

**AGREEMENT**

THIS AGREEMENT (“Agreement”) is made and entered into this 24th day of Aug., 2021, by and between the COUNTY OF FRESNO, a Political Subdivision of the State of California, hereinafter referred to as "COUNTY", and Election Systems & Software, LLC, a Delaware Limited Liability Company,, whose address is 11208 John Galt Boulevard, Omaha, NE 68137, hereinafter referred to as "CONTRACTOR".

**WITNESSETH:**

WHEREAS, the COUNTY desires to engage the CONTRACTOR for the purpose of providing ongoing maintenance and support services for Signature Capture and Comparison Scanning Hardware and Software for the processing of Vote by Mail ballot envelopes during elections; and

WHEREAS, the COUNTY processes approximately 300,000 Vote by Mail ballot envelopes for each major election, dependent on the number of participating voters; and

WHEREAS, California Elections Code section 3019 *et seq.* requires vote-by-mail ballot envelope signatures to be compared against the voter registration record; and

WHEREAS, the CONTRACTOR has the equipment, expertise, and resources to provide signature capture and comparison services and ongoing maintenance and support services during elections; and

WHEREAS, the CONTRACTOR has provided similar services to the COUNTY since 2007 with performance that has been consistently to the satisfaction of the COUNTY; and

WHEREAS, the CONTRACTOR is the only company able to provide license and maintenance for their proprietary software and hardware.

NOW, THEREFORE, in consideration of their mutual covenants and conditions herein contained, the parties hereto agree as follows:

1. **OBLIGATIONS OF THE CONTRACTOR**

A. CONTRACTOR shall perform all services and fulfill all responsibilities as set forth in this Agreement including the Summary of Services, attached hereto as Exhibit A, and the Pricing and Payment Terms and Payment Schedule, attached hereto as Exhibit B, which are

1 incorporated herein by reference and made part of this Agreement.

2 B. CONTRACTOR shall ensure that all services are in compliance with the  
3 California Elections Code and the Federal Help America Vote Act (HAVA) requirements.

4 2. OBLIGATIONS OF THE COUNTY

5 A. COUNTY shall fulfill all responsibilities as set forth in this Agreement,  
6 including the Summary of Services, attached hereto as Exhibit A, and the Pricing  
7 and Payment Terms and Payment Schedule, attached hereto as Exhibit B, which are  
8 incorporated herein by reference and made part of this Agreement.

9 3. TERM

10 The term of this Agreement shall be for a period of three (3) years, commencing  
11 on July 1, 2021 through and including June 30, 2024. This Agreement may be extended for two  
12 (2) additional consecutive twelve (12) month periods upon written approval of both parties no  
13 later than thirty (30) days prior to the first day of the next twelve (12) month extension period.  
14 The initial three (3) year period and two (2) additional twelve (12) month extension periods shall  
15 collectively herein be referred to as the "Term." The County Clerk/Registrar of Voters or his or  
16 her designee is authorized to execute such written approval on behalf of COUNTY based on  
17 CONTRACTOR'S satisfactory performance.

18 4. TERMINATION

19 A. Non-Allocation of Funds - The terms of this Agreement, and the services  
20 to be provided hereunder, are contingent on the approval of funds by the appropriating  
21 government agency. Should sufficient funds not be allocated, the services provided may be  
22 modified, or this Agreement terminated, at any time by giving the CONTRACTOR thirty (30)  
23 days advance written notice.

24 B. Breach of Contract - The COUNTY may immediately suspend or  
25 terminate this Agreement in whole or in part, where in the determination of the COUNTY there  
26 is:  
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- 1) An illegal or improper use of funds;
- 2) A failure to comply with any term of this Agreement;
- 3) A substantially incorrect or incomplete report submitted to the COUNTY;
- 4) Improperly performed service.

In no event shall any payment by the COUNTY constitute a waiver by the COUNTY of any breach of this Agreement or any default which may then exist on the part of the CONTRACTOR. Neither shall such payment impair or prejudice any remedy available to the COUNTY with respect to the breach or default. The COUNTY shall have the right to demand of the CONTRACTOR the repayment to the COUNTY of any funds disbursed to the CONTRACTOR under this Agreement, which in the judgment of the COUNTY were not expended in accordance with the terms of this Agreement. The CONTRACTOR shall promptly refund any such funds upon demand.

C. Without Cause - Under circumstances other than those set forth above, this Agreement may be terminated by COUNTY upon the giving of thirty (30) days advance written notice of an intention to terminate to CONTRACTOR.

5. COMPENSATION/INVOICING:

COUNTY agrees to pay CONTRACTOR and CONTRACTOR agrees to receive compensation as outlined in the Summary of Services, attached hereto as Exhibit A, and the Pricing and Payment Terms and Payment Schedule, attached hereto as Exhibit B, which are incorporated herein by reference and made part of this Agreement. CONTRACTOR shall submit invoices upon completion of services, in triplicate, to: County of Fresno, County Clerk/Registrar of Voters, 4525 E. Hamilton Ave., Fresno, CA 93702.

In no event shall compensation paid for services performed under this Agreement be in excess of Four Hundred Five Thousand Five Hundred Seventy and 00/100 dollars (\$405,570.00) during the Term of this Agreement. It is understood that all expenses incidental to CONTRACTOR's performance of services under this Agreement shall be borne by

1 CONTRACTOR.

2 6. INDEPENDENT CONTRACTOR:

3 In performance of the work, duties and obligations assumed by CONTRACTOR  
4 under this Agreement, it is mutually understood and agreed that CONTRACTOR, including any  
5 and all of the CONTRACTOR'S officers, agents, and employees will at all times be acting and  
6 performing as an independent contractor, and shall act in an independent capacity and not as an  
7 officer, agent, servant, employee, joint venturer, partner, or associate of the COUNTY.

8 Furthermore, COUNTY shall have no right to control or supervise or direct the manner or method  
9 by which CONTRACTOR shall perform its work and function. However, COUNTY shall retain the  
10 right to administer this Agreement so as to verify that CONTRACTOR is performing its obligations  
11 in accordance with the terms and conditions thereof.

12 CONTRACTOR and COUNTY shall comply with all applicable provisions of law and  
13 the rules and regulations, if any, of governmental authorities having jurisdiction over matters the  
14 subject thereof.

15 Because of its status as an independent contractor, CONTRACTOR shall have absolutely  
16 no right to employment rights and benefits available to COUNTY employees. CONTRACTOR  
17 shall be solely liable and responsible for providing to, or on behalf of, its employees all  
18 legally-required employee benefits. In addition, CONTRACTOR shall be solely responsible and  
19 save COUNTY harmless from all matters relating to payment of CONTRACTOR'S employees,  
20 including compliance with Social Security withholding and all other regulations governing such  
21 matters. It is acknowledged that during the Term of this Agreement, CONTRACTOR may be  
22 providing services to others unrelated to the COUNTY or to this Agreement.

23 7. MODIFICATION:

24 Any matters of this Agreement may be modified from time to time by the written  
25 consent of all the parties without, in any way, affecting the remainder.

26 8. NON-ASSIGNMENT:

27 Neither party shall assign, transfer or sub-contract this Agreement nor their rights or  
28 duties under this Agreement without the prior written consent of the other party.

1           9.    HOLD HARMLESS:

2                    CONTRACTOR agrees to indemnify, save, hold harmless, and at COUNTY'S  
3 request, defend the COUNTY, its officers, agents, and employees from any and all costs and  
4 expenses (including attorney's fees and costs), damages, liabilities, claims, and losses occurring or  
5 resulting to COUNTY in connection with the performance, or failure to perform, by  
6 CONTRACTOR, its officers, agents, or employees under this Agreement, and from any and all  
7 costs and expenses, damages, liabilities, claims, and losses occurring or resulting to any person,  
8 firm, or corporation who may be injured or damaged by the performance, or failure to perform,  
9 of CONTRACTOR, its officers, agents, or employees under this Agreement.

10                   The provisions of this Section 9 shall survive termination of this Agreement.

11           10.   INSURANCE

12                   Without limiting the COUNTY's right to obtain indemnification from  
13 CONTRACTOR or any third parties, CONTRACTOR, at its sole expense, shall maintain in full  
14 force and effect the following insurance policies or a program of self-insurance, including but  
15 not limited to, an insurance pooling arrangement or Joint Powers Agreement (JPA) throughout  
16 the Term of the Agreement:

17                   A.   Commercial General Liability

18                   Commercial General Liability Insurance with limits of not less than Two  
19 Million Dollars (\$2,000,000.00) per occurrence and an annual aggregate of Four Million Dollars  
20 (\$4,000,000.00). This policy shall be issued on a per occurrence basis. COUNTY may require  
21 specific coverages including completed operations, products liability, contractual liability,  
22 Explosion-Collapse-Underground, fire legal liability or any other liability insurance deemed  
23 necessary because of the nature of this Agreement.

24                   B.   Automobile Liability

25                   Comprehensive Automobile Liability Insurance with limits for bodily injury of  
26 not less than One Million Dollars (\$1,000,000.00) per accident for bodily injury and for property  
27 damages. Coverage should include any auto used in connection with this Agreement.

28                   C.   Professional Liability

1 If CONTRACTOR employs licensed professional staff, (e.g., Ph.D., R.N.,  
2 L.C.S.W., M.F.C.C.) in providing services, Professional Liability Insurance with limits of not less  
3 than One Million Dollars (\$1,000,000.00) per occurrence, Three Million Dollars (\$3,000,000.00)  
4 annual aggregate.

5 D. Worker's Compensation

6 A policy of Worker's Compensation insurance as may be required by the  
7 California Labor Code

8 E. Cyber liability

9 Cyber Liability Insurance, with limits not less than Two Million Dollars  
10 (\$2,000,000.00) per occurrence or claim, Two Million Dollars (\$2,000,000.00) aggregate.

11 Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by  
12 CONTRACTOR in this Agreement and shall include, but not be limited to, claims involving  
13 infringement of intellectual property, including but not limited to infringement of copyright,  
14 trademark, trade dress, invasion of privacy violations, information theft, damage to or destruction  
15 of electronic information, release of private information, alteration of electronic information,  
16 extortion and network security. The policy shall provide coverage for breach response costs as  
17 well as regulatory fines and penalties as well as credit monitoring expenses with limits sufficient  
18 to respond to these obligations.

19 Additional Requirements Relating to Insurance

20 CONTRACTOR shall obtain endorsements to the Commercial General  
21 Liability insurance naming the COUNTY, its officers, agents, and employees, individually and  
22 collectively, as additional insured, but only insofar as the operations under this Agreement are  
23 concerned. Such coverage for additional insured shall apply as primary insurance and any other  
24 insurance, or self-insurance, maintained by COUNTY, its officers, agents and employees shall be  
25 excess only and not contributing with insurance provided under CONTRACTOR's policies  
26 herein. This insurance shall not be cancelled or changed without a minimum of thirty (30) days  
27 advance written notice given to COUNTY.

28 CONTRACTOR hereby waives its right to recover from COUNTY, its

1 officers, agents, and employees any amounts paid by the policy of worker's compensation  
2 insurance required by this Agreement. CONTRACTOR is solely responsible to obtain any  
3 endorsement to such policy that may be necessary to accomplish such waiver of subrogation, but  
4 CONTRACTOR's waiver of subrogation under this paragraph is effective whether or not  
5 CONTRACTOR obtains such an endorsement.

6           Within Thirty (30) days from the date CONTRACTOR executes this  
7 Agreement, CONTRACTOR shall provide certificates of insurance and endorsement as stated  
8 above for all of the foregoing policies, as required herein, to the County of Fresno, County  
9 Clerk/Registrar of Voters, Attention: Business Office, 4525 E. Hamilton Ave., Fresno, CA  
10 93702, stating that such insurance coverage has been obtained and are in full force; that the  
11 COUNTY, its officers, agents and employees will not be responsible for any premiums on the  
12 policies; that for such worker's compensation insurance the CONTRACTOR has waived its right  
13 to recover from the COUNTY, its officers, agents, and employees any amounts paid under the  
14 insurance policy and that waiver does not invalidate the insurance policy; that such Commercial  
15 General Liability insurance names the COUNTY, its officers, agents and employees, individually  
16 and collectively, as additional insured, but only insofar as the operations under this Agreement  
17 are concerned; that such coverage for additional insured shall apply as primary insurance and any  
18 other insurance, or self-insurance, maintained by COUNTY, its officers, agents and employees,  
19 shall be excess only and not contributing with insurance provided under CONTRACTOR's  
20 policies herein; and that this insurance shall not be cancelled or changed without a minimum of  
21 thirty (30) days advance, written notice given to COUNTY.

22           In the event CONTRACTOR fails to keep in effect at all times insurance  
23 coverage as herein provided, the COUNTY may, in addition to other remedies it may have,  
24 suspend or terminate this Agreement upon the occurrence of such event.

25           All policies shall be with admitted insurers licensed to do business in the  
26 State of California. Insurance purchased shall be purchased from companies possessing a current  
27 A.M. Best, Inc. rating of A FSC VII or better.

28           11. AUDITS AND INSPECTIONS:

1 The CONTRACTOR shall at any time during business hours, and as often as the  
2 COUNTY may deem necessary, make available to the COUNTY for examination all of its records  
3 and data with respect to the matters covered by this Agreement. The CONTRACTOR shall, upon  
4 request by the COUNTY and in no event more than once per each twelve (12) month period during  
5 the Term of this Agreement, permit the COUNTY to audit and inspect all of such records and data  
6 necessary to ensure CONTRACTOR'S compliance with the terms of this Agreement.

7 If this Agreement exceeds ten thousand dollars (\$10,000.00), CONTRACTOR  
8 shall be subject to the examination and audit of the Auditor General for a period of three (3)  
9 years after final payment under Agreement (Government Code Section 8546.7).

10 12. NOTICES:

11 The persons and their addresses having authority to give and receive notices under  
12 this Agreement include the following:

13 COUNTY

14 James A. Kus, County Clerk/Registrar  
15 of Voters  
16 County Clerk/Elections Department  
17 2221 Kern Street  
18 Fresno, CA 93721

CONTRACTOR

Election Systems & Software, LLC  
Attention: Office of General Counsel  
11208 John Galt Boulevard  
Omaha, NE 68137  
[legal@essvote.com](mailto:legal@essvote.com)

19 All notices between the COUNTY and CONTRACTOR provided for or permitted  
20 under this Agreement must be in writing and delivered either by personal service, by first-class  
21 United States mail, by an overnight commercial courier service, or by electronic mail transmission.  
22 A notice delivered by personal service is effective upon service to the recipient. A notice delivered  
23 by first-class United States mail is effective three COUNTY business days after deposit in the  
24 United States mail, postage prepaid, addressed to the recipient. A notice delivered by an overnight  
25 commercial courier service is effective one COUNTY business day after deposit with the overnight  
26 commercial courier service, delivery fees prepaid, with delivery instructions given for next day  
27 delivery, addressed to the recipient. A notice delivered by electronic mail is effective when  
28 transmission to the recipient is completed (but, if such transmission is completed outside of  
COUNTY business hours, then such delivery shall be deemed to be effective at the next beginning



1 of a COUNTY business day), provided that the sender maintains an electronic record of the  
2 completed transmission. For all claims arising out of or related to this Agreement, nothing in this  
3 section establishes, waives, or modifies any claims presentation requirements or procedures  
4 provided by law, including but not limited to the Government Claims Act (Division 3.6 of Title 1 of  
5 the Government Code, beginning with section 810).

6 13. GOVERNING LAW

7 Venue for any action arising out of or related to this Agreement shall only be in  
8 Fresno County, California. The rights and obligations of the parties and all interpretation and  
9 performance of this Agreement shall be governed in all respects by the laws of the State of  
10 California.

11 14. DISCLOSURE OF SELF DEALING TRANSACTIONS

12 This provision is only applicable if the CONTRACTOR is operating as a  
13 corporation (a for-profit or non-profit corporation) or if during the Term of the agreement, the  
14 CONTRACTOR changes its status to operate as a corporation.

15 Members of the CONTRACTOR's Board of Directors shall disclose any self-  
16 dealing transactions that they are a party to while CONTRACTOR is providing goods or  
17 performing services under this agreement. A self-dealing transaction shall mean a transaction to  
18 which the CONTRACTOR is a party and in which one or more of its directors has a material  
19 financial interest. Members of the Board of Directors shall disclose any self-dealing transactions  
20 that they are a party to by completing and signing a Self-Dealing Transaction Disclosure Form,  
21 attached hereto as Exhibit C, and incorporated herein by reference, and submitting it to the  
22 COUNTY prior to commencing with the self-dealing transaction or immediately thereafter.

23 15. ELECTRONIC SIGNATURE:

24 The parties agree that this Agreement may be executed by electronic signature as  
25 provided in this section. An "electronic signature" means any symbol or process intended by an  
26 individual signing this Agreement to represent their signature, including but not limited to (1) a  
27 digital signature; (2) an electronically scanned and transmitted (for example by PDF document) of a  
28 handwritten signature. Each electronic signature affixed or attached to this Agreement (1) is deemed

1 equivalent to a valid original handwritten signature of the person signing this Agreement for all  
2 purposes, including but not limited to evidentiary proof in any administrative or judicial proceeding,  
3 and (2) has the same force and effect as the valid original handwritten signature of that person. The  
4 provisions of this section satisfy the requirements of Civil Code section 1633.5, subdivision (b), in  
5 the Uniform Electronic Transaction Act (Civil Code, Division 3, Part 2, Title 2.5, beginning with  
6 section 1633.1). Each party using a digital signature represents that it has undertaken and satisfied  
7 the requirements of Government Code section 16.5, subdivision (a), paragraphs (1) through (5), and  
8 agrees that each other party may rely upon that representation. This Agreement is not conditioned  
9 upon the parties conducting the transactions under it by electronic means and either party may sign  
10 this Agreement with an original handwritten signature.

11           16. ENTIRE AGREEMENT

12           This Agreement including all Exhibits, constitutes the entire agreement between  
13 CONTRACTOR and COUNTY with respect to the subject matter hereof and supersedes all  
14 previous agreement negotiations, proposals, commitments, writings, advertisements, publications  
15 and understandings of any nature whatsoever unless expressly included in this Agreement.

16           IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day  
17 and year first hereinabove written.

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**CONTRACTOR**

  
(Authorized Signature)

Thomas O'Brien  
Executive Vice President


11208 John Galt Blvd., Suite 200

Omaha, NE 68137  
Mailing Address

**COUNTY OF FRESNO**

  
Steve Brandau, Chairman of the Board of Supervisors of the County of Fresno

**ATTEST:**  
Bernice E. Seidel  
Clerk of the Board of Supervisors  
County of Fresno, State of California

By:   
Deputy

**FOR ACCOUNTING USE ONLY:**

Fund: 0001

Subclass: 10000

ORG: 28500600

Account: 7309

## SUMMARY OF SERVICES

ORGANIZATION: Election Systems & Software, LLC

ADDRESS: 11208 John Galt Boulevard, Omaha, NE 68137

MANAGERS: Chelsea Machado, Regional Sales Manager

CONTACT: Phone: (209) 277-6674

PRODUCT & SERVICES: Hardware Maintenance and Software License, Maintenance and Support for the Mail Ballot Verifier

TERM OF AGREEMENT (“TERM”): July 1, 2021 – June 30, 2024, with two (2) optional consecutive twelve (12) month extension periods from July 1, 2024 – June 30, 2025 and July 1, 2025 – June 30, 2026.

## AGREEMENT AMOUNTS:

\$57,795.00 for the period of July 1, 2021 – June 30, 2022, plus any applicable ASR Overage Fees  
 \$47,640.00 for the period of July 1, 2022 – June 30, 2023, plus any applicable ASR Overage Fees  
 \$49,425.00 for the period of July 1, 2023 – June 30, 2024, plus any applicable ASR Overage Fees  
 \$49,425.00 for the period of July 1, 2024 – June 30, 2025, plus any applicable ASR Overage Fees  
 \$51,285.00 for the period of July 1, 2025 – June 30, 2026, plus any applicable ASR Overage Fees

TOTAL AGREEMENT AMOUNT: \$405,570.00, which includes applicable ASR Overage Fees not to exceed \$150,000.00 for the Term (July 1, 2021 – June 30, 2024, with two (2) optional consecutive twelve (12) month extension periods from July 1, 2024 – June 30, 2025 and July 1, 2025 – June 30, 2026).

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I. Summary of Services

Election Systems & Software, LLC (ES&S) shall provide software license and maintenance and hardware maintenance and support services for the Mail Ballot Verifier (“MBV”) System. ES&S has previously sold Fresno County, California (hereinafter “County”) the proprietary MBV equipment (“Equipment”) and licensed the software (“Software”) described below, and County now desires to obtain maintenance services for such Equipment and license, maintenance and support services for such Software:

1. (3) Mail Ballot Verifier (MBV) 1000 Systems
  - a. Friction Feeders
  - b. Transports
    - i. Thickness detectors

- ii. Image Cameras
    - iii. Integrated Divert Bins
  - c. MBV Computers
    - i. Image Capture Software
    - ii. Barcode Scanning Software
    - iii. No Signature Detect Software
    - iv. Label Printers
  - d. Extended Envelope Stackers
  - e. (3) Mobile Cart for MBV 1000 to hold laser printer and supplies, and organize cables and cords
  - f. Covers for MBV 1000
- 2. (1) Centralized MBV Server
  - a. Automated Signature Recognition Software
  - b. Side by Side Comparison Client
  - c. Report Printer

### **General Terms**

In consideration of the Summary of Services (which is specifically incorporated herein by this reference) and the mutual representations, warranties, covenants and agreements set forth below, the parties hereby agree as follows:

**Definitions.** “Documentation” means the operating instructions, user manuals or training materials for the ES&S Equipment and ES&S Software. "ES&S Equipment" means ES&S' hardware or other ES&S proprietary equipment. "ES&S Software" means ES&S' proprietary Mail Ballot Verifier (“MBV”) software and all Updates delivered to County under this Agreement, unless licensed pursuant to a separate written agreement. “ES&S Firmware” means ES&S proprietary Mail Ballot Verifier (“MBV”) software which is included on ES&S's equipment delivered to this County under this Agreement.

**Services.** Subject to the terms and conditions of this Agreement, ES&S agrees to provide, and County agrees to pay for, maintenance services for Equipment described herein and license, maintenance and support services for the Software described herein. The maintenance, license and support services shall be provided to County from July 1, 2021 – June 30, 2024, with two (2) optional consecutive twelve (12) month extension periods from July 1, 2024 – June 30, 2025 and July 1, 2025 – June 30, 2026 (hereinafter the “Term”) at costs detailed in Exhibit B, Pricing and Payment Terms and Payment Schedule.

**Grant of Licenses.** Subject to the terms and conditions of this Agreement, ES&S hereby grants to County nonexclusive, nontransferable licenses for its bona fide full time, part time and temporary employees to use the ES&S Software and any related Documentation supplied by ES&S. The licenses allow County to use (but not copy) the ES&S Software and the Documentation in the course of operating the ES&S Equipment and solely for the purposes of managing the vote by mail process in County. The licenses granted in this section do not permit County to use the source code for the ES&S Software.

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

- a) Reverse engineer, decompile, disassemble, re-engineer or otherwise create, attempt to create, or permit, allow or assist others to create, the source code or the structural framework for part or all of the ES&S Software;
- b) Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software or Documentation, in whole or in part, to or by any third party, including, but not limited to, any transfer of possession to, or use of the ES&S Software or Documentation by any third party to perform any services for County (including, but not limited to, any ballot printing, coding, programming or ballot layout services) without ES&S's prior written consent; or
- c) Cause or permit any change to be made to the ES&S Software without ES&S' prior written consent; or
- d) Allow a third party to cause or permit any copying, reproduction or printing of any output generated by the Software 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.

**Term of Licenses.** The licenses granted to County shall commence upon delivery of the Software and shall be in effect for the Term of the Agreement. ES&S may terminate the license if County fails to pay the consideration due for, or breaches the Agreement with respect to, such license. Upon the termination of either of the licenses granted to County for ES&S Software or upon County's discontinuance of the use of any ES&S Software, County shall immediately return such ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

**Updates.** During the Term, ES&S may provide new releases, upgrades or maintenance patches to the ES&S Software, together with appropriate Documentation ("Updates"), on a schedule defined by ES&S. County is solely responsible for obtaining and purchasing any upgrades or 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 for purposes of this Agreement upon delivery. Updates will be installed by ES&S in conjunction with a regularly scheduled preventative maintenance event at no additional charge to County. If this foregoing is not acceptable to County, and subject to County's prior execution of a purchase order therefor, ES&S shall charge to install the Updates. ES&S shall also charge County at its then-current rates to (i) train County on Updates, if such training is requested by County; and (ii) if applicable, provide maintenance and support on the ES&S Software that is required as a result of County's failure to timely or properly install an Update. If applicable, County shall be responsible for any claim, damage, loss, judgment, penalty, cost, amount paid in settlement or fee which is caused by County's failure to install the most recent Update provided to it by ES&S. If County proposes changes in the ES&S

Software 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 County or any third party.

### **Maintenance & Support**

a. ES&S Equipment and ES&S Software. ES&S agrees that during the Term of the Agreement, ES&S shall maintain the ES&S Equipment and ES&S Software in good working condition in order allow the County to use the ES&S Equipment and ES&S Software in accordance with its Documentation, wear and tear excepted ("Normal Working Condition"). If a defect or malfunction occurs in any ES&S Equipment and/or ES&S Software while it is under normal use and service, County shall promptly notify ES&S, and ES&S shall use reasonable efforts to restore the item to Normal Working Condition as soon as practicable. ES&S shall repair or replace any item of ES&S Equipment and ES&S Software at ES&S' or the County's designated location as determined by ES&S in its sole discretion. If a defect or malfunction occurs in any ES&S Equipment and ES&S Software as a result of (1) repairs, changes, modifications or alterations not authorized or approved by ES&S, (2) accident, theft, vandalism, neglect, abuse or use that is not in accordance with instructions or specifications furnished by ES&S or (3) causes beyond the reasonable control of ES&S or County, including acts of God, fire, riots, acts of war, terrorism or insurrection, epidemics, pandemics or outbreak of communicable disease; quarantines; national or regional emergencies, labor disputes, transportation delays, governmental regulations, rodent infestation, and utility or communication interruptions, County shall pay ES&S for any maintenance services at ES&S' then-current rates, as well as for the cost of all parts used in connection with the performance of such maintenance services.

b. Technical Support. In addition to providing those services set forth in this Exhibit A, ES&S shall provide the County with technical help desk support.

**Disclaimer of Warranties.** Except as otherwise set forth herein, 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.

**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 County arising out of or relating to this Agreement shall not exceed the aggregate amount to be paid to ES&S hereunder. Any action by County against ES&S must be commenced within one (1) year after the cause of action has accrued. By entering into this Agreement, County agrees to accept responsibility for (a) the selection of the ES&S Equipment and ES&S Software to achieve County's intended results; (b) the use of the ES&S Equipment and ES&S Software; (c) the results obtained from the use of the ES&S Equipment and ES&S Software; (d) the selection of, use of and results obtained from any equipment, software or services not provided by ES&S and used with the ES&S Equipment or ES&S Software; (e) errors that arise from mechanical or electronic component failures that are not covered under the maintenance agreement or not subject to maintenance efforts or cure under

this Agreement; or (f) 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 its obligations under this Agreement.

**Proprietary Rights.** County acknowledges and agrees as follows:

a. ES&S owns the ES&S Software, 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. County 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.

b. County shall not cause or permit the adaptation, conversion, reverse engineering, disassembly or decompilation of any of the ES&S Equipment or ES&S Software.

c. County shall keep the ES&S Software and related Documentation free and clear of all claims, liens and encumbrances and shall maintain all copyright, trademark, patent or other intellectual or proprietary rights notices that are set forth on the ES&S Equipment, the ES&S Software, the Documentation, training materials and ballots that are provided, and all permitted copies of the foregoing.

**Indemnification.** To the fullest extent permitted under applicable law, County shall indemnify and hold harmless ES&S from and against any and all claims, damages, amounts paid in settlement and reasonable fees and costs (including reasonable attorneys' fees) (collectively "Adverse Consequences") arising out of or relating to the following: Any claim that any of the ES&S Equipment or ES&S Software infringes upon any third party's copyright, trademark or patent existing as of the date hereof (a "Third Party Infringement Claim") resulting from (i) County's failure to timely or properly install and use any Update provided to it by ES&S; (ii) the use of any ES&S Equipment or ES&S Software in combination with other equipment, hardware or software not meeting ES&S' specifications for use with such ES&S Equipment or ES&S Software; or (iii) County's modification or alteration of any item of ES&S Equipment or ES&S Software without the prior written consent of ES&S; Any claims by Third Parties arising out of or relating to the use or misuse by County, its employees and any other persons under its authority or control ("County's Representatives") of any Third Party Items; and Personal injury (including death) or property damage that is caused by any negligent or willful act, error or omission of one or more of County's Representatives. ES&S shall notify County immediately if it becomes aware of any claim for which it may be entitled to indemnification under this Section, and hereby gives County full and complete authority, and shall provide such information and assistance as is necessary (at County's expense with respect to reasonable out-of-pocket costs), to enable County to defend, compromise or settle any such claim.

**Taxes; Interest.** County shall provide ES&S with proof of its tax-exempt status. If County does not provide such proof, it shall pay, or shall reimburse ES&S for, all sales and use, excise or other



similar taxes imposed on the transactions contemplated by this Agreement; provided, however, County shall in no event be liable for taxes imposed on or measured by ES&S' income. If County disputes the applicability of any tax to be paid pursuant to this Section, it shall pay the tax and may thereafter seek a refund. Any undisputed payment not paid by County to ES&S when due shall be subject to the California Prompt Payment Act.

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

**Support Services.** The support services to be provided by ES&S during the Term, a description of such services and total fees are described in Table 1 - Support Services set forth below. County acknowledges that ES&S's fees for support services are based on the descriptions listed in the table on the following page, and that a change in the descriptions may require ES&S to change the fees charged to County. For purposes of ES&S's provision of Support Services under this Agreement, a "Service Day" shall mean the performance of any agreed upon Support Services on or off of County's facilities, as applicable, by one (1) ES&S employee, contractor or agent on any one (1) calendar day or four hour portion thereof. By way of example, "ten Service Days" could be used by County through the provision of Support Services by one (1) ES&S employee, contractor or agent on each of ten different calendar days, two (2) ES&S employees, contractors or agents on each of five (5) different calendar days, or ten (10) ES&S employees, contractors or agents on one (1) calendar day.

**Table 1 - Support Services**

<b>Support Services</b>	<b>Area of Work or Description</b>	<b>Primary Responsibility</b>	<b>Fee</b>
<b>Training</b>	<p>Training will be provided on a pre-scheduled basis at ES&amp;S’s current daily rate. Number and length of training sessions will be mutually agreed upon in advanced. County agrees to provide a facility to hold training sessions. Levels of training include:</p> <p><b>1st level (operator) training</b></p> <ul style="list-style-type: none"> <li>- Provides sufficient skills to operate the system, replace consumables, clear jams.</li> </ul> <p><b>2nd level (lead) training</b></p> <ul style="list-style-type: none"> <li>- Involves more in depth troubleshooting knowledge including aligning feeder, understanding communication issues with VR systems, and production of reports.</li> </ul> <p><b>Technical training to IT or operations staff</b></p> <ul style="list-style-type: none"> <li>- Involves a complete understanding of system architecture and operations.</li> </ul> <p><b>Training on updates</b></p> <ul style="list-style-type: none"> <li>- Involves training on the most recent update provided by ES&amp;S if such training is requested by County</li> </ul> <p>Refresher training can be provided in advance of each election on a mutually agreeable timeframe at ES&amp;S’ then current daily rate.</p>	ES&S	\$1,700.00 per Service Day (July 1, 2021 to June 30, 2022; thereafter, the daily rate is subject to change)

<p><b>Hardware Maintenance and Software License / Maintenance</b></p>	<p><b>Software Maintenance</b></p> <ul style="list-style-type: none"> <li>• See the Maintenance &amp; Support and Updates Sections of the General Terms on Pages 3 and 4 of Exhibit A</li> </ul> <p><b>Hardware Maintenance</b></p> <ul style="list-style-type: none"> <li>• See Maintenance &amp; Support Section of the General Terms on Pages 3 and 4 of Exhibit A</li> </ul>	<p>ES&amp;S</p>	<p>Included within annual software/hardware maintenance and license fees.</p>
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**Note 1:** The County currently has six (6) unused Support Service Days which can be utilized by the County for training, project management or election support services. After the County utilizes its six (6) Support Service Days, the County will be billed at ES&S's then current daily rate for Support Service days which for the period July 1, 2021 to June 30, 2022 is \$1,700.00 per day.

### Pricing and Payment Terms

<b><u>MBV Upgrade Costs</u></b>	
MBV Windows 10 Upgrade	\$5,055.00
On-Site Installation	\$5,100.00
Upgrade cost total	<b>\$10,155.00</b>

<b><u>July 1, 2021 through June 30, 2022</u></b>	
Hardware Maintenance	\$9,840.00
Software Maintenance/ License	\$25,800.00
Phone Support	<u>Included</u>
Unique Voter Envelope Volume between 100,000 and 200,000	<u>\$12,000.00</u>
Annual cost	<b>\$47,640.00</b>

<b><u>July 1, 2022 through June 30, 2023</u></b>	
Hardware Maintenance	\$9,840.00
Software Maintenance/ License	\$25,800.00
Phone Support	<u>Included</u>
Unique Voter Envelope Volume between 100,000 and 200,000	<u>\$12,000.00</u>
Annual cost	<b>\$47,640.00</b>

<b><u>July 1, 2023 through June 30, 2024</u></b>	
Hardware Maintenance	\$10,335.00
Software Maintenance/ License	\$27,090.00
Phone Support	<u>Included</u>
Unique Voter Envelope Volume between 100,000 and 200,000	<u>\$12,000.00</u>
Annual cost	<b>\$49,425.00</b>

<b><u>July 1, 2024 through June 30, 2025 - Optional Renewal Period</u></b>	
Hardware Maintenance	\$10,335.00
Software Maintenance/ License	\$27,090.00
Phone Support	<u>Included</u>
Unique Voter Envelope Volume between 100,000 and 200,000	<u>\$12,000.00</u>
Annual cost post warranty	<b>\$49,425.00</b>

<b><u>July 1, 2025 through June 30, 2026 – Optional Renewal Period</u></b>	
Hardware Maintenance	\$10,845.00
Software Maintenance/ License	\$28,440.00
Phone Support	<u>Included</u>
Unique Voter Envelope Volume between 100,000 and 200,000	<u>\$12,000.00</u>
Annual cost	<b>\$51,285.00</b>

<b>Total for July 1, 2021 June 30, 2026 (without ASR Overage Fees). Includes two optional one-year renewals beginning July 1, 2024)</b>	<b>\$255,570.00</b>
<b>Total for July 1, 2021 - June 30, 2026 (Includes two optional one-year renewals beginning July 1, 2024). Includes ASR Overage Fees not to exceed \$150,000.00 for the Term.</b>	<b>\$405,570.00</b>

The above referenced costs include the following:

1. MBV Windows 10 Upgrade for Three (3) MBV Units with Onsite Installation
2. Hardware Maintenance and Support
3. Software License and Maintenance and Support
4. Phone Support
5. Usage of the ES&S Equipment for up to 200,000 unique voter envelopes during the period of July 1<sup>st</sup> through June 30<sup>th</sup> (each, a "Fiscal Year"). There is a cost of \$.15 per piece for each unique voter envelope processed in excess of this amount per Fiscal Year up to an aggregate maximum cap of \$150,000.00 for the Term.

**Payment Schedule**

\$10,155.00 due within forty-five (45) Calendar Days of invoice after contract execution.

July 1, 2021 through June 30, 2022: \$47,640.00 for the items listed above, is due July 1, 2021.

July 1, 2022 through June 30, 2023: \$47,640.00 for the items listed above is due July 1, 2022.

July 1, 2023 through June 30, 2024: \$49,425.00 for the items listed above is due July 1, 2023.

July 1, 2024 through June 30, 2025: \$49,425.00 for the items listed above is due July 1, 2024.

July 1, 2025 through June 30, 2026: \$51,285.00 for the items listed above is due July 1, 2025.

The above referenced fees include the processing of up to 200,000 unique envelopes during the period of July 1<sup>st</sup> through June 30<sup>th</sup> (each, a "Fiscal Year"). In the event the County exceeds 200,000 unique envelopes per Fiscal Year during the Term, each unique envelope processed in excess of 200,000 in a Fiscal Year shall be charged an Automatic Signature Recognition ("ASR") Overage Fee at the rate of \$0.15 per unique envelope. ASR Overage Fees are due within forty-five (45) calendar days of receipt of a corresponding ES&S invoice. Invoicing shall follow the applicable election. In the event that County does not process 200,000 unique envelopes during any Fiscal Year, any unused Fiscal Year processing allocation shall not be rolled over or credited to the next Fiscal Year during the Term. The maximum ASR Overage Fee shall not exceed \$150,000.00 over the total duration of the Term.

\*Any additional Support Services shall be billed following the completion of the service provided. Customer shall have forty five (45) days from the receipt of the invoice to pay for all Support Services provided.

## SELF-DEALING TRANSACTION DISCLOSURE FORM

In order to conduct business with the County of Fresno (hereinafter referred to as "County"), members of a contractor's board of directors (hereinafter referred to as "County Contractor"), must disclose any self-dealing transactions that they are a party to while providing goods, performing services, or both for the County. A self-dealing transaction is defined below:

*"A self-dealing transaction means a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest"*

The definition above will be utilized for purposes of completing this disclosure form.

### INSTRUCTIONS

- (1) Enter board member's name, job title (if applicable), and date this disclosure is being made.
- (2) Enter the board member's company/agency name and address.
- (3) Describe in detail the nature of the self-dealing transaction that is being disclosed to the County. At a minimum, include a description of the following:
  - a. The name of the agency/company with which the corporation has the transaction; and
  - b. The nature of the material financial interest in the Corporation's transaction that the board member has.
- (4) Describe in detail why the self-dealing transaction is appropriate based on applicable provisions of the Corporations Code.
- (5) Form must be signed by the board member that is involved in the self-dealing transaction described in Sections (3) and (4).

<b>(1) Company Board Member Information:</b>			
<b>Name:</b>		<b>Date:</b>	
<b>Job Title:</b>			
<b>(2) Company/Agency Name and Address:</b>			
<b>(3) Disclosure (Please describe the nature of the self-dealing transaction you are a party to):</b>			
<b>(4) Explain why this self-dealing transaction is consistent with the requirements of Corporations Code 5233 (a):</b>			
<b>(5) Authorized Signature</b>			
<b>Signature:</b>		<b>Date:</b>	