

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, :

*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; Thomas DiNapoli, Comptroller of the  
State of New York; and John C. Liu, New York City  
Comptroller, :

*Respondents.* :

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Index No. \_\_\_\_\_

**VERIFIED PETITION**

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petitioner respectfully alleges as follows:

**JURISDICTION, PARTIES AND VENUE**

1. This is a special proceeding brought against Respondents pursuant to Article 78 of the New York Civil Practice Laws and Rules (“CPLR”) and CPLR § 3001.

2. This action arises out of Respondent the Board of Elections in the City of New York’s (“NYC Board of Elections”) award of the New York City purchase contract for voting machines and systems to Election Systems & Software (“ES&S”), which determination was made in violation of applicable procurement laws.

3. On February 12, 2010, the NYC Board of Elections finalized the award process by preparing and signing the requisition documents for the purchase of voting machines for the City of New York from ES&S.

4. Upon information and belief, the signing of the requisition documents rendered the award of the New York City purchase contract for voting machines and systems final.

5. The NYC Board of Elections did not indicate or provide any evidence as to whether the purported award was conducted pursuant to New York City or New York State procurement rules.

6. On February 16, 2010, bid protests were filed with the NYC Board of Elections in accordance with New York City procurement rules and with the Office of the New York State Comptroller in accordance with New York State procurement rules.

7. Neither the bid protest filed with the NYC Board of Elections nor the bid protest filed with the Office of the New York State Comptroller affords Petitioner a stay of the processing, payment or shipment of the ES&S voting machines and systems selected by the NYC Board of Elections.

8. Given the nature, implications, and urgency of the award of voting systems by the NYC Board of Elections, exhaustion of the administrative remedies in this case would cause irreparable harm to Dominion, New York City voters, and the State of New York.

9. In the alternative, because the NYC Board of Elections neither purported to nor complied with the New York State nor New York City procurement laws nor provided a mechanism by which bidders could appeal the Board's decision, there are no applicable administrative remedies available to Dominion.

10. Petitioner Dominion Voting Systems Corporation (“Dominion” or “Petitioner”) is a Canadian corporation authorized to do business in the State of New York.

11. Dominion is a leading provider of election automation products and is one of only two vendors certified by the State of New York to provide HAVA-compliant voting machines and systems for use in elections in New York State.

12. Respondent NYC Board of Elections is responsible under State law for, among other things, the ownership, care, custody and control of voting machines used in the City of New York.

13. Respondent NYC Board of Elections was and is charged with, among other things, selecting certified voting machines or systems pursuant to procurement contracts entered into by the New York State Board of Elections (the “NYS Board of Elections”) and the New York State Office of General Services (“OGS”) in accordance with the federal Help Americans Vote Act of 2002 (“HAVA”).

14. Respondent the New York State Board of Elections (“NYS Board of Elections”) is responsible under New York State law for, among other things, the administration of the election process in New York State.

15. Respondent NYS Board of Elections was and is charged with, among other things, certifying voting machines in accordance with HAVA, acting as a purchasing agent for the local boards of elections, and confirming that the selection of voting machines selected by the local boards of elections comply with New York law.

16. Respondent Thomas P. DiNapoli is the Comptroller of the State of New York (the “Comptroller”) and is responsible for carrying out the duties assigned by law to him and the Office of the New York State Comptroller (“OSC”).

17. The Comptroller was and is charged with releasing funds to vendors on behalf of local boards of elections for the purchase of HAVA-complaint voting machines upon notification and approval from the New York State Office of General Services (“OGS”).

18. Respondent OGS is responsible under State law for, among other things, procuring commodities and services to be used by New York State agencies, municipalities and their subdivisions.

19. Respondent OGS, on behalf of the NYS Board of Elections and local boards of elections, entered into procurement contracts with Dominion and ES&S for the provision of HAVA-compliant voting systems.

20. Respondent John C. Liu is the New York City Comptroller (the “NYC Comptroller”) and is responsible for carrying out the duties assigned by law to him and the Office of the New York City Comptroller.

21. The NYC Comptroller was and is charged with releasing funds to vendors on behalf of the NYC Board of Elections for the purchase of HAVA-complaint voting machines of and systems.

22. Venue is proper in this Court pursuant to Sections 7804(b) and 506(b) of the CPLR as the Comptroller of the State of New York is a respondent in this special proceeding.

**ENACTMENT AND IMPLEMENTATION OF THE HELP  
AMERICA VOTE ACT OF 2002**

23. On October 29, 2002, President Bush signed into law the “Help America Vote Act of 2002,” Pub. L. No. 107-252, 116 Stat. 1666 (2002).

24. HAVA, among other things, established certain minimum election administration standards for states and local governments with responsibility for the administration of federal elections, as well as a program to provide funds to states to replace punch card voting systems.

25. In 2005, New York State enacted the Election Reform and Modernization Act, 2005 N.Y. Sess. Laws, Ch. 181, which implemented the HAVA requirements and thus enabled New York State to access HAVA funding to replace its voting machines and systems.

**A. PROCUREMENT LAWS GOVERNING THE PURCHASE OF HAVA-COMPLIANT VOTING MACHINES AND SYSTEMS**

26. New York's Election Reform Act establishes the procurement process to be used in the administration of HAVA funds to local boards of elections and vendors for the purchase of HAVA-compliant voting machines and systems.

27. Specifically, the Election Reform Act provides that the NYS Board of Elections shall certify voting machines that may be sold and used for elections conducted in New York State and, in consultation with OGS, shall act as the purchasing agent for local boards of elections.

28. The Election Reform Act further provides that: local boards of elections shall chose their voting systems from the NYS Board of Election's certified list of voting machines; the NYS Board of Elections must approve the local board of elections plan; and, if approved, the NYS Board of Elections shall enter into contracts with vendors on behalf of the local boards of elections and notify the Comptroller to release the correct amount of funds to the vendor on behalf of the local board.

29. New York's Election Reform Act expressly provides that the procurement of voting systems by the NYS Board of Elections and OGS must be accomplished in accordance with New York State Finance Law § 163, which requires that contracts for commodities be awarded on the basis of lowest price to a responsive and responsible bidder, and New York State Election Law § 7-204.

30. The Election Reform Act further dictates that the NYS Board of Elections, in consultation with OGS, “shall issue regulations specifying the manner in which contracts must be drawn in order to comply with [Section 7-204 of the New York State Election Law].”

31. The regulations promulgated by the NYS Board of Elections thereunder provide that, for purposes of the initial purchase of HAVA-complaint voting systems, “all contracts entered by the State Board or county boards with vendors, must comply with Office of General Services (OGS) regulations on purchasing procedures and purchases from preferred sources, found in NYCRR Title 9, Subtitle G, Subchapter A, Part 250, section 250.0 through and including section 250.11.”

32. OGS procurement rules and regulations on purchasing procedures found in NYCRR Title 9, Subtitle G, Subchapter A, Part 250, section 250.0 through and including section 250.11 set forth rules governing the purchase of both commodities and services.

33. Section 250.1(e) defines commodities to include “material goods, supplies, products, construction items or other standard articles of commerce other than technology which are the subject of any purchase or other exchange.”

34. OGS has deemed the HAVA-compliant voting machines and systems a commodity.

35. Section 250.2(a)(2) requires that all “commodities contracts shall be awarded on the basis of lowest price to a responsive and responsible offeror.”

36. Section 250.2(e) allows a state agency to competitively purchase commodities “in lieu of using centralized contracts when the resultant price is less than the centralized contract price.”

37. If a state agency chooses to purchase commodities “in lieu of using centralized contracts,” then Section 250.7 requires that the agency “select among permissible methods of procurement, including, but not limited to, an invitation for bid, request for proposals or other means of solicitation pursuant to guidelines issued by the State Procurement Council.”

38. The guidelines issued by the State Procurement Council do not recognize a “request for information” as a permissible method of procurement; rather, such guidelines provide that a request for information is a “research and information gathering document” and that such is not intended to result in a procurement contract.

39. Section 250.9(a) states that the formal competitive procurement process chosen “shall include, but is not limited to, a clear statement of need, a description of the required specifications governing performance and related factors, a reasonable process for ensuring a competitive field, a fair and equal opportunity for offerors to submit responsive offers, and a balanced and fair method of award.”

40. Section 250.9(b) provides that the “solicitation shall prescribe the minimum specifications or requirements that must be met in order to be considered responsive and shall describe and disclose the general manner in which the evaluation and selection shall be conducted. Where appropriate, the solicitation shall identify the relative importance or weight of cost and the overall technical criteria to be considered . . . in [the] determination of best value.”

41. Upon information and belief, some portion of the HAVA-compliant voting machines that are the subject of this suit are to be paid by the City of New York.

42. New York Election Law Section 4-136 also provides that “[i]n the City of New York all leased or purchased equipment, supplies, ballots, printing and publications, except newspaper notices and advertisements, to be used or furnished by such board, shall be procured

for it by the purchasing department or agency of such city as if the board were an agency of such city.”

43. The procurement rules and procedures set forth in the New York City Charter and the New York City Procurement Policy Board Rules promulgated thereunder apply to all goods and services to be paid out of money under the control of, assessed or collected by, or in the treasury of the City of New York.

44. The rules promulgated by the New York City Procurement Policy Board (“PPBR”) govern intergovernmental purchases.

45. The PPBR rules provide that the NYC Board of Elections may procure the purchase of goods and services through the Office of General Services or any other State agency provided that, for goods, the price is lower than the prevailing market price.

46. As defined by the PPBR, the term “goods” includes all personal property, including but not limited to, equipment, materials, printing, and insurance, excluding land or a permanent interest in land.

47. The term “prevailing market price” is defined as the price commonly paid by the public through a standard price list or catalogue.

48. The New York City Procurement Policy Board Rules require the award of the contract be published in the City Record.

49. The protocols for intergovernmental procurement of services established by the City of New York Mayor’s Office of Contract Services (“MOCS Protocols”) also control when utilizing a OGS contract for a good procurement.

50. The MOCS Protocols were established to implement a process to protect the City of New York’s interests when purchases are made off State backdrop contracts.

51. The MOCS Protocols provide, in part, that the following actions be taken when purchasing off State contracts:

- a. follow the State contract for selecting a vendor;
- b. prepare a project definition statement, which, among other things, describes the scope of the work to be done, responsibilities of all the parties involved, and the minimum requirements that will be used in the evaluation of bids;
- c. prepare a written description of how the contract was solicited and awarded;
- d. make a determination that the price of the contract is lower than the prevailing market price;
- e. obtain approval of the City Chief Procurement Officer and, for contracts over two million dollars, the Deputy Mayor;
- f. obtain the approval of the NYC Comptroller; and
- g. publish the notice of award.

52. Pursuant to the MOCS Protocols, contracts for the purchase of goods off State contracts are to be executed by the Department of Citywide Administrative Services.

**B. NEW YORK STATE'S IMPLEMENTATION OF HAVA**

53. On or about February 21, 2008, OGS awarded the contract for HAVA-compliant voting systems to Dominion<sup>1</sup> and ES&S (the "OGS Backdrop Contract"), subject to each being certified by the NYS Board of Elections.

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<sup>1</sup> Although Sequoia Voting Systems, Inc. ("Sequoia") was an initial party to the OGS Backdrop Contract, Sequoia, with the consent of OGS, assigned all rights and obligations under the contract to Dominion as of September 24, 2009. NYS Board of Elections and OGS public records of the OGS Backdrop Contract have been conformed to reflect Dominion as party to the contract. From April 2007 - 2009, Dominion and Sequoia were engaged in a strategic partnership in which they jointly marketed and sold election equipment in New York State.

54. Pursuant to the OGS Backdrop Contract, each local board of elections (including the NYC Board of Elections) is deemed an “Authorized User” entitled to place purchase orders (or contracts) pursuant to the terms thereof.

55. Each local board of elections is authorized to select Dominion or ES&S as its vendor for HAVA-complaint voting machines on the basis of price.

56. Each local board of elections is further authorized to negotiate competitive-pricing from Dominion and ES&S that is lower than the price set forth in the OGS Backdrop Contract and select between Dominion or ES&S on that basis.

57. If quality or other criteria are to be used by a local board of elections in deciding as between Dominion and ES&S, however, the local board of elections must undertake a “mini-bid” using a bid document containing the bid specifications, the criteria to be used, and weight to be afforded each criteria developed by the local board of elections which solicits bids from both Dominion and ES&S.

58. Each local board of elections is “accountable and responsible for compliance with the requirements of public procurement processes.”

59. On or about December 15, 2009, the NYS Board of Elections certified the Dominion Voting Systems’ ImageCast precinct-based scanner and ballot marking device, thus permitting it to be sold and used for elections conducted in New York State.

60. On or about, December 15, 2009, the NYS Board of Elections also certified ES&S’ AutoMark Voter Assist Terminal ballot marking device and ES&S’ DS200 precinct-based scanner, thus permitting both to be sold and used for elections conducted in New York State.

61. On or about January 5, 2010, OGS authorized Dominion and ES&S to sell their certified voting systems in the State of New York.

**THE NYC BOARD OF ELECTION'S UNLAWFUL AWARD OF THE VOTING  
SYSTEMS CONTRACT TO ES&S**

62. On or about December 17, 2008, the NYC Board of Elections issued a "Request for Information (RFI) for Voting System Selection for Fall 2009" (the "RFI") in which it requested information from Dominion/Sequoia and ES&S to make its selection of a HAVA-compliant voting system for the City of New York.

63. The RFI requested a variety of non-price information from Dominion/Sequoia and ES&S concerning voting system designs, election day operations, security and privacy, implementation services, ongoing support and training, and vendor strength and experience.

64. The NYC Board of Elections' RFI did not set forth:

- a. the criteria upon which the bid was to be evaluated,
- b. the weight to be afforded such criteria;
- c. the process to be used in determining best value,
- d. the manner in which the evaluation process and selection were to be conducted; or
- e. notice of the bidder's right to appeal the decision.

65. The NYC Board of Elections further represented in the RFI that the NYC Board of Elections' staff would make a formal recommendation to the NYC Board of Elections and that the NYC Board of Elections would act upon such recommendation.

66. On or about January 3, 2009, the NYC Board of Elections submitted additional security questions to Dominion and ES&S as an addendum to its RFI.