

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

*Respondents.* :

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PROVINCE OF ONTARIO )  
 ) ss.:  
CITY OF TORONTO )

John Poulos, being duly sworn, deposes and says:

1. I am the President of Petitioner Dominion Voting Systems Corporation (“Dominion” or “Petitioner”) and have been Dominion’s President for the last 7 years, and have been involved in hundreds of election related public procurement bids. As Dominion has been involved with the contracting of 53 local counties in New York State over the past two years for Dominion’s voting machine technology, I have specific experience in the procurement process for the purchase of HAVA-compliant voting machines by local boards of elections in New York

State. As such, I am familiar with the facts and circumstances that form the basis for the Petition in this proceeding and this motion.

2. This Petition arises out of an award of a contract for voting machines to Dominion's competitor, Election Systems & Software, Inc. ("ES&S") for \$40 million by the New York City Board of Elections ("NYC Board of Elections" or the "Board"). In particular, I make this affidavit in support of Dominion's Petition and motion for a temporary restraining order and preliminary injunction enjoining the Respondents from implementing the award of the New York City voting machines contract to ES&S or, in the alternative, pursuant to Section 7805 of the Civil Practice Law and Rules, to stay the implementation of such award until such time as the applicable bid protest procedures are concluded or, if the Court finds exhaustion of administrative remedies inapplicable or unavailable, until the Court determines whether the award was lawful.

3. On February 21, 2008, the NYS Office of General Services (OGS) awarded the contract for HAVA-compliant voting systems to Sequoia Voting Systems ("Sequoia") and ES&S (the "OGS Backdrop Contract"), subject to their respective voting systems being certified by the New York State Board of Elections ("NYS Board of Elections"). I first became aware of this through Sequoia, and shortly thereafter obtained a copy of the contract via the public portal on the OGS website. Attached hereto as "Exhibit A" is a true and correct copy of the OGS Backdrop Contract, as published on the OGS website.

4. From April 2007 to September 2009, Dominion and Sequoia were engaged in a strategic partnership in which they were involved in jointly marketing and selling election

equipment in New York State. I know this to be true as I was the main representative for Dominion for this strategic partnership throughout the period.

5. On December 17, 2008, the NYC Board of Elections issued a "Request for Information for Voting System Selection for Fall 2009" (the "RFI") to Sequoia and ES&S to be used in the Board's selection of voting machines. I became aware of this RFI as I was sent a copy of it by Sequoia, who asked that Dominion help prepare Sequoia's response to the RFI (as it was Dominion equipment that was being featured on the Sequoia response). Attached hereto as "Exhibit B" is a true and correct copy of the RFI issued by the New York City Board of Elections on December 17, 2008 as I received it.

6. 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.

7. 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.

8. I did not become aware of how the bidders would be evaluated by the NYC Board of Elections until after the evaluations had been done.

9. The RFI 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."

10. The RFI also stated that the "Board of Commissioners [would] Vote on [the] 2009 Voting System Vendor Selection."

11. On January 28, 2009, both Dominion and Sequoia staff involved with the submission informed me that Dominion, in conjunction with Sequoia, submitted responses to the RFI.

12. After direct conversations by the NYC Board of Elections staff, I understood ES&S had also submitted responses the RFI and was deemed to be a “responsive bidder” by the Board.

13. Sequoia, with the consent of the New York State Office of General Services (“OGS”) and the New York State Office of the State Comptroller (“OSC”), assigned all rights and obligations under the OGS Backdrop Contract to Dominion as of September 24, 2009. As President of Dominion, I was involved in this assignment from Sequoia to Dominion and I learned of the State’s approval through direct written correspondence by OGS to Dominion.

14. I was directly told by various member of the NYC Board of Elections staff and various members of the private management consulting firm, Gartner, Inc. (“Gartner”), that the NYC Board of Elections engaged Gartner to evaluate and score Sequoia/Dominion’s and ES&S’ responses to the RFI.

15. 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. I received a copy of the March 2009 Report around the March 2009 timeframe, and a true and correct copy of the March 2009 Report I received is attached hereto as “Exhibit C.”

16. According to the March 2009 Report, Gartner independently prepared a cost analysis report, a voting system assessment report and security assessment report.

17. I received a copy of a December 7, 2009 Letter from ES&S to the NYC Board of Elections in which ES&S discusses “improvements” made to the ES&S DS200 scanner and Automark BMD during the NYS Board of Election’s certification testing process. A true and correct copy of the December 7, 2009 Letter I received is attached hereto as “Exhibit D.”

18. In its December 7, 2009 Letter to the NYC Board of Elections, ES&S states that one such improvement was its “Easy Startup Option,” which ES&S claimed would simplify election day operations for the City of New York by having the machines programmed in the warehouse prior to delivery at the poll site on election day.

19. In its December 7, 2009 Letter to the NYC Board of Elections, ES&S further claimed that its “Easy Startup Option” would enable poll workers to open the electronic voting machines without the need to enter a passcode.

20. On December 15, 2009, I attended a meeting of the NYS Board of Elections where the Board certified Dominion’s ImageCast precinct-based scanner and ballot marking device, ES&S’ AutoMark Voter Assist Terminal ballot marking device, and ES&S’ DS200 precinct-based scanner, thus permitting these voting machines to be sold and used for elections conducted in New York State. .

21. On or around December 22, 2009, I received a copy of the second report issued by Gartner and the NYC Board of Elections’ staff (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. Attached hereto as “Exhibit E” is a true and correct copy of the December 2009 Report, as it appears on the Board’s website.

22. 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.

23. Based upon my experience and knowledge of the industry, the list of “improvements” that ES&S listed in its December 7<sup>th</sup> Letter to the NYC Board of Elections, and the revised evaluation ratings from Gartner (in particular the changes to ES&S’ scores in pollsite functionality improvements and election day operations), my analysis of the December 2009 Report indicates that at least 23 points and as much as 85 points were allocated to ES&S on the basis of its “Easy Startup Option.”

24. Based upon my experience and knowledge of the industry, I conclude that, because the December 2009 Report awarded at least 23 points on the basis of the “Easy Startup Option” and the difference between their overall scores was 22 points, the “Easy Startup Option” caused ES&S to receive an overall higher score than Dominion.

25. In December 2009, I received correspondence from the NYC Board of Elections requesting that Dominion and ES&S submit their “best and final offers” concerning price to the Board.

26. Attached hereto as “Exhibit F” is a true and correct copy of the December 28, 2009 letter from Dominion to the NYC Board of Elections containing its “best and final offer.”

27. Attached hereto as "Exhibit G" is a true and correct copy of the December 28, 2009 letter from ES&S to the NYC Board of Elections containing its "best and final offer" as it appears on the NYC Board of Election's website.

28. On or around January 4, 2010, I received a copy of the cost analysis submitted by Gartner to the NYC Board of Elections (the "January 2010 Report") in which it analyzed and compared Dominion's and ES&S' "best and final" offers. Attached hereto as "Exhibit H" is a true and correct copy of the January 2010 Report that I received.

29. According to the January 2010 Report, Gartner evaluated the first year costs associated with the Dominion and ES&S voting systems on the basis of their respective "best and final offer" bids and concluded that, for the first year alone, Dominion's bid was \$3,088,338 less than ES&S' bid.

30. According to the January 2010 Report, Gartner further determined that the largest ongoing costs for operating either the Dominion or ES&S systems would be the printing of paper ballots for each election.

31. According to the "best and final offer" letters submitted by Dominion and ES&S, as published on the Board's website, Dominion's best and final offer for paper ballots was 50% less than ES&S' bid.

32. On January 5, 2010, I attended the meeting at which the Commissioners of the NYC Board of Elections selected ES&S to provide voting machines and systems for elections in the City of New York. .

33. I am aware of no other report prepared by Gartner or the NYC Board of Elections' employees or considered by the NYC Board of Elections other than the March 2009, the December 2009, and the January 2010 Reports.

34. Were the award to ES&S stand, it is my opinion that Dominion will suffer irreversible harm to both its commercial reputation and its ability to compete against ES&S in a new bid for the City of New York's voting machines.

35. Presently, according to Dominion employees present at the site, the ES&S voting machines are being stored at the NYS Board of Elections' acceptance site in Albany, New York.

36. Based upon my understanding of the OGS procurement process, upon submission of the NYC Board of Election's purchase order, the NYS Board of Elections will be required to inspect the ES&S machines, and, upon acceptance, ES&S will be paid 60% of the contract price.

37. Based upon my understanding of the OGS procurement process, the voting machines will then be delivered to warehouses in the City of New York where they will be inspected and verified against damages.

38. Based upon my understanding of the OGS procurement process, upon such verification, ES&S will be paid an additional 30% of the contract price.

39. Based upon my knowledge of the Board's implementation timeline, after verification, the NYC Board of Elections will begin training its staff and election day workers on the proper use of the ES&S machines.

40. Upon information and belief, the election day workers in the State and City of New York are per diem employees.

41. Upon information and belief, for nearly a half of a century, New York City has been using mechanical lever voting machines.

42. Upon information and belief, the election day worker's training on the use of HAVA-compliant machines will be their first experience in using electronic-based vote tabulating machines.

43. Based upon my experience and knowledge of the industry, I believe that the training will be difficult and time consuming.

44. Therefore, I conclude that to begin this process for one voting machine only to have it later halted and begun anew for a new type of voting machine will lend itself to delay and confusion, as well as increased costs for the City of New York.

45. Furthermore, I conclude that if the ES&S contract is implemented during the pendency of this action and Dominion ultimately prevails and the Board's bid process begins anew, ES&S will be given an unfair commercial advantage over Dominion in the new bid to supply the City of New York with HAVA-compliant voting machines.

46. Specifically, because the training on the ES&S machines will already have occurred and the voting machines will already have been installed, it will become more expensive for the City of New York to re-train election day workers and Board staff on the Dominion machines and to replace all of ES&S' machines with Dominion's machines.

47. I believe, based upon my experience and knowledge of the industry, that this will unfairly render ES&S machines the less expensive alternative for the City of New York.

48. It is also my understanding that the State and New York City HAVA funds are limited and contemplate a single purchase by each local board of elections such that once the

funds are paid to ES&S, there will be no additional HAVA funds available to the Board even if it wanted to chose Dominion in a new bid.

49. It is my belief that losing the bid to provide HAVA-complaint voting machines to the City of New York to ES&S when Dominion was the lowest cost bidder will have a substantial negative impact on Dominion's ability to compete with other vendors in the procurement of government contracts.

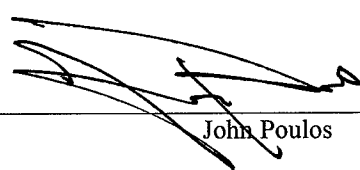
50. Specifically, it is my belief that Dominion will be questioned repeatedly by other government entities as to why Dominion lost the New York City bid when both Dominion and ES&S were certified and so closely related in terms of technical compliance and Dominion's offering was substantially less expensive.

51. It is my belief that other government entities will form the mistaken belief that because Dominion lost the New York City bid despite being the lowest cost bidder, Dominion's voting machines, system and/or services are of inferior quality.

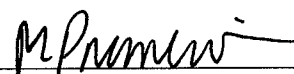
52. Dominion is committed to working expeditiously so that this dispute does not prevent New York State and the City of New York from complying with its existing federal HAVA-implementation deadlines.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Toronto, Ontario, Canada  
February 16, 2010

  
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John Poulos

Sworn to and subscribed before me  
this 16<sup>th</sup> day of February, 2010,  
by JOHN POULOS  
who is personally known to me.

  
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Name:

Title: Maria Margarita Primero  
Barrister & Solicitor  
Notary Public and Commissioner of Oaths  
in and for the Province of Ontario.  
My commission is of unlimited duration.  
No legal advice given

I have witnessed the signature of  
JOHN POULOS  
after presentation of satisfactory  
identification at TORONTO Ont.,  
this 16<sup>th</sup> day of February 2010.

