STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

DIEBOLD ELECTION SYSTEMS, INC.   )
)
            Plaintiff,   )
)
      v.   )
)
THE NORTH CAROLINA STATE   )
BOARD OF ELECTIONS and THE   )
NORTH CAROLINA OFFICE OF   )
INFORMATION TECHNOLOGY   )
SERVICES,   )
)
            Defendants.   )

**COMPLAINT FOR DECLARATORY
JUDGMENT AND MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

NOW COMES Diebold Election Systems, Inc. (hereinafter "DESI"), plaintiff in the above-styled action, and states its Complaint for Declaratory Judgment against defendants the North Carolina State Board of Elections and the North Carolina Office of Information Technology Services as follows:

NATURE OF ACTION

1.   This is an action for declaratory judgment pursuant to N.C.G.S. § 1-253 *et seq.*, for the purpose of determining the obligations of plaintiff DESI as a potential vendor under Session Law 2005-323 and the corresponding Voting Machines RFP.

PARTIES

2.   Plaintiff DESI is a corporation incorporated under the laws of the State of Delaware with its principal place of business in North Canton, Ohio.

3.   Defendant the State Board of Elections is an agency of the State of North Carolina and has overall responsibility for administration of the elections process and campaign finance disclosures in North Carolina.

4.   Defendant the North Carolina Office of Information Technology Services is an agency of the State of North Carolina and was created by the General Assembly as an office within the North Carolina Department of Commerce. The North Carolina Office of Information Technology Services has the responsibility for procurement of information technology products and services for the State of North Carolina.

5.   Jurisdiction and venue are proper in this Court.

FACTS UNDERLYING DISPUTE

6.   On August 26, 2005, the General Assembly of North Carolina enacted Session Law 2005-323, attached hereto as **Exhibit A**, which contained the following title:

> AN ACT TO RESTORE PUBLIC CONFIDENCE IN THE ELECTION PROCESS BY REQUIRING THAT THE STATE BOARD OF ELECTIONS, THROUGH THE DEVELOPMENT OF A REQUEST FOR PROPOSAL, ENSURE THAT ALL VOTING SYSTEMS GENERATE EITHER A PAPER BALLOT OR A PAPER RECORD BY WHICH VOTERS MAY VERIFY THEIR VOTES BEFORE CASTING THEM AND WHICH PROVIDES A BACKUP MEANS OF COUNTING THE VOTE THAT THE VOTER CASTS; BY PROVIDING STATUTORY GUIDANCE AS TO COUNTING; BY STANDARDIZING PURCHASING OF VOTING SYSTEMS IN NORTH CAROLINA, INCLUDING A REVIEW OF SOURCE CODE FOR SOFTWARE RELATED TO THOSE VOTING SYSTEMS AND AUTHORIZATIONS TO ESTABLISH THE ROLE OF THE STATE BOARD OF ELECTIONS AND COUNTY BOARD OF ELECTIONS RELATED TO TRAINING AND SUPPORT OF VOTING SYSTEMS; BY REQUIRING POSTELECTION TESTING OF VOTING SYSTEMS, INCLUDING A PAPER SAMPLE-COUNT; BY EXPANDING THE RIGHT TO A HAND-TO-EYE RECOUNT OF PAPER BALLOTS; AND BY PERMITTING A PILOT PROGRAM TO EXPERIMENT WITH NONPAPER MEANS OF VOTER VERIFICATION AND BALLOT BACKUP

7.   On September 26, 2005, a memorandum was issued by the Executive Director of the State Board of Elections stating that as "mandated by Session Law 2005-323 (Senate Bill 223), the North Carolina State Board of Elections is developing a Request for Proposal (RFP) for

the certification of voting equipment that will be purchased by the counties." Pursuant to the memorandum, attached hereto as **Exhibit B**, the State Board of Elections invited "all interested parties to submit written comments and/or suggestions for any additional requirements or features not already covered by the aforementioned, to be considered by the State Board."

8.   Request for Proposal No. ITS-002724 ("Voting Machines RFP") was issued on October 11, 2005. The Voting Machines RFP is being administered by the North Carolina Office of Information Technology Services. A copy of the Voting Machines RFP is attached hereto as **Exhibit C.**

9.   In response to the memorandum issued by the Executive Director of the State Board of Elections dated September 26, 2005, plaintiff DESI submitted written questions to the State Board of Elections regarding the Voting Machines RFP and the legal requirements mandated by Session Law 2005-323.

10.   Pursuant to the Voting Machines RFP, all sealed bids must be delivered before 2:00 p.m. on November 4, 2005.

11.   The Voting Machines RFP states that "[a]ll proposals and responses received shall be treated as offers to contract."

12.   The Voting Machines RFP provided the following notice highlighted in bold to all vendors:

> **NOTICE TO VENDORS: The State objects to and will not be required to evaluate or consider any additional terms and conditions submitted with a vendor response. This applies to any language appearing in or attached to the document as part of the vendor's response. By execution and delivery of this Request for Proposal and response(s), the vendor agrees that any additional terms and conditions, whether submitted purposely or inadvertently, shall have no force.**

13.   The Voting Machines RFP defines vendor as follows: "Company, firm, corporation, partnership, individual, etc., submitting a response to a solicitation."

14.   The Voting Machines RFP requires the vendor to place in escrow the following information:

> [A]ll software that is relevant to functionality, setup, configuration, and operation of the voting system, including, but not limited to, a complete copy of the source and executable code, build scripts, object libraries, application program interfaces, and complete documentation of all aspects of the system including, but not limited to, compiling instructions, design documentation, technical documentation, user documentation, hardware and software specifications, drawings, records, and data. The documentation shall include a list of programmers responsible for creating the software and a sworn affidavit that the source code includes all relevant program statements in low-level and high-level languages.

15.   The Voting Machines RFP further states that a willful violation of the requirements outlined in paragraph 14, codified in Session Law 2005-323, is a Class G felony.

16.   The State Board of Elections responded to questions submitted by plaintiff DESI and other interested vendors by issuing Addendum Number 2 dated October 25, 2005, a copy of Addendum Number 2 is attached hereto as **Exhibit D**.

17.   Question 19 in Addendum Number 2 was submitted by plaintiff DESI and states as follows:

> The RFP (and North Carolina law) require "all software that is relevant to functionality, setup, configuration and operation of the voting system" to be placed in escrow in source and object code format. In the Diebold Election System, Inc. ("DESI") voting system, the operating system, various software drivers for ancillary components such as displays and card readers and other computer programs are the property of third parties and not available to vendors. Nonetheless, failure to supply the software for those components is a felony and the SBE may impose a penalty of $100,000 for a failure to comply. How should a vendor address software for ancillary components developed by third parties?

18.   The State Board of Elections responded to Question 19 as follows:

Vendors must agree to place in escrow in source and object code format, all available "software that is relevant to functionality, setup, configuration and operation of the voting system" and indicate in the RFP response all that is not available and why it is not available.

19.   The response by the State Board of Elections to Question 19 is inconsistent with the terms and conditions of the Voting Machines RFP in that the **NOTICE TO VENDORS** outlined in paragraph 12 of this Complaint does not appear to have been deleted or properly modified from the Voting Machines RFP.

20.   The response by the State Board of Elections to Question 19 is inconsistent with the terms and conditions of the Voting Machines RFP in that Requirement #6, a portion of which was outlined in paragraph 14 of this Complaint, does not appear to have been deleted or properly modified from the Voting Machines RFP.

21.   The response by the State Board of Elections to Question 19 contained in Addendum Number 2 of the Voting Machines RFP, is in direct conflict with N.C.G.S. §163-165.9A (Session Law 2005-323) in that the North Carolina legislature mandates that the vendor shall place in escrow the following information:

[A]ll software that is relevant to functionality, setup, configuration, and operation of the voting system, including, but not limited to, a complete copy of the source and executable code, build scripts, object libraries, application program interfaces, and complete documentation of all aspects of the system including, but not limited to, compiling instructions, design documentation, technical documentation, user documentation, hardware and software specifications, drawings, records, and data. The documentation shall include a list of programmers responsible for creating the software and a sworn affidavit that the source code includes all relevant program statements in low-level and high-level languages.

22.   In connection with the Voting Machines RFP and the corresponding certification

requirements imposed by law under Session Law 2005-323 and as outlined in Question 19 of Addendum Number 2, plaintiff DESI will be unable to escrow the following required information: (i) information that was never in the custody and control of DESI; (ii) information that is no longer in the custody and control of DESI; and (iii) information in which DESI is not legally permitted to disclose and release because it belongs to a third party. As such, any proposal submitted by plaintiff DESI to the Voting Machines RFP that follows the guidance provided by the State Board of Elections as outlined in Question 19 of Addendum Number 2 would necessarily be in violation of N.C.G.S. §163-165.9A(a).

23. A willful violation of N.C.G.S. §163-165.9A(a) would subject the vendor (plaintiff DESI) to potential criminal liability in the form of a Class G felony. Additionally, a violation of N.C.G.S. §163-165.9A(a) would subject the vendor (plaintiff DESI) to civil penalties imposed by the State Board of Elections.

24. Question 20 of Addendum Number 2 was submitted by plaintiff DESI and states as follows:

> Similarly, North Carolina law requires that the vendor list all programmers involved in the development of the broad category of software described in question 1 (Question 19). As stated above (Question 20), the vendors do not have access to all of this information for third party code, yet the failure to supply the same opens the vendor(s) to felony charges and significant penalties. How should a vendor address the identification of programmers of software for ancillary voting system components developed by third parties?

25. The State Board of Elections responded to Question 20 as follows:

> Vendors must list all programmers involved in the development of the broad category of software and provide full and detailed information on all software to which they do not have access and why it is not available.

26. The response by the State Board of Elections to Question 20 is inconsistent with

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the terms and conditions of the Voting Machines RFP in that the **NOTICE TO VENDORS** outlined in paragraph 12 of this Complaint does not appear to have been deleted or properly modified from the Voting Machines RFP.

27.   The response by the State Board of Elections to Question 20 is inconsistent with the terms and conditions of the Voting Machines RFP in that Requirement #6, a portion of which was outlined in paragraph 14 of this Complaint, does not appear to have been deleted or properly modified from the Voting Machines RFP.

28.   The response by the State Board of Elections to Question 20 of Addendum Number 2 is in direct conflict with N.C.G.S. §163-165.9A (Session Law 2005-323) in that the North Carolina legislature mandates that the vendor shall place in escrow "all software that is relevant to functionality, setup, configuration, and operation of the voting system, including, but not limited to, a complete copy of the source and executable code, build scripts, object libraries, application program interfaces, and complete documentation of all aspects of the system including, but not limited to, compiling instructions, design documentation, technical documentation, user documentation, hardware and software specifications, drawings, records, and data. The documentation shall include a list of programmers responsible for creating the software and a sworn affidavit that the source code includes all relevant program statements in low-level and high-level languages."

29.   In connection with the Voting Machines RFP and the corresponding certification requirements imposed by law under Session Law 2005-323, plaintiff DESI will be unable to identify each and every programmer responsible for the creation of software required to be placed in escrow as follows: (i) potential programmers who were or are employed by third parties; (ii) the identity of programmers who may have been involved in the creation of software

required to be placed in escrow but as to which records no longer exist that permit Plaintiff DESI to reasonably identify such individuals; and (iii) the identity of programmers which DESI is not legally permitted to disclose or release. As such, any proposal submitted by plaintiff DESI to the Voting Machines RFP that follows the guidance provided by the State Board of Elections as outlined in Question 20 of Addendum Number 2 would necessarily be in violation of N.C.G.S. §163-165.9A(a).

30.   A willful violation of N.C.G.S. §163-165.9A(a) would subject the vendor (plaintiff DESI) to potential criminal liability in the form of a Class G felony. Additionally, a violation of N.C.G.S. §163-165.9A(a) would subject the vendor (plaintiff DESI) to civil penalties imposed by the State Board of Elections.

31.   Given the broad requirements mandated by the North Carolina legislature in N.C.G.S. §163-165.9A(a) [Session Law 2005-323], and the criminal and civil penalties associated with noncompliance, plaintiff DESI cannot submit a proposal in response to the Voting Machines RFP without a declaration from this Court regarding its obligations under Session Law 2005-323 and the related Voting Machines RFP.

32.   Currently, the deadline for submitting all sealed bids in response to the Voting Machines RFP is at 2:00 p.m. on November 4, 2005.

33.   Question 28 in Addendum Number 2 was submitted by plaintiff DESI and states as follows:

> Does a failure to respond to this RFP adversely affect the ability to sell to counties or others in the future; i.e. is the certification of a vendor's products in the State affected because it does not bid this opportunity.

34.   The State Board of Elections responded to Question 28 as follows: "Yes."

35.   In light of the deadline imposed by the Voting Machines RFP and in light of the

response provided by the State Board of Elections in response to Question 28 contained in Addendum Number 2, plaintiff DESI will suffer irreparable harm if the bid process is allowed to continue and any bids submitted in response to the Voting Machines RFP are opened and reviewed prior to the issuance of a declaratory judgment in this case.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

36.   Paragraphs 1-35 are realleged as if fully set forth herein and reincorporated by reference.

37.   Plaintiff DESI is entitled to a declaration of its obligations as a potential vendor under Session Law 2005-323 and the corresponding Voting Machines RFP. Specifically, a declaration as to the interpretation of the scope of the requirements imposed upon vendors by Session Law 2005-323 related to the escrow of software as specified therein and the identification of programmers responsible for creating the software.

38.   Litigation brought by plaintiff DESI as to its obligations as a potential vendor under Session Law 2005-323 and respect to the Voting Machines RFP appears unavoidable, and an action for a declaratory judgment is appropriate under N.C.G.S. §1-253 *et seq.*

SECOND CAUSE OF ACTION
INJUNCTION

39.   Paragraphs 1-38 are realleged as if fully set forth herein and reincorporated by reference.

40.   Plaintiff DESI is entitled to an injunction preventing the State Board of Elections and the North Carolina Office of Information Technology Services from opening bids submitted in response to the Voting Machines RFP prior to the issuance of a declaratory judgment in this case.

41.   Plaintiff DESI is entitled to an injunction temporarily extending the deadline for submitting all sealed bids in response to the Voting Machines RFP to permit the Court to interpret Session Law 2005-323 and issue a declaratory judgment as to the obligations of plaintiff DESI as a potential vendor under Session Law 2005-323 and the corresponding Voting Machines RFP.

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

42.   Paragraphs 1-41 are realleged as if fully set forth herein and reincorporated by reference,

43,   As set forth above, in light of the broad requirements mandated by the North Carolina legislature in N.C.G.S. §163-165.9A(a) [Session Law 2005-323], and the criminal and civil penalties associated with noncompliance, plaintiff DESI cannot submit a proposal in response to the Voting Machines RFP without necessarily being in violation of state law. As such, plaintiff DESI is precluded from submitting a proposal in response to the Voting Machines RFP without a declaration from this Court regarding its obligations under Session Law 2005-323 and the related Voting Machines RFP.

44.   Plaintiff DESI has a substantial likelihood of success on the merits of this action, given the overbroad language in Session Law 2005-323 and the conflicting guidance by the State Board of Elections contained in Addendum 2 to the Voting Machines RFP.

45.   Given the deadline imposed by the Voting Machines RFP and given the response provided by the State Board of Elections in response to Question 28 contained in Addendum Number 2, plaintiff DESI will suffer irreparable harm if the bid process is allowed to continue and any bids submitted in response to the Voting Machines RFP are opened and reviewed prior

to the issuance of a declaratory judgment in this case.

46.   The threatened and actual injury to plaintiff DESI outweighs any potential injury to the defendants in this case.

47.   Plaintiff DESI prays that the Court temporarily and immediately restrain and enjoin, preliminarily during the pendency of this action, defendants the State Board of Elections and the North Carolina Office of Information Technology Services from opening bids submitted in response to the Voting Machines RFP prior to the issuance of a declaratory judgment in this case and temporarily extending the deadline for submitting all sealed bids in response to the Voting Machines RFP.

48.   Plaintiff DESI prays that the Court further enter such orders as are necessary to effectuate the purposes of said relief.

49.   Undersigned counsel certifies that he has given notice of the motion for temporary restraining order to the defendants by telephone notification and by delivery via facsimile of this Complaint.

WHEREFORE, plaintiff DESI prays that:

1.   This Court render a declaratory judgment as to the obligations of plaintiff DESI as a potential vendor under Session Law 2005-323 and the corresponding Voting Machines RFP.

2.   This Court render a declaratory judgment as to the interpretation of the scope of the requirements imposed upon vendors by Session Law 2005-323 related to the escrow of software as specified therein and the identification of programmers responsible for creating the software.
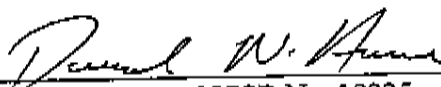
3.   This Court enter a temporary restraining order, and subsequently a preliminary injunction, restraining defendants the State Board of Elections and the North Carolina Office of

Information Technology Services from opening bids submitted in response to the Voting Machines RFP prior to the issuance of a declaratory judgment in this case and temporarily extending the deadline for submitting all sealed bids in response to the Voting Machines RFP.

4.   That Plaintiff be granted such other and further relief as this Court may deem appropriate.

This the _4th_ day of November, 2005.

                    WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

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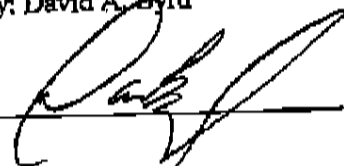   Fax: (919) 755-6171
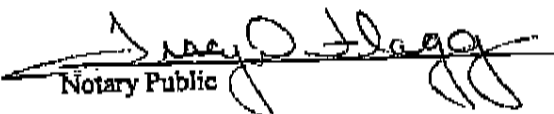   **Attorneys for Plaintiff**

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STATE OF _TEXAS_   )   **VERIFICATION**

COUNTY OF _Collin_   )

David A. Byrd, being first duly sworn, deposes and says that he is over eighteen years of age;

he is Vice President – Business Operations of Diebold Election Systems, Inc.; he is authorized and

competent to make this Verification; he has personal knowledge of the matters set forth in the

Verified Complaint; he has read the Verified Complaint and finds that the contents of the Verified

Complaint are true to the best of his own knowledge, information and belief.

DIEBOLD ELECTION SYSTEMS, INC.
By: David A. Byrd

Sworn to and subscribed before
me, this the 4th day of November, 2005.

_____
Notary Public

My Commission Expires: __7-11-2006__