

COPY

STATE OF GEORGIA
COUNTY OF FULTON

No. ___ of duplicate, original counterparts.
Counterpart of _____

CONTRACT FOR A STATEWIDE VOTING SYSTEM
CONTRACT NO. GTA000040

THIS CONTRACT FOR A STATEWIDE VOTING SYSTEM (this "Contract") is made this 3rd day of May, 2002, between the **SECRETARY OF STATE** of the State of Georgia (the "Secretary of State"), and **DIEBOLD ELECTION SYSTEMS, INC.**, a corporation organized under the laws of the State of Delaware ("Contractor") (together, the "Parties").

WITNESSETH:

WHEREAS, the Secretary of State enters into this Contract under the authority of O.C.G.A. § 21-2-300, desiring to obtain for Georgia a standardized statewide voting system consistent with the recommendations of Georgia's Twenty-first Century Voting Commission;

WHEREAS, Contractor's proposal, as modified and accepted by the Secretary of State and Georgia Technology Authority has prevailed as most advantageous to the State in a competitive request for proposals conducted by the Authority, GTA No. 000040 (the "RFP"); and

WHEREAS, Contractor desires to provide such a system, not alone for its business purposes but also in a spirit of public service, committed to the foregoing recommendations, the democratic purposes and the electoral goals of the project.

NOW, THEREFORE, the Secretary of State and Contractor hereby incorporate the premises set out above and toward those ends agree as follows:

1. **PROMISE TO SELL.**

1.1 **Basic Undertaking to Sell.** Upon the purchase order or orders of the Secretary of State and under the terms and conditions of the Contract, Contractor promises to sell (and license, as applicable) to the State of Georgia the statewide electronic voting system required by this Contract (the "Statewide Voting System") and certain associated services set forth in Section 4 below (the "Services") (together the "Deliverables").

1.2 **Specifications.** The Statewide Voting System must include all the hardware, equipment, firmware, software, instructions, documentation and other goods and materials; all the licenses, and all other rights and elements described in the "Statewide Voting System Specifications" set out in Appendix "A" and any other good, right or element required to comply with this Contract.

1.3 **Performance Features and Standards.** The Statewide Voting System must conform to the "Performance Features and Standards" required by Appendix "B."

1.4 Contractor further promises:

1.4.1 to provide within the Statewide Voting System a complete "direct electronic recording voting system" within the meaning of O.C.G.A. § 21-2-301 and of O.C.G.A. § 21-2-379.1 et seq., as of the date hereof including Voting Units (as defined in the RFP) with audio interface for non-visual access;

1.4.2 to provide within the Statewide Voting System optical scan voting equipment for absentee balloting in conformity with O.C.G.A. § 21-2-365 et seq, as of the date hereof; and .

1.4.3 to provide by means of the Election Management System within the Statewide Voting System and otherwise a fully functioning, integrated, turnkey facility and process and a complete method of recording, transporting, counting, tallying, reporting and storing all votes in all federal, state, local and special Georgia elections, in accord with federal and Georgia law.

1.5 Contract Documents, Order of Precedence. The annexed exhibits and appendices, the RFP (and any documents referenced therein) and Contractor's Proposal (with any documents referenced therein) are incorporated into this Contract by reference and form an integral part of this Contract. In the event of a conflict between any of the contract documents, the order of precedence is as follows: (1) this Contract document with its annexed exhibits and appendices; (2) the RFP and (3) Contractor's Proposal.

2. PURCHASE ORDERS AND PAYMENT.

2.1 Deployment Plan and Prices.

2.1.1 Contractor's Cost Proposal, Appendix "C", (the "Cost Proposal"), contains a schedule of costs or prices according to three deployment plans. The alternate deployment plans correspond to the three deployment schedules in RFP Appendix "F," entitled "Master Final Deployment Plan Schedule." Before placing the first purchase order, or at that time, the Secretary of State will elect a One Year Deployment Plan, a Two Year Deployment Plan, or a Three Year Deployment Plan for purposes of both the Cost Proposal and Appendix "F", (as selected, the "Deployment Plan"). The Prices for the Voting System and the Services for this Contract will then be as set out in the Cost Proposal for the Deployment Plan (the "Prices") (see Appendix "C"). For a multi-year deployment plan, the prices for each subsequent year will take effect on the anniversary of this Contract. The Secretary of State will not be required to give any notice that purchases will be made in a second or third year of a multi-year plan other than a purchase order.

2.1.2 The Parties agree that the Deployment Plan to be implemented by Contractor will be the one year Deployment Plan as set forth in Appendix "D", unless the Secretary of State elects an alternative Deployment Plan from among those described in Subsection 2.1.1 above. The price for the Statewide Voting System and the Services for this Contract with respect to the Deployment Plan set forth in Appendix "D" will be the one year plan Prices as set forth in Contractor's Best and Final Offer ("BAFO") attached hereto as Appendix "L".

2.2 Orders. The Secretary of State may commence the implementation of the Statewide Voting System by placing an initial purchase order for the Deliverables after the issuance of the Notice of Award and on or before May 31, 2002. Until the Secretary of State places a purchase order, the State will be under no obligation. Thereafter, the State will be under obligation only for such purchase orders as the Secretary of State may place in her sole discretion. In consideration of \$100 in hand paid, the sufficiency and receipt of which Contractor acknowledges, and which payment will be a credit against the first order if any, Contractor's initial obligation will be to remain in readiness to perform and to hold and honor the Prices as set out in the BAFO. The placing of a purchase order will not obligate the Secretary of State to place any other purchase order but will fix Contractor's obligation to perform with each purchase order for the remainder of the Contract. While having made estimates, the Secretary of State is under no obligation to purchase any number of Voting Units or all or any part of any other Deliverable priced on the Cost Proposal.

2.3 Progress Payments. For satisfactory performance, the Office of the Secretary of State will make partial payments to Contractor in accordance with Appendix "M" and Section 3.5.

Contractor shall be entitled to receive a partial payments as provided in Appendix "M" only upon confirmation of the occurrence of the triggering events indicated in Appendix "M" for said payments. However, satisfaction of said triggering events shall entitle Contractor to payment for all Voting Units (the threshold number as well as any excess as provided in Subsection 3.5.6) delivered, by the indicated payment trigger date.

2.4 Invoices.

2.4.1 Contractor will bill the Secretary of State by the 10th of each month for Deliverables of the previous month, directing its invoices to the Project Manager for the Office of the Secretary of State. Contractor's Project Manager will sign each invoice personally. The Office of the Secretary of State will pay promptly by check in accord with its usual procedures or cause an agency in possession of payment fund sources to do so. However, any cumulative billing for less than 30 copies of the software for the Election Management System will be rolled forward monthly until at least 30 copies are billed, except for a final balance. The payments specifically authorized in this Contract will be the sole source of compensation paid Contractor for the Deliverables, and Contractor shall pay all its own costs and expenses without further recourse against the State or its local jurisdictions.

2.4.2 Contractor may request payment by wire transfer, giving complete instructions from Project Manager to Project Manager, but the Secretary of State will be under no obligation to comply or to request compliance. If the Secretary of State or another state agency complies with a request for wire payment, Contractor will bear all risk of loss from the moment the Secretary of State or paying agency issues wiring instructions given it by Contractor. Contractor shall release and hold harmless the Secretary of State and the paying agency from any loss or liability resulting from commercial intermediary processing of the wire transfer instructions.

2.5 Options. The Secretary of State and any political subdivision may elect to purchase goods or services during any option year at the price applicable to the selected Deployment Plan. The Secretary of State or any political subdivision may issue a purchase order for a Plan for Post Warranty Maintenance, Appendix "I," ("ANNUAL MAINTENANCE IN OUT YEARS" on the Cost Proposal), at any time before a period of warranty expires. The annual Prices for post warranty maintenance will be in effect for the number of years stated in the Proposal. The Secretary of State and any political subdivision may elect to purchase goods or services after expiration of the deployment plan terms and Contractor will make such goods or services available at prices provided to Contractor's most favored customers (for similar sales and customers similarly situated) and in no event will such prices increase from the pricing set forth in the BAFO for the initial deployment by an amount greater than the increase of the CPI-U, U.S. City Average, all items, 1982-1984 = 100%, not seasonably adjusted, for the same period.

2.6 Taxes. Neither the Secretary of State nor a political subdivision will be responsible for any taxes levied on Contractor as a result of the execution, delivery or performance of this Contract. Contractor shall pay and discharge any and all such taxes in a timely manner.

2.7 Contingencies.

2.7.1 Fund Source. If the source of payment for any obligation under this Contract no longer exists, this Contract shall expire without further obligation of the State or any officer, fund, agency or instrumentality of the State as of that moment. The determination of the Office of the Secretary of State as to non-existence or insufficiency of funds will be conclusive.

2.7.2 Cooperation and Voting Rights Act Approval. Under Section 5 of the Voting Rights Act of 1965, the United States Department of Justice ("DOJ") may disapprove the implementation of direct record electronic voting as proposed under this Contract or may condition its approval. In order to satisfy objections or conditions of DOJ, Contractor promises promptly to use its commercially reasonable best efforts to accommodate any changes to its undertaking under this Agreement, requested by the Secretary of State and are reasonably consistent with Contractor's original undertaking. Contractor agrees to cooperate with representatives of DOJ and to provide any information requested by DOJ. If the DOJ does not provide its clearance for the undertaking the Secretary of State may rescind this Agreement without obligation of any nature.

2.7.3 Contingency Plan: If Contractor misses any of the Milestones set forth on Appendix "N", or if Contractor misses any of deadlines in the top schedule of Appendix "D", or if the Secretary of State determines it is otherwise in the public interest, the Secretary of State may notify Contractor to complete and propose to her within five (5) days a contingency plan for approval by the Secretary of State ("Contingency Plan"), as further provided in Appendix "N". If the Contingency Plan is invoked because of a missed Milestone, invocation of the Contingency Plan will not relieve Contractor of its obligations and liabilities under this Agreement, including liquidated damages. However, liquidated damages will cease accruing upon acceptance of the Contingency Plan by the Secretary of State.

2.8 Local Orders. Any political subdivision may purchase goods and services pursuant to separate purchase orders at any time when the Secretary of State may place a purchase order after the initial purchase order under this Contract. The Contractor shall give priority to completing the initial order of the Secretary of State prior to satisfying any order of a local government. Nothing herein shall detract from the power of the Secretary of State to provide by rule or policy for a uniform statewide voting system. Notwithstanding anything herein to the contrary, Contractor shall not license to any political subdivision software other than the most recent software approved by the Secretary of State.

3. DELIVERY.

3.1 Plan for Deployment and Implementation. Promptly, upon the issuance of the first purchase order, Contractor will commence and carry out the "detailed plan and schedule for deploying all Voting System equipment and providing technical support, and for other activities," developed by the Project Managers for implementation of the Deployment Plan as set out in Appendix "D".

3.2 Shipment, Delivery and Risk of Loss. At its own cost Contractor will deliver the Statewide Voting System and place its components in the specific locations of facilities of political subdivisions indicated in the Deployment Plan. The Contractor will bear all risk of loss until the Secretary of State accepts ownership, risk of loss and title pursuant to Section 3.6.

3.3 Schedule and Deadlines. Contractor will deliver and perform the Deliverables by the times indicated in the Deployment Plan and according to the Plan for Implementation and Deployment. The provision in RFP 5.13 for "taking into consideration all existing commercial and governmental business commitments" is omitted.

3.4 Tracking. Promptly, upon issuance of the first purchase order, and pursuant to the Deployment Plan, Appendix "D", Contractor will implement the data base, spreadsheet or similar methodology for mutual tracking of delivery and acceptance. Contractor will provide the means of tracking and resolving complaints.

3.5 Testing, Evaluation and Acceptance.

3.5.1 Contingent Verification of Warehouse Milestones for First Partial Payment. As Contractor delivers Voting Units to its central, state warehouse in Atlanta, Contractor will provide full, reasonable access to the Secretary of State or the Center for Election Services at Kennesaw State for the purpose of monitoring, auditing and observing the delivery, initial assembly and inspection by Contractor, shipment of the units to Counties, and the audit and inspection of same and the records of these activities. The Secretary of State and/or the Center for Election Services at Kennesaw State University, as appropriate, will conduct this contingent verification concurrently with Contractor's activities and will give prompt notice of any discrepancy. When Contractor has conducted the AccuVote - TS Diagnostic Test Checklist described in Appendix "E" and provided evidence of complying with or exceeding the warehouse thresholds in Appendix "M", Contractor may invoice for a partial payment as provided in Section 2.3.

3.5.2 Contingent Acceptance of County Deliveries for Second Partial Payment.

3.5.2.1 When Contractor has completed its delivery of Voting Units to any one County and has completed its own AccuVote - TS Acceptance Test Checklist contained in Appendix "E", Contractor will certify to the Project Manager for the Secretary of State that it has completed delivery of all Deliverables to that County required or eligible for delivery or performance up to that time. The Secretary of State may then commence her inspection and testing of Voting Units for contingent acceptance purposes.

3.5.2.2 Contractor may not invoice for a partial payment for any County delivery in accordance with Appendix "M" until the Secretary of State has contingently accepted all Deliverables to that County required or eligible for delivery or performance up to that time.

3.5.2.3 For the purpose of payment of the partial County acceptance payment only, the Secretary of State will have 30 days to complete the AccuVote - TS Acceptance Test Checklist, GEMS Acceptance Test Procedure and GEMS Hardware Setup Procedure as set out in Appendix "E" and either contingently accept or reject the delivery in whole or in part. Failure to give notice of accept or reject the delivery as conforming, in whole or in part within 30 days shall be deemed to be contingent acceptance of the delivery for the purpose of the partial payment only. Upon contingent acceptance of the entire, required delivery to any one County, Contractor may invoice for the Second Partial Payment as provided in Section 2.3.

3.5.2.4 Contractor will immediately repair or replace any non-conforming delivery, and the Secretary of State will promptly re-inspect.

3.5.3 Final Acceptance Statewide System. If the Secretary of State has determined to her reasonable satisfaction that Contractor has satisfactorily completed all Deliverables then required to have been performed through November 2, 2002, and the Statewide Voting System has passed Logic and Accuracy Testing (L&A Testing) in each County, the Secretary of State will then issue her notice of provisional Final Acceptance of the Statewide Voting System. For this purpose the Statewide Voting System will be deemed to have passed the L&A Testing if the Secretary of State has not received or obtained any report of failure of L&A Testing by midnight November 2, 2002. Upon the occurrence of this acceptance, Contractor may invoice for the L&A Testing acceptance payment in Appendix "M".

3.5.4 "Deemed Acceptance." No acceptance, including contingent acceptance deemed after 30 days under Section 3.5.2.3 above and after midnight on November 2 in Section 3.5.3 above will estop the Secretary of State from asserting breach of this Contract at any time.

3.5.5 Notwithstanding anything herein to the contrary, for whole counties where vendor is ahead of the payment thresholds set forth on Appendix "M" the Secretary of State agrees to accelerate the partial payment schedule on Appendix "M" on a per unit basis as follows:

Delivery to central warehouse	\$833.63
Deployment to county and self tested	\$833.63
Performance of L&A Testing and final acceptance by Secretary of State	\$833.63
State certification of November 5, 2002 election results	\$277.88
Total	\$2,778.77

3.5.6 Upon final certification of the statewide election to be held on November 5, 2002, Contractor may invoice for the partial election payment as shown on Appendix "M".

3.5.7 Upon completion of election support services in 2004, Contractor may invoice for the final payment shown on Appendix "M".

3.6 Ownership and Title. The ownership and title of the component goods of the Statewide Voting System excluding software installed into the system that is not custom-designed for the Georgia Interface as described at Section 3.8, or so much of it as has been accepted, will vest in the "State of Georgia, Custody of the Secretary of State" upon acceptance. Contractor will promptly deliver as title to the same an unconditional, itemized bill of sale or bills of sale in form reasonably acceptable to the Secretary of State for such purposes upon her demand. Prior to Final Acceptance, the Secretary of State and the Counties may make all lawful use of the Statewide Voting System permitted or reasonably contemplated under this Agreement.

3.7 Software License. Upon delivery of any Deliverable with software or firmware, the State of Georgia will have in custody of the Secretary of State a paid up, perpetual, non-exclusive, statewide license for all Contractor software associated with the Voting System (the "Software" and the "License"). The license shall be revocable only for breach of Section 4.1, 4.3 or 9.1 of the Software Agreement, which is attached and incorporated as Appendix "K". The permission will apply to all purposes associated with the Statewide Voting System, including without limitation, elections, training, testing and education. For all similar purposes, the Secretary of State may extend the permission of all use to others within the State of Georgia, including without limitation, all political subdivisions, providing however, the entity to which the Secretary of State seeks to extend permission has not breached and commits not to breach Section 4.1, 4.3 or 9.1 of the Software Agreement.

For each item of third party software for which an initial license fee is paid, and to the extent permitted by the associated third party license, Contractor shall provide a perpetual, royalty-free (to the State of Georgia), non-exclusive, statewide license for third party software which is incorporated in, or provided in support of the Statewide Voting System. Where such software is incorporated in a Contractor product, the license fee, if any, is included in the price of such Contractor product. Third party software licenses are subject to the terms and conditions imposed by the third party provider. The terms and conditions of the third party licenses are contained in attachments to the Software Agreements.

3.8 Georgia Interface and Ownership of Intellectual Property. If requested by the Secretary of State, Contractor will design modifications and include with the Statewide Voting

System a unique Georgia interface (the "Georgia Interface"), not to exceed eighty (80) hours. The design will be subject to reasonable approval of the Secretary of State. The creation of the Georgia Interface, to the extent created for the State of Georgia, is a work for hire, with the work product to be owned by the State of Georgia and custody and oversight to be in the Secretary of State. Work is included in all its form, from inception in mental thought to any embodiment. Contractor hereby assigns to the State of Georgia all its right, title and interest in the portion of the Georgia Interface created specifically for the State of Georgia, for custody in the Secretary of State, and promises to provide her any further documentation of such assignment and State ownership as the Secretary of State shall reasonably request. The Secretary of State will determine whether any work it owns pursuant to this Subsection 3.8 will be in the public domain or will be subject of copyright, trademark, patent or other registration or documentation. Contractor will provide reasonable assistance to the Secretary of State if she determines to undertake any such registration or documentation of ownership. The State of Georgia will have no other ownership or interest in intellectual property of Contractor or intellectual property created by Contractor except for the License and escrow agreement. Specifically, Contractor retains ownership of all other work incorporated in the Georgia Interface. Contractor hereby grants the State of Georgia a perpetual, royalty-free license to use all other Contractor software incorporated in the Georgia Interface, subject to revocation only if the State of Georgia breaches clauses 4.1, 4.3 or 9.1 of the Software Agreement, attached as Appendix "K". Similarly, the State of Georgia hereby grants Contractor an irrevocable, perpetual, and royalty-free license to use, copy, modify, create derivative works from, and license the work owned by the State of Georgia pursuant to this Subsection 3.8. Contractor shall not permit any sublicensees to modify, disassemble, reverse engineer, or create derivative works from the work so licensed to Contractor.

4. SERVICES.

4.1 Itemization of Services: Contractor further promises to provide by the required times all the training, support, maintenance, and other services set out for its performance, including:

4.1.1 APPENDIX "F," entitled, "PLAN FOR FIRST YEAR SUPPORT AND MAINTENANCE;"

4.1.2 APPENDIX "G," entitled, "PLAN FOR TRAINING AND EDUCATION;"

4.1.3 APPENDIX "H," entitled, "PLAN FOR ELECTION ADMINISTRATION SUPPORT;"

4.1.4 APPENDIX "I," entitled, "EXTENDED WARRANTY AGREEMENT," (if elected by the Secretary of State or a political subdivision by amended Notice of Award); and

4.1.5 APPENDIX "K", entitled "SOFTWARE AGREEMENT.

4.2 Standard of Care and Conduct. Contractor shall deliver all products and perform all Services in a professional, workman-like manner, conforming to the highest professional and

technical guidelines and standards of its industry and taking into account the fundamental and important public function for which the Services are provided.

4.3 Staffing. Contractor has identified certain key personnel to manage the project in its proposal. Contractor will not change its key managers without permission of the Secretary of State. Contractor promises to staff the Project with the staffing levels set out in the Plans listed in Section 4.1 above and in any event no less than the number required by any provision of the RFP, for example RFP 2.5.4. The Secretary of State will determine in her reasonable discretion whether a sufficient number of suitable employees is assigned. The sufficiency of staffing plans shall be reviewed with the Project Manager of the Secretary of State and shall be subject to her reasonable discretion. Employees and employees of subcontractors assigned by Contractor shall all be reasonably acceptable to the Secretary of State. Without limitation no employee involved in Contractor's performance may have a conviction for felony, for a crime of moral turpitude or for a violation of any election law. No participating employee may be related in the third degree or less to any candidate in any election or have any other personal circumstances which constitute a conflict of interest or appearance of impropriety, the determination of which will be in the sole discretion of the Secretary of State or Local government.

4.4 Coordination. As their respective, primary contacts for administering this Contract, until further notice, Contractor designates Steve Mooreland, and the Secretary of State designates Michael Barnes. Each Project Manager will be deemed to act with authority for each Party unless a party gives notice otherwise. Each Project Manager will provide oversight and general administration, and they may establish such means of communications between themselves as they determine, including email. The Project Manager of the Secretary of State will receive and review payment requests.

4.5 Drug-Free Workplace. Contractor promises and will certify to provide a drug-free workplace for the Contractor's employees during the performance of the contract as required by the "Drug-Free Workplace Act" (O.C.G.A. 50-24-1). Toward that end Contractor hereby certifies as follows:

4.5.1 Contractor will not engage in the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana during the performance of this Contract.

4.5.2 If Contractor has more than one employee, including Contractor, Contractor shall provide for such employees a drug-free workplace, as defined under Official Code of Georgia Annotated ("OCGA") Sections 50-24-1 through and including 50-24-3, throughout the duration of this Contract.

4.5.3 Contractor will secure from any subcontractor the following written certification:

4.5.3.1 As part of the subcontracting agreement with (Contractor's Name), (Subcontractor's Name) certifies to Contractor that a drug-free workplace will be provided for the subcontractor's employees during the performance of this Contract pursuant to paragraph 7 of subsection (b) of OCGA §50-24-3.

4.5.4 Contractor may be suspended, terminated, or debarred if it is determined that:

4.5.4.1 Contractor has made false certification hereinabove; or

4.5.4.2 Contractor has violated such certification by failing to carry out the requirements of official Code of Georgia §50-24-3.

5. **CONTRACTOR REPRESENTATIONS, WARRANTIES, AND COVENANTS.** Contractor represents and warrants to the Secretary of State, for the State of Georgia, and promises, as follows:

5.1 **Due Organization.** Contractor is a corporation duly organized, validly existing, and in good standing under the laws of the state of its domicile. Contractor has all requisite corporate power and authority to own, operate, and dispose of its property. Contractor is duly qualified to do business and is in good standing in the State of Georgia.

5.2 **Power and Authority.** Contractor has full power and authority to execute and deliver this Contract and to perform its obligations under this Contract. This Contract and the obligations contemplated hereby have been duly and validly authorized by all necessary action on the part of Contractor, and this Contract constitutes a legal, valid, and binding obligation of Contractor, enforceable in accordance with its terms. The Person executing this Contract on behalf of Contractor has actual authority to bind Contractor to this Contract.

5.3 **No Violation.** Contractor will enter into no Contract the execution or performance of which would violate or interfere with this Contract. Neither Contractor's execution and delivery of this Contract, nor Contractor's performance of this Contract, will result in an event of legal force or consequence, which would interfere with Contractor's performance of this Contract, e.g. by preventing sale of absolute ownership in the Statewide Voting System or full use of the License.

5.4 **Licenses.** Contractor has all requisite licenses or other permissions required to carry on its present business and to perform its obligations under this Contract or will do so before time for performance. No event has occurred with respect to any such license or permission that could cause its revocation or termination.

5.5 **Consents.** No third party act is required to enable Contractor to enter into this Contract or to perform it or, if so, such consent has been revealed in writing to the Secretary of State and will be obtained before time for performance.

5.6 **Capabilities.** Contractor has, either by itself or with the assistance it reasonably expects to receive from subcontractors, the facilities, equipment, authorizations, and know-how to perform this Contract.

5.7 **Legal Matters.** There is no pending or known potential claim, planned action or other event of any nature that could individually or in together materially impair Contractor's ability to perform this Contract. Without limiting the generality of this representation, Contractor is not currently the subject of a voluntary or involuntary petition in bankruptcy, does

not presently contemplate filing any bankruptcy petition, and is not aware that any person plans to file an involuntary petition in bankruptcy against it.

5.8 Compliance with All Laws.

5.8.1 Contractor is in material compliance, and will remain so, as to all federal, state, and local laws, regulations, ordinances, and administrative orders, the failure to comply with which could materially impair Contractor's ability to perform this Contract.

5.8.2 Contractor agrees to comply with applicable federal and state laws, rules and regulations, and the State's policy concerning, nondiscrimination in employment practices and procurement.

5.9 Truth and Correctness. Contractor has not omitted to tell, and will not fail to tell, the Secretary of State any material fact, which becomes materially pertinent to Contractor's continued performance of this agreement or is necessary to make Contractor's statements contained here not misleading.

5.10 Survival of Representations and Warranties. The representations and warranties made above will survive the early termination or the expiration of this Contract.

6. PERFORMANCE WARRANTIES AND REMEDIES.

6.1 Warranty. Contractor warrants the Statewide Voting System and every individual component will be, and will operate, in all material respects in accordance with Sections 1.1 through 1.4 above, Contractor's Proposal, the "Statewide Voting System Specifications" of Appendix "A," and the "Performance Features and Standards" of Appendix "B." Contractor further warrants that the Services will be performed substantially as promised. To the extent that they do not conflict with the terms and conditions of this Contract, all warranties, representations and covenants made in the Software Agreement (attached hereto, marked as Appendix "K" and incorporated herein by reference) shall be included in this Warranty. To the extent that they do not conflict with terms and conditions of this Contract, all warranties, representations and covenants made in the Extended Warranty Agreement (attached hereto, marked as Appendix "I" and incorporated by reference) shall be included in this Warranty. Notwithstanding any other provision herein, in the event of a conflict between terms of this Contract Instrument and any agreement incorporated as an exhibit, there terms and conditions of this Contract Instrument shall prevail. The foregoing warranty as to each component of the Statewide Voting System of the initial purchase order shall commence on County acceptance of such component and shall continue until one (1) year after Final Statewide Acceptance of the Statewide Voting System. For all subsequent purchases, the foregoing warranty shall continue for a period of one (1) year after acceptance of the purchase of such component.

6.2 No Surreptitious Code Warranty. Contractor warrants no part of the Statewide Voting System contains or will contain any code which

6.2.1 constitutes software routine designed to disable a computer program automatically with the passage of time or under the positive control of a person other than a licensee of the program. This does not include software routines designed to permit access to a

licensee's computer system for purposes of maintenance or technical support, provided Contractor has given written notice and description of the attributes of such code to the Secretary of State and has her written acquiescence. However, in any event, no such code may interfere with the security features of any Voting Device or Election Management System; or which

6.2.2 contains any virus, Trojan horse, worm, or similar software routines or hardware components.

6.3 Y2K Compliance. Contractor represents and warrants that the Statewide Voting System will be designed to be used with data created prior to, during, and after the calendar year 2000 A.D., and that the System will operate without error relating to ANY date data, specifically including without limitation any error relating to, or the product of, date data which represents or references different centuries or more than one century.

6.4 Ownership. Contractor warrants that, upon Final Statewide Acceptance, the State will have unencumbered, fee simple title to the Statewide Voting System excluding software that is installed and is not a design modification for the Georgia Interface as described at Section 3.8 upon acceptance. In the event that the State shall separately accept any component or part of the entire Statewide Voting System, the State will have unencumbered, fee simple title to such component of part, excluding software that is installed and is not a design modification for the Georgia Interface as described at Section 3.8.

6.5 Attempts to Correct Alleged Breach. Upon notice of alleged breach of warranty, Contractor will attempt to correct the breach promptly, in any event within 30 days and, if an election is imminent or in progress, immediately.

6.6 Remedies for Breach. If Contractor is unable or fails to correct a material breach of the Contract, including the warranty of the Statewide Voting System or performance of the Services, or any part of them, in a timely manner, the Secretary of State may, in her sole and absolute discretion, terminate the whole or the corresponding part of this Contract, invoke Liquidated Damages, and exercise either the Refund Remedy or the Cover Remedy, as well as her rights under the Escrow Agreement.

6.6.1 "Refund Remedy" will mean the right to a full refund of any moneys paid for the Statewide Voting System or an individual component.

6.6.2 "Cover Remedy" will mean the right to obtain alternative performance, in which case Contractor will pay the State the added cost of performance, provided the Secretary of State acts reasonably to mitigate damages and provided that such alternative performance does not breach the terms and conditions of the Software Agreement.

6.6.3 "Liquidated Damages:" Because of the difficulty of measuring certain damages and the importance of timeliness and performance to the electoral process, Contractor promises to pay liquidated damages as follows:

6.6.3.1 for each calendar day of delay in completing a Milestone described in Appendix "N" a sum equal to .25% of the dollar amount of all purchase orders

placed by the Secretary of State for all purposes. The RFP phrase and exception, "taking into consideration all existing commercial and governmental business commitments" is deleted.

6.6.3.2 for each failure to satisfy performance features and standards in Appendix "B," damages at the rate stated by Contractor in its Proposal.

6.6.3.3 Mitigation and Retroactive Application: The provisions of Appendix "N" will govern mitigation and retroactive application of liquidated damages.

7. INTELLECTUAL PROPERTY MATTERS.

7.1 Representation and Warranty. Contractor represents and warrants that the exercise of rights pursuant to this Contract will not infringe any valid and subsisting intellectual property right owned by any person. The Secretary of State and Contractor will each promptly notify the other if she or it receives or learns of an allegation to the contrary. Contractor further undertakes to indemnify the State of Georgia, its agencies, its insurance and self-insurance funds and its instrumentalities, and their officers, employees, and representatives, from all loss or liability for such infringement, including the expense of litigation and attorneys fees. Contractor agrees that the Attorney General of Georgia represents and defends the State, and his prerogative is not waived by this Contract.

7.2 Further Remedy. Contractor may procure for the State the right to continue the allegedly infringing use or replace or modify the Statewide Voting System or any part of it to make it non-infringing. If Contractor is unable to cure, in addition to the right of indemnity above, the Secretary of State may invoke Liquidated Damages, the Cover Remedy and the Refund Remedy and power of termination set out for general breach of warranty.

7.3 Duplication of Materias. The Secretary of State, or its designee, shall be permitted to reproduce, duplicate, copy and distribute any training materials provided to it by Contractor for the sole purpose of facilitating the operation of the Statewide Voting System.

8. TERM AND TERMINATION. This Contract commences as of the date of the Notice of Award. The Secretary of State may terminate this Contract for any reason in the public interest. If the Secretary of State terminates this Contract for reason other than material breach, the Office of the Secretary of State shall pay Contractor for Deliverables performed and accepted by her prior to termination. Termination will not relieve Contractor of any continuing obligations to provide warranty and support for delivered and accepted Deliverables, providing the fees for such warranty and support have been paid.

9. RELATION OF THE PARTIES; STATUS OF LOCAL GOVERNMENTS.

9.1 Independent Contractor. The Contractor will be the independent contractor of the Secretary of State. Contractor will be solely responsible for compliance with all laws, rules and regulations respecting its employees, including (but not limited to) employment of labor, hours of labor, health and safety, working conditions, workers' compensation insurance, and payment of wages. Contractor agrees to indemnify and hold harmless the State of Georgia from any loss resulting from the breach of these promises. This Contract shall not be construed so as to create a

partnership or joint venture between Contractor and the State or any of its agencies or authorities whosoever.

9.2 Approval Required. In its proposal Contractor has distinctly identified each subcontractor through which it plans to perform. Contractor may change subcontractors with approval of the Project Manager of the Secretary of State. The use of subcontractors will not relieve Contractor of any responsibility. Contractor promises to make timely payments for work performed by any subcontractor and Contractor will indemnify the State and hold it harmless for any breach of this covenant. Contractor may not assign any of its rights or obligations under the Contract without the written permission of the Secretary of State in her reasonable discretion.

9.2.1 Minority Business Policy and Tax Incentive. It is the policy of the State of Georgia that minority business enterprises shall have a fair and equal opportunity to participate in the State purchasing process. Therefore, the State encourages all companies to subcontract portions of its contracts to minority business enterprises. For tax incentive information, see O.C.G.A. § 48-7-38. Contractors may also receive clearinghouse and related assistance from the Governor's Small Business Center.

9.2.2 Quarterly Report. On the tenth day of the first month of each calendar quarter, the Contractor shall report to the Small Business Center all payments that together total more than \$2500 to any single subcontractor, supplier, business partner, joint venture or agent, which Contractor has used to fulfill the requirements of this Contract. The report shall provide the name of the business, their Federal Employment Identification (FEI) number, the purchase order or contract number and the amount paid. All reports shall be forwarded to:

The Governor's Small Business Center
Attn: Tony Greene
200 Piedmont Avenue, S.E.
Suite 1102, West Tower, Floyd Building
Atlanta, Georgia 30334-9010
Telephone: (800) 495-0053 or (404) 656-6315
E-Mail: DOASOSMB@doas.state.ga.us

10. PERFORMANCE BOND.

(a) Within ten working days of the issuance of a Notice of Award, Contractor shall deliver to the Contracting Officer a Performance Bond in substantially the form annexed as Appendix "D" of the RFP, and subject in form to the reasonable approval of the Secretary of State. (The alternative provision for a cashier's check is omitted.) The amount of the bond will be 50% of the contract amount, calculated by assuming a full deployment under the Prices. The cost of the bond will not be recoverable as a separate cost item. The surety will authorized by the Commissioner of Insurance to transact surety insurance in the State of Georgia, will have an A. M. Best rating of "A" or better and a financial size rating of VII or better. The surety will be subject to reasonable approval of the Secretary of State. The period of performance covered by the Performance Bond will end with the final certification of the November 2002, statewide election.

(b) After the release of the performance bond, within ten days of the issuance of any additional purchase order by the State or any County, which purchase order (or all such orders cumulatively) equal or exceed 25 units, Contractor shall promptly deliver a bond in the cumulative amount of such purchase orders in the form annexed as Appendix "D" of the RFP, and subject in form to the reasonable approval of the Secretary of State.

11. **ESCROW.** Contractor shall place into escrow the source code for all Contractor software in the Election Management System, and for all third party software in the Election Management System, in accordance with an Escrow Agreement substantially in the form attached hereto as Appendix "J", with such changes approved by the Secretary of State. The Escrow Agreement shall be entered into within seven (7) days of the date hereof. The escrow agreement will be a three-party escrow agreement with an escrow agent in Georgia reasonably approved by the Secretary of State. The escrow will be for the benefit of the State, the Secretary of State and local governments conducting elections.

12. CONFIDENTIALITY.

12.1 **Open Records.** Except as otherwise provided by law, records of the political subdivisions, the Georgia Technology Authority and the Secretary of State are public records subject to disclosure under Georgia "open records" law, O.C.G.A. §§ 50-18-70 et seq. The "open records law" is not "applicable to any computer program or computer software used or maintained in the course of operation of a public office or Contractor," as those terms are defined in O.C.G.A. § 50-18-72(f). If Contractor believes any other record or information it provides the Secretary of State or any political subdivision is exempt from disclosure, it must so clearly mark and identify the material when tendering it, with a written explanation. Neither the Secretary of State nor the political subdivision will be required to acquiesce in the designation, but the Office of the Secretary of State will notify Contractor promptly if it receives an open records request for material provided by Contractor and will require political subdivisions to do so by intergovernmental agreement.

12.2 **Non-disclosure.** Because confidentiality does apply in certain instances in the election process, the Secretary of State may require staff members of Contractor and its subcontractors to sign a non-disclosure agreement.

13. RISK OF LOSS, INSURANCE AND INDEMNIFICATION.

13.1 Contractor agrees to indemnify the "State" and to hold it harmless from any loss and liability caused, in whole or in part, by act or omission of Contractor in connection with this Contract. This indemnification shall not apply if Indemnities or any of them are solely responsible for such losses or damages. If Indemnities or any of them are partially responsible for such losses or damages, Contractor shall only be liable to the extent of Contractor's contribution to such losses or damages. Without limitation Contractor agrees to indemnify the State from all loss or liability from breach of copyright, patent, trademark, license or other claim based on property of another and arising in connection with the Statewide Voting System or other product or service of Contractor. For purposes of this indemnification,

13.2 "State" means the Office of the Secretary of State, local election jurisdictions, all their departments and units of government, all their instrumentalities, and all their officers and employees and voting workers, for any circumstances in which they are not otherwise immune, plus the insurance and self-insurance programs established for their protection.

13.3 "Loss or liability" includes as well the cost of legal representation and all other cost and expense of defense.

13.4 This indemnification does not require Contractor to protect for matters beyond the scope of the Contract. Nor does this indemnification extend to claims by Contractor for breach or default under the Contract.

13.5 To the extent a liability or loss covered by this indemnification is covered by the State of Georgia Tort Claims Fund (the Fund), the Contractor agrees to reimburse the Fund. To the full extent permitted by the Constitution and the laws of the State and the terms of the Fund, the Contractor and its insurers waive any right of subrogation against the State, the Indemnities, and the Fund and insurers participating thereunder, to the full extent of this indemnification.

13.6 Contractor shall, at its expense, be entitled to and shall have the duty to participate in the defense of any suit against the Indemnities subject to the prerogatives of the Attorney General as the State's chief legal officer. No settlement or compromise of any claim, loss or damage entered into by Indemnities shall be binding upon Contractor unless approved in writing by Contractor. No settlement or compromise of any claim, loss or damage entered into by Contractor shall be binding upon Indemnities unless approved in writing by Indemnities.

13.7 Contractor's total liability pursuant to this Agreement, for any reason, shall not exceed twice the cumulative, total amount of orders placed under this Agreement.

13.8 Insurance.

13.8.1 Contractor shall procure and maintain insurance that shall protect the Contractor and the State Indemnities above from any claims for bodily injury, property damage, or personal injury that may arise out of Contractor's operations under the Contract. Contractor shall procure the insurance policies at the Contractor's own expense and shall furnish the State an insurance certificate listing the State as certificate holder. Contractor will make details of all policy exclusions available upon request. The insurance certificate must document that the liability insurance coverage purchased by the Contractor includes contractual liability coverage to protect the State. In addition, the insurance certificate must provide the following information:

- 13.8.1.1 Name and address of authorized agent,
- 13.8.1.2 Name and address of insured,
- 13.8.1.3 Name of insurance company (licensed to operate in Georgia),
- 13.8.1.4 Description of coverage in standard terminology,

- 13.8.1.5 Policy period,
- 13.8.1.6 Policy Number,
- 13.8.1.7 Limits of liability,
- 13.8.1.8 Name and address of certificate holder,
- 13.8.1.9 Acknowledgment of notice of cancellation to the State,
- 13.8.1.10 Signature of authorized agent,
- 13.8.1.11 Telephone number of authorized agent.

13.8.2 Contractor is required to maintain the following insurance coverage for the period ending on the certification of the 2004 General Primary Runoff and as a condition of transacting further business with any county or municipality under this Contract:

13.8.2.1 Workers' Compensation Insurance (Occurrence) in the amounts of the statutory limits established by the General Assembly of the State of Georgia (A self-insurer must submit a certificate from the Georgia Board of Workers' Compensation stating that Contractor qualifies to pay its own workers' compensation claims.) In addition, Contractor shall require all subcontractors occupying the premises or performing work under this Contract to obtain an insurance certificate showing proof of Workers' Compensation Coverage.

13.8.2.2 Commercial General Liability Policy (Occurrence) to include contractual liability. The Commercial General Liability Policy shall have dollar limits sufficient to insure that there is no gap in coverage between this policy and the Commercial Umbrella Policy described below.

13.8.2.3 Business Auto Policy (Occurrence) to include but not be limited to liability coverage on any owned, non-owned and hired vehicle used by Contractor or Contractor's personnel in the performance of this Contract. The Business Automobile Policy shall have dollar limits sufficient to insure that there is no gap in coverage between this policy and the Commercial Umbrella Policy required in this Contract.

13.8.2.4 Commercial Umbrella Policy (Occurrence), which must provide the same or broader coverage than those provided for in the above Commercial General Liability and Business Auto Policies. Policy limits for the Commercial Umbrella Policy shall have an annual aggregate limit of three million dollars (\$3,000,000).

13.8.3 The foregoing policies shall contain a provision that coverage afforded under the policies will not be canceled, or not renewed or allowed to lapse for any reason until at least thirty (30) days prior written notice has been given to Secretary of State. Moreover, Contractor shall be separately obligated to provide the Secretary of State with sixty (60) days prior written notice of any such cancellation, non-renewal or lapse. Certificates of Insurance showing such coverage to be in force shall be filed with Secretary of State prior to commencement of any work under this Contract. The foregoing policies shall be obtained from

and maintained with insurance companies that are authorized by the Commissioner of Insurance to transact the applicable line of insurance in Georgia. The insurers are subject to the reasonable approval of the Secretary of State, whose discretion will be deemed reasonable if requiring an insurer with an A. M. Best rating of "A" or better and a financial size rating of VIII or better. All such coverage shall remain in full force and effect during the Initial Term of the Contract, any renewal or extension thereof and as a condition for transacting further business with any political subdivision or municipality under this Contract.

13.9 Contractor shall provide the Secretary of State with such certificates of coverage as she may require. The policies must be issued by a company reasonable acceptable to the Secretary of State and authorized to transact the appropriate line of insurance in the State of Georgia.

14. **NOTICES.** All notices and statements provided for or required by this Contract shall be in writing, and shall be delivered personally to the other designated party, or mailed by certified or registered mail, return receipt requested, or delivered by a recognized national overnight courier service, as follows:

If to the Secretary of State:

Secretary of State of Georgia
214 State Capital
Atlanta, Georgia 30334

with a copy to:

Assistant Secretary of State,
Chief Operating Officer
214 State Capital
Atlanta, Georgia 30334

If to Contractor:

Diebold Election Systems, Inc.
1611 Wilmeth Road
McKinney, Texas 75609
Attn: President

with a copy to:

Diebold, Incorporated
5995 Mayfair Road
P. O. Box 3077
North Canton, Ohio 44720
Attention: Vice President and General
Counsel

The parties hereto may change the address or person to which notice is to be sent by written notice to the other parties in accordance with the provisions of this Section.

15. MISCELLANEOUS.

15.1 Compliance with Investigations. Contractor will cooperate with the Secretary of State, the political subdivisions and any federal, state, local, county or municipal officials that may investigate or study any election or related events in the course of their public functions.

15.2 Trademarks. Neither party will make any use of any marks, seals or logos of the other for any reason (e.g., in advertising, press releases, or other publicity) except solely as may be expressly authorized by this Agreement or otherwise authorized in writing by that Party.

15.3 Survival. The warranties and indemnities and the provisions of Sections 2.2, 9.1 and 9.9 will survive the termination or expiration of the Contract.

15.4 Severability. If a court or administrative tribunal strikes any part of this Contract, the remainder will continue in effect, and a court may reform the invalid provisions to conform as closely as possible to the parties' original intent, but in each case only if the Secretary of State determines that the substantial purposes of both parties can still be accomplished in fairness to each.

15.5 Venue and Forum. This Contract shall be governed by and construed in accordance with Georgia law, excepting any conflicts of law provision directing its enforcement or construction to laws or forums of another jurisdiction. Any suit between the Parties respecting or related to the Contract must be brought in the state or superior court in Fulton County, Georgia, and Contractor irrevocably submits to the jurisdiction of such courts and waives any objection it may now or later have to venue. This Contract does not waive the 11th Amendment immunity of the State of Georgia, its officers, departments or instrumentalities.

15.6 No Waiver. The failure of either Party at any time to require performance by the other Party of any provision of this Agreement shall in no way affect the right of such Party to require performance of that provision. Any waiver by either Party of any Breach of any provision of this Agreement shall not be construed as a waiver of any continuing or succeeding Breach of such provision, a waiver of the provision itself, or a waiver of any right under this Agreement.

15.7 Binding on Successors. This Agreement will be binding upon and inure to the benefit of the successors and assigns of each party as permitted by this Agreement.

15.8 Assignment. Contractor may not assign or delegate any right under this Contract, in whole or in part, without the prior written consent of the Secretary of State, and any assignment or delegation without such consent will be null and void and a Breach of this Contract. For the purposes of this subsection, sale or transfer of an equity interest greater than or equal to fifty percent (50%) in, or substantially all of the assets of, Contractor will be deemed an assignment for which the Secretary of State's consent is required.

15.9 Records Retention. Contractor agrees to make available at all reasonable times any records pertaining to the Contract and its performance, for inspection or audit by any authorized representative of the State, including the State Auditor. Contractor shall preserve and make available its records for a period of five years from the date of final payment under this Contract, and for such period, if any, as is required by applicable statute. If the Contract is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of three years from the date of any resulting final settlement. Records which relate to appeals, litigation, or the settlements of claims arising out of the performance of this Contract, or costs and expenses of any such agreement as to which exception has been taken by the State Auditor or any of his duly authorized representatives, shall be retained by Contractor until such appeals, litigation, claims or exceptions have been disposed of.

15.10 Headings. The headings contained herein are for the convenience of the Parties only and shall not be interpreted to limit or affect in any way the meaning of the language contained in this Contract.

15.11 Trading With State Employees. Contractor hereby certifies that this Contract does not and will not violate the provisions of Official Code of Georgia Annotated §45-10-20 et seq. in any respect.

15.12 Contingent Fee Prohibition. The Contractor warrants that it has not employed or retained any person, partnership, corporation, or other entity, other than a bona fide employee, bona fide agent, bona fide salesperson, or commercial selling agency working for the Contractor to solicit or secure this Agreement, and that it has not paid or agreed to pay any person, partnership, corporation or other entity, other than a bona fide employee, bona fide salesperson or commercial selling agency, any fee or other consideration contingent on the making of this Agreement.

15.13 Counterparts. This Contract is executed in triplicate original counterparts, each of which shall be deemed to be an original, but all of which together shall constitute the same Contract.

15.14 Remedies Cumulative. The remedies of this Contract are cumulative of one another and cumulative of any remedy otherwise authorized in law or equity.

15.15 Force Majeure. Neither Party will be held to exact performance when delay is caused by act of God, war, riot, fire, explosion, accident, flood, sabotage, national defense requirements or any other like event beyond the reasonable control of either Party. However, Contractor acknowledges the importance of the deadlines and the novelty of the project and promises to exercise every commercially reasonable effort to meet deadlines regardless of difficulty.

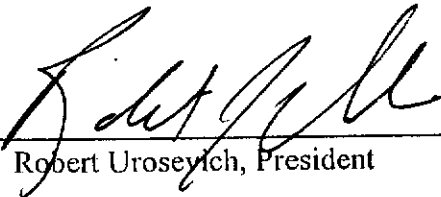
15.16 Entire Contract. This Contract includes the annexed Appendices and the incorporated RFP and Proposal. It constitutes the entire Contract among the Parties with respect to its subject matter and supersedes any prior representations, inducements, agreements or other statements or writings, each of which, if such occurred, will be of no force and effect. This

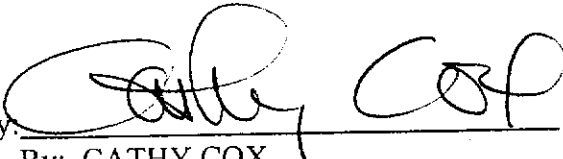
Contract may be modified or amended only by a writing executed by both Parties in the manner of this Contract.

IN WITNESS WHEREOF, the parties hereto have caused their duly authorized representatives to execute this Contract as shown below.

DIEBOLD ELECTION SYSTEMS, INC.

SECRETARY OF STATE

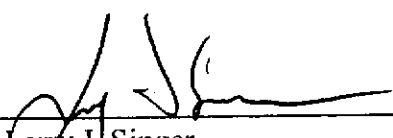
By: 
Robert Urosevich, President

By: 
By: CATHY COX
Its: Secretary of State

This 3rd day of May, 2002

This 3rd day of May, 2002

Approved:

By: 
Larry J. Singer
Chief Information Officer and
Executive Director
GTA

IN WITNESS WHEREOF, the parties hereto have caused their duly authorized representatives to execute this Contract as shown below.

DIEBOLD ELECTION SYSTEMS, INC.

SECRETARY OF STATE

By: _____
Robert Urosevich, President

By: _____
By: CATHY COX
Its: Secretary of State

This ____ day of _____, 2002

This ____ day of _____, 2002

Approved:

By: _____
Larry J. Singer
Chief Information Officer and
Executive Director
GTA