

**MADISON COUNTY FISCAL COURT
MADISON COUNTY, KY
RESOLUTION 2021-43**

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COUNTY CLERK: KENNY BARGER
DEPUTY CLERK: LANDRY LUXON
COUNTY: MADISON COUNTY
BOOK: RES2 PAGES: 294 - 294

**A RESOLUTION FOR THE MADISON COUNTY FISCAL COURT APPROVING
AN AGREEMENT BETWEEN THE MADISON COUNTY CLERK AND
ELECTION SYSTEMS & SOFTWARE, LLC ("ES&S")**

WHEREAS, the Madison County Clerk desires to enter into an agreement with Election Systems & Software, LLC ("ES&S"); and

WHEREAS, Madison County previously purchased ExpressVote BMD equipment and software from ES&S; and

WHEREAS, the Madison County Clerk desires to continue such license of software as well as purchase related services from ES&S for use in Madison County, Kentucky; and

WHEREAS, the terms and conditions under which such software and services shall be provided are set forth in the Agreement, which is attached hereto this Resolution.

NOW, THEREFORE, BE IT RESOLVED THAT THE FISCAL COURT DOES HEREBY APPROVE TO ENTER INTO THIS AGREEMENT AND AUTHORIZES THE JUDGE EXECUTIVE TO EXECUTE SAME ON BEHALF OF THE COUNTY.

Motion made by John Tudor, seconded by Roger Barger.

Vote:	Yes	No
Judge Reagan Taylor	<u>X</u>	_____
Magistrate Paul Reynolds	<u>X</u>	_____
Magistrate John Tudor	<u>X</u>	_____
Magistrate Roger Barger	<u>X</u>	_____
Magistrate Tom Botkin	<u>X</u>	_____

Signed:

R-39
Reagan Taylor
Madison County Judge Executive

Attested:

Kenny Barger
Kenny Barger
Madison County Clerk

**ELECTION SYSTEMS & SOFTWARE, LLC
BALLOT ON DEMAND SYSTEM, ONGOING LICENSE, SOFTWARE MAINTENANCE, AND SERVICES
AGREEMENT**

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

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

AND: MADISON COUNTY, KENTUCKY ("Customer").

RECITALS:

A. Customer previously purchased certain ballot printing equipment and licensed certain ballot on demand software from ES&S and now desires to continue such license of software as well as purchase related services from ES&S for use in MADISON COUNTY, KENTUCKY (the "Jurisdiction"). The terms and conditions under which such software and services shall be provided are set forth in the **GENERAL TERMS** attached hereto and incorporated herein by reference.

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

 X Exhibit A (Pricing Summary)

 X Exhibit B (ES&S Software and Services Description, Pricing and Fees)

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

- Agrees to the **GENERAL TERMS** and the terms and conditions set forth in each Exhibit attached hereto and incorporated herein.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the State of KENTUCKY, without regard to conflicts of law principles that would require the application of the laws of any other state.
- Represents and warrants to the other party that as of its signature below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement.
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, LLC
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1291

MADISON COUNTY, KENTUCKY
101 W. Main Street
Richmond, KY 40475
Fax No.: N/A

Signature

Signature

Name (Printed or Typed)

Name (Printed or Typed)

Title

Title

Date

Date

**GENERAL TERMS
ARTICLE 1
DEFINITIONS**

All capitalized terms used, but not otherwise defined, in these General Terms or in an Exhibit shall have the following meanings:

- a. "Documentation" means the operating instructions, user manuals or training materials for the ES&S Software.
- b. "ES&S Equipment" means ES&S' hardware or other ES&S proprietary equipment.
- c. "ES&S Software" means ES&S' proprietary Ballot On Demand software and all Updates delivered to Customer under this Agreement, unless licensed pursuant to a separate written agreement.

**ARTICLE 2
LICENSE OF ES&S SOFTWARE AND PAYMENT OF FEES**

2.1 a. **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 and temporary employees to use the ES&S Software described on Exhibit B and related Documentation supplied by ES&S. The licenses allow Customer 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 printing of ballots in the Jurisdiction. The licenses granted in this Section 2.1 do not permit Customer to use the source code for the ES&S Software.

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

i. 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;

ii. 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 Customer (including, but not limited to, any ballot printing, coding, programming or ballot layout services) without ES&S's prior written consent; or

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

iv. Allow a third party to cause or permit any copying, reproduction or printing of any output generated by the Software (except 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.

2.2 **Term of Licenses.** The licenses granted in Section 2.1 shall be in effect for the Term of the Agreement (as defined in Section 3.1 below) provided Customer timely pays the annual software license and maintenance and support fees as determined by ES&S. ES&S may terminate the license if Customer fails to pay the consideration due for, or breaches Sections 2.1, 2.4, or 3.6 with respect to, such license. Upon the termination of either of the licenses granted in Section 2.1 for ES&S Software or upon

Customer's discontinuance of the use of any ES&S Software, Customer shall immediately return such ES&S Software and the related Documentation (including any and all copies thereof) to ES&S, or (if requested by ES&S) destroy such ES&S Software and Documentation and certify in writing to ES&S that such destruction has occurred.

2.3 **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. 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 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 to the Customer, (ii) train Customer on Updates, if such training is requested by Customer; or (iii) provide maintenance and support on the ES&S Software 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 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 in accordance with applicable law. Customer shall pay ES&S for any Update which is required due to a change in state or local law.

2.4 **Fees**

- a. **Software License and Maintenance Fees.** The fees for ES&S Software License, Maintenance and Support Services are set forth on Exhibit A
- b. **Election Set-Up Fee.** The per election fee for election setup is set forth on Exhibit B.
- c. **Pre-Election Services.** The fees for the optional Pre-Election Services are set forth on Exhibit B.

ARTICLE 3 MISCELLANEOUS

3.1 **Term; Termination.** This Agreement shall be effective for a **One (1) Year Period beginning on the Effective Date** (the "Initial Term"). The Initial Term shall automatically renew for an unlimited number of successive one-year period unless otherwise agreed to, in writing, by the parties (each a "Renewal Period"). The Initial Term and all Renewal Periods shall be collectively referred to herein as the "Term". The Term shall continue until this Agreement is terminated by the first to occur of (i) either party's election to terminate it upon the expiration of the Initial Term or any Renewal Period thereof, written notice of such election shall be given to the other party at least sixty (60) calendar days prior to the expiration of the Initial Term or any Renewal Period; (ii) the date that is thirty (30) days after either party notifies the other that the other has materially breached this Agreement, and the breaching party fails to cure such breach within such thirty (30) day period, (except a breach as provided in (iv) below which will require no notice); (iii) the date which is thirty (30) days after ES&S notifies the Customer of ES&S intent to terminate the Agreement as a result of the Customer no longer utilizing ES&S' voter tabulation system with the Ballot On Demand printer purchased and licensed hereunder, or (iv) Customer's failure to make any payment due hereunder within thirty (30) days after it is due. In the event of early termination by ES&S due to (a) a breach of this Agreement by Customer, (b) Customer's failure to pay any amounts owed under this Agreement or (c) the failure of Customer to appropriate funds to make the payments due under this Agreement, Customer shall pay ES&S for all products delivered and services performed up through the effective date of

termination, Upon termination of this Agreement, Customer shall immediately return all ES&S Software and 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.

3.2 **Maintenance; Support**

a. **ES&S Software.** Provided Customer pays the applicable annual fees set forth on Exhibit A for ES&S Software license maintenance and support services, ES&S agrees that during the Term of the Agreement, ES&S shall maintain provide maintenance and support services for ES&S Software to enable it to perform in accordance with its Documentation in all material respects, and to cure any defect in material or workmanship. If a defect or malfunction occurs in the ES&S Software while it is under normal use and service, Customer shall promptly notify ES&S, and ES&S or its authorized representatives shall use reasonable efforts to restore the Software to perform in accordance with its Documentation as soon as practicable. ES&S or its authorized representatives shall restore ES&S Software at a location as determined by ES&S in its sole discretion. If a defect or malfunction occurs in any 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 Customer, including acts of God, fire, floods riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations, rodent infestation, and utility or communication interruptions, Customer 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. **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..

3.3 **Consumables.** Customer shall be responsible for the purchase, shipping and installation of all components that are consumed in the normal course of operating the ES&S Equipment, including, but not limited to, toner, drums, transfer belts, fusers, and ballot stock (collectively, "Consumables"). All Consumables shall meet ES&S' specifications and may be purchased directly from ES&S or from authorized dealers. In the event the Customer purchases Consumables which do not meet ES&S specifications, Customer shall be solely responsible for any and all costs, expenses, liabilities, losses and damages resulting from the Customer's failure to purchase Consumables which meet ES&S' specifications

3.4 **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 or services not provided by ES&S and used with the ES&S Equipment or ES&S Software; or (b) errors that arise from mechanical or electronic component failures that are not covered under warranty or not subject to maintenance efforts or cure under this Agreement; or (c) 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.

3.5 **Taxes; Interest.** Customer shall provide ES&S with proof of its tax-exempt status. If Customer does not provide such proof, it shall pay, or shall reimburse ES&S for, all sales and use, excise or other similar taxes imposed on the transactions contemplated by this Agreement; provided, however, Customer shall in no event be liable for taxes imposed on or measured by ES&S' income. If Customer disputes the applicability of any tax to be paid pursuant to this Section 3.7, it shall pay the tax and may thereafter seek a refund. 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 (1.5%) per

month or the maximum amount permitted by applicable law for each month or portion thereof during which it remains unpaid.

3.6 Proprietary Rights. Customer 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. 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.

b. Customer 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. Customer 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.

3.7 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, floods, riots, acts of war, terrorism or insurrection, labor disputes, transportation delays, governmental regulations and utility or communication interruptions, the delay shall be excused during the continuance of, and to the extent of, such cause, and the period of performance shall be extended to the extent necessary to allow performance after the cause of delay has been removed. ES&S agrees to work with Customer, at Customer's request, to develop mutually agreeable alternatives in order to minimize the negative impact of any such delay.

3.8 Non-Appropriation of Funds. Customer represents, warrants, and covenants that it has appropriated, and will have appropriated, funds available necessary to pay the amounts due herein through the end of the Customer's current fiscal year, and that Customer shall use its best efforts to obtain and appropriate funds in order to pay all payments which shall be due in each year of this Agreement. In the event that funds are not appropriated or otherwise made available to support the continuation of performance by Customer hereunder in any subsequent fiscal period, this Agreement may be terminated by either party; provided, however, that this Section 3.8 shall not be construed so as to permit Customer to terminate this Agreement in order to acquire a ballot on demand system and/or related services from a third party. Either party may notify the other of the termination, which may occur no later than the beginning of the subsequent fiscal period. Upon termination, Customer shall pay ES&S for all services performed pursuant to this Agreement up to the date of termination and reasonable exit costs incurred by ES&S. The amount of such payment may be paid from any appropriations available for such purposes, and Customer's highest-ranking officer or official shall use his/her best efforts to timely and sufficiently request the appropriation necessary to pay such amount.

3.9 Assignment. Except in the case of a reorganization of the assets or operation 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 to a successor who has asserted its intent to continue the business of ES&S, neither party may assign or transfer this Agreement or assign, subcontract or delegate any of its rights, duties or obligations hereunder without the prior written consent of the other party hereto, such consent not to be unreasonably withheld or conditioned, nor unduly delayed.

3.10 Notice. Any notice or other communication required or permitted hereunder shall be in writing, and will be deemed given when (a) delivered personally, (b) sent by confirmed email, (c) sent by

confirmed fax, (d) sent by commercial overnight courier (with written verification of receipt) or (e) sent by registered or certified mail, return receipt requested, postage prepaid, when the return receipt is received. All communications shall be sent to the attention of the persons listed on the signature page to this Agreement and at the addresses, email address or fax numbers set forth on such signature page unless other names, addresses or fax numbers are provided by either or both parties in accordance herewith.

3.11 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 thirty (30) days, ES&S may suspend performance under this Agreement until such amount is paid.

3.12 Entire Agreement. This Agreement, including all exhibits hereto, shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and assigns. This Agreement, including all Exhibits hereto, contains the entire agreement of the parties with respect to the subject matter hereof and shall supersede and replace any and all other prior or contemporaneous discussions, negotiations, agreements or understandings between the parties, whether written or oral, regarding the subject matter hereof. Any provision of any purchase order, form or other agreement which conflicts with or is in addition to the provisions of this Agreement shall be of no force or effect. In the event of any conflict between a provision contained in an Exhibit to this Agreement and these General Terms, the provision contained in the Exhibit shall control. No waiver, amendment or modification of any provision of this Agreement shall be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No consent by either party to, or waiver of, a breach by either party shall constitute a consent to or waiver of any other different or subsequent breach by either party. ES&S is providing Software and services to Customer as an independent contractor, and shall not be deemed to be a "state actor" for purposes of 42 U.S.C. § 1983. ES&S may engage subcontractors to provide certain of the Software or services, but shall remain fully responsible for such performance. The provisions of Article 2 and Sections 3.6-3.12 of these General Terms shall survive the termination of this Agreement, to the extent applicable.

[END OF GENERAL TERMS]

**EXHIBIT A
PRICING SUMMARY**

Sale Summary:		
Description	Refer to	Amount
ES&S Software License, Maintenance and Support Fees	Exhibit B	\$1,065.00
Total Net Sale:		\$1,065.00
Election Set Up Fees and Optional Pre-Election Services are not included in Total Net Sale. Please see <u>Exhibit B</u> for Election Set-Up Fees and Optional Pre-Election Services Fees and payment terms.		
<u>Terms & Conditions:</u>		
Note 1: Pursuant Section 3.5, any applicable state and local taxes are not included, and are the responsibility of Customer. Premium or rush transportation services incurred in connection with deliverables included in the Total Net Sale are additive and will be billed as incurred.		
Note 2: <u>Invoicing and Payment Terms are as Follows:</u>		
\$1,065.00 due Thirty (30) Calendar Days after Receipt of Corresponding ES&S Invoice.		
All other Service Fees are set forth on <u>Exhibit B</u> and are due within thirty (30) days of Customer's receipt of ES&S' invoice.		
<u>Ongoing Services:</u>		
Description	Annual Fee	
Software License, Maintenance & Support Services:		
Ballot On Demand Software Fees (See Exhibit B for descriptions). Fees for any Renewal Term will be increased at a rate not to exceed more than 5% of the previously paid fee.	\$1,065.00	

**EXHIBIT B
SOFTWARE AND SERVICES DESCRIPTION,
PRICING AND FEES**

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL PRICE
Ballot On Demand Software			\$1,065.00
	Software Licenses and Maintenance Including the Following Features:		
1	Multiple Request Software	N/A	

ELECTION SETUP FEES

Initial Election Set-Up Fee per Election Event	
Black and White Ballot Set-Up:	
\$450.00 per election set-up + \$1.00 per unique PDF for first Computer	
\$75.00 for each additional Computer set-up	
Color Ballot Set-Up:	
\$550.00 per election set-up + \$1.00 per unique PDF for first Computer	
\$75.00 for each additional Computer set-up	
Rework of Set-Up due to Customer Changes After Initial Set-Up is Complete	
\$175.00 per change event for first Computer set-up	
\$75.00 for each additional Computer set-up	
Other	
\$350.00 fee for L&A Test Deck Creation	
On-Site Set-Up: \$1,700.00 per person, per day	

Election Set-Up Fees are due within thirty (30) days of receipt of ES&S invoice.

OPTIONAL PRE-ELECTION SERVICES FEES

Upon request by the Customer and the payment of the associated fees, ES&S shall provide on-site Pre-Election services to the Customer ("Pre-Election Services") at the rate of \$1,700.00 per day for the Initial Term.

Optional Pre-Election Services Fees are due within thirty (30) days of receipt of ES&S invoice.

ES&S reserves the right to increase the fees set forth in Exhibit B at the beginning of each Renewal Period.