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November 16, 2009

OUR FILE NO. 009716 -

**By Email and Federal Express**

Ronald K. Chen, Public Advocate  
Department of the Public Advocate  
240 West State Street  
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Trenton, NJ 08625-0851

Re: Forthcoming Report by the Department of the Public Advocate Regarding Voting  
System Acquisition Contracts

Dear Mr. Chen:

Thank you for your letter of November 9, 2009, and enclosures, as well as for affording Sequoia Voting Systems, Inc. ("Sequoia") the opportunity to comment on the draft report and related documents. Please be advised that Sequoia desires that this letter be published along with the Public Advocate's final publication of the report.

We fully understand that this report is prepared in furtherance of the Public Advocate's obligation to protect the public interest in voting machine acquisition contracts, and our comments below are not intended as a criticism of this effort. Our comments do, however, address the practical and legal realities facing voting systems manufacturers and, indeed, manufacturers of technology products generally.

*Thirty-Nine Years of Service*

Our comments are as follows:

- Title: The title of the report references "aggressive demands" from "private contractors" that "impair taxpayer rights and voting security." The title itself prejudices the contents of the report and, we believe, unfairly maligns both Sequoia and the purchasing personnel of the various counties involved with these contracts. During the negotiation of voting system contracts with Sequoia, the counties have been represented by experienced and competent counsel who fully understand the realities of commercial technology contracts. The referenced contracts are not the result of "aggressive demands" by Sequoia, but rather the result of a negotiation process between sophisticated parties.

- Warranty Provisions:

- (a) Software Warranty: As a review of software license agreements currently used in the software industry will confirm, software typically carries a brief initial warranty period during which the buyer may confirm that the software operates in accordance with specifications previously reviewed and approved by the buyer. Issues arising after the warranty period are addressed under related maintenance and support contracts. The 30 day period referenced in the report is within the standard of the industry and affords a county time to install and test the software. In light of this general industry practice, use in the report of the term "unconscionable" is inappropriate and inapposite. The principle of unconscionability "is one of the prevention of oppression and unfair surprise ... and not of disturbance or allocation of risks because of superior bargaining power." Comment 1 to N.J.S.A. 12A:2-302 (internal citation omitted). Given the ability of the counties to obtain software maintenance and support, the general standards prevailing in the software and technology industries, and the clarity of the provision, there has been neither oppression nor unfair surprise.

- (b) Disclaimer of Implied Warranties:

- (i) Warranty of Fitness for Purpose: This implied warranty is applicable only where the buyer is putting the product to a "particular purpose" and is relying on the seller to know of this purpose and fulfill its requirements. Comment 2 to N.J.S.A. 12A:2-315 states as follows:

"A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business...."

Inclusion of an implied warranty of fitness for purpose would require Sequoia or any other vendor to somehow intuit the intention of a county to use the voting system for other than its clear intended purpose (i.e., recordation and tally of votes

during an election). If a county intends any other purpose, the county should clearly state that purpose in the contract rather than expecting the vendor to be clairvoyant. For this reason, this implied warranty is commonly disclaimed in nearly all product warranties, particularly warranties for technology products.

(ii) Warranty of Merchantability: Many aspects of the warranty of merchantability (as defined in N.J.S.A. 12A:2-314) are intended to apply to the bulk sale of goods. These requirements include conforming to the contract description, being of average quality, running within specified variances, being adequately labeled and packaged and conforming to the promises made on the container labels. Clearly these aspects are inapplicable to technology products.

The remaining standard of being "fit for the ordinary purposes for which such goods are used" provides very limited protection to the buyer, effectively stating that the products are what they purport to be. (See Comment 8 to N.J.S.A. 12A:2-314). Moreover, this warranty is effective only on the date of transfer and does not address subsequent problems with the purchased product (see Herbstman v. Eastman Kodak Co. 68 N.J. 1, 8 (1975)).

The express warranties provided by Sequoia with respect to its equipment typically provide protection for an extended period of time, and in many cases for a period of years. Disclaimer of the warranty of merchantability, which once again is extremely common, serves to eliminate any inconsistency and to leave the buyer with certainty as to the warranty terms for the product.

- Liability Limitation: As noted in the Public Advocate's statement, vendors have a legitimate concern about indeterminate liability resulting from sales of their products. To address this issue, technology contracts typically limit the seller's liability. The buyer's interests are protected by the express warranty terms, as well as the availability of support and maintenance offered by the manufacturer. Sequoia, like any other vendor of technology products, takes this potential liability into account in determining the purchase price for its products. Requiring a vendor to assume the liability of an insurer for unlimited consequential damages would result in a significant increase in the prices of its products, which is clearly not in the public interest.
- Fee Structure: Fees are negotiated with sophisticated county purchasing personnel. Sequoia has in fact contracted with New Jersey counties where the contract does cap fee increases for subsequent years.<sup>1</sup>
- Transparency and Accountability: Before Sequoia makes its voting system available for use by its customers, the hardware and software components are subject to months of

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<sup>1</sup> See for example, the 2005 WinEDS Software Agreement between Sequoia Voting Systems and County of Essex.

extensive testing to rigorous federal Election Assistance Commission ("EAC") specifications by federal testing laboratories licensed and overseen by the EAC. The scope and duration of the testing frequently results in the vendors incurring hundreds of thousands of dollars in testing costs to secure federal certification.

In addition to the federal certification process, voting systems are typically subject to additional state certification processes for each state where they will be used, as was recently conducted by the New Jersey Institute of Technology with respect to Sequoia's products as part of the State of New Jersey's voting system certification process.

The scope and sophistication of testing performed to obtain EAC certification, and subsequent review of that certification and/or additional state level testing by the various states, is far more detailed and rigorous than any testing likely to be conducted by a county.

Moreover, there is no assurance that tests conducted by a county would have the prerequisite scientific or engineering validity to make the test results both accurate and relevant. Testing to uncertain standards can in no way equal the rigorous certification testing previously conducted, and could result in unfounded or uncertain results which could unfairly undermine the confidence of the public in election results.

While of little practical value to the public, this testing, particularly given the provisions of the Public Advocate's proposed agreement, would serve to severely impair or destroy Sequoia's legitimate intellectual property rights in its products.

For the reasons noted above, the Public Advocate's proposed form of contract would be unacceptable not only to Sequoia, but we believe to any vendor of technology products.

Very truly yours,



Adolph A. Romei

AAR:per