

## **Provision of Proprietary Maintenance, Support and Associated Goods & Services for Vote Counting Equipment from Election Systems & Software (ES&S)**

<b>Date:</b>	October 25, 2013
<b>To:</b>	Government Management Committee
<b>From:</b>	City Clerk and Director, Purchasing and Materials Management
<b>Wards:</b>	All
<b>Reference Number:</b>	

### **SUMMARY**

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The purpose of this report is to request authority, under Toronto Municipal Code 195-9B, to enter into a single source agreement with Elections Systems & Software, Inc. (ES&S) for the continued maintenance and support of existing vote counting equipment and associated goods and services for the successful delivery of an election, in the amount of \$1,366,000 net of HST and \$1,390,041.60 net of HST recoveries, for a period of four years from January 1, 2014 to December 31, 2017.

Although the original agreement with ES&S provided support for a period of 15 years (the expected life cycle of the equipment), ES&S has agreed to support the City's equipment through to 2018 while the City determines how and when to move forward with the replacement of the voting counting equipment.

A new single source agreement is critical for the delivery of the 2014 election and any subsequent by-elections. Without a new contract the Clerk will be unable to use the equipment or any of the ES&S services for the 2014 election.

ES&S is the single source provider for the maintenance, materials and services, and software product for the vote counting equipment, and has sole access to the proprietary intellectual property.

## RECOMMENDATIONS

**The City Clerk and Director, Purchasing and Materials Management Division recommend that:**

1. City Council authorize the City Clerk to negotiate and enter into an agreement, with Election Systems and Software Inc. (ES&S) for the maintenance and support of vote counting equipment and the supply of their associated goods and services, in the amount of \$1,366,000 net of HST and \$1,390,041.60 net of HST recoveries, for a period of four years from January 1, 2014 to December 31, 2017 on terms and conditions satisfactory to the City Clerk and in a form satisfactory to the City Solicitor.

## Financial Impact

The total value of the agreement identified in this report is \$1,366,000 net of HST and \$1,390,041.60 net of HST recoveries

The following chart identifies estimated costs for ES&S goods, services, maintenance and rentals for the period of January 2014 to December 2017:

	2014 (net of HST)	2015 (net of HST)	2016 (net of HST)	2017 (net of HST)	4 year total (net of HST)	4 year total (net of HST recoveries)
Software maintenance	\$21,000.00	\$23,000.00	\$26,000.00	\$28,000.00	\$98,000.00	\$99,724.80
General Election	\$748,000.00				\$748,000.00	\$761,164.80
Potential By-elections		\$520,000.00			\$520,000.00	\$529,152.00
Grand Total					\$1,366,000.00	\$1,390,041.60

Funding for the 2014 General Election is included in the 2014 Operating Budget Submission for City Clerk's Office. , recovered from the Election Reserve. Funding for the subsequent years (2015-2017) will be included in 2015-2017 Operating Budget Submissions for City Clerk's Office.

Section 7(1) of the *Municipal Elections Act, 1996, (MEA)*, states "the costs incurred by the clerk of a local municipality in conducting an election shall be paid by the local municipality".

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

## DECISION HISTORY

At its meeting of March 2, 3 and 4, 1999, Council approved the 1999-2003 Capital Works Program which included \$13.05 million for the acquisition of a vote counting system.

To view the report on-line follow the link below:

<http://www.toronto.ca/legdocs/1999/agendas/council/cc/cc990302/sp3rpt/cl001.htm>

At its meeting of June 9, 10 and 11, 1999, Council approved the use of vote counting equipment, and on September 28 and 29, 1999, granted the City Clerk authority to enter into a contractual Master Rental and Services Agreement (Master Agreement) with ES&S, the successful proponent in the Request for Proposal (RFP No. 3412-99-01464) for a vote counting system including programming, training and associated materials. To view the reports on-line follow the link below:

<http://www.toronto.ca/legdocs/1999/agendas/council/cc/cc990609/cs6rpt/cl025.htm>

<http://www.toronto.ca/legdocs/1999/agendas/council/cc/cc990928/adm5rpt/cl001.htm>

At its meeting of July 25, 26 and 27, 2006, Council approved the amendment of the Master Agreement to reduce the indemnity requirements to more accurately reflect the business relationship between the City and ES&S and in exchange the City received favourable terms and conditions for the ongoing maintenance and support of the equipment and expects to realize cost savings from now until the end of the term of the agreement. To view the reports on-line follow the link below:

<http://www.toronto.ca/legdocs/2006/agendas/committees/adm/adm060704/it011.pdf>

<http://www.toronto.ca/legdocs/2006/agendas/committees/adm/adm060704/admdd.pdf>

<http://www.toronto.ca/legdocs/2006/agendas/council/cc060725/cofa.pdf>

## **ISSUE BACKGROUND**

On February 3, 2000, Council enacted by-law 79-2000 which authorized the use of vote counting equipment for its municipal elections.

In February of 2000, the City entered into a Master Agreement to acquire electronic election equipment and software for the purpose of carrying out City elections. In the same Master Agreement, the City also acquired maintenance and support from ES&S for a period of 15 years, the expected life cycle of the equipment.

When the Master Agreement was originally drafted, it was contemplated that from time to time the parties would reconsider the cost of maintenance and support and amend the Master Agreement accordingly. For this reason, the cost of the services was only identified to include 2004, even though the obligation for ES&S to support the equipment runs until 2015. Given the proprietary nature of the equipment and software, ES&S is the only vendor that can provide this service.

On August 31, 2006, the Master Agreement was amended to further define the hardware maintenance schedule to cover election years from 2006 to 2014, and to reduce the amount paid by the City to ES&S for maintenance in non-election years, until the 2014 regular election.

Although the Master Agreement provided support for a period of 15 years, ES&S has agreed to support the City's equipment through to 2018 while the City determines how and when to move forward with the replacement of the voting counting equipment.

## COMMENTS

It is in the public's interest for the City to produce timely, accurate and reliable results as soon as possible after the election. In each of the last four general elections, ninety percent of all election results were received within one hour after the close of polls. The public, media and candidates have become accustomed to this level of service.

The Master Agreement established on February 1, 2000, provides that "the [City] shall not permit any individual other than an ES&S Representative to provide maintenance or repairs with respect to the Hardware during the term of this Master Agreement;" and that "subject to the license granted herein ES&S also owns all patents, trademarks, copyrights, trade names and other proprietary or intellectual property in, or used in connection with, the Hardware".

In accordance with the Master Agreement, and given the specialized nature and proprietary rights to the City's vote counting equipment, ES&S must continue to provide maintenance, support, and supply associated goods and services that are compatible with the existing vote counting system. In accordance with the City's Purchasing policies, the City Clerk requires a non-competitive procurement process for the following reasons:

- The "hardware... contains confidential and proprietary trade secrets of ES&S that are protected by law and are of substantial value" and the "City has only a limited license to use such items during the Software License Term". ES&S is the only vendor that can provide the equipment and services that the City requires for the 2014 election. This includes preventative maintenance, warranty and software services, electronic components used in the equipment, and the software required to operate the hardware.
- To meet the Clerk's statutory obligation under the *MEA* to "have regard to the needs of candidates and electors with disabilities" the Clerk is required to rent additional equipment and services from ES&S that is compliant and compatible with the City's existing vote counting system.

The parties are currently negotiating with respect to the ongoing cost of the maintenance and support services, and the Master Agreement will be amended, as permitted by its terms and Council's 2000 directive, once the parties reach an agreement.

The requested amounts for 2014 – 2017 are estimated and represent "not to exceed" amounts over the four (4) year period. This amount includes costs for the 2014 municipal election plus any additional costs should the Clerk be required to conduct any by-elections during this period.

<b>ES&amp;S Costs for 2014 to 2017</b>		
<b>Event</b>	<b>ES&amp;S Cost (\$000s)</b>	<b>Comments</b>
Yearly Software Maintenance Costs	\$98	Total for the four (4) years based upon preliminary negotiations with ES&S.
2014 General Election	\$746	Estimate based on preliminary quote from ES&S. Includes preventative maintenance and associated goods and services required to conduct the election
Potential By-election(s)	\$522	Costs apply only if and when the equipment is used in a by-election and is based on three potential by-elections (two ward by-elections and one City-wide by-election).
Total Single Source request	\$1.39 M	net of HST recoveries

A new single source agreement is critical for the delivery of the 2014 election and any subsequent by-elections. Without a new contract the Clerk will be unable to use the vote counting equipment for the 2014 election.

This report was prepared in consultation with the City's Legal Services.

ES&S has provided a written statement confirming that: "The City should be assured that the unit prices offered by ES&S are no higher than those charged to any other of our customers of similar size and equipment configuration".

The Fair Wage Office has reported that all the software and hardware support and maintenance services vendors indicated in this Staff report and on the attached Appendices have reviewed and understand the Fair Wage Policy and Labour Trades requirements and have agreed to comply fully.

## CONTACT

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## SIGNATURES

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Ulli S. Watkiss  
City Clerk

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Michael Pacholok  
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