

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of :
 :
Dominion Voting Systems Corporation, :
 :
 : **Index No.:**
 :
 Petitioner, :
 :

For Judgment and Relief Pursuant to Article 78 of the :
New York Civil Practice Law and Rules :

- against -

The Board of Elections in the City of New York; New :
York State Board of Elections; New York State Office of :
General Services; and Thomas DiNapoli, Comptroller of :
the State of New York; John C. Liu, New York City :
Comptroller, :
 :
 Respondents. :
 :
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**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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Petitioner, Dominion Voting Systems Corporation (“Dominion”), by and through its attorneys, Greenberg Traurig, LLP, respectfully submits this Memorandum of Law in support of its Motion for a Temporary Restraining Order and Preliminary Injunction or Motion For a Stay staying the implementation of the award of the contract for New York City voting machines to Election Systems & Software, Inc. (“ES&S”) until this Court determines whether the award was lawful or until such time as the applicable bid protest procedures are concluded.

PRELIMINARY STATEMENT

In utter disregard of public procurement laws, rules and regulations, the New York City Board of Elections awarded the contract for HAVA-compliant voting machines for the City of New York to the highest cost bidder without undertaking a proper bid and without providing notice of the process and criteria to be used in evaluating the bidders.

The New York City Board of Elections was required to comply with New York State procurement rules in making its initial purchase of such voting machines. It failed to do so. Furthermore, to the extent that any New York City funds are to be used in this purchase, the New York City Board of Elections was required to comply with New York City procurement rules. It failed to do this as well. Instead, the New York City Board of Elections created its own procurement process, with which it likewise failed to comply. In addition to its many procedural violations, the New York City Board of Elections acted without a rational basis by awarding the contract to the highest bidder whose proposal was based upon unlawful criteria.

Given the clear and pervasive violations of applicable law and the implications of this contract to all involved, the Court should stay enforcement of this award until such time as the propriety of the award can be determined by the Court.

STATEMENT OF FACTS

I. HAVA BACKGROUND

On October 29, 2002, President Bush signed into law the Help America Vote Act of 2002 (“HAVA”), which established certain minimum election administration standards for state and local governments and a program to provide funds to states to replace punch card voting systems. Pub. L. No. 107-252, 116 Stat. 1666 (*codified at* 42 U.S.C. §§ 15301-15545) (2002). In 2005, New York State enacted the Election Reform and Modernization Act (the “Election Reform Act”), which implemented the HAVA requirements and thus enabled New York State to access federal HAVA funding to replace its voting machines. 2005 N.Y. Sess. Laws, Ch. 181 (*codified in various provisions of the Consolidated and Unconsolidated Laws of New York*). The Election Reform Act also established the process to be used in administering HAVA funds to local boards of elections and vendors for the purchase of HAVA-compliant voting machines. *Id.* Upon information and belief, the purchase of HAVA-compliant voting machines by the City of New York will be funded by both State HAVA-funds and funds from the City of New York. (Affirmation of Robert M. Harding (“Harding Aff.”) ¶ 4 and Ex. B.)

Pursuant to the Election Reform Act, the New York State Board of Elections (“NYS Board of Elections”), in consultation with the New York State Office of General Services (“OGS”), acts as the purchasing agent for the purchase of HAVA-compliant voting systems by local boards of elections. 2005 N.Y. Sess. Laws, Ch. 181, §12. On February 21, 2008, OGS awarded the contract for HAVA-compliant voting systems to Dominion¹ and ES&S (the “OGS

¹ Although Sequoia Voting Systems, Inc. (“Sequoia”) was an initial party to the OGS Backdrop Contract, Sequoia, with the consent of OGS and the New York State Office of the State Comptroller, assigned all rights and obligations under the contract to Dominion as of September 24, 2009. (Affidavit of John Poulos ¶ 13.) The NYS Board of Elections’ and OGS’ public records of the OGS Backdrop Contract have been conformed to reflect Dominion as a party to the contract. (*See id.* and Ex. A at 2, 3 and September 24, 2009 Purchasing Memorandum Contract Award Notification Update.)

Backdrop Contract”), subject to their respective voting systems being certified by the NYS Board of Elections. (Affidavit of John Poulos (“Poulos Aff.”) ¶ 3 and Ex. A at 2, 3.) On December 15, 2009, the NYS Board of Elections certified the Dominion ImageCast precinct-based scanner and ballot marking device the ES&S AutoMark Voter Assist Terminal ballot marking device and the ESS DS200 precinct-based scanner, thus permitting these voting machines to be sold and used for elections conducted in New York State. (*Id.* at ¶ 20, Ex. A at 110, 164-65.) As of January 5, 2010, Dominion and ES&S each were authorized to sell their certified voting systems in the State of New York. (*See id.* Ex. A at 111, 166-67.)

Each local board of elections, including the Board of Elections in the City of New York (“NYC Board of Elections” or the “Board”), is deemed an “Authorized User” entitled to place purchase orders under the OGS Backdrop Contract. (*Id.* Ex. A at 33, ¶ 5.) In making these purchases, however, local boards of elections are “accountable and responsible for compliance with the requirements of public procurement processes.” (*Id.* Ex. A at 3.) Although the local boards are permitted to purchase either the Dominion or ES&S voting machines and negotiate lower pricing with them, if criteria other than price are considered by a local board, the local board of elections must solicit bids from each vendor through a mini-bid process and a formal bid document. (*Id.* Ex. A at 34-35 (¶ 5), 39 (¶ 23(f-g)) and 41 (¶ 39).) The local boards of elections are required to submit their purchase orders to the NYS Board of Elections, and the purchase orders become effective ten days after receipt by the NYS Board of Elections. 2005 N.Y. Sess. Laws, Ch. 181, § 7 (*codified at* N.Y. Elec. Law § 7-204(4)). The NYS Board of Elections, in turn, notifies the Office of the New York State Comptroller (“NYS Comptroller”) to release the correct amount of funds to the vendor on behalf of the local board. 2005 N.Y. Sess. Laws, Ch. 181, § 12.

II. THE NYC BOARD OF ELECTIONS' UNLAWFUL SELECTION OF ES&S

On December 17, 2008, the NYC Board of Elections issued a “Request for Information for Voting System Selection for Fall 2009” (“RFI”) to Sequoia/Dominion² and ES&S to be used in the Board’s selection of voting machines. (Poulos Aff. ¶ 5 and Ex. B.) The RFI requested a variety of non-price information from Sequoia/Dominion and ES&S concerning voting system designs, election day operations, security and privacy, implementation services, ongoing support and training, and vendor strength and experience. (Poulos Aff. ¶ 6 and Ex. B.) The RFI did not, however, set forth the procedures to be used in evaluating bidders, the criteria to be used, or the weight to be afforded each criteria, nor did it provide a mechanism by which the losing party could protest its selection. (See Poulos Aff. ¶ 7-8, Ex. B.) The RFI, nevertheless, indicated that the NYC Board of Elections’ staff would evaluate the RFI responses and “Write [a] Vendor Evaluation Staff Recommendation Report and send [such] to NYC Board of Commissioners for Review.” (*Id.* ¶ 9 and Ex. B at 8, 9.) The RFI also dictated that the “Board of Commissioners [would] Vote on [the] 2009 Voting System Vendor Selection.” (*Id.* ¶ 10 and Ex. B at 8, 9.) On or about January 28, 2009, both Dominion, in conjunction with Sequoia, and ES&S submitted responses to the RFI and on December 28, 2009, at the request of the NYC Board of Elections, both submitted their “best and final offers” concerning price to the Board. (See *id.* ¶¶ 5, 11-12, 25-27 and Exs. F and G.)

The NYC Board of Elections engaged a private management consulting firm, Gartner, Inc. (“Gartner”), to evaluate and score Dominion’s and ES&S’ responses to the RFI. (*Id.* ¶ 14.) Gartner independently prepared a cost analysis report, a voting system assessment report and security assessment report, and assigned the secret scoring system to be afforded each evaluation

² From April 2007 to September 2009, Dominion and Sequoia were engaged in a strategic partnership in which they jointly marketed and sold election equipment in New York State. (*Id.* ¶ 4.)

criteria. (*Id.* ¶ 16.) On March 17, 2009, Gartner and the Board’s staff submitted a report and evaluation team ratings to the NYC Board of Elections (the “March 2009 Report”) and, out of a perfect score of 4495, awarded Dominion/Sequoia an overall score of 3388 and ES&S an overall score of 3278. (*Id.* ¶ 15 and Ex. C at 5.)

On December 22, 2009, Gartner and the NYC Board of Elections’ staff issued a second report (the “December 2009 Report”) based upon changes to the voting systems made during the NYS Board of Elections’ certification process and revised evaluation team ratings. (Poulos Aff. ¶ 21 and Ex. E.) In contrast to the March 2009 Report, the December 2009 Report awarded ES&S a higher overall score than Dominion – ES&S with an overall score of 3417 and Dominion with an overall score of 3395 – without any further explanation or announced change to the scoring system. (Poulos Aff. ¶ 22 and Ex. E at 5.) In comparing the two reports, it is clear that the authors “re-evaluated” only the ES&S system as Dominion’s scoring in each category remained virtually unchanged. (*Compare id.* Ex. C with *id.* Ex. E.)

The higher overall score awarded to ES&S in the December 2009 report was due largely to the inclusion of election procedures that violate New York State election laws but were nevertheless offered by ES&S to the City of New York and accepted by the NYC Board of Elections. Specifically, ES&S offered to provide a so-called “Easy Startup Option,” which ES&S claimed would simplify election day operations by having the machines programmed in the warehouse prior to delivery at the poll site on election day. (Poulos Aff. ¶¶ 19-18 and Ex. D at 2.) This would enable pollworkers to open the electronic voting machines without the need to enter a passcode. (Poulos Aff. ¶ 19.) Not only would this practice pose an obvious security risk to the integrity of the voting system, but the NYS Board of Elections expressly rejected this practice as unlawful and made clear to the NYC Board of Elections that it would reject any

contract that contained such a provision. (Harding Aff. ¶ 7, Ex. D.) As the December 2009 Report awarded at least 23 points, and as many as 85 points, on the basis of this unlawful procedure and the difference between their overall scores was 22 points, the inclusion and consideration of this unlawful procedure alone caused ES&S to receive a overall higher score than Dominion. (Poulos Aff. ¶¶ 23-24.)

On January 5, 2010, the Commissioners of the NYC Board of Elections voted to award the contract to provide voting machines for elections in the City of New York to ES&S without a staff recommendation and on the basis of the December 2009 Report alone. (*See id.* ¶¶ 32-33.) On February 12, 2010, the NYC Board of Elections finalized the process by preparing and signing the requisition documents for the purchase of voting machines for the City of New York from ES&S. (Harding Aff. ¶ 8.) On February 16, 2010 Dominion submitted bid protest letters to both the NYS Comptroller and the NYC Board of Elections. (*Id.* at ¶ 9.)

ARGUMENT

A temporary restraining order is properly granted “pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” N.Y. C.P.L.R. 6301. The granting of a temporary restraining order rests in the sound discretion of the court and is appropriate where the movant demonstrates irreparable injury in the absence of injunctive relief, likelihood of success on the merits, and a favorable balance of the equities. *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 1272 (1988). The moving party need only make a *prima facie* showing of his right to relief and the “the actual proving of his case should be left to the full hearing on the merits.” *Gambar Enters., Inc. v. Kelly Servs., Inc.*, 69 A.D.2d 297, 306, 418 N.Y.S.2d 818, 824 (4th Dep’t 1979) (citations omitted); *see also Walker Mem’l Baptist Church*