

REQUEST FOR BOARD ACTION

HENDERSON COUNTY BOARD OF COMMISSIONERS

MEETING DATE: January 6, 2020

SUBJECT: Elections Equipment Update

PRESENTER: Karen Hebb, Elections Director

ATTACHMENTS: Yes

1. Budget Amendment
2. ES&S Sales Order Agreement
3. PrintElect Quote

SUMMARY OF REQUEST:

At the October 16, 2019 meeting, the Board heard a presentation on the proposed new voting equipment identified by the Board of Elections – ES&S Voting System (Express Vote). The Board of Elections made the recommendation following a demonstration of all potential systems, and the equipment was tested during the municipal elections in November, 2019.

Following that successful test, the Elections Department is requesting the Board approve the purchase of the equipment identified on the attached Sales Order Agreement.

BOARD ACTION REQUESTED:

The Board is requested to approve the purchase of the elections equipment outlined on the attached Sales Order Agreement from ES&S, as well as the necessary Budget Amendment appropriating funding from the Capital Reserve Fund.

Suggested Motion:

I move the Board approve the purchase of elections equipment from ES&S, authorize the Elections Director to execute the required documents, and approve a Budget Amendment appropriating funding from the Capital Reserve Fund.

**LINE-ITEM TRANSFER REQUEST
HENDERSON COUNTY**



Department: Elections/Capital Reserve Fund

Please make the following line-item transfers:

What expense line-item is to be increased?

Account	Line-Item Description	Amount
<u>215400 - 598011</u>	<u>Transfer to General Fund</u>	<u>\$323,490</u>
<u>115408 - 526020</u>	<u>Non-Expendable Supplies</u>	<u>\$314,690</u>
<u>115408 - 526000</u>	<u>Departmental Supplies</u>	<u>\$8,800</u>
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What expense line-item is to be decreased? Or what additional revenue is now expected?

Account	Line-Item Description	Amount
<u>214400 - 401000</u>	<u>Fund Balance Appropriated</u>	<u>\$323,490</u>
<u>114980 - 402100</u>	<u>Transfer from Capital Reserve Fund</u>	<u>\$323,490</u>
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Justification: *Please provide a brief justification for this line-item transfer request.*
 Appropriation from the Capital Reserve Fund for the purchase of voting equipment. Approved by the Board January 6, 2020.

Budget	1/6/2020	
Authorized by Department Head	Date	
Authorized by Budget Office	Date	
Authorized by County Manager	Date	

For Budget Use Only

Batch # _____

BA # _____

Batch Date _____

Sales Order Agreement

Payment Terms

\$157,345.00 of Order Total will be invoiced upon Contract Execution.

\$157,345.00 of Order Total will be invoiced as Tabulation, BMD Equipment and Software are provided to Customer.

Invoices are due net 30 from invoice date.

Note 1: Any applicable state and local taxes are not included, and are the responsibility of the Customer.

Note 2: In no event shall Customer's payment obligations hereunder, or the due dates for such payments, be contingent or conditional upon Customer's receipt of federal and/or state funds.

Warranty Period (Years):

One (1) Year From Equipment Delivery

Software Upgrade License Term

ES&S is providing Customer with an initial no charge upgrade from ES&S' Unity Software to ES&S' ElectionWare Software and Media Burn for the balance of the existing license term set forth under that certain ES&S Hardware Maintenance and Software License, Maintenance and Support Services Agreement entered into between ES&S and the Customer dated June 23, 2017 ("Prior SLA"). Upon reaching the expiration of the current license term under the Prior SLA, ES&S will invoice Customer for annual Software License, Maintenance and Support Fees and such fees shall be due and payable thirty (30) days prior to commencement of the annual Software License, Maintenance and Support term.

Hardware Maintenance and Software License, Maintenance and Support Services (Post-Warranty Period)

Upon the expiration of the Warranty Period and Initial License Terms, ES&S and Customer will enter into a Hardware Maintenance and Software License, Maintenance and Support Services Agreement for the continued maintenance of the ES&S Equipment and the continued license and use of the ES&S Software and ES&S Firmware.

SEE GENERAL TERMS AND CONDITIONS

GENERAL TERMS

1. **Purchase/License Terms.** Subject to the terms and conditions of this Agreement, ES&S agrees to sell and/or license, and Customer agrees to purchase and/or license, the ES&S Equipment, ES&S Software and ES&S Firmware described on the front side of this Agreement. The payment terms for the ES&S Equipment and ES&S Firmware are set forth on the front side of this Agreement. Title to the ES&S Equipment shall pass to Customer when Customer has paid ES&S the total amount set forth on the front side of this Agreement for the ES&S Equipment. The consideration for ES&S' grant of the license during the Initial Term for the ES&S Firmware is included in the cost of the ES&S Equipment.

2. **Grant of Licenses.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to Customer nonexclusive, nontransferable licenses for its bona fide full time, part time or temporary employees to use the ES&S Software, ES&S Firmware and related Documentation in the Jurisdiction while Customer is using the ES&S Equipment and timely pays the applicable annual ES&S Software and ES&S Firmware license, maintenance and support fees. The licenses allow such bona fide employees to use and copy the ES&S Software and ES&S Firmware (in object code only) and the Documentation, in the course of operating the ES&S Equipment and solely for the purposes of defining and conducting elections and tabulating and reporting election results in the Jurisdiction.

3. **Prohibited Uses.** Customer shall not take any of the following actions with respect to the ES&S Software, ES&S Firmware or the Documentation:

a. Reverse engineer, decompile, disassemble, re-engineer or otherwise create, attempt to create, or permit, allow or assist others to create, the source code or the structural framework for part or all of the ES&S Software or ES&S Firmware;

b. Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software, ES&S Firmware or Documentation, in whole or in part, to or by any third party without ES&S' prior written consent; or

c. Cause or permit any change to be made to the ES&S Software or ES&S Firmware without ES&S' prior written consent; or

d. Allow a third party to cause or permit any copying, reproduction or printing of any output generated by the ES&S Software (except finished ballots by ballot printers selected by Customer) in which ES&S owns or claims any proprietary intellectual property rights (e.g., copyright, trademark, patent pending or patent), including, but not limited to, any ballot shells or ballot code stock.

4. **Term of Licenses.** The licenses granted in Section 2 shall commence upon the delivery of the ES&S Software and ES&S Firmware described in Section 2 and shall continue (i) through June 30, 2020 with respect to the ES&S Software (the "Initial Software License Term") and (ii) for a one (1) year period with respect to the ES&S Firmware (the "Initial Firmware License Term"). The Initial Software License Term and the Initial Firmware License Term shall be referred to herein collectively as the "Initial License Terms". Upon expiration of the Initial License Terms, the licenses shall automatically renew for an unlimited number of successive one-year periods (each a "License Renewal Term") upon the payment by Customer of the annual ES&S Software and ES&S Firmware license, maintenance and support fees. ES&S may terminate either license if Customer fails to pay the consideration due for, or breaches Sections 2, 3, or 9 with respect to, such license. Upon the termination of either of the licenses granted in Section 2 for the ES&S Software or ES&S Firmware or upon Customer's discontinuance of the use of any ES&S Software or ES&S Firmware, Customer shall immediately return such ES&S Software, ES&S Firmware and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software, ES&S Firmware and Documentation and certify in writing to ES&S that such destruction has occurred.

5. **Updates.** During the Initial License Terms or any License Renewal Term, ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software or ES&S Firmware, together with appropriate Documentation ("Updates"), on a schedule defined by ES&S. Customer is responsible for obtaining any upgrades or purchases of Third Party Items required to operate the Updates as well as the cost of any replacements, retrofits or modifications to the ES&S Equipment which may be necessary in order to operate the Updates. All Updates shall be deemed to be ES&S Software or ES&S Firmware for purposes of this Agreement upon delivery. Customer may install the Updates in accordance with ES&S' recommended instructions or may request that ES&S install the Updates. ES&S may charge Customer at its then-current rates to (i) install the Updates; (ii) train Customer on Updates, if such training is requested by Customer or (iii) provide maintenance and support on the ES&S Software or ES&S Firmware that is required as a result of Customer's failure to timely or properly install an Update. Customer shall be responsible for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee which is caused by Customer's failure to install and use the most recent Update provided to it by ES&S. If Customer proposes changes in the ES&S Software or ES&S Firmware to ES&S, such proposals will become ES&S' property. ES&S may, in its sole discretion, elect to make or not to make such changes without reference or compensation to Customer or any third party. ES&S represents to Customer that the Updates will comply with all applicable state law requirements at the time of delivery. Customer shall be responsible to ensure that it has installed and is using only certified versions of ES&S Software and ES&S Firmware in accordance with applicable law. In the event that any Updates are required due to changes in state law, ES&S reserves the right to charge Customer for the following:

- (i) the total cost of any third party items that are required in order to operate the Updates;
- (ii) the total cost of any replacements, retrofits or modifications to the ES&S Equipment contracted for herein that may be developed and offered by ES&S in order for such ES&S Equipment to remain compliant with applicable laws and regulations; and
- (iii) Customer's pro-rata share of the costs of designing and developing such state mandated Updates.

Customer's pro-rata share of the costs included under subsection (iii) above shall be determined at the time by dividing the number of registered voters in Customer's jurisdiction by the total number of registered voters in all counties in Customer's state to which ES&S has sold and/or licensed the ES&S Equipment, ES&S Software and ES&S Firmware purchased and licensed by Customer under this Agreement. Customer shall pay ES&S the entire costs incurred for design, development and certification of any Update which is required due to a change in local law or is otherwise requested or required by Customer.

6. **Delivery; Risk of Loss.** The Estimated Delivery Dates and First Election Use (if any) set forth on the front side of this Agreement are estimates and may only be established or revised, as applicable, by the parties, in a written amendment to this Agreement, because of delays in executing this Agreement, changes requested by Customer, product availability and other events. ES&S will notify Customer of such revisions as soon as ES&S becomes aware of such revisions. Risk of loss for the ES&S Equipment, ES&S Software and ES&S Firmware shall pass to Customer when such

items are delivered to Customer's designated location. Upon transfer of risk of loss to Customer, Customer shall be responsible for obtaining and maintaining sufficient casualty insurance on the ES&S Equipment, ES&S Software and ES&S Firmware and shall name ES&S as an additional insured thereunder and, at ES&S' request, shall deliver written evidence thereof to ES&S until all amounts payable to ES&S under this Agreement have been paid by Customer.

7. **Warranty.**

a. **ES&S Equipment/ES&S Firmware.** ES&S warrants that for a one (1) year period (the "Warranty Period"), it will repair or replace any component of the ES&S Equipment or ES&S Firmware which, while under normal use and service: (i) fails to perform in accordance with its Documentation in all material respects, or (ii) is defective in material or workmanship. The Warranty Period will commence upon delivery. The Warranty shall not include the repair or replacement of any ES&S Equipment components that are consumed in the normal course of operating the ES&S Equipment, including printer ribbons, printer cartridges, paper rolls, batteries, removable media storage devices, PCMCIA cards or marking devices. Any repaired or replaced item of ES&S Equipment or ES&S Firmware shall be warranted only for the unexpired term of the Warranty Period. All replaced components of the ES&S Equipment or ES&S Firmware will become the property of ES&S. This warranty is effective provided that (I) Customer notifies ES&S within three (3) business days of the discovery of the failure of performance or defect and is otherwise in compliance with its obligations hereunder, (II) the ES&S Equipment or ES&S Firmware to be repaired or replaced has not been repaired, changed, modified or altered except as authorized or approved by ES&S, (III) the ES&S Equipment or ES&S Firmware to be repaired or replaced is not damaged as a result of accident, theft, vandalism, neglect, abuse, use which is not in accordance with instructions or specifications furnished by ES&S or causes beyond the reasonable control of ES&S or Customer, including acts of God, fire, floods, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, and (IV) Customer has installed and is using the most recent update provided to it by ES&S. This warranty is void for any units of equipment which: (i) have not been stored or operated in a temperature range according their specifications, (ii) have been severely handled so as to cause mechanical damage to the unit, or (iii) have been operated or handled in a manner inconsistent with reasonable treatment of an electronic product

b. **Exclusive Remedies/Disclaimer.** IN THE EVENT OF A BREACH OF SUBSECTION 7(a), ES&S' OBLIGATIONS, AS DESCRIBED IN SUCH SUBSECTION, ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. ES&S EXPRESSLY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, WHICH ARE NOT SPECIFICALLY SET FORTH IN THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. FURTHER, IN THE EVENT CUSTOMER DECLINES ES&S' INSTALLATION AND ACCEPTANCE TESTING SERVICES OR IN ANY WAY AT ANY TIME ALTERS, MODIFIES OR CHANGES ANY EQUIPMENT, SOFTWARE, THIRD PARTY ITEMS AND/OR NETWORK (COLLECTIVELY "SYSTEM") CONFIGURATIONS WHICH HAVE BEEN PREVIOUSLY INSTALLED BY ES&S OR WHICH ARE OTHERWISE REQUIRED IN ACCORDANCE WITH THE CERTIFIED VOTING SYSTEM CONFIGURATION, ALL WARRANTIES OTHERWISE PROVIDED HEREUNDER WITH RESPECT TO THE SYSTEM PURCHASED, LEASED, RENTED AND/OR LICENSED UNDER THIS AGREEMENT SHALL BE VOID AND OF NO FURTHER FORCE AND EFFECT.

8. **Limitation Of Liability.** Neither party shall be liable for any indirect, incidental, punitive, exemplary, special or consequential damages of any kind whatsoever arising out of or relating to this Agreement. Neither party shall be liable for the other party's negligent or willful misconduct. ES&S' total liability to Customer arising out of or relating to this Agreement shall not exceed the aggregate amount to be paid to ES&S hereunder. By entering into this Agreement, Customer agrees to accept responsibility for (a) the selection of, use of and results obtained from any equipment, software, firmware or services not provided by ES&S and used with the ES&S Equipment, ES&S Software or ES&S Firmware; or (b) user errors, voter errors or problems encountered by any individual in voting that are not otherwise a result of the failure of ES&S to perform. ES&S shall not be liable under this Agreement for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee that is caused by (y) Customer's failure to timely or properly install and use the most recent update provided to it by ES&S or (z) Customer's election not to receive, or to terminate, the Hardware Maintenance Services or the ES&S Software and ES&S Firmware License Maintenance and Support Services.

9. **Proprietary Rights.** Customer acknowledges and agrees as follows:

ES&S owns the ES&S Software, ES&S Firmware, all Documentation and training materials provided by ES&S, the design and configuration of the ES&S Equipment and the format, layout, measurements, design and all other technical information associated with the ballots to be used with the ES&S Equipment. Customer has the right to use the aforementioned items to the extent specified in this Agreement. ES&S also owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the aforementioned items. The aforementioned items also contain confidential and proprietary trade secrets of ES&S that are protected by law and are of substantial value to ES&S. Customer shall keep the ES&S Software, ES&S Firmware and related Documentation free and clear of all claims, liens and encumbrances and shall maintain all copyright, trademark, patent or other intellectual or proprietary rights notices that are set forth on the ES&S Equipment, the ES&S Software, ES&S Firmware the Documentation, training materials and ballots that are provided, and all permitted copies of the foregoing.

10. **Termination.** This Agreement may be terminated, in writing, at any time by either party if the other party breaches any material provision hereof and does not cure such breach within 30 days after it receives written notification thereof from the non-breaching party.

11. **Disputes.**

a. **Payment of Undisputed Amounts.** In the event of a dispute between the parties regarding (1) a product or service for which payment has not yet been made to ES&S, (2) the amount due ES&S for any product or service, or (3) the due date of any payment, Customer shall nevertheless pay to ES&S when due all undisputed amounts. Such payment shall not constitute a waiver by Customer or ES&S of any of its rights and remedies against the other party.

b. **Remedies for Past Due Undisputed Payments.** If any undisputed payment to ES&S is past due more than 30 days, ES&S may suspend performance under this Agreement until such amount is paid. Any disputed or undisputed payment not paid by Customer to ES&S when due shall bear interest from the due date at a rate equal to the lesser of one and one-half percent per month or the maximum amount permitted by applicable law for each month or portion thereof during which it remains unpaid.

12. **Assignment.** Except in the case of a reorganization of the assets or operations of ES&S with one or more affiliates of ES&S or the sale, transfer or assignment of all or substantially all of the assets of ES&S or any business operations thereof to a successor who has asserted its intent to

continue the applicable business of ES&S, neither party may assign or transfer this Agreement or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld or conditioned, nor unduly delayed.

13. **Compliance with Laws.** ES&S warrants to Customer that, at the time of delivery, the ES&S Equipment, ES&S Software and ES&S Firmware sold and licensed under this Agreement will comply with all applicable requirements of federal and state election laws and regulations that are mandatory and effective as of the Effective Date and will have been certified by the appropriate state authorities for use in Customer's state. The ES&S Election Management System (EMS) Equipment, Software, and Firmware, including all EMS components will be provided to Customer in a hardened network environment which means that the network provided by ES&S will include an air-gapped, fully closed network environment that includes only the services, applications, utilities and settings necessary to operate the EMS, in accordance with the guidelines of the United States Election Assistance Commission. ES&S shall not be liable for any claims, damages, losses, liens, obligations, liabilities, judgments, assessed damages, costs, expenses (including reasonable attorney's fees) and the like arising out of or related to the Customer's failure to maintain the EMS in the hardened network or allows any internal or external access to the hardened network.

14. **North Carolina Election Certification Program.** ES&S shall comply with the requirements set forth in the Election Systems Certification Program ("Certification Program") issued by the North Carolina State Board of Elections ("NCSBOE") which are mandatory and effective as of the Effective Date and which are incorporated herein by this reference. Specifically, ES&S shall comply with the following requirements set forth under the Certification Program.

a. In accordance with Section 3.3.4.2 of the Certification Program ES&S shall bear all costs associated with necessary certifications, reviews, and reports required under the Certification Program, including for all VSTL and third-party review.

b. In accordance with Section 3.3.4.4 of the Certification Program, any voting system or update provided by ES&S will be of a version currently certified by the NCSBOE for use in North Carolina election. The term "most recent update" as used in this agreement includes only a version that is certified for use by the NCSBOE at the time it is provided to the Customer.

c. In accordance with Section 3.7.2.3 of the Certification Program, ES&S will comply with all training requirements issued by the NCSBOE. The training requirements include, but are not limited to, ES&S providing a minimum of five (5) training classes per program (e.g. voting unit, election management system, ballot creation and layout software) per ordering entity (each county board of elections) for the initial contract period and for each renewal period exercised. Dates for training sessions will be mutually agreed upon by county customer and vendor. The NCSBOE reserves the right to require ES&S provide additional or other training as it deems necessary or beneficial.

If any conflict exists between this Agreement and the Certification Program, the Certification Program will govern and any provisions in conflict with the Certification Program are void and unenforceable.

15. **Entire Agreement.** This Agreement shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and assigns. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior or contemporaneous discussions, negotiations, agreements or understandings between the parties, whether written or oral, regarding the subject matter hereof. Any provision of any purchase order, form or other agreement which conflicts with or is in addition to the provisions of this Agreement shall be of no force or effect. No waiver, amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No consent by either party to, or waiver of, a breach by either party shall constitute a consent to or waiver of any other different or subsequent breach by either party. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina, without regard to its conflicts of laws principles. ES&S acknowledges that nothing in this Agreement in any way alters its duty to comply with North Carolina law, including but not limited to the requirement that it post a performance bond pursuant to N.C.G.S. § 163-165.7(a)(1). ES&S further agrees that if it is granted a contract to provide software for an electronic voting system but fails to debug, modify, repair, or update the software as agreed or in the event of the vendor having bankruptcy filed for or against it, the source code described in G.S. 163-165.9A(a) shall be turned over to the purchasing county by the escrow agent chosen under G.S. 163-165.9A(a)(1) for the purposes of continuing use of the software for the period of the contract and for permitting access to the persons described in G.S. 163-165.7(f)(9) for the purpose of reviewing the source code. The parties agree that venue for any dispute or cause of action arising out of or related to this Agreement shall be in the state and federal courts of the United States located in the State in which the Customer resides. ES&S is providing equipment, software, firmware and services to Customer as an independent contractor, and shall not be deemed to be a "state actor" for purposes of 42 U.S.C. § 1983. ES&S may engage subcontractors to provide certain of the equipment, software, firmware or services, but shall remain fully responsible for such performance. The provisions of Sections 1-5, 7(b), 8, 9, 11(b), 12-15 these General Terms shall survive the termination of this Agreement, to the extent applicable.



QUOTATION

PO Box 13216 · New Bern, NC 28561
800.682.4500 (Toll Free) · 252.637.9320 (Fax)
www.printelect.com

DATE: 12/08/2019

CUSTOMER INFORMATION:

CUSTOMER Henderson County Board of Elections
CONTACT Karen Hebb, Director
ADDRESS
CITY Hendersonville
STATE NC
ZIP
EMAIL KHebb@Hendersoncountync.gov

Product #	Product Description	Quantity	Cost	Total
2252-01	VC ExpressVote Booths	40	175.00	7,000.00
2252-03	VC ExpressVote ADA Kits	40	45.00	1,800.00

Subtotal	\$8,800.00
Shipping	TBD
Total	

Comments: Quote valid for 30 days.

Office Use Only:

Thank you for purchasing from Printelect!
Account Manager: Michelle Mrozkowski