

**JPO02381:SS  
262255-150003**

**02/04/2004 DRAFT dated 2/6/04**

**To: Daniel D. McMillan**

**DIEBOLD ELECTION SYSTEMS, INC.**

**Re: Issues Regarding California Secretary of State Investigation**

**I. BACKGROUND**

During the November 10, 2003 Voting Systems and Procedures ("VSPP") meeting, the VSPP conditionally certified DESI's modified DRE voting system -the AccuVote-TSx (previously AccuVote-TS). The VSPP imposed the following three conditions: (1) DESI pays for an audit of its hardware, firmware, and software currently in use in all counties; (2) DESI cooperates in full with the auditors and the Secretary of State with the internal review of the AccuVote-TSx; and (3) DESI be present and participate in the next public meeting. DESI satisfied the first and third condition, but the VSPP found that DESI did not comply with the second condition because DESI did not meet with the VSPP staff and team of consultants on Nov. 17, and DESI produced certain documents to the VSPP late.

On December 5, 2003, R & G Associates completed its audit and on December 15 they issued a Final Report of their review of California counties using DESI voting systems. The report revealed, among other findings, that DESI had supplied counties with uncertified voting systems that were used in actual elections. On December 16, 2003, at the VSPP public meeting, the president of DESI, Bob Urosovich admitted that DESI was negligent in providing certain counties with uncertified voting systems. Also during that meeting, the VSPP determined that the conditional certification of the AccuVote-TSx remain conditional until further review and analysis is completed.

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The VSPP has continued to investigate DESI's business in California and has recently asked that DESI comply with a document request. The VSPP is trying to determine two things: (1) the magnitude of the modifications/changes that DESI made to its software; and (2) whether DESI *knowingly* supplied California counties with uncertified systems. If the VSPP finds that the changes DESI made to its software had a major impact on California elections and/or if DESI *knowingly* violated election laws, the VSPP will likely withdraw its conditional certification of the AccuVote-TSx and/or report DESI's election law violations to the California Attorney General and/or to the District Attorneys for the affected counties (Lassen, Trinity , and Los Angeles).

## **II. ISSUES AND SHORT ANSWERS**

**A. Issue:** Whether the California Secretary of State can issue a conditional certification of a voting system ( or, of a modified version of a voting system that was previously certified)? **Short Answer:** Probably not. The Secretary of State Procedures for certifying voting systems ("SSP")<sup>1</sup> permit conditional certification, but if the SSP are invalid and without legal effect,<sup>2</sup> the Secretary of State must rely on the California Elections Code, which does not contain any provision allowing for conditional certification. The California Elections Code contains explicit procedures for examining and certifying voting systems.

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<sup>1</sup> The SSP are found in a document located on the Secretary of State's website. The full title of the document is as follows: "Procedures for Approving, Certifying, Reviewing, Modifying, and Decertifying Voting Systems, Vote Tabulating Systems, Election Observer Panel Plans, and Auxiliary Equipment, Materials and Procedures"

<sup>2</sup> The SSP may not be enforceable "regulations" because they have not been reviewed by the Office of Administrative Law or subjected to the rulemaking requirements of the Administrative Procedure Act.

<sup>3</sup> The Secretary of State and VSPP are often used interchangeably throughout this memorandum.

<sup>4</sup> Government Code section 12172.5 provides: "If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elections officer in discharging his or her duties."

<sup>5</sup> Section 19102 provides: "The Secretary of State may investigate any alleged violation of his or her regulations with power to subpoena all necessary records."

<sup>6</sup> Whether withdrawing conditional approval for not satisfying the condition that DESI cooperate with the current investigation is discussed in section III. A. of this memorandum.

The Secretary of State must examine every voting system submitted by vendors without undue delay and issue a report within 30 days after the examination stating whether the voting system is accurate and efficient and can safely be used in elections. *See* Cal. Elec. Code §§ 19202 & 19207. If the Secretary of State's "report states that the voting system can be used, it shall be deemed approved by the Secretary of State and machines or devices of its kind may be adopted for use at elections." Cal. Elec. Code § 19208.

**B. Issue:** Whether the Secretary of State (or the VSPP acting on behalf of the Secretary of State )<sup>3</sup> has authority to investigate alleged violations of the California Elections Code? **Short Answer:** Probably not in this case. The Secretary of State may examine vote-counting computer programs and other records of elections officials that the Secretary of State finds necessary in making his determination that California election laws have been violated, but once the Secretary of State determines that a violation occurred, the Secretary of State must report the violation to the Attorney General or to the appropriate District Attorney. *See* Cal. Gov't Code § 12172.5.<sup>4</sup> In this case, the Secretary of State has already determined that DESI violated the California Elections Code, so the Secretary of State's duty is to notify the proper authority .To the extent the SSP constitute regulations, the Secretary of State may have the authority to investigate violations of those regulations and subpoena any necessary records. *See Cal. Elec. Code § 19102.*<sup>5</sup>

**C. Issue:** Whether the California of Secretary of State can withdraw his approval of a voting? **Short Answer:** Yes. The Secretary of State may withdraw his approval of a voting system if he determines that the voting system is defective, obsolete, or is otherwise unacceptable. *See* Cal. Elec. Code § 19222.

**I. Issue:** Whether the California of Secretary of State can withdraw his *conditional* approval of a voting system without adhering to section 19222 of the California Elections Code? **Short Answer:** Probably (assuming conditional approval is legal). A conditional approval implies that the system is not approved until the condition is satisfied. Thus, if the Secretary of State finds that DESI did not satisfy a condition of approval, then the, system will never receive final approval.<sup>6</sup>

### **III. DISCUSSION**

#### **A. Conditional Certification Of Modified Voting System**

The California Elections Code has separate provisions relating to approval of a new voting system and approval of a change or modification to an approved voting system. Section 19213 of the California Elections Code, pertaining to modifications of voting systems, provides: "When a voting system or a part of a voting system has been approved by the Secretary of State, it shall not be changed or modified until the Secretary of State has been notified in writing and determined that the change or modification does not impair its accuracy and efficiency sufficient to require a reexamination and reapproval pursuant to this article." In this case, DESI modified its AccuVote- TS and is seeking approval from the Secretary of State. According to section 19213, the Secretary of State must determine whether the changes made to the AccuVote- TS, which are incorporated into the AccuVote-TSx, impaired the system's accuracy and efficiency. It is unclear whether the Secretary of State followed the process specified in section 19213.