

NEW YORK STATE SUPREME COURT
COUNTY OF ALBANY

PREMIER ELECTION SOLUTIONS, INC.
Petitioner,

-against-

Index #

NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS,
Respondents.

2008 JAN 32 PM 2:54

FILED
NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK

ORDER TO SHOW CAUSE

Present: Hon. Gerald W. Loughry:

Upon reading and filing the verified petition of PREMIER ELECTION SOLUTIONS, INC. and all the proceeding heretofore had herein, it is hereby

ORDERED, that respondents show cause before this Court at the Albany County Courthouse, in the City and County of Albany, New York on the 5th day of February, 2008 at 3:00 P. m. of that day or as soon thereafter as counsel can be heard why an order should not be made and entered herein:

1. Directing that respondents take any and all actions necessary to approve and otherwise permit petitioner's AutoMARK to be among those ballot marking devices that were approved by respondents on January 24, 2008 to be examined and included for the vendor selection process for 2008 elections including primaries in the State of New York, and/or

2. Restraining the respondents until further order of this Court from taking any action preventing the counties from selecting Premier or allowing Premier to continue in the

process, including but not limited to issuing list(s) of ballot marking devices approved by respondents to be examined and included in the final vendor selection process for the 2008 elections including primaries in the State of New York, and

3. Directing the respondents to immediately distribute all petitioner's bid information, including but not limited to petitioner's offered systems and price information, to all County Boards of Elections, relevant to allow such County Boards of Elections to select the their preferred Ballot Marking Device for use in the 2008 elections, and

4. Directing the respondents to notify all the County Boards of Elections of this litigation, and

5. Granting such other and further relief as to the Court may seem just and proper, and it is further

ORDERED, that respondents are to produce upon the return date of this proceeding any and all original determinations, certifications, resolutions, minutes, audio and video recordings, reports and records of any kind of or relating to respondents' meetings and determinations concerning the subject matter of this proceeding, and it is further

ORDERED, that leave is hereby granted to petitioner upon the return date of this proceeding or any adjourned date thereof to submit such additional proof, by way of affidavits, exhibits, or other evidence in support of the petition, and it is further

~~**ORDERED**, that until further Order of this Court respondents shall include petitioner's AutoMARK on the approved list of ballot marking devices to be tested for use in the 2008 elections including primaries in New York State,~~

GWC
2/1/08

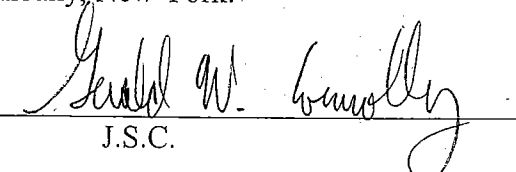
Sufficient cause appearing therefor, it is further

ORDERED, that because the Court finds that the circumstances in this case prevent the immediate filing of the Order to Show Cause and Petition herein, permission is

therefore granted to the petitioners pursuant to CPLR 304 to file the application for an index # and RJI on or before 5:00 p.m. ^{February} January 4, 2008 with the Albany County Clerk, and it is further

ORDERED, that service of this Order to Show Cause and the Petition upon which it was granted upon respondents New York State Board of Elections and Commissioners Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher and Helena Moses Donohue, be made by delivering a copy thereof to the New York State Board of Elections, 40 Steuben Street, Albany, New York and giving such papers to a person authorized to accept such papers on behalf of said New York State Board of Elections on or before February 1, 2008.

Signed this 1 day of February 2008 at Albany, New York.



J.S.C.

Hon. Gerald W. Connolly
Acting Supreme Court Justice

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FILED
NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK

NEW YORK STATE SUPREME COURT
COUNTY OF ALBANY

PREMIER ELECTION SOLUTIONS, INC.
Petitioner,

-against-

VERIFIED
PETITION
Index #

NEW YORK STATE BOARD OF ELECTIONS, and
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SAID COMMISSIONERS TOGETHER CONSTITUTING
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ALBANY, NEW YORK
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VERIFIED PETITION

INTRODUCTION

New York State under the Help America Vote Act (“HAVA”) is required to certify ballot marking device (“BMD”) to assist people with disabilities to vote independently beginning with the 2008 fall primary and general election. Premier Election Solutions submitted to New York State an established product — the AutoMARK BMD. The AutoMARK device has been widely accepted by advocates in the disabled community as the preferred solution that meets the specialized needs of voters with visual and other physical impairments. AutoMarK ballot marking device has been certified for use in 31 states, with 34,000 units deployed to jurisdictions across the U. S.

On January 23, 2008, the New York State Board of Elections met and rejected all six voting systems under review. On January 24, 2008, a motion was made to “to put up for a vote is the Premier AutoMARK.” That motion passed 3-0, although one Commissioner conditioned

her approval on criteria that were not required by the bid specifications, State regulations, and State law. Subsequent to the vote by the Board, by letter dated January 29, 2008, the executive directors of Board informed the County Board of Elections that Premier's AutoMARK device was unacceptable because it failed to met the full face ballot requirement of Election Law § 7-104.

This is and was untrue. Section 7-104 mandates that “[a]ll ballots shall be printed and/or displayed in a format and arrangement, of such uniform size and style as will fit the ballot frame Such type or display on the ballot shall satisfy all requirements and standards set forth pursuant to the federal Help America Vote Act.” The essence of the requirement is that the ballot must display every candidate for every office that is up for election.

Without question, the AutoMARK system does this. AutoMARK uses a paper ballot. This ballot is a full faced ballot — its displays every candidate for every office that is up for election. Premier has tried diligently to resolve this dispute with the New York State Board of Elections — including modifying the device. All reasonable efforts have fallen on deaf ears. For the reasons set forth below, the State Board acted arbitrary and capriciously in denying Premier AutoMARK BMD as an option for local election boards. Premier now seeks the help of this Court to correct this wrong and allow the AutoMARK device to be added to the list of BMDs to be included in the vendor selection process.

PARTIES

1. Plaintiff brings a special proceeding pursuant to pursuant to CPLR Article 78.
2. Petitioner Premier Election Solutions is a Corporation with it offices located in the City of Allen, Collin County, State of Texas.

3. Respondents Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher, and Helena Moses Donohue are the Commissioners of the New York State Board of Elections and are named as respondents in their official capacity.
4. Respondent New York State Board of Elections is a New York State Agency and is amongst others, responsible for administration and enforcement of all laws relating to elections in the State of New York.

BACKGROUND

5. As the Court is undoubtedly aware, in 2002 Congress enacted the Help America Vote Act (“HAVA”).
6. Section 301 of HAVA mandated that, by January 1, 2006, all states have in place voting systems that fully comply with the technical requirements of HAVA. Those requirements are set forth in Subtitle A of Title III of HAVA.
7. Unfortunately the Board had done practically nothing to certify any voting system to be in compliance with both federal and state law. Upon information and belief, New York State is the only state in the country that is not in compliance with HAVA. Because of this fact the Justice Department has proceeded against the Board in Federal Court for the Northern District of New York on at least two occasions seeking to compel New York’s compliance. On January 16, 2008 the Honorable Gary L. Sharpe, United States District Judge for the Northern District of New York, issued a Supplemental Remedial Order compelling New York to be in full compliance with HAVA by 2009 and to be at least partially compliant by the fall of 2008. Among other things, that order mandated that the Board “make all possible efforts to provide for certification of a [HAVA compliant] voting system(s) in time for use of such system(s) in the fall of 2008 federal primary and general elections by such

counties as wish to utilize fully HAVA-compliant voting systems in such elections.” Despite the fact that petitioner has developed and had certified a fully HAVA compliant voting system, respondents’ actions will prevent any Counties from using the petitioner’s AutoMARK BMD for the 2008 elections in New York and as a consequence hereof also from using it thereafter. In essence, the Board has imposed a single choice on every County across the State. The particular product that is the single choice has never been certified by any state or used in the United States for any election.

8. On October 17, 2007 the Office of General Services (“OGS”) published bid specifications for companies to bid on a Ballot Marking Device (“BMD”) for temporary use in the 2008 election.
9. A Ballot Marking Device is a device with the object to allow voters with disabilities to vote.
10. A BMD is not defined in HAVA, New York State Law, or New York State regulations.
11. The bid specifications did not envision an award to any one company.
12. Rather, they were designed to encourage the approval of several different companies’ machines, providing the County Boards of Elections with choices as required by Election Law 7-202(4).
13. Petitioner submitted a bid, which OGS has certified as responsive to the bid specifications.

AUTOMARK BMD

14. The AutoMARK device has been widely accepted by advocates in the disabled community as a preferred solution that meets the specialized needs of voters with visual and other physical impairments.

15. AutoMARK ballot marking device has been certified for use in 30 states, with 34,000 units deployed to jurisdictions across the U. S.
16. AutoMARK employs a paper ballot.
17. This ballot is a full faced ballot — its displays every candidate for every office that is up for election.
18. The ballot contains an oval SAT type bubble next to each candidate's name. A copy of a typical ballot is attached hereto as Exhibit A.
19. The voters mark the ballot to indicate their choice.
20. The mark can be made manually by using a pen or pencil or with the aid of an electronic marking device.
21. A depiction of the electronic marking device is attached hereto as Exhibit B.
22. To mark the ballot electronically, the voter places the ballot into the machine. The A video touch screen appears which displays the full ballot and instructions. The voter then continues with the process where the voter touches the screen a new page appears displaying the candidates for the first office on the ballot. When the voter makes her selection, the screen moves to next office. This process continues until the voter makes her selection for every office. When the process is complete, an ink jet printer marks the paper ballot (which had been inserted by the voter). The voter receives the mark ballot and the ballot is automatically placed in the box without poll worker intervention. The ballots are then counted by an optical scan device.
23. Only the most recent iteration of the software contains an initial ballot. This was not required for the prior 18 months of the development. It was not (as is not) a part of the requirements of the bid specifications or the Board's rules and regulations. Only since

January 2008, without any changes in the rules, bid specifications, or the law, has a full face touch screen become an issue with the Board.

THE VOTE BY THE BOARD

24. On January 23, 2008, the New York State Board of Elections met and rejected all six systems under review.

25. On January 24, 2008, a motion was made to “to put up for a vote is the Premier Automark.”

26. The following exchange occurred with respect to Premier’s AutoMARK device:

>> Commissioner Donohue: The second one that I would like to put up for a vote is the Premiere Automark. Supposedly it is in the process of being delivered with the full face quality. I put that up for a vote.

>> Commissioner Kellner: I am going to vote in favor of this also. I believe that the, it's my position that the submission that was already made does comply with the law in that it starts with a premarked, a preprinted full face ballot and that it ends with a marked full face ballot. Therefore, it complies with section 7 104 and that it also complies with the help America vote act disability access requirements.

I understand that they want to make a modification that has been requested by the Republican Commissioners. In fact, I saw a version of that modification this morning which unlike the Avante did present a full face ballot that was legible and therefore, I don't have any problem with that modification either.

So I will vote aye.

Commissioner Kelleher?

>> Commissioner Kelleher: Aye.

>> Commissioner Donohue: I will vote aye with the improvement that we mentioned.

27. The exact meaning of this motion is somewhat ambiguous. What is clear is that Commissioner Donohue moved to accept AutoMARK. Two commissioners approved this motion. Commissioner Donohue’s vote is a bit unclear. She voted aye “with the

improvement that we mentioned.” Apparently this improvement required that the electronic screen have additional “the full face quality” — which the AutoMARK BMD, as noted by Commissioner Kellner, complies with.

AUTOMARK MEETS THE FULL BALLOT REQUIREMENT

28. Section 7-104 mandates that “[a]ll ballots shall be printed and/or displayed in a format and arrangement, of such uniform size and style as will fit the ballot frame Such type or display on the ballot shall satisfy all requirements and standards set forth pursuant to the federal Help America Vote Act.” The essence of the requirement is that the ballot must display every candidate for every office that is up for election.
29. Without question, the AutoMARK system does this. AutoMARK uses a paper ballot. This ballot is a full faced ballot — its displays every candidate for every office that is up for election.
30. There is a critical distinction between the ballot and a ballot marking device. A ballot marking device can be some thing simple such as a pen or pencil or something more complicated like a touch screen with an ink jet printer attached.
31. In fact, Premier and AutoMARK personnel have been informed by Board staff, on repeated occasions, that this statutory provision does not require that the AutoMARK BMD present all ballot choices on a single screen but that, rather, the scannable paper ballot itself must be designed in accordance with this requirement.
32. There is no requirement in the bid specifications that a BMD contain a full faced ballot.
33. Election §7-102 does not require that a BMD contain a full faced ballot.
34. No Regulation promulgated by the Board requires that a BMD contain a full faced ballot.

35. In addition, although **not required**, the AutoMARK touch screen in fact displays a full face ballot. As noted by Commissioner Kellner: “I saw a version of that modification this morning which ... did present a full face ballot that was legible.”
36. The AutoMARK BMD complies with every requirement imposed by law and the bid specifications. The AutoMARK BMD complies with the motion made by Commissioner Donohue (although the additional requirement imposed by Commissioner Donohue was totally subjective, not required by law, or the bid specifications). Therefore, the AutoMARK BMD on that list for examination and the final vendor selection process.
37. Respondents intend to publish a list of vendors approved to sell voting systems to counties. Petitioner’s voting system, will not be on that list for examination and the final vendor selection process.
38. On January 29, 2008, Respondents sent a letter to the County Board of Elections that informed the County Boards that Petitioner was not an eligible vendor. The letter indicated that the County Boards would have only one choice in vendors.
39. Upon information and belief, this is because one of the two co-executive directors of the Board requires that AutoMARK BMD use only one screen (containing a full face ballot) for voters to express their preference as opposed to a display of the full face ballot followed by a series of touch screens.
40. This requirement is not compelled by the bid specifications, Election Law §7-102, or even the expressed resolution of the Commissioners of the Board (although one Commissioner added an illegal condition to her vote).
41. Petitioner wishes to market its voting system to Counties in New York State. Numerous other Counties have expressed a serious interest in using petitioner’s systems. Absent relief

from this Court, however, those Counties will not have the option of purchasing petitioner's voting machine.

42. As a result, petitioners will suffer immediate, severe and irreparable financial harm. Accordingly, petitioner requests that this Court issue a temporary restraining order and preliminary injunction, directing respondents to include petitioner's AutoMARK on the list of machines that county board of elections may select. In addition, this case represents significant harm to the public. By choosing one vendor that has never been approved for use in the United States, the Board has limited the choices of the local boards of elections in violation of the express intent of the Legislature and has jeopardized compliance with complying the HAVA.

RESPONDENTS' CONDUCT IS UNLAWFUL

43. Respondents failed to perform duties enjoined upon them by law; or respondents are proceeding and/or are about proceed without or in excess of jurisdiction; or respondents' determinations were made in violation of lawful procedure, were affected by an error of law, or were arbitrary and capricious or an abuse of discretion in that:
- A. Petitioner complied in all respects with bid specifications, New York State Law, and Regulations and there is and was no lawful reasons for excluding AutoMARK from the vendor list.
 - B. Respondents have never required either by rule, regulation, or bid specification that a BMD (as opposed to the ballot) contain a full faced ballot. As such, Respondents' bid specifications did not permit such a determination to be made.
 - C. A single Commissioner of the Board (yet dispositive) employed subjective criteria.

D. The Board, after passing a resolution, refused to follow their own vote.

E. The Respondents' bid specifications and procedures were contrary to law including impermissibly vague and violative of due process.

F. The aforesaid determination and process leading thereto including bid specifications were violative of State Finance Law §163 including but not limited to that the process shall be guided by among other principles, that it "be based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be performed; a documentable process for soliciting bids, proposals or other offers; a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts; contract terms and conditions that protect the state's interests and promote fairness in contracting with the business community; and a regular monitoring of vendor performance," and "To encourage the investment of the private and not-for-profit sectors in New York state by making reasonable efforts to ensure that offerers are apprised of procurement opportunities; by specifying the elements of a responsive bid and disclosing the process or awarding contracts including, of applicable, the relative importance and/or weight of cost and the overall technical criterion for evaluating offers; and by ensuring the procurement is conducted accordingly." [§ 163(2)(b),(c)].

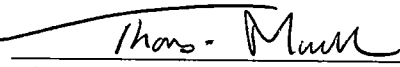
G. The aforesaid determinations and process leading thereto, including bid specifications were violative of State Administrative Procedure Act provisions for rule making in that, among other things, respondents have sought to avoid compliance with rule making procedures in connection with adopting voting machines mandated by HAVA.

44. Accordingly, the aforesaid determinations of the respondents should be annulled or modified so that petitioner's AutoMARK be approved and may be used in the 2008

elections in New York State, and until an order is obtained herein to that effect, respondents ought to be enjoined from taking any actions that would prejudice petitioner's rights such as the release of an approved list of systems which omits the AutoMARK

WHEREFORE, petitioner demands judgment annulling or modifying the aforesaid administrative determinations of respondents so that petitioner's voting machine AutoMARK is contained on the approved list of Ballot Marking Devices that may be used in 2008 elections in New York State, and that respondents be enjoined from releasing a list of approved systems that does not contain petitioner's AutoMARK, and directing the respondents to forward to the Office of State Comptroller a contract for petitioner's AutoMARK in accordance with proper procedures, and directing respondents to immediately distribute all petitioner's bid information to all County boards of elections relevant to support the selection of their preferred Ballot Marking Device for use in the 2008 elections, together with such other relief the Court deems just and proper.

Dated: February 1, 2008


Thomas Marcelle
Counsel for the Petitioner
2 E-Comm Square, 3rd Floor
Albany, New York 12207
(518) 427-1720

Attorney Verification

The undersigned affirms and verifies the foregoing is true, except as to matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true. The grounds for my belief are the examination of the papers in this case and conversations with witnesses, and events. The reason for Attorney Verification is that Petitioner is not in the county where his attorney has his office.

Dated: Dated: February 1, 2008

Thomas Marcelle

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EXHIBT A

EXHIBT B

