

**HART INTERCIVIC, INC.**

**eSLATE WARRANTY, SUPPORT, MAINTENANCE AND LICENSE AGREEMENT**

*(SIGNATURE PAGE)*

This eSlate Warranty, Support, Maintenance and License Agreement (“**Agreement**”) is entered into by and between *Hart InterCivic, Inc.*, a Texas corporation (“**Hart**”), and *Boulder County* (“**Client**”), a governmental subdivision of the *State of Colorado*. This Agreement is entered into in connection with an eSlate Agreement dated April \_\_, **2004**, between Hart and Client under which Client has purchased a *New Voting Tabulation System (System)*. This Agreement sets forth terms between Hart and Client applicable to Client’s ownership and use of the System and license from Hart of Hart Proprietary Software, including warranty, support, maintenance, license, and other terms. Defined terms used in this Agreement will have the meanings specified in Section 13, Definitions, or as otherwise set forth herein.

The following Schedules are attached to this Agreement and made a part hereof:

- Schedule A, Support Contact Information
- Schedule B, Hart Proprietary Software
- Schedule C, Non-Hart Software
- Schedule D, Initial Annual Maintenance Fee

Client acknowledges it has read and understands this Agreement (including all Schedules) and is entering into this Agreement only on the basis of the terms expressly set forth in this Agreement. There are no oral agreements, representations or warranties. The Effective Date of this Agreement is **April , 2004**.

**Agreed and Accepted:**

	<u><b>Client</b></u>	<u><b>Hart</b></u>
Name:	Boulder County, Colorado	Hart InterCivic, Inc.
Address:	1750 33 <sup>rd</sup> Street Boulder, Colorado 80301	15500 Wells Port Drive Austin, TX 78728 15500 Wells Port Drive Austin, TX 78728 Attn.: Jerry Meadows, Senior Vice President, Elections Solutions
Primary Phone:	303-413-7710	800-223-4278
Facsimile:	303-413-7750	800-831-1485
e-mail	Lsalas@co.boulder.co.us	tsimmonds@hartic.com
Executed by:	_____	_____
Name:	Linda Salas	Ted Simmonds
Title:	County Clerk & Recorder	Vice President/CFO Hart InterCivic, Inc.

***This Agreement is not effective until executed by both parties.***

**In consideration for the agreements set forth herein, the parties agree as follows:**

**1. Warranty Terms**

**1.1 eSlate Hardware Limited Warranty.** Hart warrants that during the warranty period eSlate Hardware (if any) by Client will be free from defects in materials and workmanship and will substantially conform to the performance specifications stated in the Hart Precinct Voting System Operator's Manual for the eSlate Hardware. The warranty period is three (3) years beginning with the Installation Date. Hart will, at Hart's sole discretion, replace or repair any eSlate Hardware that does not comply with this warranty, at no additional charge to Client. To request warranty service, Client must contact Hart in writing within the warranty period. Hart may elect to conduct any repairs at Client's site, Hart's facility or any other location specified by Hart. Any replacement eSlate Hardware provided to Client under this warranty may be new or reconditioned. Hart may use new and reconditioned parts in performing warranty repairs and building replacement products. If Hart repairs or replaces eSlate Hardware its warranty period is not extended and will terminate upon the end of the warranty period of the replaced or repaired eSlate Hardware. Hart owns all replaced eSlate Hardware and all parts removed from repaired products. Client acknowledges and agrees that this warranty is contingent upon and subject to Client's proper use of the eSlate Electronic Voting System and the Exclusions from Warranty, Support and Maintenance Coverage set forth in Section 1.3. This warranty does not cover any eSlate Hardware which has had the original identification marks and/or numbers removed or altered in any manner. The remedies set forth in this Section are the full extent of Client's remedies and Hart's obligations regarding this warranty.

**1.2 Hart Proprietary Software Limited Warranty.** Hart warrants that during the term of this Agreement the Hart Proprietary Software will perform substantially according to the then current functional specifications described in the BOSS™, Tally™, Ballot Now™, FUSION™, and Rally™ Operators' Manual accompanying such Hart Proprietary Software. To request warranty service, Client must contact Hart in writing within the warranty period. Failure to conform to the warranty must be reported in writing and be accompanied with sufficient detail to enable Hart to reproduce the error and provide a remedy or suitable work-around. Hart will make commercially reasonable efforts to remedy or provide a suitable work-around for defects, errors or malfunctions covered by this warranty that have a significant adverse affect upon operation of the Hart Proprietary Software, at no additional charge to Client. Because not all errors or defects can or need be corrected, Hart does not warrant that all errors or defects will be corrected. Client acknowledges and agrees that this warranty is contingent upon and subject to Client's proper use of the System and the Exclusions from Warranty, Support and Maintenance Coverage set forth in Section 1.3. The remedies set forth in this Section 1.2 are the full extent of Client's remedies and Hart's obligations regarding this warranty.

**1.3 Exclusions from Warranty, Support and Maintenance Coverage.** The warranties under this Section 1 and Software support and maintenance under Section 2 do not cover defects, errors or malfunctions which are caused by any external causes, including but not limited to any of the following: (a) Client's failure to follow operational, maintenance or storage instructions as set forth in applicable documentation; (b) the use of non-compatible media, supplies, parts or components; (c) modification or alteration of the System, or its components, by Client or third parties not authorized by Hart; (d) use of equipment or software not supplied or authorized by Hart; (e) external factors (including, without limitation, power failure, surges or electrical damage, fire or water damage, air conditioning failure, humidity control failure, or corrosive atmosphere harmful to electronic circuitry); (f) failure to maintain proper site specifications and environmental conditions; (g) negligence, accidents, abuse, neglect, misuse or tampering; (h) improper or abnormal use or use under abnormal conditions; (i) use in a manner not authorized by this Agreement or use inconsistent with Hart's specifications and instructions; (j) use of software on equipment that is not in good operating condition, (k) acts of Client, its agents, servants, employees, or any third party; (l) servicing, support or maintenance not authorized by Hart; or, (m) Force Majeure. Hart reserves the right to charge for repairs (on a time and materials basis at Hart's then prevailing rates, plus expenses) and replacements (at Hart's list prices) caused by these exclusions from warranty, support and maintenance coverage.

**1.4 Non-Hart Equipment and Non-Hart Software Excluded.** HART MAKES NO REPRESENTATIONS OR WARRANTIES AS TO NON-HART EQUIPMENT AND NON-HART SOFTWARE, IF ANY, PROVIDED BY HART TO CLIENT, ALL OF WHICH IS SOLD, LICENSED OR SUBLICENSSED TO CLIENT "AS IS." HART HAS NO RESPONSIBILITY OR LIABILITY FOR NON-HART EQUIPMENT AND

NON-HART SOFTWARE, IF ANY, PROVIDED BY HART'S DISTRIBUTORS OR OTHER THIRD PARTIES TO CLIENT. If Hart sells, licenses or sublicenses any Non-Hart Equipment or Non-Hart Software to Client, Hart will pass through to Client, on a non-exclusive basis and without recourse to Hart, any third party manufacturer's warranties covering the equipment or software, but only to the extent, if any, permitted by the third-party manufacturer. Client agrees to look solely to the warranties and remedies, if any, provided by the manufacturer or third party licensor.

**1.5 DISCLAIMER.** THE WARRANTIES IN THIS WARRANTY TERMS SECTION GIVE CLIENT SPECIFIC LEGAL RIGHTS, AND CLIENT MAY ALSO HAVE OTHER RIGHTS THAT VARY FROM STATE TO STATE (OR JURISDICTION TO JURISDICTION). HART'S RESPONSIBILITY FOR MALFUNCTIONS AND DEFECTS IN ESTATE HARDWARE AND HART PROPRIETARY SOFTWARE IS LIMITED TO REPAIR AND REPLACEMENT AS SET FORTH IN THIS WARRANTY TERMS SECTION. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, EXCEPT FOR THE EXPRESS LIMITED WARRANTIES IN SECTION 1 OF THIS AGREEMENT, (A) THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, BY OPERATION OF LAW OR OTHERWISE UNDER THIS AGREEMENT OR IN CONNECTION WITH THE SALE OF ESTATE HARDWARE AND LICENSE OF HART PROPRIETARY SOFTWARE, AND, (B) HART DISCLAIMS ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, TITLE AND NON-INFRINGEMENT FOR ALL EQUIPMENT, SOFTWARE, AND SERVICES. THE EXPRESS WARRANTIES EXTEND SOLELY TO CLIENT. SOME STATES (OR JURISDICTIONS) DO NOT ALLOW LIMITATIONS ON IMPLIED WARRANTIES, SO THE ABOVE LIMITATION MAY NOT APPLY TO CLIENT.

## **2. Software Support and Maintenance Services.**

**2.1 Description of Support and Maintenance Services.** Subject to the terms and conditions of this Agreement, Hart will provide Client the Software support and maintenance services described below. Support and maintenance under this Section 2 do not cover any of the exclusions from warranty, support and maintenance coverage as described under Section 1.3. Hart must not provide any equipment, services or other items that would cause County to incur additional costs beyond those stated in this Agreement, without the prior written approval in the form of a purchase order from Boulder County. If Hart receives prior written approval in the form of a purchase order from Boulder County to provide additional support and maintenance, Client will pay Hart for services on a time and materials basis at Hart's then prevailing rates, plus expenses, and for replacements at Hart's list prices, unless otherwise agreed in writing by Hart and Client.

**2.1.1 Software Support.** Software support will consist of assisting the Client in design and production of elections including pre-election and post-election testing and general operation of the System

**2.1.2 Software Maintenance.** Software maintenance will consist of periodic updates and any software "bug" corrections to Software. A Software "bug" will be any malfunction that prevents the Software from performing substantially as described in the then-current operator's manual for such Software. Because not all errors or defects can or need be corrected, Hart does not warrant that all errors or defects will be corrected. Hart reserves the right to determine whether any reported, claimed Software malfunction is in fact a software "bug". Software "bugs" must be reported in writing and be accompanied with sufficient detail to enable Hart to reproduce the error and provide a remedy or suitable work-around. The exclusions from warranty coverage under Section 1.3 also are exclusions from Software maintenance under this Section 2.1.2.

**2.1.3 Client Suggestions and Recommendations.** Client may propose, suggest or recommend changes to the Software at any time in writing to Hart. Such proposals, suggestions or recommendations will become Hart's property. Hart may include any such proposals, suggestions or recommendations, solely at Hart's option, in subsequent periodic Software updates. Hart is under no obligation to change, alter or otherwise revise the Software according to Client's proposals, suggestions or recommendations.

**2.2 Support Contact Information.** Support contact information is set forth on Schedule A, Support Contact Information.

### **3. Software Licenses and Sublicenses.**

**3.1 Licenses and Sublicenses.** Subject to the terms and conditions of this Agreement, Hart grants to Client a personal, non-exclusive, nontransferable limited license to use the Hart Proprietary Software and a personal, non-exclusive, nontransferable limited sublicense to use the Sublicensed Software. Hart will provide Client, and Client will be permitted to use, only the run-time executable code and associated support files of the Software for Client's internal data processing requirements as part of the System. The Software may be used only in the United States at the Licensed Location specified on Schedule B on the Equipment or other computer systems authorized by Hart in writing. Client may temporarily transfer the Software to a back-up computer system at an alternative location within Client's county of operation if the Equipment or other authorized computer system is inoperative or the Licensed Location is temporarily unavailable, provided Client must promptly give Hart written notice of such temporary transfer, including a description of the back-up computer system and the alternative location. Client's use of the Software will be limited to the number of users specified in Exhibits B and C. Only Client and its authorized employees may use or access the Software. Voters are also authorized to interact with the Software, in a manner consistent with user instructions, for the sole purpose of producing a cast vote record during the course of an election. Client agrees that Hart, the licensors of Sublicensed Software, and their representatives may periodically inspect and conduct and/or direct an independent accounting firm to conduct an audit, at mutually agreed upon times during normal business hours, of the computer site, computer systems, Equipment and appropriate records of Client in order to verify Client's compliance with the terms of the licenses and sublicenses granted to Client.

**3.2 Delivery and Installation.** Hart will deliver and install the Software at the Client's site on a mutually agreed upon date during Hart's normal working hours. The Software will be deemed accepted upon the Installation Date.

**3.3 Training and Documentation.** Hart will provide standard user-level documentation for the Software and standard operational training prior to the first election for which the Software will be used. Hart must not provide any equipment, services or other items that would cause County to incur additional costs beyond those stated in this Agreement, without the prior written approval in the form of a purchase order from Boulder County. If Hart receives prior written approval in the form of a purchase order from Boulder County to provide additional training and/or support services, charges for additional training or support services will be invoiced to Client at Hart's then-current hourly rates, plus travel, communication and other expenses. Any non-standard or additional training or support services will be mutually agreed to by Hart and Client in writing and documented in an amendment to this Agreement.

### **3.4 Protection of Software.**

(a) The eSlate Hardware (if any) and Hart Proprietary Software are designed to be used only with each other and the Non-Hart Software and Non-Hart Equipment in the System provided to the County. To protect the integrity and security of the System, without the express written consent of Hart, (i) Client shall use the Software and Equipment only in connection with the provided voting System, (ii) Client shall not install or use other software on or with the Equipment or Software or network the Equipment or Software with any other hardware, software, equipment or computer systems, and (iii) Client shall not modify the Equipment or Software. If Client does not comply with any provisions of the preceding sentence, then (i) the Limited Warranties under section 1 will automatically terminate; (ii) Hart may terminate its obligation to provide Support and Maintenance Services under section 2; (iii) Hart will have no further installation obligations under section 3.2 (Delivery and Installation), and (iv) Hart will have no further obligations under section 3.3 (Training and Documentation). Furthermore, if Client uses the Software and Equipment in combination with other software and equipment (other software or equipment being those not provided by Hart or its designees), and the combination infringes Hart proprietary patent claims outside the scope of the software license granted to Client under Section 3, Hart reserves its rights to enforce its patents with respect to those claims.

(b) Client shall not, under any circumstances, cause or permit the adaptation, conversion, reverse engineering, disassembly or de-compilation of any Software. Client shall not use any Software for application development, modification or customization purposes, except through Hart.

(c) Client shall not assign, transfer, sublicense, time-share or rent the Software or use it for facility management or as a service bureau. This restriction does not preclude or restrict Client from contracting for election services for other local governments located within Client's jurisdictional boundaries. Client shall not modify, copy or duplicate the Software; provided, during the term of the Software licenses and sublicenses, Client may have in its possession one copy of the Software for inactive archival or back-up purposes. All copies of the Software, in whole or in part, must contain all of Hart's or the third party licensor's titles, trademarks, copyright notices and other restrictive and proprietary notices and legends (including government restricted rights) as they appear on the copies of the Software provided to Client. Client shall notify Hart of the following: (i) the location of all Software and all copies thereof, and (ii) any circumstances known to Client regarding any unauthorized possession or use of the Software.

(d) Upon termination of Client's license or sublicense of Software, Client shall immediately discontinue all use of the Software and return to Hart or destroy, at Hart's option, the Software (and all related documentation and Confidential and Proprietary Information) and all archival, back-up and other copies thereof, and provide certification to Hart of such return or destruction.

(e) Any results of benchmark tests conducted by the County on the Hart provided System shall be considered a confidential and proprietary record of Hart, and as such, Client shall not publish any results of benchmark tests run on any of the System Software.

(f) Although the Hart Proprietary Software and Sublicensed Software are protected by copyright and/or patents, they may be unpublished, and constitute Confidential and Proprietary Information of Hart and the third party licensor, respectively. Client shall maintain the Software in confidence and comply with the terms of Section 6, Protection of Confidential and Proprietary Information, with respect to the Software.

(g) This Section 3.4 will survive the termination or cancellation of this Agreement.

**3.5 No Transfer of Title.** This Agreement does not transfer to Client title to any Software, intellectual property contained in any Software, or Confidential and Proprietary Information. Title to Hart Proprietary Software and all copies thereof, and all associated intellectual property rights therein, will remain in Hart. Title to Non-Hart Software and all copies thereof, and all associated intellectual property rights therein, will remain in the applicable third party licensor.

**3.6 Inherently Dangerous Applications.** The Software is not developed or licensed for use in any nuclear, aviation, mass transit, or medical application or in any other inherently dangerous applications. Client shall not use the Software in any inherently dangerous application and agrees that Hart and any third party licensor will not be liable for any claims or damages arising from such use.

#### **4. Annual Fee.**

**4.1 Amount of Annual Fee.** The Annual Fee is a combined licensing, sublicensing, support and maintenance fee. Client will pay Hart an Annual Fee upon execution of this Agreement and annually thereafter before each Anniversary Date. The amount of the Initial Annual Maintenance Fee, payable upon execution of this Agreement, is the amount specified as the "Initial Annual Maintenance Fee" on Schedule D of this document (and in Exhibit A of the Agreement). Subsequent Annual Maintenance Fees are due annually prior to each Anniversary Date of this Agreement. Hart may adjust the amount of the Annual Maintenance Fee payable on each Anniversary Date per Section 14.3 of the Agreement, by notifying Client in writing of any price changes with the invoice in which the adjustment is made. Unless adjusted by Hart, each Annual Maintenance Fee will be the same as the immediately preceding Annual Fee.

**4.2 Invoices.** Hart will invoice Client annually ninety (90) calendar days before the due date of the Annual Maintenance Fee.

**4.3 Payments.** Client must pay each invoiced Annual Maintenance Fee before the Anniversary Date immediately following the date of invoice. If Client elects not to or fails to timely pay an Annual Fee, this

Agreement and the licenses, sublicenses and Software support and maintenance services will automatically terminate on such Anniversary Date. All payments are to be made to Hart at its principal office in Austin, Texas, as set forth on the Signature Page or to such other location as may be designated by Hart in a notice to Client.

**4.4 Additional Charges.** Hart must not provide any equipment, services or other items that would cause County to incur additional costs beyond those stated in this Agreement, without the prior written approval in the form of a purchase order from Boulder County. Hart must receive prior written approval in the form of a purchase order from Boulder County to provide additional services rendered outside contracted hours or beyond normal coverage at Client's request (e.g. travel expenses, premium and minimum charges, etc.). Any additional charges mutually agreed to by Hart and Client, for which prior written approval in the form of a purchase order from Boulder County has been received, must be documented in an amendment to this Agreement.

**4.5 Payment Disputes.** If any dispute exists between the parties concerning the amount due or due date of any payment, Client shall promptly pay the undisputed portion. Such payment will not constitute a waiver by Client or Hart of any of their respective legal rights and remedies against each other.

**4.6 Taxes.** If Client is tax exempt, Client will provide Hart with proof of its tax-exempt status. If Client is not tax-exempt, (a) Client will pay any tax Hart becomes obligated to pay in connection with this Agreement, exclusive of taxes based on the net income of Hart, and (b) Client will pay all personal property and similar taxes assessed after shipment. If Client challenges the applicability of any such tax, Client shall pay the tax and may thereafter seek a refund.

**4.7 Suspension of Performance.** If any payment due to Hart under this Agreement is past due more than thirty (30) days, Hart may suspend performance under this Agreement until all amounts due are current.

## **5. Client Responsibilities.**

**5.1 Independent Determination.** Client acknowledges it has independently determined that the System meets its requirements.

**5.2 Cooperation.** Client agrees to cooperate with Hart and promptly perform Client's responsibilities under this Agreement. Client will (a) provide adequate working and storage space for use by Hart personnel near Equipment, (b) provide Hart full access to the Equipment and Software and sufficient computer time, subject to Client's security rules, (c) follow Hart's procedures for placing warranty service requests and determining if warranty remedial service is required, (d) follow Hart's instructions for obtaining support, maintenance and warranty services, (e) provide a memory dump and additional data in machine readable form if requested, (f) reproduce suspected errors or malfunctions in Software, (g) provide timely access to key Client personnel and timely respond to Hart's questions, and (h) otherwise cooperate with Hart in its performance under this Agreement.

**5.3 Site Preparation.** Client shall prepare and maintain the installation site in accordance with instructions provided by Hart. Client is responsible for environmental requirements, electrical interconnections and modifications to facilities for proper installation, in accordance with Hart's specifications. Any delays in preparation of the installation site will correspondingly extend Hart's delivery and installation deadlines.

**5.4 Site Maintenance; Proper Storage.** Client shall maintain the appropriate operating environment, in accordance with Hart's specifications, for the Equipment and Software and all communications equipment, telephone lines, electric lines, cabling, modems, air conditioning and all other equipment and utilities necessary for the Equipment and Software to operate properly. Client shall properly store the Equipment and Software when not in use.

**5.5 Use.** Client is exclusively responsible for supervising, managing and controlling its use of the eSlate Electronic Voting System, including but not limited to, establishing operating procedures and audit controls, supervising its employees, making daily backups, inputting data, ensuring the accuracy and security of data input and data output, monitoring the accuracy of information obtained, and managing the use of information and data obtained. Client will ensure that its personnel are, at all times, educated and trained in the proper use and operation

of the System and that the Equipment and Software are used in accordance with applicable manuals, instructions and specifications. Client shall comply with all applicable laws, rules and regulations with respect to its use of the System.

**5.6 Backups.** Client will maintain back-up data necessary to replace critical Client data in the event of loss or damage to data from any cause.

## **6. Protection of Confidential and Proprietary Information.**

**6.1 Confidentiality.** Client will keep in confidence and protect Confidential and Proprietary Information from disclosure to third parties and restrict its use to uses expressly permitted under this Agreement. Client shall take all reasonable steps to ensure that the trade secrets and proprietary data contained in the Equipment and Software and the other Confidential and Proprietary Information are not disclosed, copied, duplicated, misappropriated or used in any manner not expressly permitted by the terms of this Agreement. Client shall keep the Software and all tapes, diskettes, CDs and other physical embodiments of them, and all copies thereof, at a secure location and limit access to those employees who must have access to enable Client to use the Software. Client acknowledges that unauthorized disclosure of Confidential and Proprietary Information may cause substantial economic loss to Hart or its suppliers and licensors. Each permitted copy of Confidential and Proprietary Information, including its storage media, will be marked by Client to include all notices that appear on the original. Title, copyright and all other proprietary rights in and to the Software at all times remains vested exclusively in Hart or, as applicable, third-party licensors.

Notwithstanding any other provision of this Agreement to the contrary, Client may disclose all or a portion of the Confidential and Proprietary Information to a third party under the following circumstances: Client will notify Hart if it receives a request from any person, as defined by C.R.S. 24-72-202(3), to inspect, and Hart shall within 48 hours determine whether it considers such records to be subject to non-disclosure pursuant to C.R.S. 24-72-204(s)(a)(IV). If a person thus denied the right to inspect any Confidential and Proprietary Information applies to the district court pursuant to C.R.S. 24-72-204(5) for an order directing Client to show cause why he should not be permitted the inspection of Confidential and Proprietary Information, Hart will defend, or pay all costs incurred in defending such denial. Hart will also defend, indemnify and hold harmless the Client from all liability, costs and damages, including attorneys' fees, arising out of or relating to Client's refusal to allow inspection and copying of the Confidential and Proprietary Information. Hart acknowledges that confidentiality will not be preserved for Confidential and Proprietary Information ordered released for inspection pursuant to court order, and such release will not be considered a breach of this confidentiality provision or the agreement of which it is part.

**6.2 Return of Confidential and Proprietary Information.** Upon termination or cancellation of this Agreement or, if earlier, upon termination of Client's permitted access to or possession of Confidential and Proprietary Information, Client shall return to Hart all copies of the Confidential and Proprietary Information in Client's possession (including Confidential and Proprietary Information incorporated in software or writings).

**6.3 Intellectual Properties.** All ideas, concepts, know-how, data processing techniques, documentation, diagrams, schematics, firmware, equipment architecture, software, improvements, bug fixes, upgrades and trade secrets developed by Hart personnel (alone or jointly with Client) in connection with Confidential and Proprietary Information, eSlate Hardware (if any), and Hart Proprietary Software will be the exclusive property of Hart.

**6.4 Support and Maintenance Materials.** Client acknowledges that all support and maintenance materials are the property of Hart and include Confidential and Proprietary Information of Hart. Client agrees that it will not permit anyone other than Hart installation and maintenance personnel and authorized County employees to use such materials.

**6.5 Client Employees.** Client will inform its employees of their obligations under this Section 6 to ensure that such obligations are met.

**6.6 License Back.** If Client possesses or comes to possess a licensable or sublicensable interest in any issued patent with claims that read upon the provided System, its method of operation, or any component

thereof, Client hereby grants and promises to grant an irrevocable, royalty free, paid-up license, with right to sublicense, of such interest to Hart permitting Hart to make, have made, use and sell materials or services within the scope of the patent claims.

**6.7 Survival.** This Section 6 will survive termination or cancellation of this Agreement.

**7. Title; Risk of Loss**

**7.1 Software.**

(a) **Hart Proprietary Software.** Title to Hart Proprietary Software, all copies thereof and all associated intellectual proprietary rights therein will remain in Hart, including but not limited to all patents, copyrights, trade secrets, trademarks and other proprietary rights.

(b) **Non-Hart Software.** Title to Non-Hart Software, all copies thereof and all associated intellectual proprietary rights therein will remain in the applicable third-party licensor, including but not limited to all patents, copyrights, trade secrets, trademarks and other proprietary rights.

(c) **Risk of Loss.** Risk of loss to Software will pass to Client upon delivery.

**7.2 Confidential and Proprietary Information.** Title to Hart's Confidential and Proprietary Information will remain in Hart. Title to Confidential and Proprietary Information of Hart's suppliers and licensors will remain in the relevant suppliers and licensors.

**7.3 Proprietary Rights.** Client acknowledges and agrees that the design of Hart's eSlate Electronic Voting System and the provided System, design of the eSlate Hardware, Hart Proprietary Software, and any and all related patents, copyrights, trademarks, service marks, trade names, documents, logos, software, microcode, information and material, are the property of Hart. Client agrees that the sale of System and license of Hart Proprietary Software to Client does not grant to or vest in Client any right, title or interest in such proprietary property. All patents, trademarks, copyrights, trade secrets and other intellectual property rights, whether now owned or acquired by Hart with respect to the System, eSlate Hardware (if any) and Hart Proprietary Software, are the sole and absolute property of Hart and no interest therein is being vested in Client by the execution of this Agreement or the sale of the eSlate Hardware (if any) or license of the Hart Proprietary Software to Client. Client shall not, under any circumstances, cause or permit the adaptation, conversion, reverse engineering, disassembly or de-compilation of any Software or Equipment. Client will have no authority or right to copy, reproduce, modify, sell, license or otherwise transfer any rights in any proprietary property of Hart. The provisions of this section 7.3 will survive the termination or cancellation of this Agreement.

**8. Term of agreement; Termination.**

**8.1 Term.** The initial term of this Agreement and the licenses granted herein is one (1) year commencing on the Effective Date and expiring on the first Anniversary Date.

**8.2 Renewal Terms.** Except as otherwise provided in this Agreement, Client may renew this Agreement prior to its expiration or termination by paying the Annual Fee invoiced by Hart, as provided in Section 4.2, before the Anniversary Date immediately following the date of invoice, as provided in Section 4.3. Each renewal term will be a one-year (1-year) term, commencing on the expiration of the prior term and expiring on the immediately following Anniversary Date.

**8.3 Defaults.** The following events will be deemed to be defaults:

(a) A party committing a material breach of any term of this Agreement or the System Agreement if such breach has not been cured within thirty (30) days after written notice of such breach has been given by the non-defaulting party to the defaulting party;

(b) A party filing bankruptcy, becoming insolvent, or having its business placed in the hands of a receiver, assignee or trustee, whether by voluntary act or otherwise; or,

(c) A party failing to comply in any material respect with any federal, state or local laws applicable to a party's performance under this Agreement or the System Agreement.

#### **8.4 Termination.**

(a) This Agreement will terminate at the end of its then current term if Client has elected not to extend the Agreement by requesting said extension in writing to Hart at least sixty (60) days in advance of the termination date or has failed to timely make full payment to Hart of the invoiced Annual Fee required to renew the term, as provided in Sections 4.3 and 8.2. Hart must provide Boulder County ninety (90) days written notice of any decision on its part to terminate the Agreement at the end of the current term, or subsequent terms.

(b) Hart may terminate Software Support and Maintenance Services under Section 2 on thirty (30) days prior written notice to Client if Hart determines that any alterations, attachments or modifications not made by Hart or the failure to install a maintenance release will interfere with the provision of support or maintenance.

(c) A party may terminate this Agreement before expiration of its term for default by the other party. If default occurs, the parties will have all remedies provided in this Agreement and otherwise available by statute, law or equity.

**8.5 Survival.** Section 1.1 will survive the termination or expiration of this Agreement until the end of the warranty period stated therein. Sections 3.4(b), 3.4(c), 3.4(d), 3.4(e), 3.4(f), 6, 7.3, 8.5, 9, 11 and 12 will survive the termination or expiration of this Agreement.

### **9. Limitation of Damages.**

**9.1 EXCLUSIVE REMEDY.** HART DOES NOT ACCEPT ANY LIABILITY FOR WARRANTIES BEYOND THE REMEDIES SET FORTH IN SECTION 1. HART'S ENTIRE LIABILITY AND CLIENT'S EXCLUSIVE REMEDY FOR ANY AND ALL CLAIMS CONCERNING THE ESLATE HARDWARE PROVIDED TO CLIENT BY HART OR ITS DISTRIBUTORS, THIS AGREEMENT AND SOFTWARE AND SERVICES PROVIDED UNDER THIS AGREEMENT ARE SET FORTH IN THIS SECTION.

**9.2 DISCLAIMER.** CLIENT IS RESPONSIBLE FOR ASSURING AND MAINTAINING THE BACK-UP OF ALL CLIENT DATA. UNDER NO CIRCUMSTANCES WILL HART BE LIABLE TO CLIENT OR ANY THIRD PARTY FOR THE LOSS OF OR DAMAGE TO CLIENT DATA.

**9.3 LIMITATION.** NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, HART, HART'S LICENSORS AND ANY PARTY INVOLVED IN THE CREATION, MANUFACTURE OR DISTRIBUTION OF THE EQUIPMENT AND SOFTWARE AND THE PERFORMANCE OF SERVICES UNDER THIS AGREEMENT WILL NOT BE LIABLE TO CLIENT FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES (INCLUDING LOST PROFITS) OR FOR LOST DATA SUSTAINED OR INCURRED IN CONNECTION WITH THE EQUIPMENT, SOFTWARE, SERVICES OR THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, REGARDLESS OF THE FORM OF ACTION AND WHETHER OR NOT SUCH DAMAGES ARE FORESEEABLE. IN ADDITION, HART'S TOTAL LIABILITY TO CLIENT FOR DIRECT DAMAGES ARISING OUT OF OR RELATING TO THE EQUIPMENT, SOFTWARE, SERVICES AND THIS AGREEMENT WILL IN NO EVENT EXCEED THE TOTAL AMOUNT ACTUALLY PAID BY CLIENT TO HART UNDER THIS AGREEMENT. HART IS NOT LIABLE FOR DAMAGES CAUSED IN ANY PART BY CLIENT'S NEGLIGENCE OR INTENTIONAL ACTS OR FOR ANY CLAIM AGAINST CLIENT OR ANYONE ELSE BY ANY THIRD PARTY.

SOME STATES (OR JURISDICTIONS) DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE EXCLUSION OR LIMITATION MAY NOT APPLY TO CLIENT.

**9.4 Referrals.** Hart may direct Client to third-parties having products or services that may be of interest to Client for use in conjunction with the Equipment and Software. Notwithstanding any Hart recommendation, referral or introduction, Client will independently investigate and test non-Hart products and services and will have sole responsibility for determining suitability for use of non-Hart products and services. Hart has no liability with respect to claims relating to or arising from use of non-Hart products and services, including, without limitation, claims arising from failure of non-Hart products to provide proper time and date functionality.

## **10. Infringement Indemnity.**

**10.1 Indemnity.** Hart, at its own expense, will defend and indemnify Client against claims that the eSlate Hardware (if any) or Hart Proprietary Software infringe a United States patent or copyright or misappropriate trade secrets protected under United States law, provided Client (a) gives Hart prompt written notice of such claims, (b) permits Hart to control the defense and settlement of the claims, and (c) provides all reasonable assistance to Hart in defending or settling the claims.

**10.2 Remedies.** As to eSlate Hardware or Hart Proprietary Software which is subject to a claim of infringement or misappropriation, Hart may (a) obtain the right of continued use of the eSlate Hardware or Hart Proprietary Software for Client or (b) replace or modify the eSlate Hardware or Hart Proprietary Software to avoid the claim. If neither alternative is available on commercially reasonable terms, then, at the request of Hart, any applicable Software license and its charges will end, Client will stop using the applicable eSlate Hardware (if any) and Hart Proprietary Software, and Client will return to Hart all applicable eSlate Hardware (if any) and return or destroy all copies of the applicable Hart Proprietary Software, and will certify in writing to Hart that such return or destruction has been completed. Upon return or Hart's receipt of certification of destruction, Hart will give Client a credit for the price paid to Hart for the returned or destroyed eSlate Hardware (if any) and Hart Proprietary Software, less a reasonable offset for use and obsolescence.

**10.3 Exclusions.** Hart will not defend or indemnify Client if any claim of infringement or misappropriation (a) is asserted by an affiliate of Client, (b) results from Client's design or alteration of any eSlate Hardware (if any) or Hart Proprietary Software, (c) results from use of any eSlate Hardware or Hart Proprietary Software in combination with any non-Hart product, except to the extent, if any, that such use in combination is restricted to the System designed by Hart, (d) relates to non-Hart Software or Non-Hart Equipment alone, or (e) arises from Client-specified customization work undertaken by Hart or its designees in response to changes in Hart Proprietary Software or Non-Hart Software that are made in response to Client specifications.

**10.4 EXCLUSIVE REMEDIES.** THIS SECTION 10 STATES THE ENTIRE LIABILITY OF HART AND CLIENT'S SOLE AND EXCLUSIVE REMEDIES FOR INFRINGEMENT AND TRADE SECRET MISAPPROPRIATION.

## **11. Dispute Resolution.**

**11.1 Disputes and Demands.** The parties will attempt to resolve any claim or controversy related to or arising out of this Agreement, whether in contract or in tort ("**Dispute**"), on a confidential basis according to the following process, which either party may start by delivering to the other party a written notice describing the dispute and the amount involved ("**Demand**").

**11.2 Negotiation and Meditation.** After receipt of a Demand, authorized representatives of the parties will meet at a mutually agreed upon time and place to try to resolve the Dispute by negotiation. If the Dispute remains unresolved after this meeting, either party may start mandatory non-binding mediation under the commercial mediation rules of the American Arbitration Association ("**AAA**") or such other mediation process as is mutually acceptable to the parties.

**11.3 Injunctive Relief.** Notwithstanding the other provisions of this Section 11, if either party seeks injunctive relief, such relief may be sought in a court of competent jurisdiction without complying with the negotiation and mediation provisions of this Section 11.

**11.4 Time Limit.** Neither mediation under this section nor any legal action, regardless of its form, related to or arising out of this Agreement may be brought more than two (2) years after the cause of action first accrued.

## **12. General Provisions.**

**12.1 Entire Agreement.** This Agreement and the attachments, schedules and exhibits hereto are the entire agreement and supersede all prior negotiations and oral agreements. Hart has made no representations or warranties with respect to this Agreement or the System and its components that are not included herein. Client acknowledges and agrees that Hart has no responsibility or liability under the eSlate Agreement except to the extent, if any, that Hart is a party to the eSlate Agreement. This Agreement may not be amended or waived except in writing signed by an officer of the party to be bound thereby.

**12.2 Preprinted Forms.** The use of preprinted forms, such as purchase orders or acknowledgments, in connection with this Agreement is for convenience only and all preprinted terms and conditions stated thereon are void and of no effect. If any conflict exists between this Agreement and any terms and conditions on a purchase order, acknowledgment or other preprinted form, the terms and conditions of this Agreement will govern and the conflicting terms and conditions in the preprinted form will be void and of no effect. The terms and conditions of this Agreement, including but not limited to this Section 12.2, cannot be amended, modified or altered by any conflicting preprinted terms or conditions in a preprinted form.

**12.3 Interpretation.** This Agreement will be construed according to its fair meaning and not for or against either party. Headings are for reference purposes only and are not to be used in construing the Agreement. All words and phrases in this Agreement are to be construed to include the singular or plural number and the masculine, feminine, or neuter gender as the context requires.

**12.4 GOVERNING LAW.** THIS AGREEMENT WILL BE GOVERNED BY THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO ITS CONFLICT OF LAWS PROVISIONS, UNLESS CLIENT IS A GOVERNMENTAL SUBDIVISION OF ANOTHER STATE, IN WHICH CASE THE LAWS OF THE STATE IN WHICH CLIENT IS A GOVERNMENTAL SUBDIVISION WILL CONTROL.

**12.5 Severability.** Whenever possible, each provision of this Agreement will be interpreted to be effective and valid under applicable law; but if any provision is found to be invalid, illegal or unenforceable, then such provision or portion thereof will be modified to the extent necessary to render it legal, valid and enforceable and have the intent and economic effect as close as possible to the invalid, illegal or unenforceable provision. If it is not possible to modify the provision to render it legal, valid and enforceable, then the provision will be severed from the rest of the Agreement and ignored. The invalidity, illegality or unenforceability of any provision will not affect the validity, legality or enforceability of any other provision of this Agreement, which will remain valid and binding.

**12.6 Delays.** Hart is not responsible for failure to fulfill its obligations when due to causes beyond its reasonable control, including the failure of third parties to timely provide Software, Equipment, materials or labor contemplated herein. Hart will notify Client in writing of any such delay, and the time for Hart's performance will be extended for a period corresponding to the delay. Hart and Client will determine alternative procedures to minimize delays.

**12.7 Force Majeure.** "Force Majeure" means a delay encountered by a party in the performance of its obligations under this Agreement which is caused by an event beyond the reasonable control of the party, but does not include any delays in the payment of monies due by either party. Without limiting the generality of the foregoing, "Force Majeure" will include but is not restricted to the following types of events: acts of God or public enemy; acts of governmental or regulatory authorities (other than, with respect to Client's performance, the Client and its governing entities); fires, floods, epidemics or serious accidents; unusually severe weather conditions;

strikes, lockouts, or other labor disputes. If any event constituting Force Majeure occurs, the affected party shall notify the other party in writing, disclosing the estimated length of the delay, and the cause of the delay. If a Force Majeure occurs, the affected party will not be deemed to have violated its obligations under this Agreement, and time for performance of any obligations of that party will be extended by a period of time necessary to overcome the effects of the Force Majeure.

**12.8 Compliance with Laws.** Client and Hart shall comply with all federal, state and local laws in the performance of this Agreement, including those governing use of the Equipment and Software. Equipment and Software provided under this Agreement may be subject to U.S. and other government export control regulations. Client shall not export or re-export any Equipment or Software.

**12.9 Assignments.** Hart may assign this Agreement or its interest in any Equipment or Software, or may assign the right to receive payments, without Client's consent. Any such assignment, however, will not change the obligations of Hart to Client that are outstanding at the time of assignment. Client will be notified in writing if Hart makes an assignment of this Agreement. Client shall not assign this Agreement without the express written consent of Hart, such consent not to be unreasonably withheld. In the event of any permitted assignment of this Agreement, the assignee shall assume the liabilities and responsibilities of the assignor, in writing.

**12.10 Independent Contractors.** Client and Hart are independent contractors and are not agents or partners of each other. Hart's employees, agents and subcontractors will not be entitled to any privileges or benefits of Client employment. Client's employees, agents and contractors will not be entitled to any privileges or benefits of Hart employment.

**12.11 Notices.** Any notice required or permitted to be given under this Agreement by one party to the other must be in writing and shall be given and deemed to have been given immediately if delivered in person to the address set forth on the Signature Page for the party to whom the notice is given, or on the fifth business day following mailing if placed in the United States Mail, postage prepaid, by registered or certified mail with return receipt requested, addressed to the party at their address set forth on the Signature Page. Each party may change its address for notice by giving written notice of the change to the other party.

**12.12 Trademarks.** eSlate™, eSlate 3000™, Judges Booth Controller™, JBC1000™, Disabled Access Unit™, DAU5000™, Mobile Ballot Box™, Ballot Origination Software System™, BOSS™, Tally™, Rally™ and Ballot Now™ are trademarks of Hart.

### **13. Definitions.**

**“Agreement”** has the meaning set forth on the Signature Page.

**“Anniversary Date”** means each anniversary of the Effective Date.

**“Annual Fee”** means the combined annual license, sublicense, support and maintenance fees payable by Client to Hart as described in Section 4.

**“Client”** has the meaning set forth on the Signature Page.

**“Confidential and Proprietary Information”** means Software, firmware, diagnostics, documentation (including operating manuals, user documentation and environmental specifications), designs and configurations of Equipment, Software and firmware, trade secrets and related documentation, and any other information confidential to Hart or its suppliers or licensors.

**“DAU”** means the Disabled Access Unit (DAU5000) created by Hart as an add-on component to an eSlate that facilitates the performance of voting activities by disabled voters, for example, by providing an audio ballot presentation and/or accepting inputs from specialized switch mechanisms, such as head switches, breath switches, and panel switches, that facilitate interaction with disabled voters, as needed.

**“Effective Date”** has the meaning set forth in the Signature Page and indicates the date this Agreement becomes effective.

**“Equipment”** means the eSlate Hardware and Non-Hart Equipment.

**“eSlate”** means the eSlate 3000 created by Hart and consisting of hardware including an electronically-configurable, network-capable voting station that permits a voter to cast votes by direct interaction, which voting station in its present configuration created by Hart comprises an electronically configurable liquid crystal display (LCD) panel for use in displaying ballot images, a rotary input device for use in ballot navigation, and various buttons that facilitate voter options for selecting ballot choices and casting a ballot.

**“eSlate Agreement”** means the agreement, between Client and Hart or Hart’s authorized distributor of eSlate Hardware, under which Client has purchased the eSlate Hardware. The eSlate Agreement is identified on the Signature Page.

**“eSlate Electronic Voting System”** means the Equipment and the Software.

**“eSlate Hardware”** means the eSlate units, JBC units, and DAU units purchased by Client pursuant to the eSlate Agreement.

**“Force Majeure”** has the meaning set forth in Section 12.7.

**“Hart”** means Hart InterCivic, Inc., a Texas corporation.

**“Hart Proprietary Software”** means the run-time executable code and associated support files of the Ballot Origination Software System Software (BOSS), Tally Software, Ballot Now Software, computer code and software resident in the eSlate Hardware and other support software utilities as specified on Schedule B, consisting of computer programs and computer code owned by Hart that are licensed to Client pursuant to this Agreement, and all updates, upgrades, versions, new releases, derivatives, revisions, corrections, improvements, rewrites, bug fixes, enhancements and other modifications, including any custom modifications, to such computer programs and code which are provided to Client, and all copies of the foregoing. Hart Proprietary Software also includes all documentation provided by Hart to Client with respect to these computer programs and code and all copies of the foregoing.

**“Initial Annual Fee”** means the first Annual Fee, in the amount specified as the "Initial Annual Fee" on Schedule D, which is payable upon execution of this Agreement.

**“Installation Date”** means, with respect to eSlate Hardware, the date of delivery to Client and, with respect to Hart Proprietary Software, the date Hart completes delivery and installation of the Hart Proprietary Software.

**“JBC”** means the Judge’s Booth Controller (JBC1000) created by Hart which is a local area network controller capable of interacting with one or more eSlate devices or DAU devices by transmitting and receiving signals that manage or control an election, e.g., by opening and closing the polls, providing or recording an audit trail of system events during an election, storing cast ballot data, and applying data security and integrity algorithms.

**“Non-Hart Equipment”** means the equipment, if any, not consisting of eSlate Hardware that was sold to Client by Hart or Hart’s distributor for use with, and in connection with the sale of, the eSlate Hardware.

**“Non-Hart Software”** means the run-time executable code and associated support files of computer programs owned by third parties that are identified on Schedule C and sublicensed by Hart to Client pursuant to this Agreement or licensed directly by the third party licensor to Client, and all updates, upgrades, versions, new releases, derivatives, revisions, corrections, improvements, rewrites, bug fixes, enhancements and other modifications to such computer programs and code which are provided to Client, and all copies of the foregoing. Non-Hart Software also includes all documentation provided to Client with respect to these computer programs, and

all copies of the foregoing.

**“Software”** means the Hart Proprietary Software and Non-Hart Software.

**“Sublicensed Software”** means Non-Hart Software that is identified on Schedule C as being sublicensed by Hart to Client pursuant to this Agreement.

**“System”** means the *New Voting Tabulation System* developed by Hart InterCivic, Inc. for Boulder County, Colorado in response to Boulder County’s Request For Proposal #4437-03 dated May 9, 2003.

## **SCHEDULE A**

### **SUPPORT CONTACT INFORMATION**

The following contact information is to be used by Client for submitting Software Maintenance Service requests to Hart:

Client Support Center:	1-800-750-HART (4278)
Client Support Center Fax:	1-800-396-HART (4278)
e-mail address:	<a href="mailto:hartsupport@hartic.com">hartsupport@hartic.com</a>
Hart InterCivic, Inc. Switchboard:	1-800-223-HART (4278)
Client Support Manager:	

The following contact information is to be used by Hart for contacting Client on Software Maintenance Service requests:

Primary Client Contact Point (“CCP”):	Mike Harlan – 303-441-4537
First Alternate CCP:	Tom Halicki – 303-413-7745

**SCHEDULE B**

**HART PROPRIETARY SOFTWARE**

QUANTITY	MODEL	DESCRIPTION	UNIT PRICE	NUMBER OF USERS	INITIAL LICENSE FEE
One (1)	BOSS™	Ballot Origination Software System	\$40,000.00	One (1)	\$40,000.00
One (1)	Tally™	Tabulation Software	\$40,000.00	One (1)	\$40,000.00
Eight (8)	Ballot Now™	Absentee Voting System	\$50,000.00 *\$25,000 for each license over 4.	One (1)	\$300,000.00
One (1)	FUSION™	Integration Software.	\$30,000.00	One (1)	\$30,000.00
One (1)	Rally™	Tabulation Communication Software	\$10,000.00	One (1)	\$10,000.00
				<b>Total Software:</b>	<b>\$420,000.00</b>

Licensed Location: **Boulder County, Colorado.**

**NOTE:** Hart and Client will update this Schedule as appropriate if Hart releases new Hart Proprietary Software that is made available to Client under this Agreement.

**SCHEDULE C**

**NON-HART SOFTWARE**

1. Non-Hart Software Sublicensed to Client:

QUANTITY	MODEL	DESCRIPTION	UNIT PRICE	NUMBER OF USERS	INITIAL SUBLICENSE FEE
One (1)		Sybase Embedded Runtime Program	Not Applicable	Not Applicable	None.

2. Non-Hart Software licensed to Client directly by Third Party Licensor:

QUANTITY	MODEL	DESCRIPTION	UNIT PRICE	NUMBER OF USERS	TOTAL PRICE
None.					

**NOTE:** Hart and Client will update this Schedule as appropriate if Hart provides new or different Non-Hart Software to Client under this Agreement.

**SCHEDULE D**

**INITIAL ANNUAL Maintenance FEE**

Initial Annual Maintenance Fee: **\$78,000.00**