

THE PURCHASE OF VOTING SYSTEMS IN NEW JERSEY:

HOW GOVERNMENT CAN BETTER PROTECT TAXPAYER RIGHTS AND VOTING SECURITY*

**By the New Jersey Department of the Public Advocate
November 24, 2009**

Introduction

Over the past year, the Department of the Public Advocate (the “Department”) has undertaken an examination of vendor contracts for sale of voting technology and licensing of accompanying software. For this purpose, Sequoia Voting Systems (“Sequoia”), which supplies the majority of voting systems in the State, provided the Department in April 2008 with copies of its voting systems contracts then in effect with the several counties. Our Department subsequently examined the various documents supplied by Sequoia, along with documents obtained from other sources, with the goal of assessing whether these agreements are sufficiently protective of the public interest under general principles of contract law. Prior to this report’s release, we also afforded county purchasing officials, county counsel, and selected state officials an opportunity to comment on the report’s recommendations. We have incorporated into the report some of the constructive suggestions offered in response.

The Department’s inquiry is not related to any debate regarding which particular voting technology (such as DREs, precinct count optical scanners, etc.) is preferable. Rather, in examining these contracts, we endeavored to identify contract terms that might be problematic in a general sense, regardless of the specific good or service to which they applied. Our legal analysis was therefore based upon general commercial law principles, including the provisions of the Uniform Commercial Code (U.C.C.) and common law contracts doctrine.

To summarize, the Department found that there are a variety of areas in which the contractual language is problematic or could be improved to better protect the public interest. We paid particular attention to:

- limitations on warranty provisions,
- limitations on remedies and damages in the event of vendor breach,
- equity in fee structure, especially when a vendor has a “captive buyer” for its exclusive software when the county has already expended considerable capital on purchasing the hardware machines, and

* Prior to the release of this report, we afforded Sequoia Voting Systems, which is a vendor of voting systems in 19 of New Jersey’s 21 counties, an opportunity to comment on an earlier draft of this document. Sequoia provided written comments, which are attached to this report, and for which we thank them. Due in part to their comments, we changed the title of this report from its initial working title. We also carefully considered the remainder of their comments and found that no other revisions to the report were appropriate.

- limitations on transparency and accountability that render the purchasing county at a disadvantage in seeking assurances of adequate performance.

After completing our review of existing contracts, we drafted a “model” contract which we offer for use in future purchases of voting systems or components, additions, or upgrades. The model contract is attached. **The attached model contract should not be viewed as creating an attorney-client relationship or as providing legal advice. Potential users of the model contract should consult with a qualified attorney of their choosing to obtain legal advice before signing any contract.** We also include some additional suggestions for contracting officials to use in drafting procurement documents, all of which should also help protect taxpayers’ interests.

Problems with Existing Contracts

Most of the Sequoia contracts appear to have proceeded from a basic form, although there were noticeable differences among the various contracts with different counties. Typically, the vendor would enter into two types of agreements with a county: (1) a sales contract for the actual voting machine itself (hardware), and (2) a software licensing agreement. As an appendix to this memorandum, we have included a chart illustrating some of the provisions of the various contracts under review. Despite these variations, some common themes emerged.

A. Warranty provisions

One area in which we suggest improvements is in the terms governing the remedies in the event of a failure of voting machines or the software that operates them. The Department’s review of the contracts showed that several had extremely brief warranty periods, with three allowing as little as 30 days from delivery of the relevant software. We believe that a warranty period so short that any defect would not reasonably be discovered -- because no election had yet occurred -- borders on a substantively unconscionable term.

Furthermore, most of the contracts we examined contained a disclaimer of the standard implied warranties, i.e., the implied warranty of merchantability (U.C.C. § 2-314 (2008)) and the implied warranty of fitness for a particular purpose (U.C.C. § 2-315). These warranties, which are included by default in any contract by a merchant for the sale or lease of goods, are an important protection of the end user’s reasonable expectations regarding the quality of the goods. Their disclaimer, while generally permissible, raises important questions on how those reasonable expectations will otherwise be protected, lest the counties, and ultimately the public, be relegated to the more primitive legal concept of “buyer beware.”

The contracts we examined typically replace the U.C.C. implied warranties with a limited express warranty that the item purchased will “function substantially in accordance with the Specification” or is “free from material error that would prevent it from substantially performing as delineated within the software documentation.” In other words, the Seller

is merely promising that the software is substantially similar to whatever the Seller (who of course drafts the technical specifications and documentation) says it is, without any guarantee that those specifications will embrace what a reasonable purchaser would expect from voting technology.

As reflected in the model contract, we recommend that the counties, in purchasing equipment or licensing software, insist on the protections generally afforded all purchasers of goods from merchants, i.e., the warranty that the good is merchantable and thus “fit for the ordinary purposes for which such are used,” and also fit for any particular purpose for which the seller at the time of contracting has reason to know the goods are required. In the case of voting technology, it is self-evident that these purposes embrace the accurate and verifiable recording and counting of votes (as such terms are used in 42 U.S.C. § 15481(a)(1)(A)(i) and N.J. Stat. Ann. § 19:48-1(b)(1)).

B. Remedy Limitations

Even where warranties applied, several contracts had clauses substantially limiting the types and amount of damages that government entities could recover in the event of machine or software failure (e.g., costs of new elections, litigation, etc.). For example, at least 8 of the 21 contracts under review stated that Sequoia’s sole “liability in contract, tort, or otherwise will be to make all necessary adjustments and repairs” (or similar language).¹ Sixteen of the 21 contracts disclaimed liability for damages resulting from “data loss,” an obviously problematic limitation when the machines’ specific function is to count and store votes.² Those same 16 contracts also immunized Sequoia from all consequential damages resulting from machine failure, such as overtime for public employees, the costs of new elections, etc.³ Finally, three of the contracts for the actual voting machines (i.e., the hardware) capped Sequoia’s total liability at \$100,000, or between 1.7 and 3.4 percent of the total contract purchase price.⁴

We understand that a balance must be struck that protects both the public interest in ensuring that taxpayers are protected as well as the contractors’ legitimate concerns about indeterminate, ruinous liability. But a limitation on damages that essentially

¹ See the chart in the Appendix for detail about which of the contracts contained these clauses.

² See footnote 1.

³ See footnote 1.

⁴ See Purchase Agreement between Camden County, New Jersey and Sequoia Voting Systems, Inc., Aug. 19, 2005 (providing in § 21 for a \$100,000 damages cap and a total purchase price in Schedule 1 of \$5,758,900, which equals 1.7 percent of the total contract price); Purchase Agreement Between Atlantic City [sic], New Jersey and Sequoia Voting Systems, Inc., Sept. 23, 2005 (providing in § 21 for a \$100,000 damages cap and a total purchase price in Schedule 1 of \$2,933,230, which equals 3.4 percent of the total contract price); Purchase Agreement Between Passaic County, New Jersey and Sequoia Voting Systems, Inc., dated December 22, 2005 (providing in § 21 for a \$100,000 damages cap and a total purchase price in Schedule 1 of \$4,858,830, which equals 2.1 percent of the total contract price);

deprives the purchasing county of the very “benefit of the bargain” imposes an unjustifiable burden on the county, and thus ultimately the public. See U.C.C. § 2-719(2) (“Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.”) The manufacturer of voting technology is in at least as good a position as the buyer to quantify and allocate the risks that result from defects in its own merchandise, and thus it is not unfair to require it to insure against the consequences of such defects.

Moreover, limitations such as the common exclusions for data loss and consequential damages, along with comparatively low caps on total recovery for the reasonably foreseeable consequences of a defective or unmerchantable product, may also be legally suspect depending on the circumstances. See U.C.C. § 2-719(3) (“Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.”) While it is difficult to draw global conclusions as to whether a particular limitation on damages would be upheld or not if challenged, a balance can be struck that better protects the public’s interest in a meaningful remedy in the event the product does not meet warranty standards.

In sum, the Department believes that these limitations on Sequoia’s liability unfairly prejudice the interests of New Jersey taxpayers. Common law contract principles already provide significant limitations on contract damages for defective goods: (1) the duty to mitigate damages, (2) the requirement that consequential damages be reasonably foreseeable, and (3) the requirement that damages be calculable to a reasonable degree of certainty. The model contract we suggest makes the warranty valid for a period of five years and applies the same warranty period retroactively to previously supplied equipment. In addition, the limitation on data loss liability is removed, and contractors expressly acknowledge that they may be liable for consequential damages resulting from machine failure, such as the costs of new elections, overtime, legal fees, etc.

C. Fee Structure

Under the existing contracts, counties basically pay a set sum for machinery and equipment at the outset of the contractual term and simultaneously pay for a one-year license for firmware and software, with all of these costs being separately itemized. The counties do not appear to have the right to obtain automatic renewal of these licenses and even if they did, the renewal price is solely at Sequoia’s discretion.⁵ If such a license were not in effect on the date of a particular election, counties could be unable to use the machines they had purchased with millions of taxpayer dollars. Because the contractors are the sole source of the licensing rights, it is important to protect the

⁵ See, e.g. Software License between Sequoia and Camden County, August 19, 2005 (stating in Appendix 1 that if a renewal occurs, there are no limitations on what Sequoia may charge provided it gives 60 days notice). As to other kinds of licenses and maintenance agreements, Sequoia has expressly reserved the right not to renew the agreement at its discretion. See Integrity License and Technical Maintenance Agreement between Sequoia and Salem County, Jan. 25, 2007, § 9 (“[Sequoia] has no obligation to renew this Agreement beyond its current [one-year] Term”).

counties' investment in equipment and machinery with assurances about long-term availability of such licensing rights at a fair price, and to prevent vendors from taking unreasonable advantage of captive customers through license fees once the investment in the hardware has been made.

The model contract therefore limits the increase in license fees to 5 percent per year, but allows additional increases in the event the contractor provides certain specified upgrades to the firmware or software. In addition, the model contract contemplates that after paying license fees for five years, counties will thereafter receive a perpetual license to use the product, although the contractor will be under no further obligation to provide upgrades after that time.

D. Transparency and Accountability

Existing contracts bar officials from making meaningful inquiries into why machines malfunction, being relegated instead to vendor-supervised testing procedures. Claims of confidentiality have also impaired the officials' ability to scrutinize the effectiveness of voting systems, with one county official having been threatened with a lawsuit if she proceeded to investigate and independently test the causes of anomalies that occurred in the February 2008 presidential primary.⁶ Contract law generally recognizes the right of the purchaser to demand an assurance of adequate performance when reasonable grounds for insecurity exist. U.C.C. § 2-609. When such reasonable grounds exist, many cases make clear that a unilateral ipse dixit assertion by the vendor that it is performing according to the contract is insufficient, and actual tangible evidence of adequate performance is required.

The model contract addresses this issue in a way that balances county election officials' and the public's rights to assure themselves that the machines work properly with manufacturers' legitimate confidentiality rights. In particular, counties will retain the right to test machines independently should anomalies arise in the course of future elections. Both election officials and independent testers would be precluded from disclosing specified proprietary information or trade secrets identified by the vendor in the contracting process. The model contract thus allows contractors to safeguard legitimately confidential information while at the same time permitting the tests that give election officials and the public the information they need to assure themselves that the election system is working properly.

Miscellaneous Improvements

The attached model contract also contains a number of other improvements. For example, at least four counties' contracts required litigation over contractual disputes to

⁶ Letter dated March 13, 2008 from Edwin B. Smith III, Vice President, Sequoia Voting Systems, to Hon. Joanne Rajoppi, Union County Clerk.

be brought in California or Colorado⁷; here, the forum clauses assure county officials that litigation will be heard by New Jersey courts.

Another improved provision states that any equipment must meet the most recent federal guidelines for voting systems, as opposed to older, 'grandfathered' versions that have been superseded.

* * *

On January 7, 2009, the media reported that state and/or county election officials planned in the near future to purchase printers that would be added on to the existing inventory of Sequoia Advantage DRE voting machines. Subsequent to that announcement, however, the funding for \$19 million of the \$20 million for voting machine upgrades that had been appropriated in the FY09 budget was withdrawn, and the Legislature suspended its mandate for voting systems to have an individual paper record for each vote cast until funding for such a system becomes available.⁸

These and other recent developments leave open a variety of possibilities. In the near term, the State and/or counties may buy new voting machines or upgrade existing machines, solely for a program of testing. In the longer term, when the economy is on a sounder footing, the State and/or counties may buy new machines or upgrade older ones for general use.

In making these acquisitions of new equipment, and in contracting for annual licenses and service agreements, we recommend that county purchasing officials make use of more transparent contracting practices that are also consistent with laws relating to political contribution compliance disclosures (N.J.S.A. 19:44A-20.4 et seq.). The purchase of election equipment and supplies is generally not subject to laws requiring sealed bids, and thus purchasers can use less rigorous processes such as direct, "no-bid" contracts. However, State law does not forbid, and in fact permits, purchasing officials to use more open procedures, referred to under political contribution compliance laws as a "fair and open process." Thus, we recommend that purchasers of voting hardware, software, licenses and services should advertise the availability of these contracts and disseminate the advertisement widely so that suppliers and the public at large can learn of these opportunities to do business with government purchasers. The contracts should be awarded in a manner consistent with the fair and open process, thus guaranteeing the process will be as transparent, or more transparent, than what that law requires. In addition, government solicitations for election services contracts should make clear that the government will accept only

⁷ See Software License Agreement between Sequoia and Union County, October 2007 ("exclusive jurisdiction of the Courts of the State of Colorado" and Colorado choice of law); Agreement Between Sequoia Voting Systems, Inc. and Bergen County, New Jersey Superintendent of Elections Office, May 6, 2005 ("exclusive jurisdiction of the Courts of the State of California" and California choice of law); Integrity License and Technical Maintenance Agreement between Sequoia and Cumberland County, Jan. 8, 2007 (same); Integrity License and Technical Maintenance Agreement between Sequoia and Salem County, Jan. 25, 2007 (same).

⁸ N.J. Stat. Ann. § 19:53A-3.1 (2009).

contracts with the meaningful warranty provisions, narrow damages limitations, fairness in fee structure, and accountability for vendors described in this report.

As a whole, the Department believes the model contract is an improvement for the public and election officials because it controls costs, enhances warranty rights, increases transparency, and does a fairer job of outlining the rights responsibilities of voting system manufacturers and government officials. We therefore recommend that terms drawn from this model agreement be used in any subsequent acquisition of voting systems or voting system upgrades. The Department also urges, to the extent possible, that procurement officials take into consideration the issues we outline in this memo when advertising and ultimately executing contracts for, annual software licenses with the vendor(s) and obtain more favorable terms than may have existed in prior agreements.

Readers of this report who have questions or comments about this or other election administration issues are welcome to contact the Department to discuss them in further detail.

WARRANTY AND REMEDY PROVISIONS IN SEQUOIA CONTRACTS

County	Type and date¹⁰ of Contract	Warranty length	Warranty limitation	Remedy limitation
Atlantic	Technical maintenance and support, 1/8/08	n/a	Implied warranties disclaimed; express warranties limited	Damages limited to payment received by contractor; no recovery for lost data, consequential damages, etc.
Atlantic	Purchase Agreement for hardware and license for software, 9/23/05	1 year from acceptance	Implied warranties disclaimed; express warranties limited	Remedy limited to repair, replacement, or substitution of malfunctioning products; \$100,000 limitation and no recovery for lost data, loss of use, consequential damages, etc.

¹⁰ For purposes of determining the date of the contract, we selected the date printed in the contract, the date the contract was signed, or the date of the county's approving resolution. Not all contracts had this information, and not all the dates matched.

Bergen	Software license, 5/6/05	30 days after delivery	Implied warranties disclaimed; express warranties limited	Damages capped at licensing fee except for "injury to, illness or death of any person caused solely by the negligence of Licensor"; no damages for lost data, consequential damages, etc.; recovery for "loss or damage to any physical property of the Licensee caused solely by the negligence of the Licensor" is allowable (with limitation capped at annual license fee).
Burlington	Election Database Coding, Testing & Election Support, 4/27/06 – RFP and Offer of Contract	n/a	n/a	n/a
Camden	Purchase Agreement for voting systems and license for software, 8/19/05	1 year from acceptance	Implied warranties disclaimed; express warranties limited	Remedy limited to repair, replacement, or substitution of malfunctioning products; \$100,000 limitation and no recovery for lost data, loss of use, consequential damages, etc.

Camden	Integrity Support Agreement, 3/16/07	None	All warranties whatsoever are disclaimed: "No warranty, express or implied, statutory or otherwise, including but not limited to any warranty of fitness for a particular purpose, warranty of merchantability, satisfactory quality, usefulness or timeliness, exists in relation to this Agreement."	Damages capped at total fees paid under agreement except for indemnity obligations, and no recovery for lost data, loss of use, consequential damages, etc.
Cape May	Resolution Authorizing the Purchase of Electronic Voting Machines, 4/25/06	n/a	n/a	n/a
Cape May	Purchase Agreement for voting systems and license for software, 5/25/04	1 year from acceptance	Implied warranties disclaimed; express warranties limited	Remedy limited to correction, repair, or replacement of malfunctioning products; damages limited to purchase price amount and no recovery for lost data, consequential damages, etc.
Cumberland	Integrity License and Technical Maintenance	90 days from installation of software	Implied warranties disclaimed; express warranties limited	Damages capped at annual maintenance fee; no damages for lost data, loss of use,

	Agreement, 1/8/07	enhancements		consequential damages, etc.
Essex	Resolution and Agreement for purchase of voting equipment, software and services, 10/25/05	5 years from acceptance	Implied warranties disclaimed; express warranties limited	Remedy limited to making necessary adjustments and repairs or replacing or substituting equipment; damages capped at \$6.9 million; no damages for lost data, consequential damages, etc.
Hudson	Software license agreement, 4/29/05	Same as agreement term, i.e., one year.	Implied warranties disclaimed; express warranties limited	Damages capped at licensing fee; no damages for lost data, consequential damages, etc. except compensation for "loss or damage to any physical property of the Licensee caused solely by the negligence of the Licensor" is allowable (with limitation capped at annual license fee).

Hudson	Agreement for cartridge reader kits and related services, 11/28/06 ¹¹	n/a	Sequoia “disclaims all warranties, either express or implied, not expressly and specifically set forth herein”; however, there are no warranties expressly set forth	Damages capped at contract value of \$50,000; no damages for lost data, loss of use, consequential damages, etc.
Mercer	Software license agreement, 11/21/06	30 days following delivery of software	Implied warranties disclaimed; express warranties limited. Sole warranty obligation is to “use reasonable efforts to correct any material failure of the Software”	Damages capped at licensing fee except for “injury to, illness or death of any person caused solely by the negligence of Licensor” no damages for lost data, loss of use, consequential damages, etc.; recovery for “loss or damage to any physical property of the Licensee caused solely by the negligence of the Licensor” is allowable (with limitation capped at annual license fee).

¹¹ Note: this agreement may be post-dated, as it bears a date of November 28, 2006 but is intended to provide for “a smooth vote count on election night” for the November 2006 general elections.

Mercer	Support Services and Software License Agreement, 3/26/08	No limit	Implied warranties disclaimed; express warranties limited.	Exclusive remedy is for Sequoia to re-perform improperly performed services; damages capped at \$100,000; no damages for lost data, loss of use, consequential damages, etc.
Middlesex	Resolution for contract for cartridge readers, 5/25/04; Resolution for Software maintenance contract, 8/16/07; Resolution for cartridge reader kit contract, 10/05/06 ¹²	n/a	n/a	n/a

¹² Sequoia did not supply the proposals on which these three contract awards were based; consequently, we cannot determine the warranty length, terms, exclusions, or limitations on damages that may be applicable to these acquisitions.

Monmouth	Purchase agreement and software license, 10/7/05	1 year from date of acceptance	Implied warranties disclaimed; express warranties limited.	Remedy limited to making adjustments and repairs or replacing or substituting equipment; damages capped at approx. \$8.1 million; no damages for lost data, loss of use, consequential damages, etc.
Ocean	Resolution (3/19/08) regarding purchase of voting machines and related software license and maintenance services	No limitation specified	No disclaimer or limitations	No reference to limitations on remedies.
Ocean	Purchase agreement and software license, 8/2/06	1 year from date of acceptance	Implied warranties disclaimed; express warranties limited.	Remedy limited to repair, replacement, or substitution of malfunctioning products; \$100,000 limitation and no recovery for lost data, loss of use, consequential damages, etc.

Passaic	Purchase agreement and software license, 12/22/05	1 year from date of acceptance	Implied warranties disclaimed; express warranties limited.	Remedy limited to repair, replacement, or substitution of malfunctioning products; \$100,000 limitation and no recovery for lost data, loss of use, consequential damages, etc.
Salem	Integrity License and Maintenance Agreement, 1/25/07	90 days from installation of software	Implied warranties disclaimed; express warranties limited.	Damages capped at annual maintenance fee; no damages for lost data, loss of use, consequential damages, etc.
Union	Software license agreement, October 2007	30 days from delivery of software	Implied warranties disclaimed; express warranties limited.	Damages capped at annual license fee; no damages for lost data, loss of use, consequential damages, etc.