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ELECTIONS
CO SECRETARY OF STATE

July 17, 2021

To The Colorado Secretary of State, County Clerks and Recorders

This is addressed to the Colorado Secretary of State (SoS) and the various county clerks and recorders (CCRs) in the State of Colorado. It also is relevant to the county commissioners in all counties. It relates to actions of the Colorado SoS that might have legal consequences to her, as well as to the CCRs and commissioners in regard to voting equipment for which they have various responsibilities under Colorado law. The purpose of providing this information is to alert the SoS, the CCRs and the commissioners of the apparent facts so that they might avoid taking any actions that could have negative legal consequences for them.

Relevant Provisions of the Colorado Revised Statutes

C.R.S. 1-5-608.5 is the provision of Colorado law that governs the testing and certification of voting systems statewide. It requires the SoS to use a “federally accredited laboratory” to test voting systems to be used in Colorado. It does not authorize certification of systems that have not been so tested. The provision acknowledges that the systems so certified by the SoS will be used by the CCRs throughout the state in administering elections.

The federal agency that accredits such laboratories is the United States Election Assistance Commission (USEAC). See 52 U.S.C. sec. 20971.

Various provisions of the Colorado Revised Statutes impose duties on CCRs and other county officials in regard to the acquisition and proper use of voting systems. For example, C.R.S. 1-5-617(5) (county election officials purchase voting systems based on SoS’ representation that the systems have met state certification requirements); C.R.S. 1-5-603 and 1-5-613(2) (county commissioners must approve the use of voting systems only if they meet the legal requirements described above); C.R.S. 1-6-612(1) and (2) (county commissioners are responsible for insuring the voting systems and any upgrades comply with the rules described above).

C.R.S. 1-13-107 and 1-13-723 provide it is a misdemeanor offense for a public officer or election official to violate any duty under the election code.

As explained below, it appears that the SoS certified election systems for use in Colorado on the basis of testing conducted by a laboratory when that laboratory did not have an applicable accreditation from the USEAC. This would appear to violate the above Colorado statutes. The SoS also appears to have instructed teams of her staff and the various CCRs to assist representatives of the provider of the voting systems to install software into the systems, some parts of which were tested by that same laboratory at

a time when it did not have accreditation by the USEAC. That activity appears to have occurred during 2021 and continues at this time.

Relevant Facts

1. On 7 Jun 2019, CO SoS Griswold certified DVS Democracy Suite 5.11-CO (<https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/certificationLetter.pdf>) in response to an Application for Modification of a Voting System, dated 6 June 2019 (<https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/finalApplicationForCertification.pdf>). That certification letter cited C.R.S. 1-5-608.5, (which states that "(1) A federally accredited laboratory may test, approve, and qualify electronic and electromechanical voting systems for sale and use in the state of Colorado"), appearing to confirm that SoS Griswold knew federal accreditation of the laboratory was a requirement. The certification letter stated, "Pro V&V, a federally accredited voting-system testing laboratory [VSTL], tested Democracy Suite 5.11-CO in accordance with the test plans my office approved on May 20, 2019 and May 23, 2019. My office also reviewed Pro V&V's test reports dated June 3, 2019 and June 7, 2019, and the Colorado requirements matrix completed and transmitted by Pro V&V on June 4, 2019,"

2. We are not aware of any evidence that Pro V&V was an accredited VSTL when it tested DVS D-Suite 5.11-CO (nor when it tested ClearBallot Group (CBG) ClearVote 2.1) in 2019.

a. The information we have obtained indicates that Pro V&V was accredited by the USEAC in February 2015; and that the accreditation expired in February 2017. (https://www.eac.gov/sites/default/files/voting_system_test_lab/files/Pro_VandV_accr_education_certificate_2015.pdf).

b. The information we have obtained further indicates that the next time Pro V&V was accredited by the USEAC was in February 2021. (https://www.eac.gov/sites/default/files/voting_system_test_lab/files/Pro%20V%26V%20Accreditation%20Certificate.pdf)

c. The information we have obtained indicates that Pro V&V's accreditation could continue past its 2017 expiration date if the USEAC lacked a quorum and, therefore, could not re-accredit. However, it appears that during much if not all of the period when Pro V&V's accreditation seems to have expired, the USEAC had a quorum of commissioners. The accreditation seems to have remained expired until it was renewed

in 2021, despite the fact that the USEAC had a quorum of commissioners through the majority of that period, accrediting other VSTLs (e.g. SLI Compliance, of Colorado) and certifying voting systems with that same quorum. (

https://www.eac.gov/sites/default/files/voting_system_test_lab/files/SLI_Compliance_Certificate_of_Accreditation011018.pdf)

d. We have no information indicating that the Colorado SoS made any attempt to confirm that Pro V&V's accreditation was effective after the 2017 expiration, even though it was her legal duty to insure that Colorado voting systems were tested by a federally-accredited laboratory.

3. On 26 April 2021, CO SoS Griswold certified DVS Democracy Suite 5.13 (<https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite513/certificationLetter.pdf>), citing C.R.S. 1-5-608.5, and on the basis of a test report from Pro V&V, dated 23 April 2021.

4. The 23 April 2021 Pro V&V test report indicates, in Table 2.0. "D-Suite 5.13 COTS Components," that multiple components (17 of 25 components) of D-Suite 5.13 were not tested by Pro V&V in April, 2021, but that Pro V&V relied upon testing conducted on those components in the "D-Suite 5.11-CO" test campaign. The latter testing occurred during the period when Pro V&V appears not to have been accredited by the USEAC. (<https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite513/testReport.pdf>)

5. During 2021 the SoS and her staff have instructed CCRs around Colorado to permit voting systems to be "upgraded" by employees or agents of the systems' vendors. For example, Jessi Romero, Voting Systems Manager in the SoS' office, engaged in communications with CCRs issuing instructions to the CCRs and otherwise driving this activity.

Conclusions

A. Pro V&V does not appear to have been a federally-accredited VSTL in 2019, when it conducted certification testing on the Dominion Voting Systems (DVS) Democracy Suite (D-Suite) 5.11-CO voting system, nor in 2020, when it conducted certification testing on Clear Ballot Group ClearVote 2.1 voting system.

B. The Colorado SoS appears to have violated C.R.S. 1-5-608.5 by certifying those two voting systems, since they had not been tested by a federally-accredited VSTL prior to her certification.

C. The Colorado SoS appears to have violated C.R.S. 1-5-608.5 by certifying D-Suite 5.13, since the certification test report states that it relied upon testing conducted by Pro V&V when they did not appear to have a valid VSTL accreditation from the USEAC.

D. CCRs and county commissioners may violate their duties under Colorado election laws if they permit the installation on voting systems of software or any other component of the systems that was not tested and certified as required by Colorado law. Any such violations might be a misdemeanor.

Sincerely,

Maurice Emmer
Aspen, Colorado

Redacted by SOS

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