

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

House Bill 863
Ways and Means

(Delegate Barve, *et al.*)

Election Law - Voting Machines - Voting System Warranty Requirement

This bill specifies that a voting system selected by the State Board of Elections (SBE) for use in the State must be warranted by the vendor for two years from the date the contract is entered into. The warranty must require the vendor to replace or upgrade any voting machine hardware or software necessary to conduct an election using any voting method in use in the State, or that may be adopted during the warranty period, at no cost to the State. The bill also allows a person to file a civil action on behalf of the person and the State against a vendor who has breached the warranty; allows the State to intervene and proceed with such a civil action, petition the court to dismiss an action, and/or settle an action; and specifies applicable rules and procedures.

Fiscal Summary

State Effect: General fund expenditures may increase in FY 2010 and future years due to increased voting system costs to the extent potential bidders on the new voting system contract increase their offer price to account for the possibility of needing to upgrade or replace software or hardware, at no cost to the State, and/or the increased potential for litigation and associated costs. Revenues are not affected.

Local Effect: Local expenditures for the boards of elections may increase due to higher voting system costs. Revenues are not affected.

Small Business Effect: None.

Analysis

Bill Summary: If a person files a civil action on behalf of the person and the State, it is brought in the name of the State and the person must, on the same date a complaint is

filed, serve on the State a copy of the complaint and a written disclosure of substantially all material evidence and information possessed by the person. The State, within 60 days of receiving the complaint, may intervene and proceed with the action, and may also request, for good cause shown, that the court order an extension of the 60-day period for up to 90 days. If the State does not proceed with an action, the person may conduct the action. If a person brings a valid civil action under the bill, no person other than the State may intervene or bring a related action based on the facts underlying the pending civil action.

If the State proceeds with an action, it has primary responsibility for proceeding with the action and is not bound by any act of the person who initiated the action; and the person may not continue as a party to the action.

The State may also petition the court to dismiss an action if the person who initiated the action is notified by the State and provided an opportunity by the court for a hearing on the motion to dismiss. In addition, the State may settle a civil action, against the objections of the person initiating the action, if the court determines after a hearing that a proposed settlement is fair, adequate, and reasonable under the circumstances.

In addition to any settlement regarding replacement voting machine hardware or software, the court may award reasonable expenses found to be necessarily incurred and reasonable attorney's fees and costs.

The bill defines "voting method" as a system of rules for casting, sorting, and counting votes without reference to the specific voting machine or other physical infrastructure used to cast, sort, and count votes, including plurality voting and instant runoff voting.

Current Law: SBE, in consultation with the local boards, must select and certify a voting system for voting in polling places and a voting system for absentee voting. Each voting system must be used in all counties. SBE must determine that a voting system meet certain standards, specified in statute, before it is certified and must take various considerations into account in making that determination. Requirements regarding the accessibility of a voting system to voters with disabilities also apply.

Background: Chapters 547 and 548 of 2007, enacted following continued scrutiny in Maryland and nationwide of the security and accuracy of direct-recording electronic (DRE) touchscreen voting machines, provide in part that SBE may not certify a voting system unless it determines the voting system will provide a "voter-verifiable paper record." The law is applicable to each election occurring on or after January 1, 2010. The State's existing DRE touchscreen voting machines do not produce a paper record that a voter may verify at the time of voting.

SBE issued a request for proposal (RFP) in January 2009 in order to procure a new voting system and the proposed fiscal 2010 State budget includes approximately \$5.8 million for one capital lease payment and contractual services for a new voting system. This amount represents \$2.9 million in State general funds and \$2.9 million in special funds from local election reform payments.

The estimated total cost of the voting system is just under \$39 million, expected to extend from fiscal 2009 through 2015, which includes capital lease payments and contractual services. Actual costs may vary depending on the contract awarded.

State and Local Fiscal Effect: State and local expenditures may increase in fiscal 2010 and future years due to increased voting system costs. Pursuant to Chapter 564 of 2001, the State and counties share voting system costs.

SBE anticipates that the requirement that a vendor guarantee that it will upgrade or replace software or hardware to accommodate any voting method adopted by the State during the warranty period will cause potential bidders on the voting system contract to increase their offer price. The requirement may create a need for those companies to develop and certify specific software and/or hardware to address the State's requirements. There is not a similar requirement in the RFP that has been issued by SBE.

In addition, the bill's establishment of the right of a person, other than the State, to file a civil action against a vendor that has breached the warranty provisions established by the bill, may also cause potential bidders on the voting system contract to increase their offer price. Bidders may determine it necessary to do so in order to offset the increased potential for litigation and associated costs.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): State Board of Elections, Department of Legislative Services

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