



# Office of the State Auditor

## Local Government Cooperation Waiver Application

**1. Applicant Name(s).** *All entities listed must be local units of government. If request is on behalf of a nonprofit organization, include name of nonprofit organization.*

Washington County  
 14949 62<sup>nd</sup> Street  
 Stillwater, MN 55082

**2. Application Contact Person.** *The contact person should be able to respond to questions regarding this application.*

Name: Kevin Corbid

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Title: Director

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Agency: Washington County

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Stillwater, MN 55082

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**3. Service/Program.** *Identify the specific service or program for which you are requesting a waiver.*

Certain procedural requirements related to the implementation of assistive voting devices in order to meet the federal and state requirements to allow individuals with disabilities the opportunity to vote independently and privately. The County will comply with the federal and state requirements to have the equipment in each polling location.

**4. Rule/Law.** *Specifically identify the rule(s) or procedural law(s) governing the delivery of services from which you are requesting a waiver as well as any related rule(s) or law(s) (for example: M.R. 9525.0125, subp. 1 or M.S. 279.03, subd. 1) Minnesota Statute 206.80 (b)(2) or Minnesota Statute 206.80 (b)(3) Minnesota Statute 206.57 subd 1*

**5. Is the request for a waiver from a statutory notice requirement?**

Yes  No

*If yes, application need not be submitted, because the State Auditor's may not grant the application pursuant to Minn. Stat. § 6.80, subd. 3.*

**6. School Districts.** *Does the Commissioner of Education have authority to grant variance under section 122A.163.*

\_\_\_\_\_ Yes      XX No

*If yes, the State Auditor cannot grant a waiver or variance pursuant to Minn. Stat. § 6.80.*

**7. Do you know of any state statute, federal law, or state or federal constitutional doctrine that could be interpreted to inhibit the waiver of the rule or law requested?**

\_\_\_\_\_ Yes (CITE AND DISCUSS AS APPROPRIATE)      XX No

**8. Is there a Minnesota statute or a federal law, other than Minn. Stat. §§ 6.80, 14.055 and 14.056 that currently allows a waiver from the rule or law?**

\_\_\_\_\_ Yes      XX No

*If yes, please cite the applicable rule or law and explain why a waiver or exemption is then needed from the State Auditor.*

**9. Does the requested waiver or exemption only change the procedural requirements imposed on the applicant?**

XX Yes      \_\_\_\_\_ No (SEE NARRATIVE FOR EXPLANATION)

*If yes, please explain. It is not sufficient merely to affirm that granting the waiver will only change the procedural requirements of the applicant. You are required to describe; (1) who must deliver a service; (2) where the service must be delivered; (3) to whom and in what form reports regarding the service must be made; and (4) how long or how often the service must be made available to a given recipient. In addition, you must describe the nature of the law or rule and show that its waiver will not have any substantive impacts on the applicant's responsibilities.*

**10. Previous Requests.** *If request is for exemption from an administrative rule, has the petitioner requested and been denied an exemption from the appropriate agency per Minn. Stat. §§ 14.055 and 143056?*

\_\_\_\_\_ Yes, when: \_\_\_\_\_      XX No

*If yes, please attach the agency's findings.*

*If no, you must request an exemption from the appropriate agency and be denied before submitting this application.*

**11. In the past three years, has the applicant or any related party been involved in any litigation, mediation, arbitration, or review by an agency or tribunal involving the applicable rule or law for which a waiver is requested?**

\_\_\_\_\_ Yes      XX No

*If yes, identify the parties and all persons having information about the action. Also, include all relevant documentation from the action.*

**12. Overseeing Agency.** *List any state or metropolitan agencies having jurisdiction over the rule or law from which the waiver or exemption is sought.*

Secretary of State's Office

**13. For waivers of administrative rules, indicate the length of time for which you would like the waiver to be effective.**

*Waiver of administrative rules can be granted for no less than two years and no more than four year, subject to renewal if both parties agree. Exemptions from enforcement of procedural laws automatically expire ten days after the adjournment of the next regular legislative session in the next calendar year, unless extended by the legislature.*

\_\_\_\_\_ Years

**14. Affected Parties.** *List the name, address, and telephone number of any person, business, or other government unit you know would be adversely affected by the grant of this petition. In addition, include any materials you may have relating to their position on this issue.*

To our knowledge no person, business or governmental unit would be adversely affected by this waiver

**15. Exclusive Representatives.** *You must provide a copy of this application to the exclusive representative (union) certified under M.S. 179A.12 to represent employees who provide the service or program affected by your request.*

**Are the affected employees represented by an exclusive representative? Yes: \_\_\_\_ No: XX**

*List all applicable exclusive representatives and indicate the date on which you sent the copy:*

Exclusive representatives: *You may submit written comments on this application, including objections, to the State Auditor within 60 days of receipt of the application.*

*This application is submitted to the State Auditor pursuant to Minn. Stat. §6.80. The local government unit(s) requesting the waiver agrees (agree) to abide by the requirements of Minnesota law and the operating procedures of the Office of the State Auditor. To the best of my (our) knowledge the information contained in this application, including the attached narrative and resolution, is accurate and complete.*

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Date)

*Office of the State Auditor  
Procedural Law Waiver Application Narrative*

**A. Background**

In 2002 the federal government passed the Help America Vote Act (HAVA). One prong of this Act mandates that the voting method in each polling place must include a voting system that is accessible for individuals with disabilities in a manner that provides the same opportunity for access and participation, including privacy and independence, as for other voters. The federal Act required this equipment be in place for all federal elections occurring after January 1, 2006.

In 2005, the Minnesota Legislature passed Chapter 162 which included language requiring assistive voting equipment for individuals with disabilities in state and local elections and also outlining the procedures and requirements these assistive voting systems must meet. Minnesota law also currently requires the Secretary of State's Office to certify any voting system prior to its use in Minnesota.

The development of language defining assistive voting machines that would be allowable in Minnesota was hampered by the fact that federal standards related to election equipment were not developed until after the 2005 Legislative session had adjourned, election equipment vendors were scrambling to develop equipment to meet the federal timeline without the aid of the guidelines, and trying to balance Minnesota's public policy objective of having a paper-based system while still providing the disability access required by HAVA.

Chapter 162 of Minnesota Laws of 2005 amended Minnesota Statute 206.80 to include language laying out the requirements for allowable assistive voting devices. After a Request for Proposal process completed late last winter, we have the situation where only one vendor was able to meet the requirements set forth in Minnesota Statute 206.80. This vendor, Election Systems and Software (ES&S), is producing a machine called the Automark. This equipment will most likely be used by 83 of the 87 Minnesota counties. This solution is a good fit for those counties who currently utilize ES&S vote counters or for those who were purchasing vote-counting equipment for the first time.

However, this solution is problematic for counties that have invested in vote counting equipment from a different vendor. Those four counties, Washington, Dakota, Ramsey and Anoka, all currently utilize optical scan vote counters developed by Diebold. The ES&S Automark and the Diebold vote counters are not compatible and would require an impractical, or most likely impossible, amount of manual programming to make the two systems work together seamlessly. The dual programming is not only more costly, but increases the opportunity for errors to be made. In addition, if a compatible assistive voting device is used, the counties would be able to independently program and test the system and not rely on an outside vendor for programming.

This solution is also problematic from a financial standpoint as well. Clearly in elections our first responsibility is to protect the integrity of the election system and to administer a successful election.

However, this does not mean we shouldn't also look for the most efficient way to meet that goal. If we purchase the Automark equipment it will utilize nearly our entire federal grant allocation. The costs to purchase a compatible vote counter would mean a local investment of over \$500,000 for Washington County and in total the cost could exceed \$3 million for the four counties in this similar circumstance.

Because of this, these counties identified an alternative voting device that would be compatible with our current counters and also meet all of the federal requirements, as well as meet the state's overriding policy goal of having a paper record of each vote or ballot cast to be used in a possible recount or audit.

This alternative, the Diebold TS(x), meets all the requirements of federal law. It is currently used in a number of states and has been granted federal certification. It meets nearly all of Minnesota's requirements, except for those we are requesting a waiver from in this application.

This system meets the following requirements related to election systems:

- 206.56 subd 1a definition of assistive voting technology
- 206.56 subd 1b definition of audio ballot reader
- 206.56 subd 3 definition of ballot
- 206.56 subd 7a definition of an electronic ballot display
- 206.56 subd 7b definition of an electronic ballot marker
- 206.80 subd a 1-7 on requirements for an electronic voting system

The procedural requirement this alternative does not meet is found in M.S. 206.80 subdivision b. This section reads:

*(b) An electronic voting system purchased on or after June 4, 2005, may not be employed unless it:*

- (1) accepts and tabulates, in the polling place or at a counting center, a marked optical scan ballot;*
- (2) creates a marked optical scan ballot that can be tabulated in the polling place or at a counting center by automatic tabulating equipment certified for use in this state; or*
- (3) securely transmits a ballot electronically to automatic tabulating equipment in the polling place while creating an individual, discrete, permanent paper record of each vote on the ballot.*

Please note the equipment must meet only one of the three requirements listed. This machine, while it clearly will provide the desired outcomes, does not create the "marked optical scan ballot" required in item 2. Instead the equipment creates an individual paper record of the votes cast. This paper record is able to be used in a recount or audit and satisfies the overall goal of having a paper trail.

Secondly, the equipment would meet the requirements in item 3 except for the fact the ballot is not electronically transmitted from the TS(x) machine to the automatic tabulating equipment. In this case

the votes cast would be stored in the TS(x), at the same time as the paper record is being created and stored as well. Then the results from the optical scanner and the TS(x) would be summarized on a single results summary tape created by the TS(x). The votes are not able to flow into the optical scan tabulator from the TS(x) because the TS(x) utilizes the newest memory and data cards that cannot transfer data into older versions, but the older versions are able to transfer data into the newer TS(x) versions.

The outcomes of what an electronic voting system produces are contained in 206.80 items A 1-7. This list of requirements makes sure the equipment can do what we require and the TS(x) meets all of these requirements. The procedural requirements in item b are not completely met and therefore we are requesting the waiver.

## **B. Proposal**

The waiver request is as follows:

1. The State Auditor waive the requirement under M.S. 206.80 (b)(3) that the machine securely transmits a ballot electronically to “automatic ballot tabulating equipment” in the polling place. The waiver would remove the requirement that the vote be transmitted to the automatic ballot tabulating equipment, and instead allow the vote to be counted by the assistive voting device and results summarized with the results from the automatic tabulating equipment. The requirement that an individual, discrete, permanent paper record of each vote on the ballot would remain.
2. The State Auditor waive the requirement under M.S. 206.80 (b)(2) that the equipment create a “marked optical scan ballot”. The requirement would remain that the equipment create a paper record of the votes cast to be used in a recount or audit.
3. The State Auditor waive the requirement under M.S. 206.57 that any system receive certification from the Secretary of State’s Office to be used in Minnesota. This waiver would only be granted if the proposed equipment met all requirements of state law except for those waived under this application.

## **Improved Service Outcome**

Granting the waiver will provide equipment options that are compatible with our current vote counting equipment. This will improve the service outcome in several ways. First, the administration and programming aspects of the TS(x) machine would be much simpler. With the TS(x) machine we would be able to utilize knowledge and training that our staff already has from working with the Diebold optical scan vote counters. Thus, there would be minimal additional training of staff necessary. In contrast, if we have to use the Automark machine, significant training will be needed for county and local election staff, as well as for election judges. If Washington County has to use the Automark machine, it will also require dual programming and a significant amount of manual programming. The manual programming is so extensive it may be impractical or impossible to accomplish this programming along with the other required election administration

duties. The need for manual programming is costly and creates a much larger potential for errors on Election Day.

Additionally, if Washington County has to purchase the Automark machines, the County will have to expend a large amount of County funds to obtain a compatible system, which will be a great expense to County taxpayers. Waiver of the procedural requirements would improve the service outcome because it would allow Washington County to protect its current investment, utilize federal grant money to obtain the best equipment to meet Washington County's needs, and provide for assistive voting machines that provide excellent disability access. In addition to improving the service outcome, the TS(x) alternative would be a more efficient means of providing government services.

In addition, the equipment allowed under the waiver provides as good or better opportunity for disabled voters to cast their ballot privately and independently as the state certified alternative. The TS(x) has the same options available as the Automark without the need for a non-visual voter to handle a paper ballot and attempt to insert the ballot into the Automark.

### **How will purpose of the law still be met**

The Legislature's overriding goal is to ensure the voting equipment has a paper record of the votes cast that can be used in a recount or audit. The equipment proposed meets those requirements. The equipment creates an individual, discrete, permanent paper record of the votes cast as required by law.

### ***Waiver request relates to procedure, not substantive outcomes or services***

Minnesota Statute § 206.80 sets out the requirements for an electronic voting system in Minnesota. Subdivision (a) contains the policy requirements, while subdivision (b) contains the procedural requirements for putting the policy into practice. The TS(x) machine meets all the policy requirements contained in both HAVA and in Minnesota Statute § 206.80. Section 206.80, subdivision (a) sets out Minnesota's policy on providing access for disabled voters to vote privately and independently in the same manner as other voters. The TS(x) machine meets this requirement as it provides equal or better access for disabled voters than the Automark machine. Subdivision (a) also contains policy requirements for having a paper-based system. It sets a policy that Minnesota will continue to have a paper-based voting system. Specifically, subdivision (a) requires that the assistive voting machine "produces an individual, discrete, permanent, paper ballot or paper record of the ballot cast by the voter, and preserves the paper ballot or paper record as an official record available for use in any recount." The TS(x) machine complies with the policy requirement and produces a permanent paper record of each vote cast that can be used in any recount.

The only requirement not met by the TS(x) machine is the procedural requirement set out in section 206.80 (b). Minnesota Statute § 6.80, subdivision 3 defines a procedural law as a law that specifies how a local government unit is to achieve an outcome. A substantive law prescribes the outcome or establishes policy. The policy of having a permanent, paper record of each vote cast is already

established by section 206.80, subd. (a). Subdivision (b) does not set any policy. It simply sets out the how of implementing the policy requirements of subdivision (a).

The Local Government Cooperation Waiver Application asks who must deliver the service, where the service must be delivered, to whom and in what form reports regarding the service must be made, and how long or how often the service must be made available to a given recipient. Here, it is the county and local elections officials who are delivering the service and it is being delivered at polling locations on Election Day and absentee polling locations prior to Election Day. The counties receiving grants must report to the Secretary of State's Office regarding how the money is spent for the purchase of electronic voting systems. The assistive voting equipment must be in place in each polling location for all federal elections occurring after January 1, 2006.

If the waiver is granted to Washington County, it will not have any substantive impacts on Washington County's responsibilities or delivery of the services. Washington County will still be providing assistive voting machines that allow disabled voters to vote privately and independently in each polling location. Washington County will also still be complying with state law that requires a permanent paper record of each vote cast. The only difference will be the type of assistive voting machine that is used. The assistive voting machine that Washington County proposes to use, the Diebold TS(x) machine, has the same capabilities for disability access as the Automark machine. It also produces a permanent, paper record of each vote cast. There is no substantive difference between the machines. The requirements set out in section 206.80 (b) are simply procedural. No policy is set by these requirements. Thus, Washington County should be granted a waiver from these requirements.

### **C. Barriers**

There are a number of barriers that currently exist. The counties interested in finding a solution have looked at a variety of options and believe this is the best alternative.

1. Secretary of State Certification. The Secretary of State has told the counties that it will not certify the TS(x) machine because it does not meet the requirements of Minnesota Statute 206.80 as noted above.
2. Experimental Certification. The counties have requested the Secretary of State consider experimental certification of the TS(x) as an interim solution for the four counties most affected. This has not been granted.
3. Timing. A decision on purchasing will most likely need to be made prior to the time a legislative change could be adopted.
4. Only option available. The one option available does not provide a seamless solution for disabled voters and is a very costly solution for these counties. The need to ultimately have a compatible system in each polling place could lead to an expenditure of over \$3 million in just these four counties. This could be reduced or eliminated with the approval of an alternative.
5. Election Integrity. The need for extensive manual programming could lead to significant election-day problems in these counties. We wish to avoid this potential.

### **Why can't the desired outcome be accomplished under the existing rules or laws?**

The counties have researched as many alternatives as we have been able to identify. The existing laws create a situation where only one vendor was able to meet the procedural requirements and that equipment does not work well with our current vote tabulating equipment. The current laws will require an unneeded expenditure of public tax dollars in order to have a compatible long-term solution.

### **Any negative impact?**

The granting of this waiver would not cause any significant negative impact on state government, other local units of government, businesses, or citizens. In fact, the waiver will have positive impacts on the voters we serve and all taxpayers. The equipment proposed in this application provides a seamless voting experience for disabled voters. It provides all of the voting features of the system approved by the state, without the necessity to handle a paper ballot. The handling of the paper ballot in the Automark system may be difficult for blind voters or those voters without the use of their hands or arms. The waiver will allow a very good disability solution.

The waiver will also allow a second election equipment vendor to do business in Minnesota. Minnesota election administrators and all voters will benefit from the better service and lower costs that competition can foster.

The waiver of the state law requirements included in this application would not result in any violations of federal law, specifically any violations of the Help America Vote Act of 2002.

### **D. Alternatives**

Since the passage of the Federal HAVA act in 2002, counties have been working on this issue of disability access and voting equipment. We have identified and researched as many alternatives as possible. We have found that some alternatives do not provide the level of service we expect and those have not been considered. Alternatives considered have included:

1. Use of the certified Automark with our current vote counters. While we will utilize this option if no relief is granted, let me reiterate the reasons we feel this solution is less than ideal. First, the manual programming necessary in this configuration is if not impossible, impractical. Not surprisingly, the vendor of our current equipment is not allowing us to use files created in their software to program a competitor's ballot. Additionally, under any scenario using this equipment together would be a temporary solution, leading to additional purchases of equipment. As mentioned earlier, the financial implications could top \$3 million.
2. Use of the Vote-Pad. The counties also considered use of a non-electronic voting device to fulfill our disability requirements. It is felt this solution would not provide adequate service to disabled voters and would also be an administrative burden.

3. Other Disability machines. Other equipment being approved in other states to meet their HAVA disability requirements face the same state requirement problems faced by the Diebold TS(x).
4. Do nothing scenario. There has been some discussion of the ability for a county to not comply with the HAVA equipment requirements for 2006 elections and wait for a better solution in future years. This option was dismissed because of the potential legal issues and our desire to implement the HAVA requirements as directed by the federal government.
5. Submission of TS(x) to Secretary's Office. The Diebold Company submitted the TS(x) to the Secretary of State's Office in 2005 with a request for conditional certification. This certification request was denied. The counties have met with officials from the Secretary's Office a number of times since then, and have been given no indication that the Secretary's Office is willing to work with the affected counties to find a solution that includes the TS(x).

### Summary

Washington County requests approval of the Local Government Cooperation Procedural Law Waiver Application for the following reasons:

1. The alternative solution we are requesting meets the outcomes and substantive policy objectives of Minnesota State Law. The machine meets the requirements necessary to handle Minnesota's election laws related to primaries, candidate rotation, etc. The machine also creates a paper record of the votes cast to fulfill the Legislature's objective of having a paper-based system.
2. The alternative solution provides an equal, if not superior, experience for disabled voters as they are allowed to cast their ballots without assistance.
3. The alternative solution allows us to protect the taxpayer's current investment in our equipment and the training of county, city, township election officials and election judges.
4. The alternative solution will lead to a more efficient use of federal tax dollars and remove the necessity for the spending of over \$3 million in local property tax dollars.
5. The waiver to allow this equipment will not compromise the integrity of the election in these counties. The equipment is federally certified and would be available to the Secretary's Office to inspect to ensure it meets the requirements that have not been waived by the State Auditor if this application is successful.
6. The county is willing to enter into an agreement with the Auditor's Office that would restrict our use of this alternative equipment to one per polling place. This alternative is suggested only to meet our HAVA disability requirements, ensuring an optical scan based system throughout the state.
7. The waiver allows a temporary solution at a time when we know that other solutions will be available to us by 2007 and 2008. Vendors are still reacting to the new federal standards and will most likely improve upon their current offerings. The waiver will give us this one chance to spend the federal funds provided to Minnesota and subsequently to these counties in the wisest manner.

8. The state has an interest in preserving a competitive environment for voting equipment. Taxpayers and voters will benefit from both lower prices and better service.
9. This alternative solution is the most fiscally prudent use of the federal funds and any local tax dollars that may be necessary.