulation results
13. Tabulate, print and post (Internet and State Net) election results
14. Perform required canvassing of election including printing images of electronic ballots
15. Recount 1 contest
16. Certify results

The COUNTY will be responsible for carrying out the test election. The contractor will be available for instruction as necessary.

**On the completion of the test election the COUNTY shall certify in writing that the System has passed the final acceptance test, provided that in all material respects the System correctly performed the above identified processes, and other processes to which the CONTRACTOR and COUNTY have agree in writing.**

**RIDER I**  
**NOT IN USE**

**RIDER J**  
**SOFTWARE/EQUIPMENT SUPPORT/MAINTENANCE AGREEMENT**

**1. PROVISIONS FOR MAINTENANCE SERVICES**

CONTRACTOR agrees to furnish as specified herein priority services to support and maintain the Equipment and Software as described in Riders B and C respectively and COUNTY hereby purchases comprehensive support and maintenance service for said Software and Equipment upon the terms and conditions set forth herein.

**2. TERM**

This Comprehensive Software/Equipment Support/Maintenance Agreement shall commence following the successful completion of the Final Acceptance Test and shall continue through the initial term and any subsequent term of the License and Warranty Agreement. This Support/Maintenance Agreement may be automatically renewed at COUNTY's option annually, provided that COUNTY pays the appropriate maintenance fees detailed in Section 8 herein below, unless the Agreement is terminated per Section 33 of the main Agreement.

**3. SUBCONTRACTORS**

CONTRACTOR hereby accepts full responsibility for the obligations outlined by this Agreement. COUNTY agrees that CONTRACTOR may subcontract some or all of the performance of its duties provided for herein, provided that COUNTY approves of the subcontractor. Such approval shall not be unreasonably withheld. Nothing in this Section shall be interpreted as authorizing the assignment of this Support/Maintenance Agreement by CONTRACTOR.

**4. DIAGNOSIS OF PROBLEMS**

CONTRACTOR shall maintain technical personnel for purposes of providing a telephone customer service to report problems and discuss questions about operations. This customer service shall be available via an "800" telephone line to COUNTY. For diagnosis of problems, CONTRACTOR technical personnel shall be able to dial COUNTY's CPU directly. CONTRACTOR technical staff will respond to each reported problem as determined by COUNTY System Manager as follows:

- a. On a simple software problem, response should be defined as having dialed into the System and having the problem fixed within two (2) hours. Simple software problems being defined as a software problem which is negatively impacting COUNTY's ability to provide election voting services at one (1) or two (2) voting locations but which is not causing host site computer down time and is not causing severe response time problems.
- b. On a complex software problem, response should be defined as starting to work on the problem within two (2) hours of notification and having the problem fixed no later than two (2) days prior to release of the Official Canvass. CONTRACTOR shall use its best effort to assist COUNTY in compiling the Unofficial Results for release within forty-eight (48) hours following closure of the polls on election day. Complex software problems being defined as a software problem which is severely impacting COUNTY's ability to provide election voting services at more than two (2) voting locations, or the System is suffering severe response time problems due to the software problem, or COUNTY is unable to consolidate and/or tabulate election results from voting locations.

**5. SUPPORT RESPONSIBILITIES**

- a. CONTRACTOR will provide all Equipment maintenance, and Software fixes, minor enhancements, releases, or upgrades to the Licensed DESI Application Software at no additional charge to COUNTY, and to other Licensed Software to the extent (1) it is available for distribution without additional charge to CONTRACTOR, or (2) CONTRACTOR is

obligated to provide the same pursuant to Subsection 10.A of the Agreement, at no additional charge to COUNTY. Such fixes, minor enhancements, or upgrades shall be provided with all appropriate documentation for successful installation and implementation.

- b. CONTRACTOR shall provide corrections to the Licensed Software at no additional cost to COUNTY for any error, malfunction, or defect which causes the Licensed Software to fail to perform in accordance with functional specifications of currently installed release.
- c. CONTRACTOR shall provide scheduled Data File Optimization during contracted coverage hours.
- d. CONTRACTOR shall provide a designated Account Executive assigned to COUNTY's account to monitor performance and service delivery.
- e. Unscheduled Software maintenance and COUNTY consultations shall be provided during the following hours:

MON-FRI

7AM-7PM

Pacific Time

Notwithstanding the above, CONTRACTOR shall provide through the initial term of this Agreement, on-site support from 8:00 am the day before an election through 8:00 p.m. the day after that election, at no additional cost to COUNTY. After the initial term of this Agreement, CONTRACTOR shall provide on-site support at the request of COUNTY at CONTRACTOR's then published rates and expenses for such on-site support.

- f. Holidays excluded from unscheduled Software maintenance service include:

New Year's Day  
Martin Luther King's Birthday  
President's Day  
Memorial Day  
Independence Day  
Labor Day  
Thanksgiving Day  
Friday after Thanksgiving Day  
Christmas Eve (1/2 day)  
Christmas Day  
New Year's Eve (1/2 day)

- g. CONTRACTOR shall provide assistance for emergency problems at the request of COUNTY during all other hours including weekends and holidays. COUNTY will be billed at the then published rate for the time required to perform such services.
- h. CONTRACTOR shall have no obligation to provide assistance in correcting errors or problems arising in connection with any modifications or alterations to the Licensed Software which have been made by or on behalf of COUNTY without CONTRACTOR's express written consent.
- i. COUNTY may request that CONTRACTOR perform standard services such as maintenance or installations of Software upgrades during times outside those identified in paragraphs e. and f. above. The performance of regular services outside normal hours is called "discretionary services" and will be billed at the then published rate for the time required to perform such services.

## 6. CONDITIONS OF CONTRACTOR'S OBLIGATIONS

All maintenance services of any nature rendered by CONTRACTOR hereunder shall be limited to the System and shall be contingent upon COUNTY's proper use of the System in the application for which the System was intended.

## 7. OBLIGATIONS OF COUNTY

- a. COUNTY shall immediately notify CONTRACTOR of an Equipment and/or Software malfunction.
- b. COUNTY shall be responsible for maintaining a sufficient staff to handle normal day-to-day operation and support for the System, including but not limited to such tasks as back-ups and report handling. It is acknowledged and understood that the maintenance and support service to be provided by CONTRACTOR hereunder is not intended to supplant COUNTY's day-to-day operation and support for the System.
- c. COUNTY shall provide CONTRACTOR full and free access to each item of Equipment to allow CONTRACTOR to provide maintenance service thereon and a suitable place in which to perform such service shall be made available to CONTRACTOR. COUNTY shall provide CONTRACTOR all access to the System which CONTRACTOR believes is necessary or desirable for the performance of any unscheduled on-site remedial maintenance services. A designated representative of COUNTY shall be in the building whenever CONTRACTOR personnel are present.
- d. COUNTY shall provide and maintain suitable environmental conditions, including space, heat, light, ventilation, cooling, electrical power, current and grounding, and the like, per the Site Preparation Guide, for the System to be maintained properly hereunder.
- e. COUNTY shall not perform, nor attempt to perform, or cause to be performed, maintenance or repair to the Equipment or Licensed Software covered hereunder during any term of this Maintenance Agreement except with the prior written or oral approval of CONTRACTOR.
- f. COUNTY shall be responsible for maintaining: (1) a telephone within operational reach of the central Equipment; (2) an auto-answer, modem supplied by CONTRACTOR as indicated in Rider B attached to a port for the exclusive use of CONTRACTOR; and (3) an "outside" phone line connected to the modem for use in dial-up diagnostics and maintenance. The cost of procuring and maintaining this line in good operating condition shall be borne by COUNTY.
- g. During System implementation, COUNTY shall provide:
  - (1) All available documentation on current automated and manual systems related to this project.
  - (2) All available relevant documentation on current automated system for conversion purposes such as: file layouts of existing data and appropriate test data.
  - (3) Space for System and training facility for up to 10 students.
  - (4) Facility for regular review meetings.
- h. Provide a System Administrator/Project Coordinator.

## 8. CHARGES AND PAYMENTS

- a. The maintenance charges are due and payable by COUNTY at the start of each maintenance period. COUNTY will pay the maintenance charges annually. Payment discounts for annual payment will be given according to CONTRACTOR's discounted rate.
- b. Charges for the initial term under this Agreement and the second through fifth terms under the License and Warranty Agreement are specified in Riders B and C including the ability to adjust the charges after the fifth term. Written notice of any adjustment shall be made by CONTRACTOR to COUNTY no later than ninety (90) days prior to the next renewal period.

Should CONTRACTOR not notify COUNTY of such rate adjustment, then any intended rate adjustment on CONTRACTOR's part shall not accrue into successive years. Software enhancements and upgrades shall be made available for licensed modules at no additional cost. Acceptance of upgrades shall not result in an increase in charges for Software support/maintenance.

- c. There shall be no additional charge for:
  - (1) Upgrades (including installation) of the System Software.
  - (2) Unscheduled maintenance begun during the contracted hours of maintenance and extending beyond.
  - (3) Travel expenses or per diem expenses for support on-site if it is determined that CONTRACTOR personnel are required on-site to diagnose or remedy a support problem.
- d. CONTRACTOR shall indemnify COUNTY for all charges, over and above the normal support charges charged by the provider of support on the Equipment, when it is found that an error condition attributed otherwise was in fact an error condition in the DESI Application Software or CONTRACTOR support.
- e. With respect to travel costs that are reimbursable by COUNTY, CONTRACTOR shall be reimbursed at the current rates applicable to COUNTY employees.



## RIDER K

### TAXES

- A. COUNTY represents that it is subject to taxation as listed hereafter. COUNTY shall also be obligated to pay such other taxes which are found to be directly related to COUNTY's purchase pursuant to this Agreement.

		<u>Amount</u>	Percentage
1.	Federal Tax	None	None
2.	State Sales Tax	\$331,789.43	7.25 %
3.	Local Tax	None	None
4.	Other	None	None

Note: Taxes do not apply to services which are billed separately. Billings for services are identified separately from Equipment and products on the applicable Riders.

## RIDER L

### SOFTWARE ESCROW AGREEMENT BETWEEN DIEBOLD ELECTION SYSTEMS, DSI TECHNOLOGIES AND KERN COUNTY ESCROW AGREEMENT 2002

#### MASTER PREFERRED ESCROW AGREEMENT

Master Number \_\_\_\_\_

This agreement "Agreement" is effective \_\_\_\_\_, 20\_\_\_\_ among DSI Technology Escrow Services, Inc. ("DSI"), Diebold Election Systems, Inc. ("Depositor") and any additional party signing the Acceptance Form attached to this Agreement ("Preferred Beneficiary"), who collectively may be referred to in this Agreement as the parties ("Parties").

A. Depositor and Preferred Beneficiary have entered or will enter into a license agreement, development agreement, and/or other agreement regarding certain proprietary technology of Depositor (referred to in this Agreement as "the License Agreement").

B. Depositor desires to avoid disclosure of its proprietary technology except under certain limited circumstances.

C. The availability of the proprietary technology of Depositor is critical to Preferred Beneficiary in the conduct of its business and, therefore, Preferred Beneficiary needs access to the proprietary technology under certain limited circumstances.

D. Depositor and Preferred Beneficiary desire to establish an escrow with DSI to provide for the retention, administration and controlled access of certain proprietary technology materials of Depositor.

E. The parties desire this Agreement to be supplementary to the License Agreement pursuant to 11 United States Bankruptcy Code, Section 365(n).

#### ARTICLE 1 -- DEPOSITS

1.1 Obligation to Make Deposit. Upon the signing of this Agreement by the parties, including the signing of the Acceptance Form, and Exhibit D naming the Deposit Account, Depositor shall deliver to DSI the proprietary technology and other materials ("Deposit Materials") required to be deposited by the License Agreement or, if the License Agreement does not identify the materials to be deposited with DSI, then such materials will be identified on Exhibit A. If Exhibit A is applicable, it is to be prepared and signed by Depositor and Preferred Beneficiary. DSI shall have no obligation with respect to the preparation, signing or delivery of Exhibit A.

1.2. Identification of Tangible Media. Prior to the delivery of the Deposit Materials to DSI, Depositor shall conspicuously label for identification each document, magnetic

tape, disk, or other tangible media upon which the Deposit Materials are written or stored. Additionally, Depositor shall complete Exhibit B to this Agreement by listing each such tangible media by the item label description, the type of media and the quantity. Exhibit B shall be signed by Depositor and delivered to DSI with the Deposit Materials. Unless and until Depositor makes the initial deposit with DSI, DSI shall have no obligation with respect to this Agreement, except the obligation to notify the parties regarding the status of the account as required in Section 2.2 below.

1.3. Escrow Account Name Identification. Subject to this Article 1, and at the time Depositor makes the initial deposit with DSI in accordance with Section 1.2 above, Depositor shall complete and sign Exhibit D naming the initial account upon which the Deposit Materials are written or stored. Any new deposits referencing new account names made subsequent to the signing of this Agreement, intended by the Depositor to be held in a separate account and maintained separately from the initial account, but made a part of this Agreement, shall be provided for by the Depositor on Exhibit E, and Exhibit E shall be signed by the Depositor and DSI.

1.4 Deposit Inspection. When DSI receives the Deposit Materials and Exhibit B, DSI will conduct a deposit inspection by visually matching the labeling of the tangible media containing the Deposit Materials to the item descriptions and quantity listed on Exhibit B. In addition to the deposit inspection, Preferred Beneficiary may elect to cause a verification of the Deposit Materials in accordance with Section 1.7 below.

1.5 Acceptance of Deposit. At completion of the deposit inspection, if DSI determines that the labeling of the tangible media matches the item descriptions and quantity on Exhibit B, DSI will date and sign Exhibit B and mail a copy thereof to Depositor and Preferred Beneficiary. If DSI determines that the labeling does not match the item descriptions or quantity on Exhibit B, DSI will (a) note the discrepancies in writing on Exhibit B; (b) date and sign Exhibit B with the exceptions noted; and (c) mail a copy of Exhibit B to Depositor and Preferred Beneficiary. DSI's acceptance of the deposit occurs upon the signing of Exhibit B by DSI. Delivery of the signed Exhibit B to Preferred Beneficiary is Preferred Beneficiary's notice that the Deposit Materials have been received and accepted by DSI.

1.6 Depositor's Representations. Depositor represents as follows:

- a. Depositor lawfully possesses all of the Deposit Materials deposited with DSI;
- b. With respect to all of the Deposit Materials, Depositor has the right and authority to grant to DSI and Preferred Beneficiary the rights as provided in this Agreement;
- c. The Deposit Materials are not subject to any lien or other encumbrance;
- d. The Deposit Materials consist of the proprietary technology and other materials identified either in the License Agreement or Exhibit A, as the case may be; and

- e. The Deposit Materials are readable and useable in their current form or, if any portion of the Deposit Materials is encrypted, the decryption tools and decryption keys have also been deposited.

1.7 Verification. Preferred Beneficiary shall have the right, at Preferred Beneficiary's expense, to cause a verification of any Deposit Materials. Preferred Beneficiary shall notify Depositor and DSI of Preferred Beneficiary's request for verification. Depositor shall have the right to be present at the verification. A verification determines, in different levels of detail, the accuracy, completeness, sufficiency and quality of the Deposit Materials. If a verification is elected after the Deposit Materials have been delivered to DSI, then only DSI, or at DSI's election an independent person or company selected and supervised by DSI and approved by Depositor, may perform the verification.

1.8 Deposit Updates. Unless otherwise provided by the License Agreement, Depositor shall update the Deposit Materials within 60 days of each major release of the product which is subject to the License Agreement. Such updates will be added to the existing deposit. All deposit updates shall be listed on a new Exhibit B and the new Exhibit B shall be signed by Depositor. Each Exhibit B will be held and maintained separately within the escrow account. An independent record will be created which will document the activity for each Exhibit B. The processing of all deposit updates shall be in accordance with Sections 1.2 through 1.6 above. All references in this Agreement to the Deposit Materials shall include the initial Deposit Materials and any updates thereto.

1.9 Removal of Deposit Materials. The Deposit Materials may be removed and/or exchanged only on written instructions signed by Depositor and Preferred Beneficiary, or as otherwise provided in this Agreement.

## ARTICLE 2 – CONFIDENTIALITY AND RECORD KEEPING

2.1 Confidentiality. DSI shall maintain the Deposit Materials in a secure, environmentally safe, locked facility which is accessible only to authorized representatives of DSI. DSI shall have the obligation to reasonably protect the confidentiality of the Deposit Materials. Except as provided in this Agreement, DSI shall not disclose, transfer, make available, or use the Deposit Materials. DSI shall not disclose the content of this Agreement to any third party. If DSI receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposit Materials, DSI will immediately notify the parties to this Agreement unless prohibited by law. It shall be the responsibility of Depositor and/or Preferred Beneficiary to challenge any such order; however, that DSI does not waive its rights to present its position with respect to any such order. DSI will not be required to disobey any order from a court or other judicial tribunal. (See Section 7.5 below for notices of requested orders.)

2.2 Status Reports. DSI will issue to Depositor and Preferred Beneficiary a report profiling the account history at least semi-annually. DSI may provide copies of the

account history pertaining to this Agreement upon the request of any party to this Agreement.

2.3 Audit Rights. During the term of this Agreement, Depositor and Preferred Beneficiary shall each have the right to inspect the written records of DSI pertaining to this Agreement. Any inspection shall be held during normal business hours and following reasonable prior notice.

### **ARTICLE 3 -- GRANT OF RIGHTS TO DSI**

3.1 Title to Media. Depositor hereby transfers to DSI the title to the media upon which the proprietary technology and materials are written or stored. However, this transfer does not include the ownership of the proprietary technology and materials contained on the media such as any copyright, trade secret, patent or other intellectual property rights.

3.2 Right to Make Copies. DSI shall have the right to make copies of the Deposit Materials as reasonably necessary to perform this Agreement. DSI shall copy all copyright, nondisclosure, and other proprietary notices and titles contained on the Deposit Materials onto any copies made by DSI. With all Deposit Materials submitted to DSI, Depositor shall provide any and all instructions as may be necessary to duplicate the Deposit Materials including but not limited to the hardware and/or software needed.

3.3 Right to Transfer Upon Release. Depositor hereby grants to DSI the right to transfer Deposit Materials to Preferred Beneficiary upon any release of the Deposit Materials for use by Preferred Beneficiary in accordance with Section 4.5. Except upon such a release or as otherwise provided in this Agreement, DSI shall not transfer the Deposit Materials.

### **ARTICLE 4 -- RELEASE OF DEPOSIT**

4.1 Release Conditions. As used in this Agreement, "Release Condition" shall mean the following:

- a. Depositor ceases to commercially offer (directly or indirectly) to provide maintenance and support services as required under the License Agreement during or upon the expiration of any period in which the Preferred Beneficiary was under contract to receive such maintenance and support services and the Depositor does not assign such right to a third party capable of fulfilling the Depositor's obligations to the Preferred Beneficiary under the License Agreement;
- b. Depositor ceases doing business in the ordinary course and which cessation prevents Depositor from performing its obligations under the License Agreement; or

- c. Depositor is in breach of its material maintenance and support obligations under the License Agreement, and such breach remains uncured for 60-days or within the period provided for in the License Agreement.

4.2 Filing For Release. If Preferred Beneficiary believes in good faith that a Release Condition has occurred, Preferred Beneficiary may provide to DSI written notice of the occurrence of the Release Condition and a request for the release of the Deposit Materials. Upon receipt of such notice, DSI shall provide a copy of the notice to Depositor by overnight express mail, signed receipt required, and facsimile transmission.

4.3 Contrary Instructions. Depositor shall have ten business days from the date it receives notice requesting release of the Deposit Materials to deliver to DSI contrary instructions ("Contrary Instructions"). Contrary Instructions shall mean the written representation by Depositor that a Release Condition has not occurred or has been cured. Upon receipt of Contrary Instructions, DSI shall send a copy to Preferred Beneficiary by overnight express mail, signed receipt required. Additionally, DSI shall notify both Depositor and Preferred Beneficiary that there is a dispute to be resolved pursuant to the Section 7.3. Any correctly addressed notice or last known address of the Depositor or Preferred Beneficiary that is relied on herein that is refused, unclaimed, or undeliverable because of an act or omission of the party to be notified as provided herein shall be deemed effective as of the first date that said notice was refused, unclaimed, or deemed undeliverable by overnight express mail; and in the event DSI cannot confirm receipt of the notice herein with Depositor as provided for in this Section, the release process under this Section will be terminated, provided that Depositor has complied with Section 8.2 of this Agreement. Subject to Section 5.2 of this Agreement, DSI will continue to store the Deposit Materials without release pending (a) joint instructions from Depositor and Preferred Beneficiary; (b) dispute resolution pursuant to Section 7.3; or (c) order of a court.

4.4 Release of Deposit. If in accordance with and subject to the process in Section 4.3, DSI does not receive Contrary Instructions from the Depositor, DSI is authorized to release the Deposit Materials to the Preferred Beneficiary or, if more than one beneficiary is registered to the deposit, to release a copy of the Deposit Materials to the Preferred Beneficiary. However, DSI is entitled to receive any fees due DSI before making the release. Any copying expense in excess of \$300 will be chargeable to Preferred Beneficiary. Upon any such release, the escrow arrangement will terminate as it relates to the Depositor and Preferred Beneficiary involved in the release.

4.5 Right to Use Following Release. Unless otherwise provided in the License Agreement, upon release of the Deposit Materials in accordance with this Article 4, Preferred Beneficiary shall have the right to use the Deposit Materials for the sole purpose of continuing the benefits afforded to Preferred Beneficiary by the License Agreement. Preferred Beneficiary shall be obligated to maintain the confidentiality of the released Deposit Materials.

## ARTICLE 5 -- TERM AND TERMINATION

5.1 Term of Agreement. The initial term of this Agreement is for a period of one year. Thereafter, this Agreement shall automatically renew from year-to-year unless (a) Depositor and Preferred Beneficiary jointly instruct DSI in writing that the Agreement is terminated; (b) Preferred Beneficiary instructs DSI in writing that the Agreement is terminated as it relates to Preferred Beneficiary; or (c) DSI instructs Depositor and Preferred Beneficiary in writing that the Agreement is terminated for nonpayment in accordance with Section 5.2 or by resignation in accordance with Section 5.3. If the Acceptance Form has been signed at a date later than this Agreement, the initial term of the Acceptance Form will be for one year with subsequent terms to be adjusted to match the anniversary date of this Agreement. If the deposit materials are subject to another escrow agreement with DSI, DSI reserves the right, after the initial one year term, to adjust the anniversary date of this Agreement to match the then prevailing anniversary date of such other escrow arrangements.

5.2 Termination for Nonpayment. In the event of the nonpayment of fees owed to DSI, DSI shall provide written notice of delinquency to the parties to this Agreement affected by such delinquency. Any such party shall have the right to make the payment to DSI to cure the default. If the past due payment is not received in full by DSI within one month of the date of such notice, then at any time thereafter DSI shall have the right to terminate this Agreement to the extent it relates to the delinquent party by sending written notice of termination to such affected parties. DSI shall have no obligation to take any action under this Agreement so long as any payment due to DSI remains unpaid.

5.3 Termination by Resignation. DSI reserves the right to terminate this Agreement, for any reason, by providing Depositor and Preferred Beneficiary with 60-days' written notice of its intent to terminate this Agreement. Within the 60-day period, the Depositor and Preferred Beneficiary may provide DSI with joint written instructions authorizing DSI to forward the Deposit Materials to another escrow company and/or agent or other designated recipient. If DSI does not receive said joint written instructions within 60 days of the date of DSI's written termination notice, then DSI shall destroy, return or otherwise deliver the Deposit Materials in accordance with Section 5.4.

5.4 Disposition of Deposit Materials Upon Termination. Subject to the foregoing termination provisions, and upon termination of this Agreement, DSI shall destroy, return, or otherwise deliver the Deposit Materials in accordance with Depositor's instructions. If there are no instructions, DSI may, at its sole discretion, destroy the Deposit Materials or return them to Depositor. DSI shall have no obligation to destroy or return the Deposit Materials if the Deposit Materials are subject to another escrow agreement with DSI or have been released to the Preferred Beneficiary in accordance with Section 4.4.

5.5 Survival of Terms Following Termination. Upon termination of this Agreement, the following provisions of this Agreement shall survive:

- a. Depositor's Representations (Section 1.6);

- b. The obligations of confidentiality with respect to the Deposit Materials;
- c. The rights granted in the sections entitled Right to Transfer Upon Release (Section 3.3) and Right to Use Following Release (Section 4.5), if a release of the Deposit Materials has occurred prior to termination;
- d. The obligation to pay DSI any fees and expenses due;
- e. The provisions of Article 7; and
- f. Any provisions in this Agreement which specifically state they survive the termination of this Agreement.

## ARTICLE 6 -- DSI'S FEES

6.1 Fee Schedule. DSI is entitled to be paid its standard fees and expenses applicable to the services provided. DSI shall notify the party responsible for payment of DSI's fees at least 60 days prior to any increase in fees. For any service not listed on DSI's standard fee schedule, DSI will provide a quote prior to rendering the service, if requested.

6.2 Payment Terms. DSI shall not be required to perform any service unless the payment for such service and any outstanding balances owed to DSI are paid in full. Fees are due upon receipt of a signed contract or receipt of the Deposit Materials whichever is earliest. If invoiced fees are not paid, DSI may terminate this Agreement in accordance with Section 5.2.

## ARTICLE 7 -- LIABILITY AND DISPUTES

7.1 Right to Rely on Instructions. DSI may act in reliance upon any instruction, instrument, or signature reasonably believed by DSI to be genuine. DSI may act only upon the written notice, request, or instruction of a party's designated contact. DSI will not be required to inquire into the truth or evaluate the merit of any statement or representation contained in any notice or document. DSI shall not be responsible for failure to act as a result of causes beyond the reasonable control of DSI.

7.2 Indemnification. Depositor and Preferred Beneficiary each agree to indemnify, defend and hold harmless DSI from any and all claims, actions, damages, arbitration fees and expenses, costs, attorney's fees and other liabilities ("Liabilities") incurred by DSI relating in any way to this escrow arrangement except to the extent that such Liabilities were caused by the adjudged negligence or willful misconduct of DSI.

7.3 Dispute Resolution. Any dispute relating to or arising from this Agreement shall be resolved by binding arbitration under the Commercial Rules of the American Arbitration Association, with notice for request to arbitrate being served by overnight express mail, signed receipt required, to the party at the last known business address.



Three arbitrators shall be selected. The Depositor and Preferred Beneficiary shall each select one arbitrator and the two chosen arbitrators shall select the third arbitrator, or failing agreement on the selection of the third arbitrator, the American Arbitration Association shall select the third arbitrator. However, if DSI is a party to the arbitration, DSI shall select the third arbitrator. Unless otherwise agreed by Depositor and Preferred Beneficiary, arbitration will take place in San Diego, California, USA. Any court having jurisdiction over the matter may enter judgment on the award of the arbitrator(s). Service of a petition to confirm the arbitration award will be made by overnight express mail, signed receipt required, to the attorney for the party or, if unrepresented, to the party at the last known business address.

**7.4 Controlling Law.** This Agreement is to be governed and construed in accordance with the laws of the State of New Jersey, without regard to its conflict of law provisions.

**7.5 Notice of Requested Order.** If any party intends to obtain an order from the arbitrator or any court of competent jurisdiction which may direct DSI to take, or refrain from taking any action, that party shall:

- a. Give DSI at least two business days' prior notice of the hearing;
- b. Include in any such order that, as a precondition to DSI's obligation, DSI be paid in full for any past due fees and be paid for the reasonable value of the services to be rendered pursuant to such order; and
- c. Ensure that DSI not be required to deliver the original (as opposed to a copy) of the Deposit Materials if DSI may need to retain the original in its possession to fulfill any of its other escrow duties.

## **ARTICLE 8 – GENERAL PROVISIONS**

**8.1 Entire Agreement.** This Agreement, which includes the Acceptance Form and Exhibits A, B, C, D and E described herein, embodies the entire understanding among all of the parties with respect to its subject matter and supersedes all previous communications, representations or understandings, either oral or written. DSI is not a party to the License Agreement between Depositor and Preferred Beneficiary and has no knowledge of any of the terms or provisions of any such License Agreement. DSI's only obligations to Depositor or Preferred Beneficiary are as set forth in this Agreement. No amendment or modification of this Agreement shall be valid or binding unless signed by all the parties hereto, except that Exhibit A need not be signed by DSI, Exhibit B need not be signed by Preferred Beneficiary, Exhibit C need not be signed by any party, Exhibit D need not be signed by Preferred Beneficiary or DSI and the Acceptance Form need only be signed by the parties identified therein.

**8.2 Notices.** All notices, invoices, payments, deposits and other documents and communications shall be given to the parties at the addresses and facsimile numbers specified in the attached Exhibit C and Acceptance Form. It shall be the responsibility of the Depositor and Preferred Beneficiary to notify the parties by overnight express

mail, signed receipt required, in the event of a change of address or facsimile number. The parties shall have the right to rely on the last known address of the other parties. Unless otherwise provided in this Agreement, all documents and communications may be delivered by First Class mail.

8.3 Severability. In the event any provision of this Agreement is found to be invalid, voidable or unenforceable, the parties agree that unless it materially affects the entire intent and purpose of this Agreement, such invalidity, voidability or unenforceability shall affect neither the validity of this Agreement nor the remaining provisions herein, and the provision in question shall be deemed to be replaced with a valid and enforceable provision most closely reflecting the intent and purpose of the original provision.

8.4 Successors. This Agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the parties. However, DSI shall have no obligation in performing this Agreement to recognize any successor or assign of Depositor or Preferred Beneficiary unless DSI receives clear, authoritative and conclusive written evidence of the change of parties.

8.5 Regulations. Depositor and Preferred Beneficiary are responsible for and warrant compliance with all applicable laws, rules and regulations, including but not limited to customs laws, import, export, and re-export laws and government regulations of any country from or to which the Deposit Materials may be delivered in accordance with the provisions of this Agreement.

Diebold Election Systems, Inc.

DSI Technology Escrow Services, Inc.

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

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

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

***EXHIBIT A***

**MATERIALS TO BE DEPOSITED**

Account Number \_\_\_\_\_

Depositor represents to Preferred Beneficiary that Deposit Materials delivered to DSI shall consist of the following:

\_\_\_\_\_  
Depositor

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
Preferred Beneficiary

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT B**  
**DESCRIPTION OF DEPOSIT MATERIALS**

Depositor Company Name \_\_\_\_\_

Account Number \_\_\_\_\_

Product Name \_\_\_\_\_ Version \_\_\_\_\_  
(Product Name will appear as Exhibit B Name on Account History report)

**DEPOSIT MATERIAL DESCRIPTION:**

**Quantity      Media Type & Size      Label Description of Each Separate Item**

\_\_\_\_\_ Disk 3.5" or \_\_\_\_\_  
\_\_\_\_\_ DAT tape \_\_\_\_\_ mm  
\_\_\_\_\_ CD-ROM  
\_\_\_\_\_ Data cartridge tape \_\_\_\_\_  
\_\_\_\_\_ TK 70 or \_\_\_\_\_ tape  
\_\_\_\_\_ Magnetic tape \_\_\_\_\_  
\_\_\_\_\_ Documentation  
\_\_\_\_\_ Other \_\_\_\_\_

**PRODUCT DESCRIPTION:**

Environment \_\_\_\_\_

**DEPOSIT MATERIAL INFORMATION:**

Is the media or are any of the files encrypted? Yes / No If yes, please include any passwords and the decryption tools.

Encryption tool name \_\_\_\_\_ Version \_\_\_\_\_

Hardware required \_\_\_\_\_

Software required \_\_\_\_\_

Other required information \_\_\_\_\_

I certify for **Depositor** that the above described  
Deposit Materials have been transmitted to DSI:

DSI has inspected and accepted the above  
materials (*any exceptions are noted above*):

Signature \_\_\_\_\_

Print Name \_\_\_\_\_

Date \_\_\_\_\_

Signature \_\_\_\_\_

Print Name \_\_\_\_\_

Date Accepted \_\_\_\_\_

Exhibit B# \_\_\_\_\_

Send materials to: DSI, 9265 Sky Park Court, Suite 202, San Diego, CA 92123 (858) 499-1600

**EXHIBIT C**

**DESIGNATED CONTACT**

Master Number \_\_\_\_\_

Requests to change the designated contact should be given in writing by the designated contact or an authorized employee.

**Depositor:**

Notices and communications  
should be addressed to:

Diebold Election Systems, Inc.  
1611 Wilmeth Rd  
McKinney, Texas 75069-8250  
Attn: Contract Manager  
Telephone: 972-542-6000  
Facsimile: 972-542-6044

E-Mail: \_\_\_\_\_

Invoices should be addressed to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Contact: \_\_\_\_\_

P.O.#, if  
required: \_\_\_\_\_

**AND**

Vice President and General Counsel  
Diebold, Incorporated  
5995 Mayfair Road  
North Canton, OH 44720  
Verification Contact:  
\_\_\_\_\_

**DSI:**

Contracts, Deposit Materials and notices to  
DSI should be addressed to:

DSI Technology Escrow Services, Inc.  
Contract Administration  
9265 Sky Park Court, Suite 202  
San Diego, CA 92123

Telephone: (858) 499-1600  
Facsimile: (858) 694-1919  
E-Mail: ca@dsiescrow.com

Date: \_\_\_\_\_

Invoice inquiries and fee remittances  
to DSI should be addressed to:

DSI Technology Escrow Services, Inc.  
PO Box 45156  
San Francisco, CA 94145-0156

(858) 499-1636  
(858) 499-1637

## EXHIBIT D

### NAME OF INITIAL ACCOUNT

Account Number \_\_\_\_\_

\_\_\_\_\_ ("Depositor") has entered into a Master Preferred Escrow Agreement with DSI Technology Escrow Services, Inc. ("DSI"). Pursuant to that Agreement, Depositor may deposit certain Deposit Materials with DSI.

The initial account will be referenced by the following name:

\_\_\_\_\_

\_\_\_\_\_  
Depositor

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT E**

**ADDITIONAL ESCROW ACCOUNT  
TO MASTER PREFERRED ESCROW AGREEMENT**

Master Number \_\_\_\_\_

New Account Number \_\_\_\_\_

\_\_\_\_\_ ("Depositor") has entered into a Master Preferred Escrow Agreement with DSI Technology Escrow Services, Inc. ("DSI"). Pursuant to that Agreement, Depositor may deposit certain Deposit Materials with DSI.

Depositor desires that new Deposit Materials be held in a separate account and be maintained separately from the initial account. By execution of this Exhibit E, DSI will establish a separate account for the new Deposit Materials. The new account will be referenced by the following name: \_\_\_\_\_.

Depositor hereby agrees that all terms and conditions of the existing Master Preferred Escrow Agreement previously entered into by Depositor and DSI will govern this account. The termination or expiration of any other account of Depositor will not affect this account.

\_\_\_\_\_  
Depositor

DSI Technology Escrow Services, Inc.

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

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

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**PREFERRED BENEFICIARY  
ACCEPTANCE FORM**

Account Number \_\_\_\_\_

Depositor, Preferred Beneficiary and DSI Technology Escrow Services, Inc. ("DSI"), hereby acknowledge that the **County of Kern, a political subdivision of the State of California** is the Preferred Beneficiary referred to in the Master Preferred Escrow Agreement effective \_\_\_\_\_, 20\_\_\_\_ with DSI as the escrow agent and Diebold Election Systems, Inc. as the Depositor (the "Master Escrow Agreement"). Preferred Beneficiary hereby agrees to be bound by all provisions of such Agreement, as modified in Section 3 of this Acceptance Form.

1. Depositor hereby enrolls Preferred Beneficiary to the following account(s):

Account Name

Account Number

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Requests to change the designated contact should be given in writing by the designated contact or an authorized employee.

Notices and communications to Preferred Beneficiary should be addressed to:

Invoices should be addressed to:

Company Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Designated Contact: \_\_\_\_\_

Contact: \_\_\_\_\_

Telephone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

E-Mail: \_\_\_\_\_

P.O.#, if  
required: \_\_\_\_\_

3. The Master Escrow Agreement is amended as follows:

- a. Section 1.7 of the Master Escrow Agreement is deleted in its entirety and replaced with the following:

**"1.7 Verification.** Preferred Beneficiary shall have the right, at Preferred Beneficiary's expense, to cause a verification of any Deposit Materials. Preferred Beneficiary shall notify Depositor and DSI of Preferred Beneficiary's request for verification. Depositor and Preferred Beneficiary shall have the right to be present at the verification. A verification



determines, in different levels of detail, the accuracy, completeness, sufficiency and quality of the Deposit Materials. If a verification is elected after the Deposit Materials have been delivered to DSI, then only DSI, or at DSI's election an independent person or company selected and supervised by DSI and approved by Depositor and Preferred Beneficiary, may perform the verification. If the verification determines that the accuracy, completeness, sufficiency and/or quality of the Deposit Materials are materially insufficient relative to the then current documentation in use by the Preferred Beneficiary, or the Deposit Materials or portion thereof are determined to have not been materially updated as required in Section 1.8, then Depositor shall be responsible for Preferred Beneficiary's costs and expenses directly arising from that verification occurrence."

b. Section 2.1 of the Master Escrow Agreement is deleted in its entirety and replaced with the following:

"2.1 Confidentiality. DSI shall maintain the Deposit Materials in a secure, environmentally safe, locked facility which is accessible only to authorized representatives of DSI. DSI shall have the obligation to reasonably protect the confidentiality of the Deposit Materials. Except as provided in this Agreement, DSI shall not disclose, transfer, make available, or use the Deposit Materials. DSI shall not disclose the content of this Agreement to any third party. If DSI receives a subpoena or any other order from a court or other judicial tribunal pertaining to the disclosure or release of the Deposit Materials, DSI will immediately notify the parties to this Agreement unless prohibited by law. It shall be the responsibility of Depositor and/or Preferred Beneficiary to challenge any such order; provided however, that DSI does not waive its rights to present its position with respect to any such order. DSI will not be required to disobey any order from a court or other judicial tribunal. (See Section 7.5 below for notices of requested orders.)"

c. Section 4.1 of the Master Escrow Agreement is modified by adding the following new sub-section d:

"or,

d. Depositor files for, or is declared bankrupt under, Chapter 7 of the United States Bankruptcy Code."

d. Section 4.3 is amended by replacing the first sentence after the caption with the following sentence:

"Depositor shall have twenty (20) business days from the date it receives notice requesting release of the Deposit Materials to deliver to DSI contrary instructions ("Contrary Instructions")."

e. Section 7.3 of the Master Escrow Agreement is deleted in its entirety and replaced with the following:

7.3 Dispute Resolution. In order to attempt to resolve any dispute between the parties hereunder, the parties will attempt to resolve such dispute in the following manner:

a. Management Negotiations. The parties, with the help and assistance of each party's Designated Contact, will attempt to reach a mutually agreeable resolution of the dispute through best efforts negotiation.

b. Executive Negotiations. If such best efforts negotiation between the parties' Designated Contacts does not resolve the dispute to the satisfaction of both parties, within 5 days after the failed best efforts negotiation meeting referenced in Section 7.3(a) above, each party will escalate the negotiation effort to an executive of the party with sufficient authority to resolve the dispute, and will immediately notify the other party in writing of the name and contact information of that party's chosen executive. Within 5 days after the last party's receipt of said notice, the parties chosen executives will meet and attempt to reach a mutually agreeable resolution of the dispute using best efforts.

c. Exhaustion of Internal Dispute Resolution Process. If the executive meeting referenced in Section 7.3(b) above does not resolve the dispute to the satisfaction of both parties, either party may pursue any other remedies available under this Agreement or at law or equity.

f. Section 7.4 of the Master Escrow Agreement is deleted in its entirety and replaced with the following:

7.4 Controlling Law. This Agreement is to be governed and construed in accordance with the laws of the State of California, without regard to its conflict of law provisions.

4. Except as expressly modified in this Acceptance Form, all other terms and provisions of the Master Escrow Agreement remain in full force and effect.

IN WITNESS HEREOF, the parties hereby sign this Acceptance Form on the date indicated below.

\_\_\_\_\_  
Preferred Beneficiary

\_\_\_\_\_  
Depositor

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

DSI Technology Escrow Services, Inc.

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

## ATTACHMENT 1

### Nondisclosure/Confidentiality

#### Agreement

To: DIEBOLD ELECTION SYSTEMS, INC. ("CONTRACTOR")  
1611 Wilmet Road  
McKinney, Texas 75069

KERN COUNTY, for and on behalf of itself and its agents and employees (hereafter "COUNTY") having entered into a Source Code Escrow Agreement with CONTRACTOR, (referred to herein as the "Source Code Agreement"), intending to be legally bound hereby, unconditionally agrees as follows ("Confidentiality Agreement"):

#### 1. Nondisclosure

a. Disclosure by CONTRACTOR. COUNTY understands and acknowledges that pursuant to the Source Code Agreements that CONTRACTOR may, subject to the terms and conditions of the Source Code Agreements, disclose to COUNTY "Confidential Information" which CONTRACTOR regards as proprietary, confidential and involving trade secrets. COUNTY recognizes the proprietary and confidential nature of such information and understands and agrees that CONTRACTOR has and shall retain exclusive rights to all materials, documents and information provided to COUNTY in connection with the Source Code Agreements.

b. Confidential Information. For the purposes of this Confidentiality Agreement, the term "Confidential Information" of CONTRACTOR shall mean all information which relates to CONTRACTOR's past, present and future research, development and business activity, and which includes but is not limited to, specifically, CONTRACTOR Source Code (as said term is defined in the Source Code Agreements) provided to COUNTY pursuant to the Source Code Agreements, and, generally, information regarding computer products including hardware and software designs, programs, literature or materials, operations, methods of doing business, research and development programs, program decks, routines, subroutines, translators, compilers, assemblers, operating systems, object and source codes, updates thereto and related items, including but not limited to specifications, lay-outs, cards, card decks, charts and other like material and documentation, together with all information, data and know-how, technical or otherwise, included therein, manuals, print-outs, notes and annotations, discs, diskettes, tapes or cassettes, both masters and duplicates, and all other trade secrets of CONTRACTOR; provided, however, that the term "Confidential Information" does not include any material or information regarding the property, business or operations of CONTRACTOR which has been or may hereafter be acquired by COUNTY from any third person not under a binder of secrecy to CONTRACTOR or which as been, or may hereafter be, made public by CONTRACTOR. Confidential Information disclosed under this Confidentiality Agreement shall not be deemed to be within the foregoing exceptions merely because such information is embraced by more general information in the public domain or in the possession of COUNTY.

c. Nondisclosure to Third Parties. COUNTY shall not in any manner communicate Confidential Information of CONTRACTOR either purposely or inadvertently to any Third Party, and shall not use any Confidential Information other than for the sole benefit of COUNTY as provided by the Source Code Agreements.

This Confidentiality Agreement shall extend to COUNTY and its employees only, and specifically excludes other parties, including but not limited to all contractors, subcontractors, consultants, and agents

of COUNTY. COUNTY agrees to notify such of its contractors, subcontractors, consultants, agents and employees of the existence of and contents of this Nondisclosure/Confidentiality Agreement and to obtain their agreement hereto. As such agreement relates to non-employees of COUNTY, including but not limited to such contractors, subcontractors, consultants, and agents of COUNTY, COUNTY hereby agrees to obtain such agreement hereto from non-employees in writing and to provide written copies of such agreement to CONTRACTOR. COUNTY further hereby agrees that it shall be responsible to CONTRACTOR for any breach of this Confidentiality Agreement by any contractor, subcontractor, consultant, agent or employee of COUNTY.

d. Property Rights. All materials, including without limitation, documents, drawings, models, apparatus, sketches, computer designs, software programs, and lists furnished to COUNTY by CONTRACTOR shall remain the property of CONTRACTOR.

e. Scope. The provisions of this Confidentiality Agreement prohibiting disclosure shall survive termination or expiration or fulfillment of the Source Code Agreements and any contracts or agreements referenced therein or executed between COUNTY and CONTRACTOR pursuant thereto.

f. Injunctive Relief. COUNTY recognizes that any unauthorized disclosure of Confidential Information will cause great and irreparable damage to CONTRACTOR. COUNTY therefore agrees that, in addition to any other relief to which CONTRACTOR may be entitled, injunctive relief will be appropriate to prevent either an initial or continuing breach of this paragraph.

2. Counterparts

This Confidentiality Agreement may be signed in counterparts.

3. Authority

The undersigned represents and warrants that s/he has the authority to execute this Confidentiality Agreement and any and all necessary actions relating thereto have occurred.

4. Successors and Assigns

The terms and provision hereof shall inure to the benefit of, and be binding upon the respective successors and assigns of COUNTY and CONTRACTOR.

Dated as of November 12, 2002.

ATTEST:

COUNTY OF KERN

By: James A. Rhoades  
{Name, Title of Dept Head}

Auditor Controller County Clerk

Steve A. Perez  
Steve A. Perez, Chairman Board of Supervisors

By: \_\_\_\_\_  
{Name, Title of Dept Head if Multiple}

## RIDER M

### SOFTWARE LICENSE AND WARRANTY AGREEMENT

#### DESI Application License

DESI Application Software	Type of License	Number of Licenses	Annual License Fee
GEMS Software	Multiple Device	1	\$11,470 / license
AccuVote-OS Software	Single Device	6	\$5.00/license
AccuVote-TS Software	Single Device	1350	\$5.00 / license

#### Extended Warranty

DESI Equipment	Number of Units	Warranty Fee
AccuVote-OS	6	\$150.00/ Unit
AccuVote-TS	1350	\$50.00/ Unit

In consideration of the promises set forth herein, and pursuant to the terms and conditions set forth herein, Diebold Election Systems, Inc., ("CONTRACTOR") herein, grants to The County of Kern, California ("COUNTY") the number and type of licenses indicated above for the Software identified above ("DESI Application Software"). CONTRACTOR shall also furnish maintenance services for the DESI Application Software licensed hereunder and shall provide an extended warranty ("Extended Warranty") to COUNTY for the DESI Equipment identified above. This License and Warranty Agreement is initially entered into as part of a larger agreement ("Agreement"), and defined terms used herein have the same meaning as in the Agreement.

#### Software License and Warranty

##### **1. License.**

- 1.1. **DESI Application Software.** Upon payment of each annual license fee ("Annual License Fee"), CONTRACTOR grants to COUNTY, and the COUNTY accepts, a nonexclusive, nontransferable License to use one copy of the DESI Application Software provided by CONTRACTOR to COUNTY ("Original") to conduct elections or related activities within the COUNTY's jurisdiction, in compliance with the terms and conditions set forth in this License and Warranty Agreement. As used in this License and Warranty Agreement, COUNTY shall include directors, officers, employees, and subcontractors.
- 1.2. **Associated Third Party Software.** The DESI Application Software is integrated with, or is accompanied by, Software owned by various third parties ("Third Party Software"). CONTRACTOR warrants that it has the right to license or sublicense to COUNTY all Third Party Software which is integrated into, or provided as part of, the System. Such Third Party Software is necessary for the operation of the Equipment, DESI Application Software and/or peripheral devices. This License is granted contingent on COUNTY agreeing to the additional terms and conditions contained in the applicable licenses for the Third Party Software. The Third Party Software may include, but is not limited to, the Software explicitly identified in Attachment 1 to this License and Warranty Agreement. The License Agreements for some of the Third Party Software are reprinted in Attachment 2 to this License and Warranty Agreement. The License Agreements for other Third Party Software are contained on or in the media on which such Third Party Software may be provided. COUNTY's installation, or first use, of such Third Party Software constitutes COUNTY's assent to be bound by the terms of each applicable License Agreement, pursuant to which the Third Party Software is provided to COUNTY.

- 2. Term of License.** The License for each item of DESI Application Software shall begin on the date CONTRACTOR installs the DESI Application Software at COUNTY and shall continue through the 2004 General Election certification of election results which shall occur no later than November 30, 2004 ("Anniversary"). Thereafter, for a cumulative period not to exceed twenty (20) years, COUNTY may renew this License, annually, for successive one-year terms, by paying the Annual License Fee. Regardless of the length of time the DESI Application Software is licensed, COUNTY shall not acquire ownership of the DESI Application Software, associated Third Party Software, or any rights other than those expressly granted to COUNTY in this License and Warranty Agreement and in the Agreement.

**3. COUNTY's Use of DESI Application Software.**

- 3.1. Each License is either a Multiple Device License, or a Single Device License, as identified above. COUNTY's use of the associated DESI Application Software is governed by the applicable grant below:
- 3.1.1. Multiple Device License: CONTRACTOR grants COUNTY the right to use the Original of the DESI Application Software licensed hereunder for as long as this License and Warranty Agreement remains in effect. COUNTY may install an image of the Original ("Copy" or "Image Copy") of the licensed DESI Application Software into the memory of as many computers as are reasonably necessary for the conduct of elections or related activities within the COUNTY's jurisdiction, so long as each computer is owned by or leased to COUNTY. The creation or use of multiple Copies of the DESI Application Software may be limited by the terms and conditions of the licenses of associated Third Party Software including, but not limited to, the licenses to any operating system or server Software. COUNTY shall make no other copies of the DESI Application Software, except for one archival copy ("Copy" or "Archival Copy"), which may be used for recovery purposes only. Any Copy of the DESI Application Software made by COUNTY shall belong to CONTRACTOR. COUNTY shall not act as a service bureau to third parties, or make the DESI Application Software available to third parties.
- 3.1.2. Single Device License: COUNTY is granted the right to use each Original of the DESI Application Software licensed hereunder for as long as this License and Warranty Agreement remains in effect. COUNTY may install one image of each Original ("Copy" or "Image Copy") into the memory of a single election Equipment device owned by or leased to COUNTY, which CONTRACTOR has provided for or approved in writing for use with such DESI Application Software. COUNTY shall make no other copies of the Software except for one archival copy ("Copy" or "Archival Copy"), which may be used for recovery purposes only. Any Copy of the DESI Application Software made by COUNTY shall belong to CONTRACTOR. COUNTY shall not act as a service bureau to third parties, nor shall it make the DESI Application Software available to third parties.
- 3.2. Some of the Third Party Software License Agreements may additionally restrict the use of the associated Third Party Software. Such restrictions include, but are not limited to, placing limits on the number of concurrent users or copies that may be made. COUNTY is responsible for ensuring that its use of such Third Party Software complies with the terms and conditions of any applicable License Agreements.
- 3.3. COUNTY may not use, copy, modify, transfer, rent, reverse engineer, decompile, disassemble, translate, create derivative works based upon, or perform any other similar process on any DESI Application Software, portion thereof, or documentation, or Third Party Software provided by CONTRACTOR including but not limited to any MediaQ Display Driver or FlashFX<sup>®</sup> (Datalight) portions, except as expressly authorized in this License and Warranty Agreement. COUNTY shall not remove, alter, obscure, modify, or obliterate any copyright, trademark, proprietary or other protective notice, or serial number on any of the System components, including but not limited to any which

appear in connection with Datalight Software. COUNTY agrees not to act in contravention of any of CONTRACTOR's rights or to assist others in doing so.

- 3.4. COUNTY shall not use the DESI Application Software on hardware other than the Equipment provided, or approved in writing, by CONTRACTOR. Such approval shall not be unreasonably withheld. COUNTY shall not make any changes to Equipment which may affect DESI Application Software performance, without the prior written consent of CONTRACTOR, including but not limited to, changes to existing Equipment configurations, network configurations, or terminal and printer characteristics.
- 3.5. COUNTY agrees to permit representatives of CONTRACTOR, with two (2) weeks advance written notice to the COUNTY, to inspect the location and the computer Equipment upon which the DESI Application Software is being used or kept, COUNTY's records of use of the DESI Application Software, and any Copies of the DESI Application Software. Such inspections shall occur at reasonable times during normal business hours. In addition, CONTRACTOR will use all reasonable efforts to minimize disruption to the normal business activities of COUNTY.

#### **4. Software Maintenance.**

- 4.1. For as long as this License and Warranty Agreement is in effect, CONTRACTOR shall maintain COUNTY's DESI Application Software such that it operates in conformity with the current user documentation ("User Documentation") for the installed version of such DESI Application Software, pursuant to Section 21 of the Agreement, including all error corrections or changes provided pursuant to Subsection 5.1 and Upgrades provided pursuant to Subsection 5.2. Furthermore, CONTRACTOR warrants that the DESI Application Software, when used in conjunction with the Equipment configured by CONTRACTOR pursuant to this Agreement (the "System"), will perform in accordance with the then current User Documentation, will maintain State certification and will be free of defects that would prevent the System from operating in all material respects in the manner required to meet the functional standards of Rider H of the Agreement and Section 10 of the Agreement, as limited by Subsection 10.B.5 and Subsection 10.C. CONTRACTOR shall use its best efforts to correct any reproducible error. Suspected error conditions will be investigated and corrected by CONTRACTOR personnel at the CONTRACTOR office to the extent possible.
- 4.2. If a problem cannot be resolved using remote diagnostics, with the COUNTY's authorization CONTRACTOR will send a specialist to the COUNTY's site under the following terms:
  - 4.2.1. If the problem lies solely with DESI's Application Software, CONTRACTOR is responsible for all expenses associated with the resolution of the problem, provided, however, that COUNTY has incorporated all error corrections or changes to the DESI Application Software within ninety (90) days of receipt of the same from CONTRACTOR, and
  - 4.2.2. If the problem is COUNTY generated, including any failure to incorporate all error corrections or changes in a timely manner, the COUNTY is responsible for all fees and expenses at CONTRACTOR's then-current consulting service rate pursuant to a separate written agreement. COUNTY generated problems include, but are not limited to, problems that arise from the failure of Equipment or Software that is not licensed or under warranty from CONTRACTOR, installation of the DESI Application Software on hardware that was not provided or approved in writing by CONTRACTOR, or improper use of the DESI Application Software or the Equipment upon which it is installed in a manner other than provided for in the current User Documentation.
- 4.3. CONTRACTOR shall, within the period provided by law, issue Software changes reflecting any new or modified legislation and/or regulation(s) which affect any portion of the Licensed Software and/or which are required to retain Secretary of State certification of the System.



**5. Changes to DESI Application Software.**

- 5.1. CONTRACTOR may provide COUNTY with unsolicited error corrections or changes to the DESI Application Software that CONTRACTOR determines from time to time are necessary for proper operation of the System. COUNTY shall incorporate these corrections or changes within ninety (90) days of receipt from CONTRACTOR, except when deferral is necessary due to the occurrence of an election, unless COUNTY is granted permission in writing to delay the incorporation of such corrections or changes for other reasons. Notwithstanding the preceding, if CONTRACTOR notifies COUNTY that the correction or change is required in order for the System to operate in compliance with election laws, COUNTY shall incorporate the corrections or changes as soon as possible, but in no event later than the next election. Such error corrections or changes shall be treated as part of the Original of the DESI Application Software for purposes of this License and Warranty Agreement.
- 5.2. CONTRACTOR may, from time to time, release DESI Application Software improvements ("Upgrades"). Upgrades shall mean any added functionality or change to functionality of programs and materials not included in the DESI Application Software at the time of the execution of this License and Warranty Agreement. Upgrades do not include later released versions of the DESI Application Software with a higher version number, which generally provide significantly increased functionality or introduce new technology. During the term of this License and Warranty Agreement COUNTY is entitled to receive one copy of each Upgrade, including any associated documentation and installation procedures. Upgrades shall be treated as part of the Original of the DESI Application Software for purposes of this License and Warranty Agreement, whether or not installed by COUNTY. Specific training courses for Upgrades are available under a separate written agreement.
- 5.3. CONTRACTOR and/or Third Party Software provider(s) retain title to all updates, revisions and releases of software and related documentation provided to COUNTY and CONTRACTOR's other customers under provisions of software maintenance support. COUNTY shall not modify, or permit a third party to modify, any DESI Application Software, unless it is authorized by an amendment to this License and Warranty Agreement that satisfies Section 27 of this License and Warranty Agreement.
- 5.4. Any materials, products and software developed by CONTRACTOR for COUNTY at the request of COUNTY will be provided under a separate written contract. No works made for hire shall be provided pursuant to this License and Warranty Agreement.

**Equipment Warranty**

- 6. Extended Warranty.** CONTRACTOR warrants that each item of DESI Equipment identified above, when used with the Equipment and Software configuration purchased from or approved by CONTRACTOR ("System"), will during any term of this License and Warranty Agreement, be free of defects that would prevent the System from operating in all material respects in accordance with the then current User Documentation and in the manner required to meet the functional standards of Rider H of the Agreement and Section 10 of the Agreement, as limited by Subsection 10.B.5 and Subsection 10.C. In addition, CONTRACTOR warrants that during the term of this License and Warranty Agreement, for a cumulative period of not less than ten (10) years following the effective date of the Agreement, the System licensed and warranted herein will remain certified by the State, absent changes mandated by State or federal election agencies as provided in Section 10.A. of the Agreement.

- 7. Term of Warranty Agreement.** The term of the initial Warranty shall begin upon System acceptance and shall continue through the 2004 General Election certification of election results which shall occur no later than November 30, 2004. Thereafter, COUNTY may renew this Extended Warranty Agreement, annually, for successive one-year terms, by paying the annual warranty fee ("Warranty Fee"). COUNTY understands that in order to benefit from the System Warranty provided by Section 10 of the Agreement, COUNTY must purchase the Extended Warranty hereunder.

## **8. Equipment Warranty Work.**

- 8.1. If, during any term of this License and Warranty Agreement, any item of CONTRACTOR Equipment identified above fails to satisfy the Extended Warranty articulated in Section 6 of this License and Warranty Agreement CONTRACTOR shall, at CONTRACTOR's option, either provide full and complete repair or provide a replacement of the DESI Equipment identified above.
- 8.2. The following services are not Warranty Work, and CONTRACTOR shall invoice COUNTY at CONTRACTOR's then current time and material rates, subject to advance written approval by the COUNTY, for:
  - 8.2.1 The replacement of consumable items such as batteries, paper rolls, ribbons, clock chips, smart cards, floppy disks, and disks on chips;
  - 8.2.2 The repair or replacement of Equipment damaged by accident, abuse, improper usage, or as a result of service modification by anyone other than CONTRACTOR or its authorized agent or service representative; or
  - 8.2.3 Other similar work which COUNTY requests, and which CONTRACTOR agrees to perform

## **General Provisions**

### **9. Fees.**

- 9.1. The initial charge includes any Annual License and Warranty Fee COUNTY is required to pay for the first term as defined at Sections 2 and 7 above. The License Fee and the Warranty Fee, at the time of execution of this License and Warranty Agreement, are as stated above. These prices are guaranteed for the second through fifth terms of the Agreement. Thereafter, CONTRACTOR has the right to adjust the Fees annually by no more than five percent (5%) by providing ninety (90) days advance notice of any increase. During the first ten (10) years, if COUNTY does not wish to pay the License and Warranty Fee increase, COUNTY may terminate the License and Warranty Agreement by discontinuing use of the DESI Application Software and returning the Original and all Copies to CONTRACTOR, along with the original and all copies of any associated User Documentation. COUNTY shall immediately destroy all Copies of the DESI Application Software remaining in electronic or other memory. Thereafter, if COUNTY does not wish to pay the Equipment Warranty Fee increase, COUNTY may give CONTRACTOR a thirty (30) day notice of intent to terminate that portion of this License and Warranty Agreement which pertains to warranty of the Equipment. Such termination shall have no effect on COUNTY's right to continue to use the Software and receive support.
- 9.2. These Annual Fees, and any other amounts payable by COUNTY pursuant to this License and Warranty Agreement, are exclusive of any local, state, federal, excise, personal property, or similar taxes or duties which may be levied on the DESI Application Software or any services provided by CONTRACTOR. COUNTY is responsible for and shall pay all such taxes, as they are due. If COUNTY is exempt from taxes, COUNTY shall supply CONTRACTOR a tax exemption certificate in a form satisfactory to CONTRACTOR and all applicable taxing authorities. If CONTRACTOR is required to pay any such taxes on COUNTY's behalf, COUNTY shall promptly reimburse CONTRACTOR for payment of such taxes upon receipt of CONTRACTOR's invoice.
- 9.3. CONTRACTOR shall invoice COUNTY for the Annual License Fee at least forty-five (45) days in advance of the Anniversary. COUNTY shall pay such invoice on or before the Anniversary. If the Licenses granted pursuant to this License and Warranty Agreement have multiple Anniversaries, or if CONTRACTOR and COUNTY have entered into one or more related Warranty Agreements with differing Anniversaries, CONTRACTOR may consolidate all of the Anniversaries. CONTRACTOR

shall do so by changing the Anniversary of one or more Licenses or Warranties so that it coincides with the Anniversaries of other Licenses or Warranties, which Anniversaries occur before the expiration of the next term of any License for which the Anniversary is being changed. CONTRACTOR shall prorate the Annual License Fee for the resulting shortened term.

- 9.4. CONTRACTOR shall invoice COUNTY for work provided pursuant to Sections 8.2 and 4.2.2 for which additional fees are due as such work is done, subject to advance approval of the COUNTY.

**10. County's Obligations.** As is reasonably necessary for CONTRACTOR to perform Software maintenance, or Equipment warranty Services, COUNTY shall:

- 10.1 Provide CONTRACTOR personnel with the work space necessary for the proper execution of its service obligations;
- 10.2 Be responsible for maintaining the GEMS server, and all other hardware not included in Rider B;
- 10.3 Make available computer time and assist in the testing and maintenance of Software; and
- 10.4 Make available all necessary supplies such as paper, magnetic tape, and disk packs.

**11. System Warranty.**

- 11.1. CONTRACTOR warrants that it is the owner of DESI Application Software or has the right to permit COUNTY to use the DESI Application Software in compliance with the express terms of this License and Warranty Agreement. CONTRACTOR also warrants that when used with the Equipment and Software configuration purchased from or approved by CONTRACTOR, the DESI Application Software will perform free of Software defects that would prevent the System from operating in all material respects in the manner described in the User Documentation at the time of shipment, and during any term of this License and Warranty Agreement. CONTRACTOR also warrants that the System will remain certified by the State, pursuant to the terms of Section 10 of the Agreement.
- 11.2. To the extent permitted by the owner of any Third Party Software CONTRACTOR may provide, CONTRACTOR shall pass through to the COUNTY all warranties provided to CONTRACTOR. Otherwise, Third Party Software, including without limitation, Software products of Microsoft, IBM, or BSQUARE, even if provided to COUNTY by CONTRACTOR, is delivered AS IS AND WITHOUT WARRANTY. CONTRACTOR MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND OR NATURE WHATSOEVER CONCERNING THE SOFTWARE, THE DOCUMENTATION OR ANY SERVICES PROVIDED HEREUNDER. CONTRACTOR DOES NOT WARRANT UNINTERRUPTED OPERATION OR THAT THE SOFTWARE WILL BE ERROR FREE. THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.
- 11.3. In the event CONTRACTOR fails at any time to maintain the System requirements specified in Rider H, or maintain State certification requirements as modified from time-to-time by the State, during the initial ten (10) years under the Agreement, inclusive of the term of this License and Warranty Agreement, CONTRACTOR will provide and install at no additional cost whatsoever to COUNTY such additional Equipment and Software necessary to bring the System into compliance with these requirements within one hundred and twenty (120) days after written notification to CONTRACTOR by COUNTY of such failure, unless an extension is mutually agreed to in writing by CONTRACTOR and the COUNTY.
- 11.4. Should CONTRACTOR provision of such additional Equipment and Software be insufficient to maintain the System requirements specified in Rider H, or maintain State certification requirements as modified from time-to-time by the State, CONTRACTOR shall facilitate and assist COUNTY to fall

back, within one hundred and fifty (150) days of the original written notification to CONTRACTOR by COUNTY of the failure, to the most recent prior version of the System which operates successfully in COUNTY's environment as long as that prior version continues to conform to the Systems requirements specified in Rider H and all State certification requirements then in effect.

- 11.5. If, in the normal course of providing Software maintenance and Equipment warranty Services, CONTRACTOR is unable to maintain State certification of the System during the first ten (10) years of this License and Warranty Agreement and any term thereafter for which COUNTY has renewed the License and Warranty Agreement, and such failure is not corrected within 180 days, COUNTY shall be entitled to have access to the Source Code for the DESI Application Software, as provided by Section 16.H. of the Agreement.
- 11.6. Notwithstanding the foregoing, during this initial ten (10) year period, should the State or federal election agencies change the certification requirements such that CONTRACTOR is unable to maintain State certification of the System, including taking all efforts to upgrade Equipment with off-the-shelf components, applying updates to the DESI Application Software and adapting to new releases of Third Party Software to comply with the mandated changes, then CONTRACTOR shall have no obligation regarding this warranty for that portion of the System which the State or federal election agency specifies in writing will no longer retain certification due to the mandated change.

## **12. Intellectual Property.**

- 12.1 If notified promptly in writing of any action brought against COUNTY alleging that COUNTY's use of the DESI Hardware or DESI Application Software infringes upon a United States patent or copyright or trademark, CONTRACTOR will: (1) assume the defense of any suit, action, or claim brought against COUNTY for infringement of any United States or foreign patent or copyright arising from use and/or sale of the Equipment or Licensed Software under this Agreement; (2) defray the expense of such defense including costs of investigations, reasonable attorney fees, expert witness fees, damages and any other litigation-related expenses; and (3) indemnify COUNTY against any and all liability, claims, monetary damages, losses and/or costs, including attorney's fees, in such suit; provided that: (1) CONTRACTOR is given sole and exclusive control of the defense of such suit and sole and exclusive control of negotiations relative to the settlement thereof, provided CONTRACTOR agrees to consult with COUNTY during such defense or negotiations; (2) the liability claimed shall have arisen solely because of CONTRACTOR's selection as to the design or composition of the Licensed Software or the Equipment and the Licensed Software or the Equipment is used by COUNTY in the form, state or condition as delivered by CONTRACTOR; and (3) that COUNTY provides CONTRACTOR with written notice of any claim with respect to which COUNTY asserts that CONTRACTOR assumes responsibility under this Section, provided that such written notice shall occur no later than twenty (20) days prior to the date on which a response to the claim must be made.
- 12.2. If the System is, in CONTRACTOR's opinion, likely to become or does become the subject of a claim of infringement or misappropriation of a United States or foreign patent, copyright, trade secret or other proprietary right, or if a temporary restraining order or other injunctive relief is entered against the use of part or all of the System, CONTRACTOR shall within ninety (90) days:
  - 12.2.1. Promptly replace the System with a compatible, functionally equivalent and non-infringing system;
  - 12.2.2. Promptly modify the System to make it non-infringing without materially impairing COUNTY's ability to use the System as intended;
  - 12.2.3. Promptly procure the right of COUNTY to continue using the System; or
  - 12.2.4 As a last resort, if none of the foregoing alternatives are reasonably available to CONTRACTOR or if COUNTY is enjoined or otherwise precluded legally from using the

System, CONTRACTOR shall, within 120 days of the judgment or other court action or CONTRACTOR's determination that none of the foregoing alternatives are reasonably available, promptly refund to COUNTY the fees for the System under this Agreement and amendments thereto, as depreciated based on a ten (10) year, straight line depreciation schedule, and COUNTY will discontinue using the System, whereupon this Agreement will terminate. All computer hardware supplied by COUNTY will remain the property of COUNTY. All computer hardware obtained from CONTRACTOR will be returned to CONTRACTOR at CONTRACTOR's expense. At CONTRACTOR's expense, all Licensed Software will be disposed of as ordered by the governing court or returned to CONTRACTOR.

- 12.3. The foregoing shall be the entire liability of CONTRACTOR with respect to alleged infringement of patents, copyrights, or trademarks by the DESI Application Software and Services or any part thereof.
- 12.4. COUNTY shall hold CONTRACTOR harmless against any expense, judgment or loss for alleged infringement of patents, copyrights or trademarks which result from COUNTY's use of the DESI Application Software in a manner not authorized by CONTRACTOR. If CONTRACTOR reasonably believes that any designs, specifications, or instructions provided by COUNTY will result in the infringement of the intellectual property rights of a third party, CONTRACTOR shall inform the COUNTY in writing of its belief. In that event, COUNTY shall not require CONTRACTOR to implement such designs, specifications, or instructions, or shall hold CONTRACTOR harmless if COUNTY requires CONTRACTOR to proceed despite such written notice.

### **13. No Other Warranties.**

13.1 THOSE WARRANTIES EXPRESSLY PROVIDED FOR IN THE AGREEMENT AND IN THIS LICENSE AND WARRANTY AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.

### **14. Limitation of Liability.**

- 14.1. DESI Application Software and DESI Equipment may not perform properly for a variety of reasons that are beyond the control of CONTRACTOR, including but not limited to the DESI Application Software being negligently or improperly used, being modified, being installed on inappropriate hardware, or being supplied with improperly formatted data. Operation of the DESI Application Software and DESI Equipment is the sole responsibility of the COUNTY and, except for those changes made by CONTRACTOR, CONTRACTOR shall not be responsible for the consequences of any changes to, or use of, the DESI Application Software and DESI Equipment made by or on behalf of COUNTY. Except as expressly provided in the Agreement or this License and Warranty Agreement, the sole and exclusive remedy of COUNTY, and the sole and exclusive liability of CONTRACTOR, in any action concerning or arising from COUNTY's use of the DESI Application Software or Third Party Software and any Equipment in which the DESI Application Software or Third Party Software is used, shall be limited solely and exclusively at CONTRACTOR's option, to either repair or replacement of any defective DESI Application Software and/or Equipment.
- 14.2. CONTRACTOR will not be liable for any claims, actions, suits, proceedings, costs, expenses, damages, or liabilities arising out of CONTRACTOR's performance under this License and Warranty Agreement unless caused by the negligent act or omission of CONTRACTOR, its subcontractors, agents, servants, or employees. Except as otherwise provided for in the Agreement and in this License and Warranty Agreement, CONTRACTOR's liability under this License and Warranty Agreement for damages, regardless of the form of action, shall not exceed the fees or other charges paid to

CONTRACTOR for the current term of this License and Warranty Agreement. NEITHER CONTRACTOR NOR ANY MANUFACTURER OR SOFTWARE PROVIDER FOR THIS SYSTEM SHALL IN ANY EVENT BE LIABLE FOR SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST INCOME, LOST REVENUE, OR LOST PROFIT, WHETHER SUCH DAMAGES WERE FORESEEABLE OR NOT AT THE TIME THAT THIS LICENSE AND WARRANTY AGREEMENT WAS ENTERED INTO, AND WHETHER OR NOT SUCH DAMAGES ARISE OUT OF A BREACH OF WARRANTY, A BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY OR ANY OTHER THEORY OF LIABILITY.

- 14.3. CONTRACTOR's provision of DESI Application Software to the COUNTY shall not be interpreted, construed, or regarded, either expressly or impliedly, as being for the benefit of or creating any obligation toward any third party or legal entity outside of CONTRACTOR and the COUNTY; CONTRACTOR's obligations under this License and Warranty Agreement extend solely to the COUNTY.

**15. Indemnification.**

- 15.1. Each Party will act at its own sole risk and responsibility with respect to its own actions. Neither Party will hold the Other Party responsible or liable for acts of the first Party.
- 15.2. Each Party agrees to indemnify, defend and hold harmless the other Party and its agents, board members, elected and appointed officials and officers, employees, volunteers and authorized representatives from any and all losses, liabilities, charges, damages, claims, liens, causes of action, awards, judgments, costs, and expenses (including, but not limited to, reasonable attorneys' fees including fees of County Counsel and counsel retained by COUNTY, expert fees, costs of staff time, and investigation costs) for personal injury or death to any person or persons, and damage to any personal or real property, regardless of where located, including the property of COUNTY and CONTRACTOR, which arise out of any negligent act or omission of the first Party or its officers, agents, employees, independent contractors, sub-contractors of any tier, or authorized representatives, in the course of performing under or otherwise related to this Agreement. CONTRACTOR further agrees to indemnify, defend and hold harmless COUNTY for any workers' compensation claim or suit arising from or connected with any services performed pursuant to this Agreement on behalf of CONTRACTOR by any person or entity.

**16. Confidential Information.**

- 16.1. CONTRACTOR Confidential Information. In addition to anything that may be Confidential Information pursuant to an associated Agreement, DESI Application Software source and object code, written documentation associated therewith, and internal Equipment design are confidential and trade secret information ("Confidential Information") and are the exclusive property of CONTRACTOR.

16.1.1 COUNTY shall treat CONTRACTOR's Confidential Information as confidential within its organization, and shall disclose it therein only on a need-to-know basis.

16.1.2 COUNTY shall not disclose any Confidential Information to any other entity or use such items for any purpose not expressly authorized in this License and Warranty Agreement, unless disclosure is made in response to, or because of, an obligation to any federal, state, or local governmental agency or court with appropriate jurisdiction, or to any person properly seeking discovery before any such agency or court. CONTRACTOR shall be given the ability to defend the confidentiality of its Confidential Information to the maximum extent allowable under the law prior to disclosure by the COUNTY of such Confidential Information.

16.1.3 COUNTY shall implement such safeguards and controls as may be necessary to protect against the unauthorized uses or disclosures of the DESI Application Software or its documentation.

16.1.4 If COUNTY violates any provision of this Subsection 16.1, or if any third party obtains any Confidential Information through COUNTY without CONTRACTOR's authorization then COUNTY shall take, at its own expense, all actions that may be required to remedy such violation or recover such Confidential Information and to prevent its further dissemination. Such actions may include, but are not limited to, legal actions for seizure and/or injunctive relief. If COUNTY fails to take such actions in a timely and adequate manner, CONTRACTOR may take such actions in its own name at the expense of COUNTY.

16.2. COUNTY Confidential Information. In addition to anything that may be Confidential Information pursuant to an associated Agreement, COUNTY may also possess research, statistical, identifying, or other information about private individuals, which it may be necessary to share with CONTRACTOR in the course of CONTRACTOR's performance of this License and Warranty Agreement. In addition to anything that may be Confidential Information pursuant to an associated Agreement, such information about private individuals is Confidential Information. CONTRACTOR shall not use or reveal such Confidential Information furnished by or on behalf of COUNTY that is identifiable to any specific private person for any purpose other than the purpose for which COUNTY obtained it. Copies of such information shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit or other judicial or administrative proceedings, unless ordered by a court of competent jurisdiction. The COUNTY shall be notified immediately upon receipt of any such order of court, pertaining to production of such information.

## **17. Termination.**

17.1. In the event either Party breaches one or more provisions of this License and Warranty Agreement, the injured Party may serve written notice upon the violating Party identifying the violation and a reasonable cure period. Except as otherwise noted herein, such cure period shall be at least thirty (30) days. CONTRACTOR may terminate this License and Warranty Agreement on seven (7) days written notice for a breach by COUNTY of any of Sections or Subsections: 3, 5.3, or 16.1, and seek any legal remedy to which CONTRACTOR may be entitled, including but not limited to injunctive relief.

17.2. In the event the violating Party has not remedied the infraction at the end of the cure period, the injured Party may serve written notice upon the violating Party of intent to terminate, and seek any legal remedy to which it may be entitled, including the recovery of damages, injunctive relief, and court costs. If the breach identified in the notice cannot be completely cured within the specified time period, no default shall occur if the Party receiving the notice begins curative action within the specified time period and thereafter proceeds with reasonable diligence and in good faith to cure the breach as soon as practicable.

17.3. In the event of termination of the Licensing portion of this License and Warranty Agreement, by expiration of its term or by either Party, COUNTY shall immediately discontinue use of the DESI Application Software and will return the Original and all Copies of the DESI Application Software to CONTRACTOR along with the original and all copies of the documentation. COUNTY shall immediately destroy all Copies of the DESI Application Software remaining in electronic or other memory. However, termination of only the Equipment Warranty portion of this License and Warranty Agreement after the tenth (10<sup>th</sup>) year shall have no effect on COUNTY's right to continue to use the Software and receive support.

**18. Circumstances Beyond the Control of CONTRACTOR or COUNTY.** Should any circumstances beyond the control of CONTRACTOR or COUNTY occur that delay or render impossible the performance of any obligation due under this License and Warranty Agreement, such obligation will be postponed for the period

of any delay resulting from any such circumstances, plus a reasonable period to accommodate adjustment to such extension, or cancelled if performance has been rendered impossible thereby. Such events may include, without limitation, accidents; war; acts of terrorism; acts of God; labor disputes; acts, laws, rules or regulations of any government or government agency; or other events beyond the control of both CONTRACTOR and COUNTY. CONTRACTOR or COUNTY shall not be liable under this License and Warranty Agreement for any loss or damage to the other Party due to such delay or performance failures. Notwithstanding the foregoing, both Parties shall use their best efforts to minimize the adverse consequences of any such circumstances. This Section 18 shall not operate to excuse any Party from paying amounts that are owed pursuant to this License and Warranty Agreement.

- 19. Survival.** The provisions of Sections and Subsections 3.2, 3.3, 5, 8, 9.1, 11, 12, 13, 14, 15, 16, 17.1, 17.3, 18, 19, 20, 21, 22, 23, 24, 25 and 27 shall survive the expiration or termination of this License and Warranty Agreement.
- 20. Assignment and Right to Subcontract.** Neither Party may assign its rights, obligations, or interests in this License and Warranty Agreement without the written consent of the other Party, providing however that CONTRACTOR may assign the proceeds of this License and Warranty Agreement to a financial institution without prior consent of the COUNTY.
- 21. Legality and Severability.** This License and Warranty Agreement and the Parties' actions under this License and Warranty Agreement shall comply with all applicable federal, state and local laws, ordinances, rules, regulations, court orders, and applicable governmental agency orders. If any term or provision of this License and Warranty Agreement is held to be illegal or unenforceable, the remainder of this License and Warranty Agreement shall not be affected thereby and each term or provision of this License and Warranty Agreement shall be valid and enforceable to the fullest extent permitted by law. The Parties agree that any court reviewing this License and Warranty Agreement shall reform any illegal or unenforceable provision to carry out the express intent of the Parties as set forth herein to the fullest extent permitted by law.
- 22. Choice of Law.** Interpretation of this License and Warranty Agreement shall be governed by the laws of the State of California, and the courts of the State of California will have jurisdiction to hear and determine all questions relating to this License and Warranty Agreement. The applicability of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded.
- 23. Waiver.** Any failure of a Party to assert any right under this License and Warranty Agreement shall not constitute a waiver or a termination of that right, this License and Warranty Agreement, or any provisions of this License and Warranty Agreement.
- 24. Notices.** All notices required under this License and Warranty Agreement, shall be sent by registered mail, certified mail, or other delivery means for which receipt can be verified. Notice shall be deemed to have been given on the date actually received or, if delivery was refused, on the date delivery was refused by an individual at the address provided for the receiving Party as set forth below. Either Party may change the address to which notices shall be delivered by providing ten (10) days' advance written notice to the other Party at the address listed in this Section 24, or other then current address to which notices are to be delivered.

***DESI Contract Manager***  
Diebold Election Systems, Inc  
1611 Wilmeth Rd  
McKinney, Texas 75069-8250

and

***COUNTY:***  
County of Kern  
Auditor-Controller-County Clerk  
1115 Truxtun Avenue  
Bakersfield, CA 93301



Vice President and General Counsel  
Diebold, Incorporated  
5995 Mayfair Road  
North Canton, OH 44720

- 25.** No Third-Party Beneficiaries. This License and Warranty Agreement is intended to describe the rights and responsibilities only as to the Parties hereto. This Agreement is not intended and shall not be deemed to confer any rights on any person or entity not named as a Party hereto.
- 26.** **Financial Obligations of the County.** All financial obligations of the COUNTY under this License and Warranty Agreement are subject to appropriation, budgeting, and availability of funds to discharge such obligations. Nothing in this License and Warranty Agreement shall be deemed to pledge the COUNTY's credit or faith, directly or indirectly, to CONTRACTOR.
- 27.** **Entire Agreement/Modifications.** This License and Warranty Agreement, together with any Agreement of which this License and Warranty Agreement initially formed a part, states the entire agreement between COUNTY and CONTRACTOR concerning the subject matter hereof and supersedes all prior proposals or agreements whether oral or written. No alteration, waiver or modification of any provision of this License and Warranty Agreement shall be effective unless it is in writing, expressly indicates that it modifies this License and Warranty Agreement and is signed by the duly authorized representatives of both COUNTY and CONTRACTOR.

IN WITNESS WHEREOF, COUNTY and CONTRACTOR have caused this Agreement to be executed by their duly authorized officers as of the date set forth below.

**DIEBOLD ELECTION SYSTEMS, INC.:**

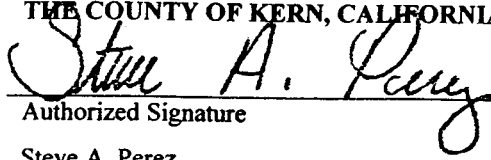
\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**THE COUNTY OF KERN, CALIFORNIA:**

  
\_\_\_\_\_  
Authorized Signature

Steve A. Perez

\_\_\_\_\_  
Printed Name

Chairman of the Board

\_\_\_\_\_  
Title

NOV 12 2002

\_\_\_\_\_  
Date

## **Attachment 1 to Rider M**

Third Party Software distributed with, or incorporated in GEMS Software may include:

Microsoft Windows NT 4.0 Server

Microsoft Windows MFC and OMDC DLLs

Microsoft Windows OMDC DLLs

Report Writing Code

Software Associated with Third Party Peripheral Devices

Third Party Software distributed with, or incorporated in AccuVote-TS Software may include:

Microsoft Windows CE 2.12, embedded or Microsoft Windows CE 3.0, embedded.

BSQUARE Deliverables, sublicensed from or through BSQUARE, including third party Software such as Flash FX, Datalight Flash File System, MediaQ 200 Display Driver, Xaudio, Elo TouchSystems Touch Panel Driver, and BSQUARE modifications thereto.

FMOD sound and music system, copyright © Firelight Multimedia, 1994-2001, if the operating system is Microsoft Windows CE 3.0 embedded

## Attachment 2 to Rider M

### THIRD PARTY SOFTWARE LICENSES

#### Microsoft Windows NT 4.0 Server:

The End User License Agreement ("EULA") for Microsoft Windows NT 4.0 Server is incorporated herein by reference, and is available for review in a file on the installed system. CUSTOMER consents to the terms of the EULA by CUSTOMER's first use of the GEMS server.

#### Microsoft Windows CE Embedded 2.12 or 3.0:

You have acquired a device ("DEVICE") that includes Software licensed by DESI from Microsoft Licensing Inc. or its affiliates ("MS"). Those installed Software products of MS origin, as well as associated media, printed materials, and "online" or electronic documentation ("SOFTWARE") are protected by international intellectual property laws and treaties. The SOFTWARE is licensed, not sold. All rights reserved.

IF YOU DO NOT AGREE TO THIS END USER LICENSE AGREEMENT ("EULA"), DO NOT USE THE DEVICE OR COPY THE SOFTWARE. INSTEAD, PROMPTLY CONTACT DESI FOR INSTRUCTIONS ON RETURN OF THE UNUSED DEVICE(S) FOR A REFUND. ANY USE OF THE SOFTWARE, INCLUDING BUT NOT LIMITED TO USE ON THE DEVICE, WILL CONSTITUTE YOUR AGREEMENT TO THIS EULA (OR RATIFICATION OF ANY PREVIOUS CONSENT).

**GRANT OF SOFTWARE LICENSE.** This EULA grants you the following license:

- ▶ **You may use the SOFTWARE only on the DEVICE.**
- ▶ **NOT FAULT TOLERANT.** THE SOFTWARE IS NOT FAULT TOLERANT. DESI HAS INDEPENDENTLY DETERMINED HOW TO USE THE SOFTWARE IN THE DEVICE, AND MS HAS RELIED UPON DESI TO CONDUCT SUFFICIENT TESTING TO DETERMINE THAT THE SOFTWARE IS SUITABLE FOR SUCH USE.
- ▶ **NO WARRANTIES FOR THE SOFTWARE.** THE SOFTWARE is provided "AS IS" and with all faults. THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY, AND EFFORT (INCLUDING LACK OF NEGLIGENCE) IS WITH YOU. ALSO, THERE IS NO WARRANTY AGAINST INTERFERENCE WITH YOUR ENJOYMENT OF THE SOFTWARE OR AGAINST INFRINGEMENT. IF YOU HAVE RECEIVED ANY WARRANTIES REGARDING THE DEVICE OR THE SOFTWARE, THOSE WARRANTIES DO NOT ORIGINATE FROM, AND ARE NOT BINDING ON, MS.

- ▶ **Note on Java Support.** The SOFTWARE may contain support for programs written in Java. Java technology is not fault tolerant and is not designed, manufactured, or intended for use or resale as online control Equipment in hazardous environments requiring fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, or weapons systems, in which the failure of Java technology could lead directly to death, personal injury, or severe physical or environmental damage. Sun Microsystems, Inc. has contractually obligated MS to make this disclaimer.
- ▶ **No Liability for Certain Damages. EXCEPT AS PROHIBITED BY LAW, MS SHALL HAVE NO LIABILITY FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL OR INCIDENTAL DAMAGES ARISING FROM OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THE SOFTWARE. THIS LIMITATION SHALL APPLY EVEN IF ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE. IN NO EVENT SHALL MS BE LIABLE FOR ANY AMOUNT IN EXCESS OF U.S. TWO HUNDRED FIFTY DOLLARS (U.S.\$250.00).**
- ▶ **Limitations on Reverse Engineering, Decompilation, and Disassembly.** You may not reverse engineer, decompile, or disassemble the SOFTWARE, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation.
- ▶ **SOFTWARE TRANSFER ALLOWED BUT WITH RESTRICTIONS.** You may permanently transfer rights under this EULA only as part of a permanent sale or transfer of the Device, and only if the recipient agrees to this EULA. If the SOFTWARE is an upgrade, any transfer must also include all prior versions of the SOFTWARE.
- ▶ **EXPORT RESTRICTIONS.** You acknowledge that SOFTWARE is of US-origin. You agree to comply with all applicable international and national laws that apply to the SOFTWARE, including the U.S. Export Administration Regulations, as well as end-user, end-use and country destination restrictions issued by U.S. and other governments. For additional information on exporting the SOFTWARE, see <http://www.microsoft.com/exporting/>.

***BSQUARE Deliverables Sublicense:***

**1. License Grant Conditions:**

DESI's rights to distribute and/or further sublicense the BSQUARE Deliverables under this Agreement is conditioned upon DESI Licensee entering into a written sublicense Agreement ("shrinkwrap" or "clickwrap" forms are acceptable) with any and all parties to who DESI grants any sublicense or rights, which contains the terms specified in these PASS THROUGH SUBLICENSE TERMS.

**2. No Warranty**

DESI'S LICENSORS MAKE NO WARRANTY OF ANY KIND, EITHER EXPRESS, IMPLIED, OR STATUTORY REGARDING THE SOFTWARE. DESI'S LICENSORS EXPRESSLY DISCLAIM ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT OR INTELLECTUAL PROPERTY RIGHTS, AND ANY WARRANTY OTHERWISE ARISING OUT OF ANY PROPOSAL, SPECIFICATION OR SAMPLE.

**3. Limitation of Liability**

IN NO EVENT SHALL DESI'S LICENSORS BE LIABLE FOR ANY DAMAGES WHATSOEVER, INCLUDING WITHOUT LIMITATION, DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES, REVENUE, LOSS OF BUSINESS, LOSS OF DATA OR LOSS OF USE, IRRESPECTIVE OF WHETHER SUCH LICENSORS HAVE ADVANCE NOTICE OF THE POSSIBILITY OF SUCH DAMAGES. THE PARTIES AGREE THAT THESE LIMITATIONS ON POTENTIAL LIABILITIES WERE AN ESSENTIAL ELEMENT IN SETTING CONSIDERATION UNDER THIS AGREEMENT.

**4. Third Party Beneficiaries**

DESI acknowledges that DESI's LICENSORS are third party beneficiaries to this Agreement, and shall have the right to enforce the terms of this Agreement directly against DESI and all parties which receive a license from DESI.

**RIDER N**

**RECEIPT FOR CONNELLY ASBESTOS**

**NOTICE TO EMPLOYERS**

I, the undersigned County employee, licensee, tenant or other, hereby acknowledge receipt of a copy of the Connelly Asbestos Notice to Employees on the date appearing next to my signature below.

Dated \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_ Check if County Employee

\_\_\_\_\_  
Print name

**GSS 580 1151 395-5700 (6-89)**

## CONNELLY ASBESTOS NOTICE TO EMPLOYEES

### ASSEMBLY BILL 3713 - 1988 REGULAR SESSION

All employers with employees occupying buildings constructed prior to 1979 are required by AB 3713 to notify such employees of any known asbestos-containing construction materials contained within their buildings. Kern County is complying with this requirement by giving this written notice to all of its employees and by identifying all known asbestos-containing materials in its pre-1979 buildings.

The general procedure necessary to prevent or minimize disturbance, release or exposure to asbestos is to avoid the areas indicated in Exhibit A, where possible. If any physical damage to the material has occurred from remodeling or other activity in the area, notify the Air Pollution Control District and the County Safety Officer. Follow their instructions. Those employees whose regular assignments are in areas where possible fiber release is likely to result from their activity should seek detailed handling instructions from the County Safety Officer, John Mellow, whose office is located at 1115 Truxtun Ave., Bakersfield, Calif., and whose telephone number is 861-2326.

#### **Exhibit A**

The attached Exhibit "A" details the location within each pre-1979 building of any quantity of each type of construction material containing at least one-tenth of one percent asbestos by weight.

For each building where the County has asbestos sample or test data, this information is available for review and photocopy by employees at the locations and times specified on Exhibit "A". This information includes the results of routine safety inspections and the results of any bulk sample analysis, air monitoring or monitoring conducted pursuant to Section 5208 of Title 8 of the California Code of Regulations, including reference to sampling or laboratory procedures utilized.

#### **Exhibit B**

The potential health risks or impacts that may result from exposure to asbestos are discussed in Exhibit "B".

**G.S.S. 580 1151 395-5700 (6-89)**



## EXHIBIT "A"

### BUILDING LOCATION, CONSTRUCTION YEAR

### ASBESTOS-CONTAINING CONSTRUCTION MATERIAL AND PLACE/TIME TO EXAMINE TEST DATA

- |      |  |  |
|------|--|--|
| *1.  | Camp Owen Complex<br>Highway 178, Kernville<br>1978                          | Wallboard in Shop Bathroom<br>Floor Tile-Barracks, Rec. Rm,<br>Office, Commissary, Mess<br>Hall, Auto Shop Siding, Fire<br>Brick in Kilns, Barracks Mech<br>Rm/ Prob.<br>Div.; Dir. Office M-F, 8 to 5 |
| 2.   | Kernville Fire Station<br>11018 Kernville Rd., Kernville                     | Floor Tile-Housing<br>Area/Captain's Off. 7 days per 1950<br>week, 9 to 9  |
| 3.   | Shafter Library<br>236 James St., Shafter<br>1960                            | Stucco Ceiling over<br>Reception Area/ Branch<br>Supv. Off. 12 to 5  |
| 4.   | North Edwards Fire Station<br>Del Oro, North Edwards<br>1950                 | Exterior Siding/ North 16638 Vista<br>Edwards Fire Station   |
| 5.   | Meadows Field Airport Terminal<br>1401 Skyway Dr., Bakersfield<br>1950       | Stucco Ceiling, Mech Rms/<br>Aviation Dir. Off. M-F, 8 to 5  |
| 6.   | Baker Library<br>1400 Baker St., Bakersfield<br>1915                         | Crawl Space Under Floor/<br>Beale Lib. Reception Area<br>M-F, 8 to 5   |
| 7.   | Administration and Courts Building<br>1415 Truxtun Ave., Bakersfield<br>1959 | Mech Rms, Ceiling<br>Spaces/ CAO M-F<br>8 to 5   |
| 8.   | Sheriff's Facility (Jail)<br>1415 Truxtun Ave., Bakersfield<br>1959          | Firedoors/ Comdrs.<br>Off. M-F 8 to 4  |
| 9.   | Former Beale Library<br>1315 Truxtun Ave., Bakersfield<br>1957               | Ceiling Spaces,<br>Mech Rm/ Risk Mgmt.Off. M-F<br>8 to 5   |
| 10.  | Health Department<br>1700 Flower St., Bakersfield<br>1950                    | Ceiling Spaces, Mech Rm/<br>Co. Hlth Officer's Off. M-F,<br>8 to 5   |
| *11. | Juvenile Court<br>1901 Ridge Rd., Bakersfield<br>1950                        | Stucco Ceiling, Floor Tile,<br>Ceiling Spaces/Prob. Div.<br>Dir Off M-F 8 to 5   |
| *12. | Juvenile Hall<br>1831 Ridge Rd., Bakersfield                                 | Stucco Ceiling,<br>Floor Tile, Ceiling Spaces/<br>Prob. Div. Dir Off M-F 8 to 5  |
| *13. | Crisis Resolution Center   | Floor Tile, Pipe Lagging in  |

	1821 Ridge Rd., Bakersfield	Mech Rm/ Prob. Div. Dir Off M-F 8 to 5
*14.	Kern Youth Facility 1809 Ridge Rd., Bakersfield	Floor Tile/ Prob. Div. Dir Off M-F 8 to 5
*15.	Jamison Childrens' Center 1010 Shalimar Dr., Bakersfield	Linoleum Flooring, Vibration Cloth in Mech Rm/ Mgrs. Off. M-F, 8 to 5
16.	Hall of Records 1655 Chester Ave., Bakersfield 1937	Crawl Space Under floor/Chief Dep. M-F 8 to 5
17.	Kern Medical Center 1830 Flower St., Bakersfield 1937	Mech Rms, Ceiling Spaces/ Adm. Off. M-F, 8 to 5
18.	G-Ward - Kern Medical Center 1830 Flower St., Bakersfield 1940	Roof Tiles, Floor Tiles Ceiling Spaces, Mech Rm
19.	F-Ward - Kern Medical Center 1830 Flower St., Bakersfield 1940	Mech Rm, Ceiling Spaces, Under Floor Utility Trench/ Clinic Reception Area M-F, 8 to 5

\* In 1986, Congress passed the Asbestos Hazard Emergency Response Act (AHERA). The law requires all school and school-related sites to be inspected by Environmental Protection Agency accredited inspectors to identify any building materials that contain asbestos, which has been done. The law further requires the development of a management plan by an EPA-accredited management planner based upon the findings of the inspection, which outlines our intent in controlling the potential for exposure to asbestos fibers. A management plan has been written and submitted to the state in draft form. It outlines in detail the methods we will use to maintain the materials in a safe manner. The County has contracted with EPA-accredited inspectors, management planners, contractor supervisors, and project designers to ensure that all procedures are properly administered in our facilities. The management plan also includes a schedule for the phased removal of these materials as applicable.

## **EXHIBIT "B"**

### **Health Risk Assessment of Asbestos**

The health risks associated with exposure to asbestos have been widely recognized for a long time. Although the level of asbestos in most buildings is low, it presents a potential health risk which should not be dismissed as there is no known safe level of exposure. However, there are a number of steps which may be taken for protection when exposure to asbestos is suspected.

Asbestos is the name for a group of minerals found in a soft rock composed of compressed silky fibers. Asbestos is a strong durable material with a variety of uses in industry and manufacturing. In buildings it is contained in plasterboard, insulation, roofing, flooring, siding and ceiling plaster. Other uses of asbestos include friction products such as clutch facings and brake linings, caulking materials, theater curtains, fire-protective clothing and some concrete-like products.

The health problems associated with asbestos exposure are due to its physical properties. Asbestos can break into a dust of microscopically small fibers that float in the air and can be easily inhaled or swallowed. Left undisturbed or bonded into durable tiles, slates, or other materials which prevent the fibers from being released into the air, asbestos poses little or no health risk. But, when asbestos containing material is crumbly, friable or disrupted in any way, it is extremely dangerous because it can easily spread through the environment. In a building, for example, if loosely bound asbestos containing material is used in an area which is part of its air circulation system, asbestos fibers can travel freely through the ventilation system to other areas of the building and contaminate the air breathed by the occupants.

Asbestos fibers that are swallowed or inhaled can cause a host of health problems. The three diseases most commonly associated with asbestos exposure are asbestosis, a lung disease that can produce shortness of breath and permanent lung damage; lung cancer; and mesothelioma, a rare cancer of the lining around the lungs, heart, or abdominal organs. Asbestos exposure is also related to cancers of the stomach, large intestine, kidney, larynx, and rectum.

Individuals exposed to asbestos during County employment should promptly inform the County's Risk Management Office at 861-2987. Regular medical examinations are extremely important to aid in the early detection and treatment of any asbestos related problems that may arise. In this physical examination the physician will take a detailed health history, including a history of you and your family's asbestos exposure.

For more information on the health effects of asbestos, call the Kern County Health Department at (805) 861-3631.

## **RIDER O**

### **SITE AND WAREHOUSE SPECIFICATIONS**

#### **Environmental Requirements:**

##### **Operation**

- Temperature: Range from +5C to +40C (+41F to +104F)
- Relative Humidity: 10% to 90% (non-condensing)
- Uninterruptible Power Supply (UPS)
- Power for Servers/printers/modems
- Cabling for workstations/monitors/printers at each count site and elections central
- Power, cabling and connectivity for six (6) AccuVote-OS units
- Notebook PCs, modems and cabling for remote early voting and vote tabulation sites
- Telephone lines for both external PCs and for modem/voice communications
- One phone line for each 20-25 remote count sites with rollover, i.e., cascading lines, or single line, as required.
- One dedicated voice grade line in the server room for exclusive use by DESI as a modem-support-line directly connected to server. Line must be a number that does not go through a switchboard so that after hours work can be conducted whenever necessary.
- One voice grade telephone line available and accessible to each server for use by DESI and the COUNTY. This phone line is voice only and must be accessible while any work on servers is being performed

##### **Storage**

- Storage Temperature: Range from -15C to +55C (+5F to +131F)
- Relative Humidity: 10% to 90% (non-condensing)
- Power for unit charging during storage
- Secured storage for AccuVote-TS units

#### **Network/Telecommunications Requirements:**

- Dell servers being provided and configured by CONTRACTOR
- Connection to voter registration system provided by COUNTY

## **RIDER P**

### **AMENDMENT REQUIREMENTS**

This Agreement may be amended from time-to-time so that COUNTY may acquire licenses to additional DESI Application Software modules. So that both parties to the amendment may agree that the amendment(s) shall be subject to all terms, conditions and other provisions of this Agreement, the following portions of this Agreement must be amended:

- |         |  |
|---------|--|
| Rider A | Each amendment shall incorporate an Exhibit to Rider A which indicates the implementation schedule agreed to by both parties.  |
| Rider B | Each amendment shall incorporate an Exhibit to Rider B which provides a CONTRACTOR recommended Equipment configuration sufficient to maintain performance guarantees listed in Rider G   |
| Rider C | Each amendment shall incorporate an Exhibit to Rider C which indicates the DESI Application Software module licenses being acquired, for what quantity of concurrent users, for what price, and the additional Annual Maintenance support charges.   |
| Rider D | Each amendment shall incorporate an Exhibit to Rider D, Schedule 1, which indicates which set of Services are being purchased and for what price.  |
| Rider E | Each amendment shall incorporate an Exhibit to Rider E which indicates the total price for licenses and services, including applicable California State sales tax.   |
| Rider F | Unless stated otherwise, all amendments will be subject to the same milestone payment schedule as incorporated in Rider F.   |
| Rider H | As each successive DESI Application Software module is licensed by COUNTY, Rider H shall be amended to include a FUNCTION CHECKLIST for that module in substantially the same format and detail level. Subsequent license acquisitions for the same module(s) by other COUNTY Departments shall be governed by the same functional requirements. |
| Rider J | Unless specifically stated otherwise through an Exhibit to this Rider amending it, the same warranty, maintenance and support provisions shall be in force for all additional software acquired.   |
| Rider L | Unless specifically stated otherwise, for purposes of release of Source Code under provisions of Section 16.H and Rider L, COUNTY shall only have rights to obtain the limited Source Code license on those modules for which it has acquired a Run-Time license.  |