



ELECTION EQUIPMENT FAQS

December 17, 2018

The following FAQs were prepared to highlight the information presented in the December 17 conference call with the CCAP membership. Updates will be posted on the CCAP website.

The Issue

The Pennsylvania Department of State (DOS) has announced an agreement with the Stein presidential campaign that will require replacement of existing voting systems in Pennsylvania with voter-verifiable paper trail equipment by the April 2020 presidential primary. The agreement is settlement of federal litigation brought by the Stein campaign regarding Constitutional questions regarding election recounts arising from the 2016 Presidential election, including assertions of the potential for a fair recount. At the same time the agreement was announced, Gov. Wolf's administration indicated its intention to seek state funding of at least 50 percent of the cost of new systems.

Litigation Agreement

Why did the state agree to this agreement?

The DOS entered the agreement after receipt of a court ruling dismissing its preliminary objections to the Stein complaint. Based on concerns with that ruling, the administration indicates it agreed to settle with the Stein campaign because of the potential for a judicial decision that could have resulted in a tighter timeline for equipment replacement.

Could counties bring litigation to delay or overturn the agreement?

This is a private settlement agreement filed with the federal court, which not only effectively closed the case but also meant that counties did not have standing. Counsel is exploring other viable avenues, but has not identified any; even if counties were able to find a basis for their involvement and mount new litigation, a hearing date would likely not be set until at least fall 2019. In addition, the Stein campaign would be party to any litigation brought by a county, both for defense and counterclaims to enforce the agreement as written. Any county that sought potential litigation could find their petition dismissed or lose their case, which could result in an even more compressed timeline, with the April 2020 deadline remaining in effect.

Does the agreement require those counties that currently have optical scan systems to replace them?

The current position of the DOS is that optical scan equipment must be replaced on the same timeline. While CCAP is still seeking guidance on that question, the DOS has indicated their belief that despite existing systems being capable of paper audit, they are not up to current security standards, and so are subject to decertification. They note as well that in the next few

years there will come a point when current optical scan systems and the underlying software will no longer be supported by vendors.

What happens if counties do not replace their voting equipment by April 2020?

The Stein agreement effectively requires decertification of current equipment by the April 2020 primary.

Substitute Boards

What is the scope of the Election Board authority regarding selection and purchase of election equipment?

There are two key sections of the Election Code counties should reference (emphasis added):

Section 302. Powers and Duties of County Boards.--The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

* * *

(c) **To purchase**, preserve, store and maintain primary and **election equipment** of all kinds, including voting booths, ballot boxes and voting machines, and to procure ballots and all other supplies for elections.

Section 305. Expenses of County Boards and of Primaries and Elections to Be Paid by County; Expenses of Special Elections; Boards to Be Provided with Offices.--

(a) **The county commissioners or other appropriating authorities of the county shall appropriate annually, and from time to time**, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county, including the payment of the compensation of the employes of the board, custodians, election officers, and other assistants and employes herein provided for, and the fees of witnesses as herein provided; for the purchase or printing, under contracts made by the board, of all ballots and other primary and election supplies required by this act, or which the board shall consider necessary to carry out the provisions of this act; **for the purchase, under contracts made by the board, and maintenance, of voting machines, when adopted as herein provided, and of all other primary and election equipment required by this act, or which the board shall consider necessary to carry out the provisions of this act; ...**

When does jurisdiction of the substitute boards of elections begin?

While it would not be binding on counties, CCAP is working with the DOS to get an opinion for county solicitors to use in preparing local advice on when a commissioner becomes a candidate within the meaning of the Election Code and a substitute must be appointed to the board of elections.

What if a substitute board makes a decision on purchasing machines that the commissioners disagree with?

If the commissioners refuse to take the recommendation of the board of elections, it would mean at minimum that the decision on voting machine purchase would be put off until after the general election in November 2019, when the commissioners are no longer candidates and are thus eligible to be back on the board, offering a very compressed purchase and deployment timeline. In the interim, there is also a risk that the board could take action to litigate against the commissioners, arguing that the commissioners are preventing the board from exercising its authority under the Election Code.

What, if any, direction can commissioners give a substitute board of elections?

Although the DOS has indicated it believes commissioners can give informal direction to the substitute board, it is CCAP's belief that doing so seems contrary at a minimum to the intent of the statute. As an alternate strategy, at least one county has put together guidelines for its substitute board of what the commissioners wanted to see purchased, although acknowledging that these are not binding on the board.

Funding

What do we know about the Governor's funding request for voting systems?

The Governor is seeking 50 percent of the cost of replacement, which the administration anticipates will be a maximum of about \$75 million. This would be in addition to the \$14.5 million in federal money the Commonwealth has received.

Are there any opportunities to seek a higher level of funding?

The administration has indicated that it is seeking 50 percent funding, although it is not opposed to a higher ratio. Direct grassroots contacts by counties will be needed to advocate with the legislature to consider a higher percentage, with the message that anything less than 100 percent state funding means the difference will come from county property taxes. Strategically we also want to avoid this becoming a dispute between the Governor and legislature, keeping the focus on the harm to county taxpayers if there is no funding or if the funding is inadequate.

What is the timeline for a decision on state funding?

The administration has begun meeting with the House and Senate Appropriations and State Government committees, as well as legislative leadership, to discuss the funding request. Any decision on funding is likely to be made in conjunction with the FY 2019-2020 state budget process.

What form will the funding take?

The administration indicates it is looking at multiple options, including general fund appropriations, multi-year appropriations, borrowing, and others. It is also asking equipment vendors to indicate their willingness to allow payment over multiple years.

Will counties that make purchase decisions in advance of legislative action on funding be eligible for reimbursement?

The administration indicates all counties will be eligible, including those making replacement decisions as early as 2018.

Equipment

What is the current marketplace for election equipment?

Three types of equipment have been certified, two are approaching certification, and one is expected to enter the certification process in January. The DOS is working with the federal Election Assistance Commission to expedite certifications at both levels, a requirement of Pennsylvania law. The list of certified equipment is on the DOS website (www.dos.pa.gov); click Voting & Elections, then Policies, Statistics & Other Services, then Voting Systems. The page also contains links to monthly reports on the status of pending system certifications.

Is the equipment available on COSTARS contract?

COSTARS contracts allow direct purchase without the need for a county to go to competitive bidding. The DOS and COSTARS have just released a new Invitation For Bid to the equipment vendors, restructured from an earlier version with the intent that the vendor proposals will be more apples-to-apples than the previous contracts on the site. The deadline for vendor response is January 31, 2019, although COSTARS will post vendors as soon as their proposals are received and verified.

Is the COSTARS pricing negotiable?

Both the pricing and, to some extent, the terms of COSTARS purchases are negotiable. The price and features listed in the agreement are considered to be the maximum, and a lower price or omission of some features is acceptable.

How does a county know it has achieved its best deal?

The DOS and the county election directors are working on development of a dataset of vendor offers, for counties to use in bid comparisons. Additionally, counties are permitted to join together for multi-jurisdiction contracts, which can further leverage bulk buying.