



CITY OF PHILADELPHIA

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REBECCA RHYNHART
City Controller

Tuesday, August 13, 2019

Honorable Giovanni Campbell, Board of Elections Chairman
1408 Criminal Justice Center
1301 Filbert Street
Philadelphia, PA 19107

Dear Judge Campbell,

In July, my office shared several preliminary findings from our investigation into the procurement process for new voting technology with the Law Department. Our investigation is ongoing, however, the issues we identified were significant and we believed an appropriate justification for withholding authorization of payment purportedly due to Election Systems & Software (ES&S) per its contract. After providing the initial findings to the Law Department, they agreed that the finding warranted withholding of payment and further review. Upon further review, the Law Department determined the contract to be voidable. As such, the Law Department communicated that the contracts were voidable to you, as well as a request from the Procurement Commissioner, for consideration.

The purpose of this letter is to provide you with additional information and context regarding the initial findings we provided to the Law Department as you consider what action to take next. I would like the opportunity to meet with you, Judge Furlong and Commissioner Clark to provide additional detail that, due to the on-going nature of the investigation, my office is not ready to discuss publicly. With the understanding that our investigation is not yet complete and we believe that we may have other findings that impact your decision on whether to void or move forward with the contract, I respectfully request that you delay making a final decision until after our investigation is complete.

The initial findings we provided to the Law Department detailed ES&S's failure to disclose its use of consultants, its lobbying activities and its consultants' campaign contributions on its Mandatory Contribution Disclosure form. Specifically, ES&S stated that it did not use a consultant in the year prior to the RFP application deadline. Our investigation revealed that

ES&S used a lobbyist and engaged in lobbying activities in 2017 and 2018, including lobbying activities through direct communication with City Commissioner Al Schmidt. This information was obtained by reviewing lobbying registrations filed quarterly with the City's Board of Ethics. In fact, several registration reports show that the only communications ES&S registered were direct communications with Commissioner Schmidt. It's worth noting that Richard Jablonski, ES&S's Vice President of Finance, signed ES&S's Mandatory Disclosure form and signed off on at least one of the lobbying registration forms with the Board of Ethics.

ES&S also failed to disclose its consultants' campaign contributions to City Commissioners Lisa Deeley and Al Schmidt – the very two individuals charged with the final selection of the vendors for new voting technology. In February 2018, Duane Morris and Triad Strategies, which are both registered lobbying firms for ES&S with the City Board of Ethics, contributed \$1,000 and \$250 respectively to "Friends of Al Schmidt", a political action committee formed to support Al Schmidt's re-election as City Commissioner. Additionally, ES&S failed to disclose a \$500 contribution to "Deeley 15", a political action committee formed to support Lisa Deeley's re-election as City Commissioner, by Triad Strategies in March 2018.

In the past, failures to meet mandatory disclosure requirements have resulted in the vendor's disqualification by the City of Philadelphia. Notably, this was the case last spring when the administration disqualified U.S. Facilities, Inc., a minority-owned business, from bidding on a contract for failing to disclose political contributions totaling less than \$500. The Kenney Administration, at that time, stated that the value of the contribution is not relevant and that the City had little discretion to overlook these kinds of violations. In a *Philadelphia Tribune* article from April 28, 2019, Mike Dunn, a spokesperson for the Kenney Administration, stated, "...these laws are well-known for their strict, mandatory requirements for disclosing political contributions and the resulting consequences for non-compliance."

The Best Value procurement process, by its very design, is meant to be a transparent process that allows the city to get the best product for its money. The City's anti-pay-to-play rules, like mandatory disclosures, were put in place to protect the integrity of the procurement system. In their letters, both the Law Department and Procurement point out that if these disclosures had been made on the Mandatory Disclosure form that they would not disqualify the vendor. However, since they weren't made and based on the Administration's previous statements regarding the nature of mandatory disclosures, this point is irrelevant. Moreover, I've been led to believe that had the disclosure issues been identified by Procurement at the start of the process, ES&S would have been disqualified then.

Our initial findings show violations of the procurement process and warrant serious pause. Again, I ask that you consider waiting to vote on whether to void the contract until after our investigation is complete within the next few weeks. The Procurement Commissioner's letter to the Board of Elections argues that the Commissioners should move forward with the contract due to cost, timing and employee effort. But doing so without careful consideration of the facts in this letter would seriously undercut the procurement rules set up to protect taxpayers against waste, fraud and abuse. I appreciate that there are expenses the City has incurred and the time employees have spent learning the new equipment, but the improper actions of ES&S should not be rewarded without considerable scrutiny. I also understand that the Administration is concerned about meeting the Governor's December 31, 2019 deadline, but ultimately, the City must not throw out its procurement rules to accomplish it. And, it's worth noting that the previous process, from posting the RFP to selecting a vendor, took less than three months. A

brief delay of a mere matter of weeks would allow us to complete our investigation and the City additional time to evaluate what other options it may have at its disposal, such as seeking an extension from the Commonwealth and/or asserting claims for damages against ES&S.

As stated in your letter dated April 17, 2019, you stated that you did not believe the Board of Elections "...should overrule prior legitimate determinations" regarding the selection of ES&S as the vendor for Philadelphia's new voting technology. The disclosure issues identified during our investigation demonstrate those previous determinations to be invalid due to violations of City procurement rules. The Law Department has agreed by stating the contract is voidable, but the ultimate decision belongs to the Board of Elections. I respectfully request that you wait to make a decision until we complete our investigation and can present you with a full report.

I know how seriously you take your role on the Board of Elections and that the RFP process and vendor selection occurred prior to your appointment, but ensuring the integrity of the City's procurement system and that a fair process for selecting new voting technology happened is of the utmost importance.

Thank you for your time and consideration in this matter.

In service,

A handwritten signature in black ink, appearing to read 'R. Rhyhart', with a stylized flourish at the end.

Rebecca Rhyhart, City Controller

CC: Honorable Judge Vincent Furlong
 Honorable Anthony Clark, City Commissioner
 Honorable Mayor James Kenney
 Honorable Darrell Clarke, Council President
 Marcel Pratt, City Solicitor
 Ira Neil Richards. Schnader Harrison Segal & Lewis LLP