



## **ELECTION EQUIPMENT FAQS**

**May 6, 2019**

The following FAQs were prepared to highlight the information presented in the December 17, 2018, and May 6, 2019, conference calls with the CCAP membership. Additional updates will continue to be posted on the CCAP website.

### **The Issue**

Last fall the Pennsylvania Department of State (DOS) announced an agreement with the Stein presidential campaign that requires 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 arising from election recounts 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 Settlement**

*Why did the state agree to this settlement?*

The DOS entered the settlement 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. CCAP counsel explored other viable avenues, but was not able to identify 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.

*Could legislation delay or overturn the agreement?*

The General Assembly is now considering legislation (SB 48) that could potentially delay the decertification of current voting systems and the implementation of the Stein settlement. While we appreciate support for county discretion in the purchasing timeline, we believe the legislation likely violates the settlement agreement and would lead to a probable gubernatorial veto.

Moreover, the replacement timeline is already compressed enough that few counties would risk waiting for the outcome on passage of such legislation. In addition, most counties are too far down the road in the equipment procurement process to change course now.

*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, indicating their belief that despite existing systems being capable of paper audit, they are not up to current security standards for operating systems, password protocols and the like, 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, and by law counties are required to conduct elections only on certified equipment.

### **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?*

In response to questions from counties, DOS sent a memo on January 23, 2019, that it is the Department's opinion that a person is a candidate for elective office when the petition for that office has been timely filed with the appropriate body. Therefore, timing is variable; replacement Board of Elections members could be appointed any time during the filing period for the 2019 municipal primary (February 19 – March 12, 2019), provided that appointment occurs before the filing of the petition. CCAP counsel was in conversation with DOS counsel while the opinion was under development and agrees with its conclusions.

While the opinion is not binding on counties, the memo was shared with 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 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 will be made in conjunction with the FY 2019-2020 state budget process.

*What form will the funding take?*

CCAP has had discussions with legislators and the administration about multiple options, including general fund appropriations, supplemental appropriations from state surplus, multi-year appropriations, borrowing, and others. The objective is to match state reimbursement to the county purchasing timeline.

*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?*

Five types of equipment have been certified, and one is approaching certification. The DOS worked 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](http://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. All of the approved vendors have their bids posted and can be accessed by going to <http://www.costars.state.pa.us/HomeMem.aspx>, then selecting COSTARS contracts from the Search Contracts menu on the left side of the page. Select "39-Voting Systems and/or ePoll Books" from the Contract drop down and select search.

*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?*

CCAP recommends that counties discuss purchase terms with peers and neighbors.

*How many counties have already made decisions about election equipment and when are they deploying?*

Based on feedback from the county election directors, as of May 1, 2019, more than 40 counties have made formal decisions, or informally determined direction, on their equipment selections. It appears eight counties are planning to deploy their new systems for the May 2019 primary election, 34 have indicated they plan to deploy at the November 2019 general election and another 11 at the April 2020 primary election. The remainder are undecided or have not made an indication.