

**Village of Weston, Wisconsin
AGENDA ITEM COVERSHEET
Requested for Official Consideration and Review**

REQUEST FROM: **SHERRY WEINKAUF; VILLAGE CLERK/EMPLOYEE RESOURCE
MANAGER**

ITEM DESCRIPTION: **ORDINANCE NO. 16-041 RELATING TO ABSENTEE BALLOT
CANVASSERS, ABSENTEE CENTRAL COUNT PROCEDURES AND AN
AGREEMENT FOR A ONE-TIME RENTAL OF A DS200 VOTING
MACHINE.**

DATE/MTG: **BOARD OF TRUSTEES; MONDAY, AUGUST 29, 2016**

POLICY QUESTION: Should the Board of Trustees approve Ordinance No. 16-041 relating to Absentee
Ballot Canvassers, Absentee Central Count Procedures and an Agreement for a
one-time rental of a DS200 voting machine?

RECOMMENDATION TO: Staff recommendation is to approve Ordinance No. 16-041 relating to Absentee
Ballot Canvassers, Absentee Central Count Procedures and an Agreement for a
one-time rental of a DS200 voting machine.

LEGISLATIVE ACTION:

- | | | |
|--|---|---------------------------------------|
| <input checked="" type="checkbox"/> Acknowledge/Approve | <input checked="" type="checkbox"/> Ordinance | <input type="checkbox"/> Proclamation |
| <input type="checkbox"/> Administrative Order | <input type="checkbox"/> Policy | <input type="checkbox"/> Reports |
| <input type="checkbox"/> Expenditure | <input type="checkbox"/> Procedure | <input type="checkbox"/> Resolution |
-

FISCAL IMPACT ANALYSIS:

- Budget Line Item: _____
- Budget Line Item: _____
- Budgeted Expenditure: Repairs/Maint.-Other Mach. & Equip.
- Budgeted Revenue: _____
-

STATUTORY / RULEMAKING / POLICY REFERENCES:

- WI Statue: _____
- WI Administrative Code: _____
- Case Law / Legal: _____
- Municipal Code: Chapter 30 – Elections
- Municipal Rules: _____
-

PRIOR REVIEW: N/A

BACKGROUND:

I have been researching the absentee ballot central count location idea for some time now. I have had several conversations with the County Clerk, other clerks around the state, as well as ES&S (voting equipment provider) and have decided this is something I feel should be implemented. The absentee ballot process at the polling locations has become unmanageable. One thing learned from the April Election was trying to get ballots in the voting machine between voters. This was a big struggle and very overwhelming for the Election Workers.

There is also a lot of extra paperwork to be filled out for the absentee ballots. I feel having the central count location away from the other polling locations will be way more efficient and less stressful for the election workers. If ordinance is approved, my plan is to appoint 5 qualified electors of the municipality to conduct the absentee ballot process on Election day by following the attached procedures. I am also requesting approval of the procedures, which come directly from the state statutes. Of course, a training course to review the procedures will be held before election day. I am also asking for approval of an agreement between ES&S and the Village for a one-time rental of a voting machine in the amount of \$1,290.00, which would come from the elections budget. If we decide to move forward with this process for future elections, I was told \$950.00 of the \$1,290.00 can be applied to the purchase of a new machine. A new machine costs approximately \$6,100.00 and I have already spoke to the Finance Director about using 2015 surplus funds to pay for the cost of a new machine to use going forward. Hope to have your blessing on using this process for the November election and maybe for future elections if all goes well.

Supplemental Briefer for Agenda Items under Consideration?

Attachments

ORDINANCE NO. 16-041

**AN ORDINANCE CREATING, SECTION 30.106 RELATING TO THE
MUNICIPAL BOARD OF ABSENTEE BALLOT CANVASSERS OF THE
MUNICIPAL CODE FOR THE VILLAGE OF WESTON, MARATHON COUNTY,
WISCONSIN**

The Village Board of the Village of Weston, Marathon County, Wisconsin, do ordain as follows:

SECTION 1: Section 30.106 Municipal Board of Absentee Ballot Canvassers, of the Village of Weston Municipal Code, is hereby created as follows:

Sec. 30.106 Municipal Board of Absentee Ballot Canvassers.

- a) **Appointment of Inspectors.** The Village of Weston hereby establishes the Municipal Board of Absentee Ballot Canvassers as designated under Wis. Stat. § 7.53 (2m). The Board of Absentee Ballot Canvassers shall be composed of the Village Clerk or a qualified elector of the municipality designated by the clerk, and 2 other qualified electors of the municipality appointed by the clerk. The first term for the members of the Board of Absentee Canvassers will expire on December 31, 2016. For subsequent terms, the members of the Board of Absentee Ballot Canvassers shall serve for two-year terms commencing on January 1 of each odd-numbered year, except that any member who is appointed to fill a permanent vacancy shall serve for the unexpired term of the original appointee.
- b) The Village of Weston hereby declares in lieu of canvassing absentee ballots at polling places under Wis. Stats. § 6.88, the Municipal Board of Absentee Ballot Canvassers shall canvass all absentee ballots at all elections held in the municipality pursuant to procedures established by the State division governing elections.
- c) The Village Clerk shall give at least 48-hour notice of any meeting under this subsection.
- d) The Village Clerk, no later than the closing hour of the polls, shall post at his or her office and on the Internet at a site announced by the Village Clerk before the poll opens, and shall make available to any person upon request, a statement of the number of absentee ballots that the Clerk has mailed or transmitted to electors and that have been returned by the closing hour on election day.

SECTION 2: SEVERABILITY. If any section, clause, provision, or portion of this Ordinance is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby.

SECTION 3: SECTION 4: EFFECTIVE DATE. This ordinance shall take effect upon approval and publication.

Dated the 29th day of August, 2016

VILLAGE BOARD, VILLAGE OF WESTON

By: _____
Barbara Ermeling, President

ATTEST: _____
Sherry Weinkauff, Clerk

APPROVED:

ADOPTED:

PUBLISHED:



PROCEDURES FOR THE CENTRAL COUNT OF ABSENTEE BALLOTS FOR THE VILLAGE OF WESTON

Sherry Weinkauff, Clerk
Village of Weston
Date: August 23, 2016

CHECK LIST AND PROCEDURES FOR CANVASSING OF ABSENTEE BALLOTS BY THE MUNICIPAL BOARD OF ABSENTEE BALLOT CANVASSERS IN THE VILLAGE OF WESTON

CLERK DUTIES

1. Shall give at least 48 hours' notice of the meeting of the Board of Absentee Ballot Canvassers under s.7.52, Wis. Stats. Notice to be posted on door where absentee ballot canvassing is to take place.
2. Determines if additional inspectors should be appointed to assist the Board of Absentee Ballot Canvassers. The total number of additional inspectors and the Board of Absentee Ballot Canvassers must be an odd number. Oath of office is given to all members if not done before hand.
3. Sends to each polling place a log of all absentee ballots for that district.
4. Brings absentee ballots to location of Board of Absentee Ballot Canvassers.
5. Places on Internet and posts in office the number of absentee ballots issued and the number returned prior to 8:00 p.m.

SUPPLIES

- 2 duplicate copies of the poll list and supplemental poll list for the entire Village printed from the WisVote system.
- Large ballot envelopes/bags/containers prepared with Chain of Custody and Certificate signed by the Board (one per reporting unit)
- Inspectors' Statements (GAB-104) (one per reporting unit)
- Addition to Inspectors' Statements (GAB-104-A) (one per reporting unit)
- Large envelope/container for Used Certificate Envelopes (GAB-103) (one per reporting unit)
- Large envelope/container for Rejected Absentee Ballot Envelopes (GAB-102) (one per reporting unit)
- Large enveloped labeled "Original Remade Ballots" (one per reporting unit)
- Provisional Certificate Envelopes (GAB-123) (one per reporting unit)
- Provisional Ballot Carrier Envelopes (GAB-108) (one per reporting unit)
- Write-in tally forms (one per reporting unit)
- Number sheets (one set per reporting unit)

- Election Day Manual for reference
- Red pens (for marking poll lists) and black pens
- Ballots for remaking voted ballots if necessary
- Challenge documentation for reference

PROCEDURES FOR PROCESSING BALLOTS (TAKEN FROM THE ELECTION DAY MANUAL)

1. Open container of absentee ballots; ballots will already be sorted by ward and alphabetically.
2. Remove one Absentee Certificate Envelope (GAB-122) and announce the elector's name.
3. Carefully review the certificate envelope to determine that:
 - a. Envelope is not open.
 - b. Envelope has not been opened and then resealed.
 - c. Signature of the elector appears on the certificate.
 - d. Address of the voter is on the certificate and the address is within the municipality.
 - e. Certificate contains the signature and address of one witness who is an adult US Citizen.
4. If the certificate envelope is found to be **insufficient**:
 - a. Do not open the envelope.
 - b. Mark the envelope "**Rejected ballot # _____**" (beginning with "1" for each ward). Write the reason for the rejection on the envelope and on the Inspectors' Statement.
 - c. Do not issue the elector a voter number.
 - d. List the elector's name, identifying serial number of the rejected ballot and the reasons for rejection on the Inspectors' Statement (GAB-104). *Use one Inspectors' Statement (GAB-104) for each Reporting Unit.*
 - e. Place the unopened certificate envelope in the Certificate of Rejected Absentee Ballots (GAB-102) brown carrier envelope (one envelope for Reporting unit).
5. If the certificate is found to be **sufficient**, carefully remove the ballot from the certificate envelope. Upon accepting each absentee ballot, the Board of Absentee Ballot Canvassers shall mark in red the voter tally # on the back of the ballot and on the pre-printed poll list next to the name of the elector, along with the indication the voter cast an absentee ballot (AB), beginning with the number 1. If the elector's name does not appear on the pre-printed poll list, the Board of Absentee Ballot Canvassers shall enter the name and voter number on the supplemental poll list.
6. Examine the ballots to ensure that:
 - a. Only one ballot is enclosed.
 - b. That the ballots contain the initials of the issuing Clerk or Deputy Clerk. (Ballot is not rejected if initials of issuing Clerk or Deputy Clerk are not present. Notation should be made on the Inspectors' Statement).
7. Place the ballots in the tabulating device. If ballots are rejected by the tabulator, poll workers should attempt to determine voter intent and remake the ballot if necessary using the procedure for remaking ballots. Duplicated ballots should be initialed by two members of the Absentee Board of Canvassers. Remade ballots must be documented on the "Original Remade Ballots" envelope and the "Inspectors Statement". If voter intent cannot be determined, ballot should be tabulated using the override key. The tabulator will

- increment voter number by one and any vote that can be counted will be counted.
- Place the used certificate envelope in the Used Certificate Envelopes of Absentee Electors (GAB-103) white carrier envelope. Rejected absentee ballots may be placed in a single Rejected Absentee Ballot (GAB-102) envelope or container.
 - All absentee ballots must be taken to the polling location prior to 8:00 p.m. to be placed in the tabulator. At 8:00 p.m. the polls are officially closed and no additional absentee ballots shall be accepted. Totals are printed and write-ins counted on 2 duplicate write-in forms. The totals of the absentee ballots will be transmitted to the County Clerk.

REMAKING BALLOTS

When an Absentee Ballot must be remade, a minimum of two (2) workers must make every attempt to determine the voter's intent and reconstruct the ballot so that it can be processed.

- Obtain an unused ballot for the correct ward; two workers initial the new ballot.
- Record the original Voter # on the back of the new ballot on the top right-hand side.
- Mark the reason for remaking the ballot in the endorsement section of the ballot (bottom right-hand side).
- On the original ballot (bottom right-hand side), record an "Original #1" (2, 3, 4, etc.); on the remade ballot, record the same number as "Duplicate #1" (2, 3, 4, etc.)
- Two workers duplicate the voter's choices onto the new ballot.
- Record the Voter's name, voter number, Original/Remade serial number, and the reason on the inspector's statement.
- Place the original ballot in the "Original Remade Ballots" envelope; the remade ballot is fed into the tabulator.

Write-in Candidates

Record ONLY registered write-in candidates on the GAB-105 Tally Sheet. Non-registered write-ins do not need to be tallied except for special circumstances (races with no candidates or the death of a candidate).

Handling Absentee Ballots when Proof of Residence is Required

If the voter list and the Absentee Certificate Envelope have the notation from the Municipal Clerk "POR required", the inspectors first check to see if the voter included the required identifying document showing Proof of Residence in the certificate envelope if the envelope is sufficient as determined by #5 above, Procedures for Processing Ballots.

Procedure:

- Open the Absentee Certificate Envelope to check if proof of residence is included in the envelope. (For an absentee voter, a copy of any of the documentation listed in the Election Day Manual is sufficient proof of residence).

2. If the required proof of residence is in the envelope, the election inspectors continue to process the absentee ballot following the procedures above. Record on poll list type of document provided.
3. If the required proof is NOT in the envelope, the absentee ballot is considered a **provisional ballot**. Continue with the procedure below.
4. Make a notation on the voter registration list indicating that the voter did not provide the required proof of residence and issue a provisional voter number for the voter: "PV# ____ (PR)" (beginning with '1').
5. Remove the ballot from the envelope and mark the back of the ballot with the PV# and "Section 6.97". Place the ballot back inside the Absentee Certificate Envelope.
6. Write the PV# and "Section 6.97" on the outside of the Absentee Certificate Envelope.
7. Place the Absentee Certificate Envelope bearing the PV# and "Section 6.97" on the outside of the Provisional Certificate Envelope (GAB-123). You do not have to fill in the rest of the GAB 123. Seal the envelope, and place inside the Provisional Ballot Carrier Envelope (GAB-108).

Challenging Absentee Ballots

An absentee ballot may be challenged in the same manner as it would be challenged at the polling place.

Any qualified elector may challenge an absentee ballot.

The Board of Absentee Ballot Canvassers shall challenge an absentee ballot cast by an elector whose name appears on the ineligible voter list. Procedures are set forth in the Election Day Manual and using challenge documentation (GAB-104-C) to document the challenge.

CLOSING THE POLLS

At 8 p.m. the announcement will be made that the polls are closed; ballots arriving after that time from voters will not be processed.

1. When all ballots have been processed, the DS-200 tabulator will print out vote report totals by ward as tally sheets; the Board of Absentee Ballot Canvassers will sign all sets of tapes generated
2. Tape results are transferred to the Election Night Call-in Sheet; the sheets are signed by the Canvassers
3. Compare the last voter number for each ward with the tape total recorded by the tabulator; resolve any discrepancy
4. Ensure all documents are completed and signed, where necessary. Replace them in the ward folders and deliver folders to City Clerk's office:
 - a. GAB-104 (Inspector's Statement)
 - b. GAB-105 (write-in votes)
 - c. Absentee ballot log

- d. Voter number sheet
 - e. Election Night Call-in Sheet
 - f. Signed tapes (delivered to Clerk's office)
5. Sign the ballot bags; the "Original Remade Ballots" envelope containing the original absentee ballots is placed in the bag; seal the bag and bring to City Clerk's office
 6. Sign the Used and Rejected Absentee Ballot carrier envelopes
 7. Modem results to Milwaukee County when instructed to do so
 8. Ballots and other materials will be transported to Milwaukee County the day after the Election

August 29, 2016.

**ADDITION TO INSPECTORS' STATEMENT (GAB 104-A) FROM THE
MUNICIPAL BOARD OF ABSENTEE BALLOT CANVASSERS**

We, the undersigned members of the Municipal Board of Absentee Ballot Canvassers, hereby certify that the following is a true and correct statement for the election on _____ held in wards _____ for the Village of Weston, Marathon County, State of Wisconsin.

The Municipal Board of Absentee Ballot Canvassers reports the following for wards _____:

Processed _____ Absentee ballots

Rejected _____ Absentee ballots

wards _____:

Processed _____ Absentee ballots

Rejected _____ Absentee ballots

wards _____:

Processed _____ Absentee ballots

Rejected _____ Absentee ballots

wards _____:

Processed _____ Absentee ballots

Rejected _____ Absentee ballots

Municipal Board of Absentee Ballot Canvassers

**ELECTION SYSTEMS & SOFTWARE, LLC
ONE-TIME RENTAL OF EQUIPMENT, SALE OF SERVICES AND LICENSE OF SOFTWARE**

This Agreement is made as of the date it is executed by the last of the parties named below on the signature page (the "Effective Date"),

BETWEEN: ELECTION SYSTEMS & SOFTWARE, LLC, a Delaware Limited Liability Company ("ES&S")

AND: VILLAGE OF WESTON, WISCONSIN ("Customer").

RECITALS:

A. Customer has agreed to rent, license and purchase, as applicable, voter tabulation equipment and related software and services from ES&S for use in the **Village of Weston, Wisconsin** (the "Jurisdiction"). The terms and conditions under which the equipment, software and services shall be provided are set forth in the **GENERAL TERMS** attached hereto and incorporated herein by reference.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, each of the parties hereto:

- Agrees to the **GENERAL TERMS** and the terms and conditions set forth in the Agreement and Amendments.
- Agrees that at all times, this Agreement shall be governed by and construed in accordance with the laws of the **State of Wisconsin**.
- Represents and warrants to the other party that as of the date of its signature below it has full power and authority to enter into and perform this Agreement, and that the person signing below on its behalf has been properly authorized to execute this Agreement
- Acknowledges that it has read this Agreement, understands it and intends to be bound by it.

ELECTION SYSTEMS & SOFTWARE, LLC
11208 John Galt Boulevard
Omaha, NE 68137
Fax No.: (402) 970-1291

VILLAGE OF WESTON, WISCONSIN
5500 Schofield Avenue
Weston, WI 54476
Fax No.: (715) 359-6117

Signature

Signature

Name (Printed or Typed)

Name (Printed or Typed)

Title

Title

Date

Date

**RENTAL OF EQUIPMENT, SALE OF SERVICES AND LICENSE OF SOFTWARE
GENERAL TERMS**

1. Description of Rental Equipment, Software and Services. The following constitutes all Rental Equipment, Software and Services to be provided by ES&S to Customer under this Agreement:

QUANTITY	MODEL	RENTAL EQUIPMENT DESCRIPTION	PRICE
Covered Election: November 8, 2016			
ES&S Equipment:			
1	Model DS200	Model DS200 Scanner with Plastic Ballot Box with Steel Door and e-Bin, Reverse Wound Paper Roll, 4GB Jump Drive, and Roundtrip Shipping & Handling	\$1,140.00
1		DS200 Wireless Modem (Verizon)	\$35.00
ES&S Services:			
1		Model DS200 Installation	\$115.00
Total Rental Fees for the November 8, 2016 General Election:			\$1,290.00

Payment Terms:

Invoicing will occur as Follows:

Total Rental Fees of \$1,290.00 due Thirty (30) Calendar Days after the later of (a) Equipment Delivery, or (b) Receipt of Corresponding ES&S Invoice.

Delays in payment due to no fault of ES&S will be subject to interest charges in the maximum amount permitted by applicable law.

Equipment Rental Pricing includes Roundtrip Shipping and Handling.

In no event shall Customer's payment obligations hereunder, or the due dates for such payments, be contingent or conditional upon Customer's receipt of federal and/or state funds.

Any applicable state and local taxes are not included, and are the responsibility of Customer.

If applicable, Ballot Printing and Shipping, Coding, and Ballot Layout will be invoiced separately.

2. Description of Services.

- a. Installation. Section 1 specifies the items of Rental Equipment or Software, if any, which ES&S' employees, agents or authorized representatives ("Representatives") will install at Customer's designated site. Customer shall pay ES&S a fee for such installation services, as set forth in Section 1. Customer will provide, at its own expense, a site adequate in space and design for installation and operation of the Rental Equipment and Software. Customer shall be responsible for providing a site that is temperature and humidity controlled, has all necessary electric current outlets, circuits, and wiring for the Rental Equipment and Software, and has electric current of sufficient quality and quantity to operate the Rental Equipment and Software, all as specified in the Rental Equipment Documentation or the Software Documentation (as each is defined below) (collectively the "Documentation"). ES&S may, but shall not be required to, inspect the site and advise on its acceptability before any Rental Equipment or Software is installed. Customer shall be responsible for installing all items of Rental Equipment or Software not installed by ES&S, in accordance with the instructions furnished in the Documentation. ES&S shall have no liability for actual site preparation or for any costs, damages or claims arising out of the installation of any Rental Equipment or Software by Customer.
- b. Additional Professional Services. If requested in writing by Customer, ES&S will provide additional Professional Services support to Customer at ES&S's then-applicable rates for such services.

TERMS AND CONDITIONS RELATING TO RENTAL EQUIPMENT

3. Items Included in Rental Equipment. In addition to the Rental Equipment, ES&S will also provide Customer with copies of operating instructions, user manuals and training materials for the Rental Equipment ("Rental Equipment Documentation"). Certain items included in the Rental Equipment may have been manufactured by parties other than ES&S; any such items are separately identified in Section 1 and are collectively known as "Non-ES&S Rental Equipment". Customer acknowledges and agrees that, except for the payment to ES&S of the amount dues under Section 1 which is attributable to the Non-ES&S Rental Equipment, all of its rights and obligations with respect to the Non-ES&S Rental Equipment flow from and to the manufacturers, lessors or other vendors of the Non-ES&S Rental Equipment (collectively the "Third Party Rental Equipment Vendors"). Customer further acknowledges that it has received copies of all applicable Third Party Rental Equipment Vendor Documentation, warranties and other applicable information regarding its rights and obligations with respect to the Non-ES&S Rental Equipment.
4. Warranty. ES&S warrants that any ES&S-manufactured scanning equipment included in the Rental Equipment ("Scanning Equipment") will perform in accordance with the specifications set forth in the Rental Equipment Documentation and will be free from defects in material and workmanship under normal use and service for the Rental Term (the "Warranty Period"). ES&S' sole obligation under this Section 4 shall be to repair or replace the Scanning Equipment or the applicable parts thereof, at its sole expense, at Customer's location or at ES&S's facilities, as determined by ES&S in its sole discretion. Any repaired or replaced Scanning Equipment or parts thereof shall be warranted only for the unexpired term of the original Warranty Period. All replaced Scanning Equipment or parts thereof will become the property of ES&S on an exchange basis. The warranty provided by ES&S under this Section 4 does not apply to and shall not require ES&S to repair or replace any item (i) which requires repair or replacement due to normal wear and tear caused solely by Customer use, (ii) which has been repaired, altered or transported by persons other than ES&S authorized Representatives, (iii) from which any serial number has been removed, defaced or changed, (iv) which is damaged due to accident, disaster, theft, vandalism, neglect, abuse, use for a purpose other than the purpose for which such item is designed or use which is not in accordance with instructions furnished by ES&S, (v) which has been subjected to physical, mechanical or electrical design alterations or any conversion by persons other than ES&S personnel, (vi) which has been used by any person other than Customer's employees or persons under Customer's direct supervision; (vii) which has been used in a site not meeting the specifications set forth in Section 2(a) above; (viii) has been used with ballots other than ES&S copyrighted ballots; or (ix) have been used with ballot code stock other than ballot code stock supplied or approved by ES&S.
5. Rental Payments. The rental payment for each item included in the Rental Equipment for the Rental Term (defined below) is set forth in Section 1 above, and the total amount thereof shall be paid in accordance with the terms of Section 1. Customer shall notify ES&S if it desires to rent additional items of Rental Equipment. If ES&S agrees to rent such items to Customer, the parties shall amend Section 1 of this Agreement to include such items within the definition of "Rental Equipment" and Customer shall pay to ES&S rental payments for each such item at ES&S's then-current rental rates.
6. Rental Term. The period during which Customer shall rent the Rental Equipment from ES&S shall be in effect from **September 15, 2016 through November 30, 2016**, unless earlier terminated pursuant to this Agreement (the "Rental Term"). The Rental Term shall terminate upon the first to occur of (i) a breach of any provision herein applicable to the Rental Equipment which has not been cured by the breaching party within thirty (30) days after it receives written notice of the breach from the non-breaching party (except a breach as provided in (iii) below which will require no notice); (ii) either party's providing thirty (30) days' prior written notice to the other party hereto of its desire to terminate the Rental Term; or (iii) Customer's failure to make any rental payment due hereunder within sixty (60) days after it is due. In the event of early termination by ES&S due to (a) a breach of this Agreement by Customer, (b) Customer's failure to pay any amounts owed under this Agreement or (c) the failure of Customer's Board of Supervisors to appropriate funds to make the payments due under this Agreement, Customer shall pay ES&S liquidated damages equal to the present value of the remaining monthly amounts owing hereunder, discounted at the rate of 8% per annum. Further, in the event of a termination by the Customer in accordance with Section 6(ii) above, Customer hereby agrees to promptly pay ES&S for all costs incurred and deliverables provided by ES&S through the effective date of such termination, including, but not limited to, any equipment and software delivered, shipping costs incurred, and services performed. No later than ten (10) calendar days following the termination of the Rental Term, Customer shall release the Rental Equipment to ES&S at its own expense and in the same operation, order, repair, condition and appearance as when received, subject to normal wear and tear. In the event Customer fails to release the Rental Equipment to ES&S no later than ten (10) calendar days following the termination of the Rental Term, Customer shall pay to ES&S a late return charge in the amount of \$500.00 per calendar day until the Rental Equipment is returned to ES&S in accordance herewith.

TERMS AND CONDITIONS RELATING TO SOFTWARE

7. Grant of License.
- a. In General. ES&S hereby grants to Customer a nonexclusive and nontransferable license during the Rental Term for its bona fide full-time employees to Use (defined below) the Software designated in Section 1.
 - b. Third Party Software. Customer acknowledges that ES&S does not own the Software designated in Section 1 as "Third Party Software" or the accompanying operating instructions, user manuals and training materials relating thereto (the "Third Party Software Documentation") (the ES&S Software Documentation and the Third Party Software Documentation sometimes collectively the "Software Documentation"). Customer further acknowledges that, except for the payment of license fees attributable to the Third Party Software and the Third Party Software Documentation (collectively the "Non-ES&S Software Items"), which shall be paid directly to ES&S pursuant to Section 1 above, all of its rights and obligations with respect to the Non-ES&S Software Items flow from and to the vendors of the Non-ES&S Software Items (the "Third Party Vendors"). Customer further acknowledges that it has received copies of all applicable license agreements for the Non-ES&S Software Items from the Third Party Vendors. None of the Non-ES&S Software Items has been independently authenticated in whole or in part by ES&S, and none of ES&S' representations, warranties, covenants or agreements set forth herein apply with respect to the Non-ES&S Software Items unless otherwise specifically stated herein.
 - c. Definition of Use. For purposes of this Agreement, the term "Use" shall mean the right to copy or utilize all or any portion of the instructions or data of the ES&S Software from tangible media supplied by ES&S ("Tangible Media"). The ES&S Software may be used only for internal purposes and shall not be used by, for, or on behalf of, third parties. "Use" shall also mean the right to retain and consult the ES&S Software Documentation. Customer's right to Use the ES&S Software and the ES&S Software Documentation shall not include the right to do any of the following:
 - i. Copy, in whole or in part, any ES&S Software (except for backup and archive purposes and provided that no more than one copy may be in existence at any one time for such purposes), any Tangible Media or any ES&S Software Documentation;
 - ii. Reverse engineer, decompile, disassemble, re-engineer or otherwise create or attempt to create or permit, allow or assist others to create the source code of the ES&S Software or the structural framework of the ES&S Software;
 - iii. Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software or the ES&S Software Documentation, in whole or in part, to or by any third party without Licensor's prior written consent;
 - iv. Modify, enhance or otherwise change the ES&S Software;
 - v. Use the ES&S Software except as specified in the ES&S Software Documentation or as otherwise authorized by ES&S in writing; or
 - vi. Use the ES&S Software on more items of Designated Equipment unless authorized in writing by ES&S.
8. Fees. The license fees for the ES&S Software, the ES&S Software Documentation, the Third Party Software and the Third Party Documentation (collectively the "Licensed Items") for the Rental Term are set forth in Section 1 above and shall be paid in accordance with the terms of Section 1.
9. Term; Termination. The license granted herein shall become effective on the date the ES&S Software is installed by Customer (the "Start Date") and shall remain in force during the Rental Term. Upon termination of the license, Customer shall immediately return the ES&S Software and any other Confidential Information in its possession or under its control (including any and all copies) to ES&S. Termination of the license pursuant to this provision is in addition to any other remedies available to ES&S at law or in equity.
10. Title; Copyright Notice. Customer acknowledges and agrees that: (a) all right, title and interest in and to the ES&S Software, the ES&S Software Documentation and the Tangible Media is owned by ES&S, and Customer has only a limited license to Use such items during the Software License Term. Customer agrees not to challenge ES&S's right, title and interest in and to the ES&S Software, the ES&S Software Documentation or the Tangible Media and to notify

ES&S immediately if it becomes aware of any such challenge. Customer shall include the copyright and proprietary rights notices which are set forth on each item of Tangible Media on any copies of the Software which are made from such item of Tangible Media. Likewise, Customer shall include the copyright and proprietary rights notices which are set forth on each item of Documentation on any copies thereof.

11. Export. Customer acknowledges that the laws and regulations of the United States may restrict the export of certain commodities and technical data of United States origin, including the Software, in any medium. Customer agrees that it shall not export the Software or the Documentation in any form without the appropriate United States and foreign government licenses. Licensee further agrees that its obligations pursuant to this Section 11 shall survive and continue after the termination of this Agreement.

TERMS AND CONDITIONS RELATING TO RENTAL EQUIPMENT AND SOFTWARE

12. Limitation on Liability. ES&S' total liability to Customer for any losses, damages, costs or expenses of any nature, whether direct or indirect, arising from or relating to ES&S' performance of this Agreement or the products or services provided by ES&S hereunder, shall be limited to the aggregate amount paid by Customer to ES&S for the product(s) or services(s) that caused the losses or damages or are the subject matter of the claim or cause of action. By entering into this Agreement, Customer agrees to accept responsibility for (i) the selection of the Rental Equipment and Software to achieve Customer's intended results; (ii) the use (Use) of the Rental Equipment and Software; (c) the results obtained from the use of the Rental Equipment and Software; and (d) the selection of, use of and results obtained from any equipment, software or services not provided by ES&S and used with the Rental Equipment or Software.
13. Shipment; Title and Risk of Loss. ES&S will ship the Rental Equipment and Software by common carrier to Customer on a date mutually agreed upon by ES&S and Customer, and risk of loss with respect to the Rental Equipment and Software shall pass to Customer when such items are delivered to Customer's place of business. Title to the Rental Equipment shall remain in ES&S. ES&S shall also bear the risk of loss with respect to the Rental Equipment (except that Customer shall bear the risk of loss with respect to, or damage to, the Rental Equipment which is caused by fire, the elements, theft, vandalism, negligent or intentional acts of Customer's employees or other events which are within the control of Customer). During the period in which this Agreement is in effect, Customer shall, at its sole expense, maintain the Rental Equipment in good operating condition and repair and protect the Rental Equipment from deterioration other than normal wear and tear and shall procure and maintain insurance on the Rental Equipment to adequately insure the risks of loss for which Customer is responsible hereunder. Upon request, Customer shall provide ES&S with copies of any and all policies procured and maintained by Customer insuring Customer's risks of loss hereunder. Customer shall not use the Rental Equipment for any purpose other than those for which it was designed and shall not, without the prior written consent of ES&S, alter the Rental Equipment or affix to or install on the Rental Equipment any accessory, equipment or device which was not supplied to it by ES&S. Customer shall not move the Rental Equipment from the place where it was originally installed without ES&S' prior written consent and shall make the Rental Equipment and any records pertaining thereto available to ES&S during regular business hours for inspection. Customer will not, without the prior written consent of ES&S and subject to such conditions as ES&S may impose for its protection, affix any item of Rental Equipment to any real property if, as a result thereof, such item of Rental Equipment will become a fixture under applicable state law.