

BEFORE THE OFFICE OF THE SECRETARY OF STATE
THE STATE OF COLORADO
1700 BROADWAY, SUITE 200
DENVER, COLORADO 80290

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IN THE MATTER OF PROPOSED
RULEMAKING NOTICED DECEMBER 15,
2015

Colorado Secretary of State

COMMENTS REGARDING PROPOSED ELECTION RULES 11.9.1 THROUGH 11.9.4

COMES NOW Election Systems & Software LLC (“ESS”) and Hart InterCivic, Inc. (“Hart”) and submits the following comments regarding proposed election rules 11.9.1 through 11.9.4:

I. INTRODUCTION

ESS and Hart are business entities that provide voting systems to Colorado counties for use in primary, general and special elections. Both entities presently provide voting systems to various counties in Colorado and support those systems with updated software, maintenance, and other forms of client support. Both have the technology and cutting edge systems available for future election cycles in Colorado.

II. THE PROPOSED RULES WILL STIFLE ECONOMIC COMPETITION AND VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATE CONSTITUTION.

The proposed rules are designed to implement a policy where the voting systems purchased by Colorado counties are sole sourced to one voting system company. In the Secretary’s letter dated December 22, 2015, he announced all counties will be required to purchase future voting systems from one vendor – Dominion.

A. The Proposed Rules Stifle Competition and Will Result in Additional Costs to Colorado Counties.

The PERC committee investigated the cost of implementing a sole source decision. When the four companies responded, the cost proposed by each greatly varied with ESS at \$5million, Hart at \$7 million, Dominion at \$9.5 million, and Clear Ballot at \$13 million. Once the rules are adopted, the Secretary intends to sole source the contract to Dominion, which will result in almost 90% increase in the cost a county must pay to purchase a system from Dominion compared to ESS and 35% increase compared to Hart. By eliminating competition through the free market, the Secretary has eliminated the ability of Colorado counties to bargain and negotiate with multiple vendors to acquire a system at the lowest cost.

More importantly, since the Secretary has already determined which vendor will receive the sole source contract, neither the counties nor the state will be in a position to bargain for the best price and the most cost effective system. In fact, all the bargaining power will be with the sole source vendor because the vendor was chosen before the price is determined. In conjunction with

the necessity to purchase new voting systems no later than 2017, the sole source vendor will be in a position to negotiate a much higher price. Effectively, neither the counties nor the state will be in a position to switch to a competitive market and will by legal necessity be placed in an inferior bargaining position. For this reason alone, the proposed rules should be abandoned.

B. The proposed rule violates the Commerce Clause of the United States Constitution.

Under Article I, Section 8, Clause 3 of the United States Constitution the Congress is empowered to regulate interstate commerce. When a state statute or rule and regulation has the effect of discriminating against out-of-state interests to the benefit of in-state economic interests it is invalid per se. *Southern Waste Systems LLC v. City of Coral Gables*, 687 F.Supp.2d 1342 (S.D.Fla. 2010).

By his letter of December 22, 2015, the Secretary announced he will sole source the voting system contract to Dominion, a company that claims its United States headquarters is in Denver, Colorado. Throughout the PERC committee hearings, Dominion asserted that one of the practical advantages it has over other vendors is the fact its headquarters is in Denver. In other words, it is a domestic Colorado company. The Secretary's interpretation of CRS §1-6-623 and the proposed rules will discriminate against all other vendors which are domiciled in other states, including ESS and Hart.

There are no other factors that legally justify the proposed rules in light of the discriminatory effect the rules will certainly have on out-of-state vendors.

III. C.R.S. ¶1-5-601 et seq. DO NOT SUPPORT A RULE SOLE SOURCING VOTING SYSTEMS TO A SINGLE VENDOR

Colorado's statutory scheme provides for competition between multiple vendors. C.R.S. §1-5-601.5 states that "all voting systems and equipment offered for sale" must meet Federal Election Commission "voting systems standards." That section contemplates multiple voting systems which are eligible for use in Colorado and were in fact in use here when the statute was enacted in 2004 and subsequently amended in 2009.

Section 1-5-603 provides "political subdivisions may adopt for use at elections any kind of voting machine fulfilling the requirements for voting machines set forth in this part 6." The same section specifically addresses the cost issue by allowing counties the discretion to pay for a voting system in a manner that is in the best interests of the county by leasing or purchasing a system and paying for it through debt instruments if necessary. The statute recognizes the counties interest in purchasing a cost effective system.

Section 1-5-608.5(3)(a) requires the Secretary to "certify *and approve the purchase, installation, and use*" of any voting systems that have been tested and approved by a "federally accredited laboratory" and that meet "the requirements of this part 6." This section clearly contemplates that any vendor who meets these requirements may sell voting systems in Colorado.

None of the other sections in Part 6 modifies the clear purpose of section 608.5(3)(a), including CRS §1-6-623.

Section 1-5-612 allows counties to purchase any voting system that the Secretary has certified in accordance with this part 6. In other words, if a voting system is certified, it can be sold in Colorado. Again, this contemplates multiple vendors. In conjunction with the preceding section, the next section places only one prohibition upon county or other local officials. See CRS §1-5-613(2). They are required to purchase a voting system certified by the requirements of Part 6. Precluding qualified systems for the sole purpose of limiting the available vendors to only one is in contravention of the clear purpose and spirit of Part 6.

Even CRS §1-5-616, the statute granting the Secretary the authority to adopt rules and regulations regarding certification of voting systems pursuant to the requirements listed in subsection (1) cannot be interpreted as a basis for sole sourcing all voting systems to one vendor. The statute contemplates general requirements that apply to all vendors. Nowhere in that section is the Secretary authorized to preclude a qualified and certified vendor from selling voting systems in Colorado.

Section 1-5-617 gives the Secretary one hundred twenty days to certify a voting system submitted to him for that purpose. This section allows any vendor to apply for certification and the Secretary is required to proceed through the certification process. Subsection 5 allows counties to purchase any certified voting system by requesting approval of the Secretary. If successful, the vendor may sell its voting system in Colorado. The Secretary's oversight role contemplated by this section is to insure the counties are purchasing a certified system. Sole sourcing all voting systems to one vendor undermines the purpose of this section and the entire statutory scheme found in Part 6.

CRS §1-5-623 did not amend or revise the certification requirements found in the sections of Part 6 outlined above and it certainly does not authorize the Secretary to limit the purchase of voting systems to one vendor.

IV. CONCLUSION

The Commerce Clause of the United States Constitution as well as the existing Colorado statutes dictate that the proposed rule be abandoned or significantly modified to allow for multiple certified companies to sell their respective voting systems in Colorado.

Respectfully submitted this 14th day of January, 2016

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