

JP002381:SS
262255-150011
11/24/2003

To: Daniel D. McMillan

DIEBOLD ELECTION SYSTEMS

Re: Alameda County Agreement

I. INTRODUCTION

On July 29, 2003, Jim March submitted a California Public Record Act Request to Alameda County requesting certain information about the voting system supplied by Diebold Election System, Inc. ("Diebold"). Since that time, much public scrutiny has been given to whether Diebold and other suppliers of voting systems have failed to comply with the certification requirements of the California Elections Code concerning updates or new versions of the voting systems. Specifically, Mr. March believes that Diebold violated the California Elections Code by providing Alameda County with an uncertified voting system or uncertified updates to the originally supplied system, which Alameda County used in the November 2002 primary election and again during the October 2003 election. On November 7, 2003, an attorney representing Mr. March submitted a Public Records Act request to Alameda County seeking the version numbers of Diebold software and/or firmware that were specified in the Agreement between Diebold and Alameda County (hereinafter referred to as "Agreement").

Diebold entered into the Agreement with Alameda County on May 23, 2002. The Agreement generally provides that Alameda County will purchase an electronic voting system from Diebold. The voting system, as defined in the Agreement, includes the AccuVote-TS and AccuVote-OS voting units and the GEMS software, along with all other hardware, software, and

firmware, equipment, devices, materials, and documentation.¹ Pursuant to the Agreement, Diebold agreed to comply with all applicable federal, state, and local laws and regulations. This memorandum briefly discusses the applicable California law regarding certification of voting systems and identifies provisions of the Agreement that Alameda County might contend were breached if it was provided with an uncertified voting system. This memorandum does not analyze potential defenses or counter arguments that can be made by Diebold (e.g., the Secretary of State's failure to establish or enforce specific regulations requiring certification of new versions, etc.). Instead, the memorandum focuses on the potential arguments that might be made by Alameda County.

II. ISSUES AND SHORT ANSWERS

A. Issue: Whether the use of an uncertified voting system is illegal? **Short**

Answer: Yes. All voting systems must be approved by the Secretary of State before use in any election. *See* Cal. Elec. Code § 19201.

B. Issue: Whether Diebold breached the Agreement if it provided Alameda County with an uncertified voting system? **Short Answer:** Most likely. If Diebold provided Alameda County with an uncertified voting system that was used in an election, then Diebold most likely breached provisions of the Agreement requiring Diebold to comply with all applicable laws.

C. Issue: What are the consequences if Diebold breached the Agreement? **Short**

Answer: If Diebold materially breached the Agreement, Alameda County can terminate the Agreement and sue for damages.

¹ Paragraph 40 provides: "As used in this Agreement, the term 'System' means the Hardware, Software, and Firmware, Equipment, devices, Materials, and Documentation which comprise AccuVote-TS and AccuVote-OS and GEMS, as well as the Services and training provided by Contractor in connection with delivery, installation, use, and maintenance of the same. The System is more fully described in Exhibit A-1 and A-2."

III. ANALYSIS

A. Certification Of Voting Systems

The Secretary of State must approve a voting system before it may be used in any election. See Cal. Elec. Code § 19201 (“No voting system, in whole or in part, shall be used unless it has received the approval of the Secretary of State, prior to any election at which it is to be first used.”). Once the Secretary of State approves a voting system, the system may not be changed or modified until the Secretary of State is notified and determines that the change does not impair the system’s accuracy or efficiency. See Cal. Elec. Code § 19213.² Additionally, the Secretary of State regulations for approving and certifying voting systems specifies that no system or part of a system may be used in an election unless it has been certified by the Secretary of State. See Secretary of State, *Voting Systems Certification Procedures*, Art. 10, §1003 available at http://www.ss.ca.gov/elections/vsp_procedures.pdf (2000) (“No system, material, equipment, or procedure, in whole or part, may be used in elections in California unless it has received the approval of and has been certified for used by the Secretary of State.”).³

B. Breach Of Contract

Alameda County may argue that sections 19201 and 19213 of the California Elections Code are “applicable laws” incorporated into the Agreement, and Diebold’s violation of these laws constitute a breach of the Agreement. In general, all applicable laws in existence when an

² “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. The Secretary of State may adopt rules and regulations governing the procedures to be followed in making his or her determination as to whether the change or modification impairs accuracy or efficiency.” Cal. Elec. Code § 19213.

³ The full title of the document is: “Procedures for Approving, Certifying, Reviewing, Modifying, and Decertifying Voting Systems, Vote Tabulating Systems, Election Observer Panel Plans, and Auxiliary Equipment, Materials, and Procedures.”

agreement is made are incorporated into the agreement. *See, e.g., Swenson v. File*, 3 Cal. 3d 389, 393 (1970) (“all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated”); *White v. Davis*, 108 Cal. App. 2d 197, 230-31 (2002) (same); *Alpha Beta Food Markets, Inc. v. Retail Clerks Union Local 770*, 45 Cal. 2d 764, 771 (1955) (same). Alameda County will maintain that sections 19201 and 19213 are incorporated into the Agreement because they were in existence when the parties executed the Agreement.

Additionally, Alameda County can argue that, in this case, the Agreement expressly incorporates all applicable laws. Alameda County will point to the following provisions of the Agreement as evidence of the parties’ intent to incorporate all applicable laws, including sections 19201 and 19213 of the California Elections Code:

- **Paragraph 6, section A:** “Contractor shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal, and local governing bodies, having jurisdiction over the scope of services or any part hereof, including all provisions of the Occupational Safety and Health Act of 1979 and all amendments thereto, and all applicable federal, state, municipal, and local safety regulations. All services performed by Contractor must be in accordance with these laws, ordinances, codes and regulations. Contractor shall indemnify and hold County harmless from any and all liability, fines, penalties and consequences from any noncompliance or violations of such laws, ordinances, codes and regulations.”
- **Paragraph 9:** “Nothing contained in this Agreement shall be construed in any manner so as to require or permit any act that is prohibited by law.”
- **Paragraph 34, section C:** “All equipment and products by or through Contractor shall at all times conform with all applicable federal, State and local laws, regulations, ordinances, resolutions and other requirements.”
- **Paragraph 38, section C:** “The System to be delivered under this Agreement shall be new when delivered and in accordance with all specifications as stated in this Agreement; and *shall be in the same configuration as has already been certified for this System by the California Secretary of State.*” (emphasis added)

- **Paragraph 43, section E:** “Contractor warrants that the System and services provided pursuant to this Agreement shall conform with all applicable federal, State and local statutes, codes, ordinances, resolutions and other regulations, and shall be fit for the purpose of properly conducting all federal, State and local government elections.”
- **Exhibit A-1, Paragraph L:** “Contractor warrants that that Software version licensed to the County during the term of this Agreement, and *any California certified Upgrades* to that version, will operate with the County’s contemporaneously purchased touch screen Hardware System configuration for the term of this Agreement.” (emphasis added)
- **Exhibit A-1, Paragraph P:** “During the term of any *Software License Agreement*, Contractor shall provide California certified Upgrades to licensed Software as well as on-going support for all licensed System Firmware, and Software in accordance with this Agreement and attached Exhibits. During the term of this Agreement, Contractor shall provide on-going support for all System hardware pursuant to the Initial or any Extended Warranty, or Exhibit J.” (emphasis added)
- **Exhibit E, Paragraph 1.9:** “The annual Software License Fee includes *all California certified System maintenance support*, and Firmware, Software Upgrades provided to the County at no additional cost, including but not limited to, Upgrades required to comply with legislative changes. *Contractor agrees to provide County with California certified Upgrades and updates as they are developed*, so long as the County maintains its Software license by paying the annual Software License Fee. It shall be County’s option whether or not to implement such Upgrades. *Software Upgrades shall be in compliance with California Secretary of State certification*. It is County’s responsibility to test these Upgrades to insure compliance with County requirements.” (emphasis added)
- **Exhibit I, Paragraph 1.5:** “Contractor shall provide County training materials and all other documentation at no additional cost to County for *California certified releases of all the System Software provided to the County. . . .*” (emphasis added) Contractor shall use best efforts to correct any reproducible error. Suspected error conditions shall be investigated and corrected by Contractor personnel at Contractor’s office to the extent possible. Contractor may provide the County with unsolicited error corrections or changes to the Software, which Contractor determines are necessary for proper operation of the System Software, and upon County approval, County shall incorporate these corrections or changes into the System within thirty (30) days of receipt from Contractor.”
- **Exhibit I, Paragraph 1.6:** “*Contractor shall inform County of and provide all California certified System Software Upgrades and New Releases in consideration* for annual Software License Fee, including but not limited Upgrades required to comply with legislative changes.

(emphasis added) Releases shall include electronic documentation of changes to System Software.”

- **Exhibit K, Paragraph 1.2:** “Contractor shall deliver to the escrow agent the latest California certified version of the System Software source code within ten (10) days after the effective date of the Agreement. Contractor shall deliver updated California certified System Software source code to the escrow agent as necessary, throughout the life of the System so that the System Software source code in the custody of the escrow agent will be the then current version reflecting all California certified changes and updates and all related documentation.” (emphasis added)

If Diebold provided Alameda County with an uncertified voting system, or failed to notify the Secretary of State of any upgrades or changes to the voting system, then Diebold most likely breached at least some of the above provisions of the Agreement.

Alameda County might also argue that if Diebold supplied Alameda County with an uncertified voting system, Alameda County is not required or permitted to perform under the Agreement and violate the California Elections Code. Therefore, Alameda County might argue that Diebold’s violation of the California Elections Code constitutes a material breach of the Agreement because neither party may continue to perform under the Agreement without violating the law.

C. Consequences Of Breach

Alameda County might argue that Diebold’s delivery of an uncertified voting system is a material breach of the contract, which allows Alameda County to terminate the Agreement and sue for damages. *See* Agreement ¶ 49 A.⁴ The Agreement does not define “material breach,” but a breach is generally material if it is a substantial breach. *Blacks Law Dictionary* 183 (7th ed.

⁴ Paragraph 49 A provides: “Either party may terminate this Agreement upon material breach or substandard or unsatisfactory performance by the other party and failure by that party to cure said breach within thirty (30) days of its receipt of written notice thereof. Upon the expiration of said notice, except where otherwise noted, this Agreement shall become of no further force or effect whatsoever and each of the parties hereto shall be relieved and discharged herefrom.” Alameda County also has a right to terminate the Agreement for its convenience – *i.e.*, without cause. *See* Agreement ¶ 49 C. If Alameda County decides to terminate the Agreement for its convenience, it must provide Diebold with 30 days notice and give Diebold an opportunity to consult with the County. *See id.*

1999) (defining material breach as “[a] substantial breach of contract, usually excusing the aggrieved party from further performance and affording it the right to sue for damages”). If Alameda County decides to terminate the Agreement for a material breach, it must give Diebold 30 days to cure the breach. *See* Agreement ¶¶ 49 A & B.⁵ Thus, Alameda County would have to give Diebold 30 days to obtain certification from the Secretary of State. But, if Diebold begins the certification process diligently within 30 days, Alameda County must to give Diebold a reasonable amount of time to obtain certification. *Id.* ¶ 49 B. If Diebold ultimately fails to cure the breach (*i.e.*, obtain certification), Alameda County can terminate the Agreement and sue Diebold for damages. In general, the Agreement provides that Diebold is liable for all damages resulting from its breach, except that the damages may not exceed the total price for the system. *See id.* ¶¶ 50 B & C.⁶ Additionally, Alameda County can terminate the Agreement and enter into a contract with another contractor for the purchase of a similar voting system. *Id.* ¶ 50 A.⁷

⁵ Paragraph 49 B provides: “If the breach cannot reasonably be so cured within the cure period, and if diligent efforts to cure the alleged breach are commenced within the cure period, and are continued until the cure is completed, which shall be within a reasonable time, then this Agreement shall not be terminated for said breach. Either party may terminate this Agreement immediately upon notice to the other party if the other party becomes insolvent, makes a general assignment for the benefit of creditors, permits the appointment of a receiver for its business or assets, or becomes subject to any proceeding under the bankruptcy or insolvency law.” If the County were intent on immediately terminating the Agreement, it might argue that the breach is not curable and that it therefore is futile to pursue the steps specified in the Agreement. For example, the County might argue that conducting an election with an uncertified system is itself a violation of the law that cannot be cured.

⁶ Paragraph 50 B provides: “Upon termination for breach by Contractor, Contractor shall be liable for all damages resulting from the default, including, without limitation, either the difference between the System price and the amount actually expended by County to complete the System, or the difference between the value of the System as existing on the termination date and the amounts theretofore paid and/or owing to Contractor under the Agreement. Contractor shall also remain liable for any other liabilities and claims related to the Agreement. For purposes of this Agreement, the value of the System shall mean the sum of the prices of the items listed in Exhibit A-2, as quoted to the County in the Contractor’s Response to the County’s Request for Proposal #003-1-7459 and Addendum No. 1, for only those component parts of the System that have passed Acceptance Tests. The foregoing notwithstanding, damages shall not exceed the total System price called for under this Agreement.”

Paragraph 50 C provides: “Upon termination for breach by Contractor, the County may also bring any suit or proceeding to recover damages or to obtain any other relief, or for any other lawful purpose under this Agreement.”

⁷ Paragraph 50 A provides: “Upon termination for breach or substandard or unsatisfactory performance by Contractor, County will have the right, but not the obligation, to contract with another contractor for the supply of a comparable System or to acquire the functionality called for by this Agreement by whatever method it deems expedient so long as it does not violate any of the intellectual property rights or license rights conveyed or restricted under this Agreement.”

IV. CONCLUSION

In sum, if Diebold provided Alameda County with an uncertified system, or an uncertified change to a system, then the County might argue that Diebold violated sections 19201 and/or 19213 of the California Elections Code, which in turn triggers a breach of the Agreement. And, if Diebold's actions constitute a material breach of the Agreement, Alameda County may seek to terminate the Agreement and sue Diebold for damages. Diebold will have a number of arguments that it can make to counter the propriety of a termination. However, Diebold needs to understand the contractual risks it faces in the event uncertified systems or updates were provided. Moreover, any public statements admitting that uncertified systems or versions were supplied by Diebold to Alameda County (or other clients) might be used as evidence against Diebold to justify termination of its Agreement.

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