

PRIORITIZING THE PEOPLE IN THE PROCUREMENT OF ELECTION INFRASTRUCTURE

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ABSTRACT

The continuous and successful holding of elections stands as one of the foundational pillars of American democracy. In the two decades since the passage of the Help America Vote Act (HAVA), federal, state, and local actors have worked in tandem to improve election administration, and, through funding provided by Congress to the U.S. Election Assistance Commission (EAC), states have been given the means to implement federal best practices. However, there exists a glaring gap wherein many states have diverged from both federal best practices and the behavior of other states—the procurement of election infrastructure such as ballots, voting machines, and tabulators. The procurement processes of some states impose inefficiencies or otherwise negatively impact the administration of elections, while the processes present in others can much more effectively facilitate the resolution of these issues. These processes can have a direct impact on voting rights and the security of election administration. Congress should create a federally implemented procurement standard within HAVA that states must meet in order to receive additional EAC funding; by doing so, the interests of all American voters may be protected at the highest level.

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I. INTRODUCTION

We are at a time of unprecedented public doubt in the administration and security of our democracy. A 2022 study found that over sixty percent of Americans “believe[] that U.S. democracy is in crisis and at risk of falling.”¹ Despite continued efforts of election officials across the country to improve the administration of elections, there must be reforms at every level of the process to bolster both the perceived strength of our electoral system and its actual robustness in the face of mounting threats from domestic and foreign actors looking to sow discord.²

To this end, a realignment of the procurement processes to secure voting equipment, ballots, and other aspects of election infrastructure can serve as the foundation needed for running elections securely and efficiently in the modern era.³ As they stand, procurements for election-related goods and services are conducted at the state and local levels, with some recommendations and assistance from the U.S. Election Assistance Commission (EAC).⁴ However, the systems currently in place do not reflect the ever-changing landscape

1. Gabriel Sanchez & Keesha Middlemass, *Misinformation Is Eroding the Public’s Confidence in Democracy*, BROOKINGS INST. (July 26, 2022), <https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy> [<https://perma.cc/QE39-JLV4>]; NAT’L COUNTERINTEL. & SEC. CTR., FOREIGN THREATS TO U.S. ELECTIONS, https://www.dni.gov/files/ODNI/documents/DNI_NCSC_Elections_Brochure_Final.pdf [<https://perma.cc/B5BL-PFVH>] (last visited July 3, 2023).

2. Claire DeSol, *2020 Was a Banner Year for U.S. Election Administration*, MIT ELECTIONS PERFORMANCE INDEX (Mar. 10, 2022), <https://elections-blog.mit.edu/articles/2020-was-banner-year-us-election-administration> [<https://perma.cc/9ERF-F32G>].

3. Before the logistical planning for an election can begin, voting machines must be purchased and certified. See U.S. ELECTION ASSISTANCE COMM’N, ELECTION MANAGEMENT GUIDELINES, https://www.eac.gov/sites/default/files/electionofficials/EMG/EAC_Election_Management_Guidelines_508.pdf [<https://perma.cc/T34H-SAAQ>] (last visited July 3, 2023).

4. U.S. ELECTION ASSISTANCE COMM’N, CLEARINGHOUSE RESOURCES FOR ELECTION OFFICIALS: PROCUREMENT AND IMPLEMENTATION, <https://www.eac.gov/election-officials/procurement-and-implementation> [<https://perma.cc/2ZAK-9Y65>] (last visited July 3, 2023).

of threats to American democracy and the need for every element of our electoral system to emphasize voting rights and election security.⁵

In Part I, this Note discusses the impacts of inequality in voting equipment and administration, compares a selection of state-level procurements with federal procurement standards, and explores the formation and purview of the EAC and its funding mechanisms. In light of this backdrop, Part II of this Note argues that, in future appropriations of funds to the EAC, Congress must use its constitutional power under the Spending Clause to amend Title III of the Help America Vote Act (HAVA) by adding conditions to future EAC funding based on the adoption of federal procurement procedures with an increased focus on voting rights and security and integrity.⁶ In addition, the advancement of election-related policy priorities through the implementation of federal guidance for state-level procurements furthers broader federal procurement priorities by improving uniformity and transparency in government contracting.⁷ These goals reflect the policy priorities of the Biden administration and ensure that the strengthening of our democracy exists as a cornerstone in all government action, including at the formative stages of any government procurement.⁸

II. BACKGROUND

A. The Impact of Low Voter Confidence and Unequal Voting Equipment

It is difficult to find a more prescient example of election infrastructure and administration playing a defining role in the confidence (or lack thereof) of voters than the “butterfly ballots” used during the 2000 presidential election. The now-infamous ballot design, used in Palm Beach County, Florida, has been linked to public doubt about the election’s final results, its procedural administration, and the Supreme Court as an institution.⁹ The “butterfly ballot,”

5. See *Funding Election Security*, BRENNAN CTR., <https://www.brennancenter.org/issues/defend-our-elections/election-security/funding-election-security> [<https://perma.cc/ZKKG6-3KF6>] (last visited July 13, 2023); see also Danielle Root et al., *Election Security in All 50 States: Defending America’s Elections*, CTR. FOR AM. PROGRESS (Feb. 12, 2018), <https://www.americanprogress.org/article/election-security-50-states> [<https://perma.cc/CP2S-6LJ7>].

6. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 952 (2005).

7. See FAR 1.102; FAR 1.102-1.

8. See Susan E. Rice, *How the Biden-Harris Administration Is Continuing to Promote Voting Access*, WHITE HOUSE BRIEFING ROOM BLOG (Sept. 20, 2022), <https://www.whitehouse.gov/briefing-room/blog/2022/09/20/how-the-biden-harris-administration-is-continuing-to-promote-voting-access> [<https://perma.cc/D78C-T62A>]. For discussion outside the realm of contract formation, and in areas such as election-related trade secrets and candidates’ rights of action in the context of procurement, see Jennifer Nou, *Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts*, 118 YALE L. J. 744, 751 (2009) (advocating for procurement contract specifications that require “bidders . . . [to] provide the technology and access with which to verify votes cast . . . [and to allow] candidates to sue state election officials and private manufacturers . . . to disclose underlying source code and to verify election results”).

9. Jonathan Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 793 (2001); Michael W. Sances et al., *Partisanship*

as it is now known, was a unique ballot-design that utilized the Votomatic, a punch-card-based voting machine commonly used in polling places across the United States for decades.¹⁰ The design, conceived of by the Palm Beach County Supervisor of Elections, was purportedly an effort to increase the readability of the ballot, but instead resulted in thousands of statistically unexpected votes going to a third-party candidate.¹¹ The ballot design was considered by some experts to be the main cause of this controversy due to a confusing layout, along with an inability to ascertain voter intent during the recount.¹²

The aftermath of the 2000 election scarred the public's confidence in the administration of elections across the country, which has arguably worsened based on partisan lines in the two decades since.¹³ Although empirical evidence is mixed as to whether changes in the administrative processes of elections have a direct causal relationship with voter confidence, voters' attitudes are nonetheless inextricably linked with their experience of the voting process.¹⁴ Ensuring that this process runs as smoothly as possible will have

and Confidence in the Vote Count: Evidence from U.S. National Elections Since 2000, 40 ELECTORAL STUD. 176, 179 (2015); see also *The Florida Recount Controversy from the Public's Perspective: 25 Insights*, GALLUP NEWS SERV. (Dec. 22, 2000), <https://news.gallup.com/poll/2176/florida-recount-controversy-from-publics-perspective-insights.aspx> [<https://perma.cc/4ZB8-VYNM>] (conducting a series of polls and concluding that “about half of all Americans did not necessarily believe that Bush had won,” one third of Americans believed the Supreme Court’s decision caused them to lose confidence in the Court, and “most [Americans] did believe the country was facing at least a serious problem.”).

10. Wand et al., *supra* note 9, at 794; *Voting Equipment Database: ES&S Votomatic*, VERIFIED VOTING, <https://verifiedvoting.org/election-system/ess-votomatic> [<https://perma.cc/Z9LC-T8CE>] (last visited July 4, 2023).

11. Wand, *supra* note 9, at 794 n.5, 795. But see Mark C. Alexander, *Don't Blame the Butterfly Ballot: Voter Confusion in Presidential Politics*, 13.1 STAN. L. & POL'Y. REV. 121, 121–22 (2002) (arguing that voter confusion began earlier than election day, wherein “many votes . . . were decided based on misunderstood and distorted information”).

12. See Wand, *supra* note 9, at 803 (conducting a statistical analysis and determining that “[t]he evidence is very strong” that “[t]he butterfly ballot was pivotal in the 2000 presidential race”). Although this issue relates to the well-known fiasco of “hanging chads” in Florida, see Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [<https://perma.cc/R7FU-6YYJ>], the key concern addressed in this Note is the way that this process came to be. Specifically, these ballots were an internally conceived-of design and were chosen without a competitive procurement process, which ultimately resulted in mayhem. There is an entire field of study dedicated to ballot design and ensuring voter intent, which extends beyond the scope of this Note. For examples of this work, see *Field Guides to Ensuring Voter Intent*, CTR. FOR CIVIC DESIGN, <https://civicdesign.org/fieldguides> [<https://perma.cc/T42X-XAKD>] (last visited July 3, 2023).

13. Ray Martinez III, Commissioner, Election Assistance Comm'n, Address at the Princeton University Policy Research Institute for the Region: Prudent Steps Toward Improving Voter Confidence (Apr. 7, 2006); *Voter Confidence*, MIT ELECTION DATA + SCIENCE LAB (Apr. 2, 2021), <https://electionlab.mit.edu/research/voter-confidence> [<https://perma.cc/J9AZ-9T6T>] (indicating a steep decline in Republican voter confidence following the 2000 presidential election).

14. Compare Lonna Rae Atkeson et al., *Voter Confidence: How to Measure It and How It Differs from Government Support*, 14 ELECTION L. J.: RULES, POL., & POL'Y 207, 207 (2015) (finding little evidence that election administration reforms directly affect voter confidence), with Lonna Rae Atkeson et al., *The Effect of Election Administration on Voter Confidence: A Local Matter?*, 40 PS:

positive effects on a voter's confidence in the overall system.¹⁵ In addition, differences in voting technology itself have been shown to have a more direct impact on both voter confidence and even election outcomes.¹⁶ By implementing robust procurement systems to ensure that ballot access, election security, and election integrity are early determinative cornerstones of any election-related procurement, these statistically significant inequities may be eliminated entirely.¹⁷

In terms of election security and integrity, risks vary greatly depending on the type of election infrastructure used by a particular jurisdiction and the processes behind their use.¹⁸ The simplest example can be found in an integrity-focused comparison between paper and electronic ballots. Direct recording electronic (DRE) voting machines, used in jurisdictions containing over twenty-five million voters as of 2022, maintain no verifiable paper trail for the purposes of ensuring that votes were cast as intended.¹⁹ In contrast, many security experts consider paper ballots to be the most secure voting technology, as they are easily traceable and leave a physical artifact of voter intent in the event of an audit.²⁰ Modernizing and standardizing election-related procurement standards may also ensure that there are not massive time-lapses between updates in voting machines and related equipment, which has resulted in the antiquity of millions of voting machines around the country.²¹

POL. SCI. & POL. 655, 658–59 (2007) (finding that voter attitudes about their election experience directly impact their confidence in the system as a whole).

15. See *Effect of Election Administration*, *supra* note 14, at 658–59.

16. Michael Ritter, *Exploring Voting Equipment and Inequality in the 2016 U.S. General Election*, MIT ELECTION LAB (Sept. 14, 2020), <https://medium.com/@MITelectionlab/exploring-voting-equipment-and-inequality-in-the-2016-u-s-general-election-part-1-f45da35aa145> [<https://perma.cc/BYE5-U7R3>]; David Card & Enrico Moretti, *Does Voting Technology Affect Election Outcomes? Touchscreen Voting and the 2004 Presidential Election*, 89 REV. ECON. & STAT. 660, 662 (2007) (using a statistical analysis to find that touchscreen voting technology had a 1.4% impact on vote share—“enough to have affected the final outcome of the election”).

17. See Ritter, *supra* note 16; see also Card & Moretti, *supra* note 16, at 662.

18. See David Brancaccio et al., *Why Upgrading Voting Machines Is Important for Election Integrity*, MARKETPLACE (Oct. 30, 2020), <https://www.marketplace.org/2020/10/30/why-upgrading-voting-machines-is-important-for-election-integrity> [<https://perma.cc/4ATK-ZPRF>].

19. Turquoise Baker & Lawrence Norden, *Voting Machines at Risk in 2022*, BRENNAN CTR. (Mar. 1, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-machines-risk-2022> [<https://perma.cc/P8DR-WY3J>]. But see ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RSCH. SERV., RL33190, *THE DIRECT RECORDING ELECTRONIC VOTING MACHINE (DRE) CONTROVERSY: FAQs AND MISPERCEPTIONS 3–4* (2007) (“[DRE Proponents] claim that following appropriate security and audit procedures is sufficient to prevent successful tampering and that modern DREs, when properly managed, have less risk of losing votes through malfunction than any other voting system.”).

20. See Raj Karan Gambhir & Jack Karsten, *Why Paper Is Considered State-of-the-Art Voting Technology*, BROOKINGS INST. (Aug. 14, 2019), <https://www.brookings.edu/blog/techtank/2019/08/14/why-paper-is-considered-state-of-the-art-voting-technology> [<https://perma.cc/N4P4-G43K>]; see also Derek Tisler & Turquoise Baker, *Paper Ballots Helped Secure the 2020 Election—What Will 2022 Look Like?*, BRENNAN CTR. (May 10, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/paper-ballots-helped-secure-2020-election-what-will-2022-look> [<https://perma.cc/823J-LB6G>].

21. Baker & Norden, *supra* note 19 (“Outdated machines suffer frequent breakdowns and create long lines at polling places. They are also more susceptible to error and fraud, risking public

B. State-Level Procurement Procedures

Elections in the United States are, by design, hyper-decentralized. The Constitution itself dictates that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”²² States and local subdivisions of government control nearly every element of the election administration process, varying greatly in their individual methods to “establish boundaries for electoral districts, to register voters, to administer elections, to report election results, and to otherwise regulate the electoral process.”²³ This decentralization results in a total of “nearly 13,000 electoral districts in the United States,” comprised of towns, counties, and other election jurisdictions, which poses serious challenges for many proposed nationwide solutions to voting- and election-related problems.²⁴ There has long been debate over the efficacy of this level of decentralization, both in the context of elections and the broader notion of decentralized governance, but the truth remains that states can and will administer elections as they so choose, including through the purchase of voting equipment.²⁵ Fortunately, in the context of procurement and federal funding, HAVA specifically dictates that each state’s “chief election official” shall handle statewide coordination with the federal government and the Administrator of General Services for payments under HAVA.²⁶ This increased centralization somewhat simplifies the task of creating and implementing federal standards.

This Note leverages a small selection of states’ current procurement procedures for election equipment to highlight both positive and negative aspects

confidence in elections [O]ld software is riskier, because new methods of attack are constantly being developed, and older software is likely to be vulnerable.”)

22. U.S. CONST. art. 1, § 4, cl. 1; *see also* Hasen, *supra* note 6, at 944, 952.

23. *See* CONG. RSCH. SERV., RL30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS 1 (2014).

24. Hasen, *supra* note 6, at 944, 952 (discussing the negative implications of “America’s “hyper-federalized” system of election administration”) (footnote omitted).

25. *Compare* Hasen, *supra* note 6, at 944, 952, and Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636 (2017) (discussing the need for policymakers to balance decentralization with costs, benefits, and information production), with Chris Good, *When It Comes to Election Cybersecurity, Decentralized System Is Viewed as Both Blessing and Curse*, ABC NEWS (Oct 31, 2018) <https://abcnews.go.com/Politics/election-cybersecurity-decentralized-system-viewed-blessing-curse/story?id=58877082> [<https://perma.cc/5HPM-NGTX>] (noting that mass-decentralization of elections in the U.S. creates increased complexity for a potential large-scale cybersecurity exploit); *see also* R. SAM GARRETT, CONG. RSCH. SERV., R45302, FEDERAL ROLE IN U.S. CAMPAIGNS AND ELECTIONS: AN OVERVIEW 5 (2018). For additional discourse in the ongoing debate over the centralization of election administration, *see* Symposium, *Electoral Federalism: Centralized or Decentralized Elections?*, CONST. CONVERSATIONS (2022), https://constitutionalconversations.substack.com/p/electoral-federalism-centralized?utm_source=twitter&sd=pf [<https://perma.cc/WJ3G-3MV2>].

26. Help America Vote Act of 2002, Pub. L. No. 107-252, § 101, 116 Stat. 1666, 1669 (2002) (codified at 52 U.S.C. § 20901).

of their respective processes as well as to inform the subsequent discussion about a need for federal guidelines and standardization.²⁷

1. Michigan

On January 24, 2017, as part of Michigan's effort to procure their "next-generation" of voting infrastructure, the State Administrative Board approved the use of three vendors to replace voting systems across the state and empowered counties with the freedom to enter into individual ten-year contracts with these vendors.²⁸ The contracts would encompass hardware, firmware, software, service and maintenance, training of local election officials, and replacement components through an outright purchase by counties in conjunction with federal HAVA funding.²⁹ The original request for proposals (RFP), published in January 2016, aimed to establish an multi-award contract with a maximum price of approximately eighty-two million dollars, which appears similar to federal multiple-award indefinite-delivery-indefinite-quantity (IDIQ) contracts.³⁰ However, unlike federal IDIQ contracts, the solicitation (Michigan Solicitation) offered no promise of a stated minimum purchase.³¹ As a result, it more closely reflects a form of blanket purchase agreement (BPA) under Federal Acquisition Regulation (FAR) 8.405-3, or basic ordering agreement (BOA), neither of which is considered as legally binding contracts due to a lack of consideration.³² This lack of consideration and binding status results in a lack of legal liability and remedies from the government's lack of affirmative

27. The states of Michigan, Colorado, and Arkansas were chosen based on the public accessibility of election-related solicitations and procurement policies and represent both a geographic and political range.

28. *Voting System Purchase Resources and Instructions for Michigan's Election Officials*, MICH. DEP'T OF STATE, <https://www.michigan.gov/sos/elections/admin-info/voting-system-purchase> [<https://perma.cc/PSA2-HZYT>] (last visited July 4, 2023); see also Press Release, Secretary of State Rush Johnson, Secretary Johnson Announces Next-Generation Voting Equipment (Jan. 24, 2017), <https://www.michigan.gov/sos/-/media/Project/Websites/sos/Elections/Voting-system-purchase/SecJohnsonAnnounce.pdf?rev=f42ce9efd20445eb0e3e4718ef700d1&hash=84EE0CB12E36D0C7C9CD1FFDEE9A399> [<https://perma.cc/YU87-HLNV>].

29. Memorandum from Sue Ciecwiwa, Buyer Specialist, Dep't of Tech., Mgmt. and Budget Procurement, Commodities Division, to Sharon Walenga-Maynard, Sourcing Director (Dec. 13, 2016), <https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/76787/JEC.pdf> [<https://perma.cc/7CGB-JL8H>]; see also Press Release, Secretary of State Rush Johnson, *supra* note 28, at 2.

30. Memorandum from Sue Ciecwiwa to Sharon Walenga-Maynard, *supra* note 29, at 1–2; see FAR 16.5 ("establishes a preference for making multiple awards of indefinite-quantity contracts). IDIQ contracts involve an indefinite amount of work over a pre-determined period wherein the government will place orders for supplies or services between a contractually specified minimum and maximum amount. See *Indefinite Delivery, Indefinite Quantity Contracts*, U.S. GEN. SERV. ADMIN., <https://www.gsa.gov/small-business/register-your-business/explore-business-models/indefinite-delivery-indefinite-quantity-contracts> [<https://perma.cc/EF6E-JYAR>] (last visited July 4, 2023).

31. FAR 16.504(a)(1) (requiring "the government to order . . . at least a stated minimum quantity of supplies or services . . . not to exceed the stated maximum").

32. *Federal Supply Schedules—Blanket Purchase Agreements*, DEF. ACQUISITION UNIV., <https://aaf.dau.edu/aaf/contracting-cone/federal-supply-schedules/bpa> [<https://perma.cc/XJ9C-PR7L>] (last visited July 16, 2023); FAR 16.703; *GSA Multiple Award Schedule: Blanket Purchase Agreements*, U.S. GEN. SERV. ADMIN., <https://www.gsa.gov/buy-through-us/purchasing-programs/gsa>

obligation.³³ The similarity between the Michigan solicitation and federal BPAs is further demonstrated by public information regarding the contract's administration, such as a state-published timeline for local purchasing of the voting systems, which notes that counties must file "Initial Purchase Plans" with the Michigan Board of Elections prior to an eventual "Purchase Order."³⁴

A Joint Evaluation Committee, consisting of state and local election administrators, as well as state procurement specialists, evaluated the proposals and presented a source selection recommendation.³⁵ The Michigan Solicitation planned to evaluate proposals in four steps: (1) mandatory minimum requirements, (2) technical evaluation, (3) state certification testing, and (4) pricing.³⁶ The mandatory minimum requirements, a pass/fail phase of the evaluation, related to whether a prospective vendor's voting systems had been tested and certified by the EAC, or by a federally accredited equivalent, such as the Voting System Test Laboratory.³⁷ The subsequent technical evaluation mirrored typical federal-level technical evaluations of proposals by laying out factors and significant subfactors as well as their quantitative weights.³⁸ The technical requirements of prospective vendors included in-place security practices and safeguards as well as audit capacity.³⁹ The proposals that received over a certain threshold score in the technical rating were then subject to state certification testing on a pass/fail basis.⁴⁰ Following this determination, the Michigan Solicitation called for a price evaluation, wherein "[the] State is not obligated

-multiple-award-schedule/schedule-features/blanket-purchase-agreements [https://perma.cc/PX E4-HWXF] (last visited July 4, 2023).

33. Library of Cong., B-318046, 2009 WL 1978719, at *3–6 (Comp. Gen. July 7, 2009).

34. *Voting System Purchase Process*, MICH. SEC. OF STATE. (Feb. 2017), <https://www.michigan.gov/sos/-/media/Project/Websites/sos/Elections/Voting-system-purchase/VSPFlowchart.pdf?rev=14001a7d5a8f4e03b898209aa7e8267f&hash=1170FC8276D571C591113796F2027B36> [https://perma.cc/WZ8C-VWLC].

35. Joint Evaluation Committees are used when included in a solicitation and serve at the request of the contracting officer, known as the Solicitation Manager in Michigan, for that procurement. See MICH. PROCUREMENT POL. MANUAL 8.3.2 (2021), https://www.michigan.gov/-/media/Project/Websites/dtmb/Procurement/documents/MPPM/Chapter_8.pdf?rev=d48e5616ef8b445d8b6c463afe47e903 [https://perma.cc/E2AE-9JSP]; see also Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 1.

36. Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2–3. For additional context into the evaluation conducted in this procurement, see MICH. DEP'T OF TECH., MGMT., & BUDGET, RFP No. 007116B0007029 (Jan. 2017), <https://www.michigan.gov/-/media/Project/Websites/sos/05holland/VendorComparison.pdf?rev=b8c1606c9b9042368d68e1b56709c845> [https://perma.cc/QR3N-MR3P].

37. Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2.

38. See *id.*; see FAR 15.305(a)(3)(ii).

39. See *supra* note 29, at 3–4; MICH. DEP'T OF TECH., MGMT., & BUDGET, RFP No. 007116B0007029 (Jan. 2017), <https://www.michigan.gov/-/media/Project/Websites/sos/05holland/VendorComparison.pdf?rev=b8c1606c9b9042368d68e1b56709c845> [https://perma.cc/CT4H-X8BA]; see also U.S. ELECTION ASSISTANCE COMM'N, ELECTION AUDITS ACROSS THE UNITED STATES 2–3 (Oct. 6, 2021), https://www.eac.gov/sites/default/files/bestpractices/Election_Audits_Across_the_United_States.pdf [https://perma.cc/UA9P-QHUA] (Post-election audits are a process to "ensure voting systems operate accurately, that election officials comply with regulations or internal policies, and identify and resolve discrepancies in an effort to promote voter confidence in the election administration process.").

40. Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2–3.

to accept the lowest price proposal.”⁴¹ The final negotiated price estimates between each contractor ranged over thirty million dollars, emphasizing Michigan’s focus on technical factors in their evaluations.⁴² The resulting contract, comprised of three vendors, allowed for individual counties to negotiate with each of the vendors and submit purchase orders following negotiations.⁴³

In sum, Michigan’s practices and procedures regarding election-related procurements represent a robust base from which to build, such as the opportunity for individual counties to select an approved vendor best suited to their individual needs, election security, and verifiability requirements,⁴⁴ and include several model practices that can, and should, be utilized beyond its borders.

2. Colorado

The state of Colorado similarly maintains a robust process for the procurement of election-related infrastructure, which is conducted at the county level with oversight by the Secretary of State.⁴⁵ During a recent, nearly three-year-long, search for a new uniform voting system to be used statewide, the Colorado Legislature created and empowered a specialized committee, known as the Pilot Election Review Committee (PERC), to make manufacturer recommendations to the Secretary of State.⁴⁶ PERC consisted of a broad range of election experts, including advocates for disability rights and public participation, as well as representatives of multiple levels of government, that “evaluated four different voting systems piloted in eight Colorado counties” and eventually decided on Dominion Voting Systems.⁴⁷ This piloting program reflects a similar practice often used in “major systems” acquisitions by the Department of Defense pursuant to DFARS 207.106, wherein competitive prototyping is often utilized to maximize competition and cost-efficiency for the government’s benefit.⁴⁸

41. *Id.* at 3.

42. *Id.* at 19.

43. *Voting System Purchase Resources and Instructions for Michigan’s Election Officials*, MICH. DEP’T OF STATE, <https://www.michigan.gov/sos/elections/admin-info/voting-system-purchase> [<https://perma.cc/PSA2-HZYT>] (last visited July 4, 2023).

44. See Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2.

45. COLO. DEP’T OF STATE, CDOS-UVS-2013-01 1 (Oct. 1, 2013), https://www.eac.gov/sites/default/files/eac_assets/1/28/Colorado%20Uniform%20Voting%20System%20RFP%202013_10_01.pdf [<https://perma.cc/3XUS-5RDR>] [hereinafter COLO. UNIFORM VOTING PROCUREMENT].

46. See Mike McKibbin, *Denver Finalizes Nearly \$1M Voting System Purchase*, COLORADO POLITICS (Sept. 30, 2016), https://www.coloradopolitics.com/news/denver-finalizes-nearly-1m-voting-system-purchase/article_b19899cb-a19f-5b3d-8316-9a902dc78ace.html [<https://perma.cc/6V8Y-7PJU>]; see also Press Release, Wayne Williams, Secretary of State, State of Colorado, Secretary of State Wayne Williams Looks to Dominion After Nearly Three Years of Study on Voting Systems (Dec. 22, 2015), <https://www.sos.state.co.us/pubs/newsRoom/pressReleases/2015/PR20151222Dominion.html> [<https://perma.cc/XX5D-LV6M>].

47. COLO. DEP’T OF STATE: PILOT ELECTION REV. COMM., NOTICE OF MEETING (Dec. 14, 2015), <https://www.coloradosos.gov/pubs/elections/VotingSystems/committees/20151217committeeMeeting.html> [<https://perma.cc/MQ64-N2TB>]; see Williams, Press Release, *supra* note 46.

48. See DFARS 207.106; 10 U.S.C. § 4022(b); see also *Major Capability Acquisition: Prototype Contracts*, DEF. ACQUISITION UNIV., <https://aaf.dau.edu/aaf/mca/prototype-contracts> [<https://perma.cc/RV2P-6PL9>] (last visited July 4, 2023).

The contractors chosen to participate in this pilot process were selected using a more traditional RFP solicitation issued by the Secretary of State.⁴⁹ The evaluation panel for these proposals consisted of a variety of relevant professionals and decisionmakers, including information technology experts as well as county and state legislators.⁵⁰

The evaluation of proposals under Colorado's solicitation involved multiple phases, which differ from those used in Michigan.⁵¹ The first phase was a preliminary administrative evaluation: a pass/fail phase which ensures the format of the proposal itself comports with the state's preferences.⁵² This initial process is more rudimentary than determinations of responsiveness in the sealed bidding process under FAR 14.301, or technical acceptability under FAR 15.101-2, as it does not yet reach the material requirements of the solicitation.⁵³ The next phase, the business proposal, held a seventy-five percent weight, and granted a numerical score to each proposal based on "the clarity and conciseness of the information presented, and how well it meets the requirements as defined in each section."⁵⁴ This proposal included requirements for information traditionally reserved for contractor responsibility determinations under federal negotiated procurements, such as company financial status, prior proposals, and business experience.⁵⁵ Requirements also included security measures within each voting system in use by each prospective vendor as well as the capacity to audit election results.⁵⁶ Notably, business proposals submitted by prospective vendors made no mention of the anticipated price or cost, which instead was required to be included and submitted separately in a cost proposal.⁵⁷

Following the evaluation and scoring of business proposals, the cost evaluation phase, scored numerically and weighted at twenty-five percent, looked to the cost proposal from each contractor, but without explicit mention of cost or price realism as are often utilized in federal procurements.⁵⁸ At this point, a competitive range was established based on the numerical points granted to each proposal, and, at the discretion of the Department of State, oral

49. COLO. UNIFORM VOTING PROCUREMENT, *supra* note 45, at 1; COLO. DEP'T OF STATE, THE PATH FORWARD TO A UNIFORM VOTING SYSTEM 1 (2015), <https://www.coloradosos.gov/pubs/elections/VotingSystems/files/2015/UVSOverview1.pdf> [<https://perma.cc/5A4P-B7WH>].

50. COLO. UNIFORM VOTING PROCUREMENT, *supra* note 45, at 36; *see also* COLO. DEP'T OF STATE, CDOS-CF-08-01 35-36 (June 6, 2008), https://www.sos.state.co.us/pubs/elections/CampaignFinance/files/colorado_campaign_finance_RFP_2008-06-06.pdf [<https://perma.cc/99C3-PQ2T>].

51. COLO. UNIFORM VOTING PROCUREMENT, *supra* note 45, at 35.

52. *Id.* at 36.

53. *Id.*

54. *Id.*

55. *Id.* at 22-24.

56. *Id.* at 18, 29-30, B-38-41, B-43-44.

57. *Id.* at 22, 32. For an example of a business proposal submitted pursuant to this solicitation, *see Business Proposal for RFP # CDOS-UVS-2013-01, DOMINION VOTING* (2013), <https://www.sos.state.co.us/pubs/elections/VotingSystems/RFI/proposals/DominionVotingSystemsColoradoUVSProposal.pdf> [<https://perma.cc/RH4V-CR2E>].

58. FAR 15.404-1; COLO. UNIFORM VOTING PROCUREMENT, *supra* note 45, at 37.

presentations and demonstrations could have occurred.⁵⁹ During the final phase, the original scores were reevaluated, and adjustments to point totals in accordance with a demonstration or presentation were made.⁶⁰ Subsequently, a notice of intent to award was publicly posted.⁶¹ This evaluation and source selection scheme is more complex than other recent Colorado Department of State solicitations regarding elections due to its significance, illustrated by its usage of a piloting process and delegation to PERC for the purpose of making specialized recommendations to the state.⁶²

3. Arkansas

In 2015, the Arkansas Secretary of State, empowered by state law to select and procure voting machines for the state, issued an RFP in search of a statewide integrated voting system for a five-year lease (Arkansas Solicitation).⁶³ The Arkansas Solicitation, in stark contrast with that of Michigan or Colorado, offered minimal guidance to prospective vendors with respect to what criteria were to be used to judge proposals as well as who would be doing the evaluating.⁶⁴ Aside from laying out the requirements for proposals, which, notably, did not include any mention of cybersecurity or auditing capability, the solicitation only noted that the “[Secretary of State] reserves the right . . . to award the bid to best serve the interest of the [Secretary].”⁶⁵ This solicitation diverges sharply from FAR regulations dealing with RFPs, which require the inclusion of “factors and significant subfactors that will be used to evaluate [a] proposal and their relative importance.”⁶⁶ This lack of evaluation criteria, if present in a federal procurement, has long been grounds for a successful protest by a prospective bidder due to an effectively arbitrary selection process.⁶⁷ The Arkansas Solicitation further noted: “All decisions by the [Secretary of State] are final. Bidders should understand that the [Secretary of State] is not under Arkansas Procurement law in terms of its Request for Proposal

59. *Id.*

60. *Id.*

61. *Id.* at 38.

62. See COLO. DEP’T OF STATE, CDOS-CF-08-01 1, 36–38 (June 6, 2008), https://www.sos.state.co.us/pubs/elections/CampaignFinance/files/colorado_campaign_finance_RFP_2008-06-06.pdf [<https://perma.cc/7LL2-D7VL>] (procuring a “commercial off-the-shelf software to replace existing . . . system”); see also COLO. DEP’T OF STATE, RFP-SPCO-AR-23-0418–19 (Dec. 14, 2022) (procuring a system for campaign and lobbying disclosures through a negotiated procurement) (on file with author).

63. See ARK. CODE ANN. § 7-5-301 (2020); ARK. SEC. OF STATE, REQUEST FOR PROPOSAL FOR STATEWIDE INTEGRATED VOTING SYSTEM 5, 12 (Apr. 15, 2015), https://www.eac.gov/sites/default/files/eac_assets/1/28/State%20of%20Arkansas%20RFP-RFQ%20Elections%20Integrated%20Voting%20System.pdf [<https://perma.cc/4U3H-M8P7>] [hereinafter ARK. REQUEST FOR PROPOSAL].

64. ARK. REQUEST FOR PROPOSAL, *supra* note 63, at 13.

65. *Id.*

66. FAR 15.203(a)(4).

67. See Randolph Engineering, B-192375, 1979 WL 12366, at *2 (Comp. Gen. June 28, 1979); CACI, Inc.–Federal, B-42041 et al., 2022 WL 1102585, at *1, 4–6 (Comp. Gen. Apr. 7, 2022).

procedures. This Request for Proposal is under the procedures of the Office of the Arkansas Secretary of State only.”⁶⁸

The apparent inability for unsuccessful vendors to file any form of protest pursuant to this solicitation, as indicated by decisions being “final,” provides an additional level of distinction from common federal-level acquisition practices.⁶⁹ Under Government Accountability Office (GAO)⁷⁰ and FAR regulations, interested parties in a procurement have a right to file protests both pre- and post-award, subject to timeliness and other requirements.⁷¹ In fact, a very similar version of this right to protest currently exists under Arkansas procurement law; however, as noted in the Arkansas Solicitation, these rights did not apply to procurements conducted under the authority of the Secretary of State.⁷²

As a constitutional office of Arkansas, the Secretary of State Executive Office is considered an “exempt agency” under state procurement law and is, therefore, not subject to its regulations.⁷³ Potentially relevant to the administration of elections, one of the few state procurement laws from which the Secretary is not exempt is denoted in section 19-11-203(30)(B) of the Arkansas Annotated Code, which subjects otherwise exempt agencies to Amendment 54 of the Arkansas Constitution.⁷⁴ Amendment 54 requires that all “printing, stationery, and supplies” contracts by the state General Assembly and other state departments be awarded to the “lowest responsible bidder.”⁷⁵ This amendment, as interpreted by the Arkansas Supreme Court, requires the use of competitive bidding when contracting with commercial printers.⁷⁶ Were the Secretary to contract specifically for the printing of ballots, as is common in many states,⁷⁷ it is therefore unclear as to whether they would be bound by the amendment. If so, Amendment 54 would both not allow the use of

68. ARK. REQUEST FOR PROPOSAL, *supra* note 63, at 13.

69. *Id.*; see also Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 PUB. CONT. L.J., 489, 501–10 (2013) (concluding that “whatever costs protests impose on the procurement system are outweighed, at least in the author’s view, by the benefits that protests bring, in terms of transparency, accountability, education, and protection of the integrity of the U.S. federal acquisition”); Meryl Grenadier, *The Benefits of Bid Protests*, PROJECT ON GOV’T OVERSIGHT (Apr. 12, 2013), <https://www.pogo.org/analysis/2013/04/benefits-of-bid-protests> [<https://perma.cc/68NU-5BNH>].

70. The GAO serves as an independent forum for adjudicating government contract protests. See *Bid Protests*, U.S. GOV. ACCOUNTABILITY OFF., <https://www.gao.gov/legal/bid-protests> [<https://perma.cc/FTR2-W85B>] (last visited July 20, 2023).

71. 4 C.F.R. § 21.1(a) (2018); see also FAR 33.1.

72. ARK. CODE ANN. § 19-11-244(a)(1).

73. *Id.* § 19-11-105(a)(2); see also *Arkansas Constitutional Offices*, ARK. SEC. OF STATE, <https://www.sos.arkansas.gov/state-capitol/arkansas-constitutional-offices> [<https://perma.cc/36JM-U9UJ>] (last visited July 4, 2023) (listing all constitutional offices in the state of Arkansas).

74. ARK. CODE ANN. § 19-11-203(30)(B).

75. ARK. CONST. amend. LIV, § 1; see also ARK. CODE ANN. § 19-11-204(12) (defining “responsible bidder” for the purposes of competitive sealed bidding).

76. See *Gatzke v. Weiss*, 289 S.W.3d 455, 461 (Ark. 2008).

77. See N.Y. BD. OF ELECTIONS, EPIN #: 00320232026, <https://vote.nyc/sites/default/files/pdf/contracts/RFP-ABSENTEE-BALLOT-PRINTING-MARCH-31-2021-LATEST.pdf> [<https://perma.cc/4GPQ-QFES>] (solicitation for the purposes of ballot printing and mailing); KAN. CITY DEP’T OF PROCUREMENT & CONTRACT COMPLIANCE, RFP 27589 (Jan. 11, 2018), <https://>

negotiated procurements and completely restrict the ability of the Secretary to consider any factors other than price in their evaluation.⁷⁸ In the context of pursuing a procurement system designed to improve election administration, the inability to consider these factors when contracting for the ballots themselves creates a conflict.

A more recent solicitation issued by the Arkansas Secretary of State in January 2022 for an “Online Integrated and Searchable Campaign Finance Filing and Reporting System” incorporated far more detail than their 2015 solicitation, including a series of point values for each requirement for the purposes of evaluation.⁷⁹ This solicitation also mentioned the Secretary’s “exempt” status under most Arkansas procurement laws, but went further than the previous solicitation by noting that “it is the intent of the [Secretary of State] to . . . ensure the selection of the most responsive and responsible vendor who shall accomplish the requisite scope of work in an efficient and transparent manner.”⁸⁰ This language reflected the much more standard nature of the rest of the solicitation in terms of its requirements and evaluation criteria. However, as a campaign finance procurement, the solicitation itself was only tangentially related to the administration of elections, unlike the prior request for proposals, and therefore does not represent the latest procurement in that field.⁸¹

In sum, the most recent election-related procurement in Arkansas represented a drastic departure from federal standards, as well as the practices of other states, such as Michigan and Colorado, through its lack of transparent evaluation criteria and constitutional concerns. In the following discussion, the role of the EAC as it relates to these and other states’ election administration practices will be explored and linked with current federal policies on election administration and procurement.

C. HAVA, the EAC, and Its Role in State Election Administration

1. History of the Election Assistance Commission

The EAC was established as an independent federal agency and the national clearinghouse for federal elections pursuant to the passage of the Help America Vote Act (HAVA) “as part of Congress’s response to administrative issues

purchasing.wycokck.org/eProcurement/bids/R27589/RFP%2027589%20Ballot%20Printing%20FINAL.pdf [https://perma.cc/7EEV-L4X9] (same).

78. ARK CONST. amend. LIV, § 1.

79. ARK. SEC. OF STATE, RFP # 2022-1 13 (Jan. 9, 2022), https://www.sos.arkansas.gov/uploads/CCE_System_RFP_2022-1_January_9,_2022.pdf [https://perma.cc/QJ6F-D4MM]. It may also be relevant to note that this is a new Secretary of State, elected in 2019. *See Office of Secretary of State*, ENCYCLOPEDIA OF ARKANSAS, <https://encyclopediaofarkansas.net/entries/office-of-secretary-of-state-5723> [https://perma.cc/NW35-D8WE] (last visited July 15, 2023).

80. ARK. SEC. OF STATE, RFP # 2022-1 3 (Jan. 9, 2022), https://www.sos.arkansas.gov/uploads/CCE_System_RFP_2022-1_January_9,_2022.pdf [https://perma.cc/QJ6F-D4MM].

81. *Compare id.* (procuring a campaign finance-related platform), *with* ARK. CODE ANN. § 7-5-301 (2020); ARK. REQUEST FOR PROPOSAL, *supra* note 63, at 5, 13 (procuring election administration-related products and services).

with the 2000 elections.”⁸² The concept of a federal clearinghouse for the sharing of election administration-related information originally dates back to the Federal Election Campaign Act of 1971, which established the National Clearinghouse for Information on the Administration of Elections within the General Accounting Office (Clearinghouse).⁸³ The purpose of this office was to combat the ongoing inefficiencies caused by a lack of comprehensive practice and procedure sharing amongst election administrators.⁸⁴ The Clearinghouse was subsequently transferred to the Federal Election Commission (FEC) as the FEC Office of Election Administration.⁸⁵ Pursuant to the passage of HAVA, these functions, along with underlying personnel, records, and contracts, were finally reassigned to the newly established EAC.⁸⁶

As the national clearinghouse for federal elections, the EAC is charged with a number of duties related to the promotion of effective election administration.⁸⁷ The EAC’s purview includes but is not limited to (1) providing technical and security expertise to state and localities; (2) establishing minimum election administration standards; (3) testing and certifying voting equipment; and (4) directly assisting in state and local election administration through trainings, payments, and grants.⁸⁸ These duties exemplify the broader legislative purpose behind HAVA, as explained by the United States House Committee on House Administration in their favorable report of the bill:

[HAVA will] establish a program to provide funds to States to replace punch card voting systems . . . , establish the [EAC] to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, . . . [and] establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections⁸⁹

2. Distribution of Funding

The overwhelming majority of the EAC’s funding was appropriated in the initial passage of HAVA, with additional congressional appropriations occurring in calendar years 2018, 2020, 2022, and 2023.⁹⁰ This funding is separated into two major categories: 1) HAVA Operational Grants, a now-expired provision providing funding to states replacing outdated voting machines; and

82. 52 U.S.C. § 20921; KAREN SHANTON, CONG. RSCH. SERV., R45770, *THE U.S. ELECTION ASSISTANCE COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 3* (2019).

83. 2 U.S.C. § 438(a).

84. *About the EAC: Help America Vote Act*, U.S. ELECTION ASSISTANCE COMM’N, https://www.eac.gov/about_the_eac/help_america_vote_act.aspx [<https://perma.cc/SVZ9-AAVZ>] (last visited July 4, 2023).

85. *Id.*

86. 52 U.S.C. §§ 21131–21133.

87. 52 U.S.C. § 20922.

88. *See id.*

89. H.R. REP. NO. 107-329, at 1 (2001).

90. *See Election Sec. Funds*, U.S. ELECTION ASSISTANCE COMM’N, <https://web.archive.org/web/20230315015937/https://www.eac.gov/payments-and-grants/election-security-funds> [<https://perma.cc/3W5K-LMGR>] (last visited July 4, 2023).

2) Discretionary Grants, which have continued to be used in the years following the EAC's initial funding.⁹¹ It had been argued that, due to the infrequent appropriation of funds to the EAC, the agency's legislative mandate has come to pass and the agency no longer serves a purpose.⁹² In fact, as recently as 2017, there have been legislative efforts in Congress to repeal the EAC in its entirety.⁹³ However, more recent appropriations by Congress to the EAC have rendered this argument outdated.

In 2018, Congress indicated their support for the continued operation of the EAC by appropriating \$380 million in funding for the purposes of improving election security in the aftermath of questions regarding the integrity of the 2016 presidential election.⁹⁴ Two years later, Congress appropriated an additional \$400 million in emergency funds to the EAC in the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 to help alleviate coronavirus-related costs incurred by states in their administration of that year's federal election.⁹⁵ This appropriation was strictly and specifically conditioned on costs incurred "to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle" with a mandatory twenty percent state match to be made "available within two years of receiving the funds."⁹⁶ This matching share provision, as articulated by the GAO Red Book, mandates that even the matching funds provided by the state or localities be exclusively used for the authorized purpose of the overall grant.⁹⁷ The Consolidated Appropriations Act of 2022, passed by Congress in March 2022, allocated an additional seventy-five million dollars to the EAC for the purposes of "improv[ing] the administration of elections for Federal office, including to enhance election technology and make election security improvements."⁹⁸

Each of the appropriations to the EAC by Congress was subject to specific and unique conditions that dictated the release of any EAC funding to

91. *Payments & Grants*, U.S. ELECTION ASSISTANCE COMM'N, <https://web.archive.org/web/20230315015937/https://www.eac.gov/payments-and-grants/payments-grants> [https://perma.cc/5XTQ-LJAK] (last visited July 4, 2023).

92. *Hearing on Election Assistance Commission Nominations Before the S. Comm. on Rules and Admin.*, 113th Cong. 44 (2013) (statement of Senator Pat Roberts, Ranking Member) (noting that "the [EAC] has fulfilled its purpose and should be eliminated").

93. See, e.g., H.R. 634, 115th Cong. (2017); H.R. 1994, 113th Cong. (2013); H.R. 260, 113th Cong. (2013); H.R. REP. NO. 113-293, at 1-2 (2013) (noting that, "[w]ithout [a flow of election administration funds to states], the EAC is a bureaucracy in search of a mission").

94. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 561 (2018); see SHANTON, *supra* note 82, at 5.

95. Commission in the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, 15 U.S.C. §§ 9001-9141 (2020).

96. Letter from Mona Harrington, Acting Executive Officer, Election Assistance Comm'n, to Chief State Election Officers I (Apr. 6, 2020) <https://sos.nh.gov/media/dnkl2pqv/cares-award-instructions.pdf> [https://perma.cc/W3M7-NYBS].

97. The Red Book is a publication that serves as a basic reference work for federal appropriations law. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 10-93, 10-94, 10-95 (3d ed. 2006), <https://www.gao.gov/assets/gao-06-382sp.pdf> [https://perma.cc/79AY-T552].

98. Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 268 (2022).

states.⁹⁹ Specifically, under 2 C.F.R. 200.400 Subpart E, the EAC noted that, “to be allowable under a grant, costs must be necessary, reasonable, and allocable to the grant.”¹⁰⁰ Allowable costs are “necessary and reasonable for the proper and efficient performance” of the activities covered by the grant; in the context of election administration during the pandemic, such costs included meeting the increased demand for mail-in ballots in response to the COVID-19 virus.¹⁰¹ Costs are reasonable if they “do not exceed what a prudent person would pay under the circumstances” and can be determined utilizing any relevant factors.¹⁰² Allocable costs are “directly related to the objectives and activities planned under the grant and included in the approved budget” and include “increased physical security for federal elections.”¹⁰³ The definitions of reasonability and allocability used by the Commission to disburse grant funds reflect those used in the FAR in terms of government contracting cost principles.¹⁰⁴

When applying for grants being distributed by the EAC, states must submit a formal request, asking for a specific amount of money, and pledge that they will use the funds provided “for activities consistent with the laws described in section 906 of HAVA and will not use the funds in a manner that is inconsistent with the requirements of Title III of HAVA.”¹⁰⁵ Section 906 of HAVA includes a list of federal election laws passed, such as the Voting Rights Act, National Voter Registration Act, and the Americans with Disabilities Act, among others.¹⁰⁶ Title III of HAVA sets out both requirements and voluntary guidance to states regarding election technology and administration.¹⁰⁷ Requirements range from mandates that all voting systems purchased with HAVA funding have post-election auditing mechanisms, to requirements that state and local election officials publicly post voting information on Election Day.¹⁰⁸

99. 2020 CARES Act Grants, ELECTION ASSISTANCE COMM’N, <https://web.archive.org/web/20230307010414/https://www.eac.gov/payments-and-grants/2020-cares-act-grants> [https://perma.cc/BSQ2-6ZMG] (last visited July 8, 2023).

100. U.S. ELECTION ASSISTANCE COMM’N, GUIDANCE ON USE OF HAVA FUNDS FOR EXPENSES RELATED TO COVID-19 1 (2020), <https://www.eac.gov/sites/default/files/paymentgrants/cares/FAQ-Guidance/Guidance%20on%20Use%20of%20HAVA%20Funds%20for%20Expenses%20Related%20to%20COVID-19.pdf> [https://perma.cc/KM4V-77T4].

101. *Id.*

102. *Id.* at 2.

103. *Id.* at 1–2.

104. See FAR 31.201-3 (determining reasonableness based on the “ordinary and necessary” cost for performance); see also FAR 31.201-4 (determining allocability based on whether the cost was “incurred specifically for the contract,” among other additional factors).

105. See U.S. ELECTION ASSISTANCE COMM’N, TEMPLATE FOR STATE REQUESTS FOR SECURITY FUNDS 1 (2023), https://www.eac.gov/sites/default/files/Grants/FY23_Hava_App_Packet/Template%20-%20FY23%20State%20Request%20and%20Certification.pdf [https://perma.cc/7R69-AQEU].

106. 52 U.S.C. § 21145; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

107. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1704–1715 (2002) (codified at 52 U.S.C. § 20901).

108. 52 U.S.C. §§ 21081–21082.

In future appropriations to the Commission, this Note proposes that appropriations by Congress must include an amendment under Title III of HAVA adding a new subset of requirements guiding the procurement of election infrastructure, creating a meaningful incentive for states and localities to improve their processes.

3. EAC Guidance to States and Localities

The EAC currently provides several resources to state and local election officials for the purposes of guiding and improving their administration of elections.¹⁰⁹ The main example is the EAC's Voluntary Voting Systems Guidelines Version 2.0 (VVSG 2.0), released in early 2021, which establishes extensive technical guidelines for voting systems and baselines for states to use when assessing the functionality, security, and accessibility of their voting systems.¹¹⁰ VVSG 2.0 is the fifth iteration of the agency's guidelines on this topic and was released following a multi-year effort by the EAC's Technical Guidelines Development Committee, chaired by a member of the National Institute of Standards and Technologies and comprised of various governmental and non-governmental experts on election infrastructure, accessibility, cybersecurity, and other topics.¹¹¹ While VVSG 2.0 and other EAC guidelines are used to some extent by a majority of states, due to their inherently voluntary nature, only "11 states and Washington, D.C., require full EAC certification of voting equipment in statute or rule," with 12 states using only state-specific certification standards.¹¹²

In stark contrast to the 300-plus page technical guidelines for voting systems, the EAC's agency guidance on the procurement of election-related systems consists of two EAC Tip Sheets comprised of a general government procurement process overview.¹¹³ The VVSG 2.0 makes brief mention of procurement, requiring that voting system software be "obtained from a trusted distribution repository" and that such software be obtained commercially.¹¹⁴ However, there is minimal additional guidance or recommendations publicly

109. See *Clearinghouse Resources for Election Officials*, U.S. ELECTION ASSISTANCE COMM'N, <https://web.archive.org/web/20230315015937/https://www.eac.gov/election-officials> [https://perma.cc/QV9A-FQER] (last visited July 4, 2023).

110. U.S. ELECTION ASSISTANCE COMM'N, VOLUNTARY VOTING SYSTEM GUIDELINES VVSG 2.0 5–6 (2021), https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf [https://perma.cc/2TLS-WPTJ].

111. *Id.* at 4, 9.

112. Saige Draeger, *Voting System Standards, Testing and Certification*, NAT. CONF. OF STATE LEGIS. (June 30, 2022), <https://www.ncsl.org/state-legislatures-news/details/election-assistance-commission-updates-voluntary-voting-system-guidelines> [https://perma.cc/WXV4-CFAE]; see also U.S. ELECTION ASSISTANCE COMM'N, *supra* note 110, at 5 ("HAVA directs the EAC to adopt voluntary voting system guidelines, and to provide for the testing, certification, decertification, and recertification of voting system hardware and software.").

113. *Clearinghouse Resources for Election Officials: Procurement and Implementation*, U.S. ELECTION ASSISTANCE COMM'N, <https://www.eac.gov/election-officials/procurement-and-implementation> [https://perma.cc/2ZAK-9Y65] (last visited July 4, 2023).

114. U.S. ELECTION ASSISTANCE COMM'N, *supra* note 110, at 100.

provided to state and local election administrators.¹¹⁵ The EAC does publish a non-comprehensive list of recent procurements by states and localities as a “courtesy to election officials,” but disclaims that the agency does not endorse any of the procurements.¹¹⁶

D. Advancing Federal Policy Goals

At the federal level, procurements are most frequently conducted with a focus on the anticipated price of the product or service.¹¹⁷ The same often goes for state procurements utilizing federal dollars, which occasionally utilize aspects of the FAR.¹¹⁸ To this end, ongoing lobbying efforts seek to further compel states to adopt the FAR as the basis for their procurement procedures to increase uniformity across the country.¹¹⁹ Achieving such uniformity, at least on a federal level, is another major guiding principle of the FAR.¹²⁰ While this Note does argue for a departure from typical FAR policy objectives, such as entirely setting aside any emphasis on cost, it relies on the discretion granted to contracting officers and agencies to place an outsized value on technical factors in evaluating proposals and utilizing procurement as a tool for furthering non-procurement-related public policy goals.¹²¹ As explained by the Office of Management and Budget’s Deputy Director for Management, the federal government’s “purchasing power makes Federal procurement a powerful tool” in the advancement of policy goals, such as the resolution of economic inequity.¹²² Considering the Biden administration’s continued multifaceted efforts toward the improvement of voting rights, the utilization of federal procurement is yet another tool in this effort.¹²³

The most direct way to effectuate policy through procurement, aside from reservations, is through the evaluation of proposals in accordance with

115. U.S. ELECTION ASSISTANCE COMM’N, *supra* note 110.

116. *Voting Technology Procurement*, U.S. ELECTION ASSISTANCE COMM’N, <https://web.archive.org/web/20230315015937/https://www.eac.gov/voting-equipment/voting-technology-procurement> [<https://perma.cc/KA5M-GW34>] (last visited July 4, 2023).

117. FAR 1.102(b)(1)–102(b)(2) (noting that “satisfying the customer in terms of cost” and “minimiz[ing] administrative operating costs” are two of the FAR’s guiding principles).

118. *Federal Acquisition Regulation (FAR) Use by State and Local Governments*, AM. COUNCIL OF ENG’G Cos., <https://web.archive.org/web/20210411005749/https://www.acec.org/advocacy/key-issues/far-use> [<https://perma.cc/AWF9-CFBZ>] (last visited July 4, 2023).

119. *Id.*

120. FAR 1.102(b)(2).

121. See Exec. Order No. 13985, 86 Fed. Reg. 7009, 7009–10 (Jan. 20, 2021) (directing that the federal government “pursue a comprehensive approach to advancing equity for all”, including “potential barriers that underserved . . . individuals may face in taking advantage of agency procurement and contracting opportunities”).

122. Memorandum on Advancing Equality in Federal Procurement, M-22-03 1 (Dec. 2, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-03.pdf> [<https://perma.cc/PF53-G8E6>].

123. See Rice, *supra* note 8; see also Press Release, White House Briefing Room, FACT SHEET: The Biden-Harris Administration Continues to Promote Access to Voting (Mar. 3, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/05/fact-sheet-the-biden-harris-administration-continues-to-promote-access-to-voting> [<https://perma.cc/L37Q-X3BR>].

specific goals.¹²⁴ To this end, an evaluation methodology based on the technical specifications of a vendor's proposal, rather than solely the cost, will put the interests of the voters at the forefront. In *Sevatec, Inc.*, the GAO upheld the usage of "highest technically rated offerors with a fair and reasonable price" as the basis for award in a request for proposals for a multiple-award IDIQ contract.¹²⁵ The GAO found that the "best-value continuum," found in FAR 15.101, granted the contracting officer the discretion to award the highest technically-rated offeror.¹²⁶ The Court of Federal Claims decided similarly on a protest dealing with the same evaluation scheme a few years prior, finding that "because the Solicitation [called for] Highest Technically Rated Offerors with Fair and Reasonable Pricing," the agency's actions in declining to consider price were proper.¹²⁷

Although the procurements at the heart of this Note focus on the state and local levels, understanding the outer limits of the FAR as it relates to evaluation schemes serves as a useful tool when discussing additional conditions placed on states regarding their proposal evaluations in election-related procurements.

III. ANALYSIS

A. Constitutionality of EAC Action and Authority

Although the individual states and territories of the United States serve in a primary role for the administration and security of elections, the Constitution provides ample room for Congress and administrative agencies such as the EAC to retain involvement in the electoral process.¹²⁸ Although theoretical outer bounds exist to the limits of the federal government's authority to act regarding election administration, courts have found that Congress has rarely approached this limit and has always acted within the purview of its constitutional authority.¹²⁹

124. FAR 19.202-1 ("Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the government's interest."); see FAR 19.14 (implementing the Service-Disabled Veteran-Owned Small Business Procurement Program); FAR 15.304(c), (d) ("[The] evaluation factors and significant subfactors that apply to an acquisition and their relative importance, are within the broad discretion of agency acquisition officials," provided they are "stated clearly in the solicitation.").

125. *Sevatec, Inc.*, B-413559.3 et al., 2017 WL 106133, at *5-9 (Comp. Gen. Jan. 11, 2017).

126. *Id.*

127. *Octo Consulting Group, Inc. v. United States*, 117 Fed. Cl. 334, 354, 361 (2014) (finding that "procurement officials have an even greater degree of discretion when it comes to best-value determinations, as compared to deciding on price alone").

128. U.S. CONST., art. I, § 4, cl. 1; see *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (dismissing Tenth Amendment concerns over federal oversight in election administration, noting that the Constitution's Elections Clause, Art. I, §4, cl. 1, "is broadly worded and has been broadly interpreted"); see also CONG. RSCH. SERV., RL30747, CONGRESSIONAL AUTHORITY TO DIRECT HOW STATES ADMINISTER ELECTIONS 14-15 (Dec. 4, 2014).

129. See *ACORN*, 56 F.3d at 796 (noting that if Congress "used the power granted in Article I, Section 4 to *destroy state government* . . . it could no longer be [constitutional]") (emphasis added); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-470, THE SCOPE OF CONGRESSIONAL

With regard to election security specifically, a number of agencies beyond the EAC are legislatively delegated authority over elections, including the Department of Homeland Security's Cybersecurity and Infrastructure Agency and the Department of Justice.¹³⁰ These agencies have worked collaboratively with one another, and with state and local governments and officials, to improve and safeguard the democratic process.¹³¹ In 2017, when announcing the classification of election infrastructure as "critical infrastructure," then-Secretary of the Department of Homeland Security Jeh Johnson reiterated the continued role that states and localities play in strengthening election security.¹³² This classification prioritized elections under the National Infrastructure Protection Plan and allowed for better communication between federal and state actors regarding cybersecurity.¹³³ The plan's vision is to achieve a "[n]ation in which physical and cyber critical infrastructure remain secure and resilient, with vulnerabilities reduced, consequences minimized, threats identified and disrupted, and response and recovery hastened."¹³⁴ This designation was accompanied by the \$350,000,000 appropriation to the EAC by Congress in 2018 for the purposes of improving election security, with specific measures to be determined by the Commission.¹³⁵

1. Leveraging Discretionary Funding

It has long been recognized as a constitutional power of Congress to utilize discretionary funding pursuant to the Spending Clause as a "carrot" to incentivize action or inaction by states and other entities.¹³⁶ The Spending

AUTHORITY IN ELECTION ADMINISTRATION 4 (2001) (citing *Ex Parte Siebold*, 100 U.S. 371, 388 (1879) (holding that Congress may impose penalties for state election law violations)).

130. See SHANTON, *supra* note 82, at 20–21; Press Release, Department of Justice: Office of Public Affairs, Justice Department Releases Information on Efforts to Protect the Right to Vote, Prosecute Election Fraud and Secure Elections (Oct. 26, 2022), <https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote-prosecute-election-fraud> [https://perma.cc/C9TG-UHD5].

131. ELECTION SECURITY, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/topics/election-security> [https://perma.cc/9ELY-8UGQ] (last visited July 4, 2023); Press Release, *supra* note 130.

132. Press Release, Department of Homeland Security, Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical> [https://perma.cc/49JX-FM6T]; see also *National Infrastructure Protection Plan and Resources*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/national-infrastructure-protection-plan> [https://perma.cc/FG2R-CLFM] (last visited July 3, 2023).

133. Statement by Secretary Jeh Johnson, *supra* note 132; see *National Infrastructure Protection Plan and Resources*, *supra* note 132.

134. *National Infrastructure Protection Plan and Resources*, *supra* note 132.

135. Press Release, Election Assistance Comm'n, U.S. Election Assistance Commission to Administer \$380 Million in 2018 HAVA Election Security Funds (Mar. 29, 2018), <https://www.eac.gov/news/2018/03/29/us-election-assistance-commission-administer-380-million-2018-hava-election#:~:text=Election%20Security%20Funds-,U.S.%20Election%20Assistance%20Commission%20to%20Administer%20%24380,2018%20HAVA%20Election%20Security%20Funds&text=Silver%20Spring%2C%20Md.,Consolidated%20Appropriations%20Act%20of%202018> [https://perma.cc/M6K6-7Q52].

136. U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ."); see also *South Dakota v. Dole*, 483 U.S. 203, 213–14 (1987).

Clause and the Supreme Court's accompanying jurisprudence highlight the federal government's ability to place conditions on funding, so long as the conditions are "unambiguously established," directly related to the purpose of the funding, not violative of other constitutional provisions, and do "not cross the line from enticement to impermissible coercion."¹³⁷ As explained by Chief Justice Roberts in *NFIB v. Sebelius*, impermissible coercion would mean that states would be left with "no real option but to acquiesce" to the federal government's conditions.¹³⁸ However, Roberts did not discount the authority afforded to Congress under the Spending Clause, noting that "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds."¹³⁹ In the context of internal agency actions, any conditions imposed on the distribution of federal funding must remain within the bounds of that agency's statutory mandate, and in accordance with congressional intent according to the legislative history.¹⁴⁰

In the case of elections and future appropriations under HAVA by Congress to the EAC, it is unlikely that additional conditions placed on grants would impose restrictions to the point of impermissible coercion. As with prior appropriations, states must apply to receive the grants and consent to certain actions regarding both the use of the grant money pursuant to the relevant requirements in HAVA as previously discussed.¹⁴¹ These requirements have evidently not proved untenable, as in both the 2018 and 2020 appropriations, Congress-imposed additional conditions on funding went unchallenged.¹⁴² Such conditions avoid any judicially imposed limitations because they come directly from Congress through a statutory amendment, as opposed to an internal EAC decision, and go to the core of HAVA's purpose.¹⁴³

137. BRIAN T. YEH, CONG. RSCH. SERV., R44797, THE FEDERAL GOVERNMENT'S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS 2 (2017).

138. See *Nat'l Fed. Of Indep. Bus. v. Sebelius*, 567 U.S. 519, 523 (2012) (holding that the federal government's plan to require states to expand Medicaid eligibility or lose all Medicaid funding was impermissibly coercive).

139. *Id.* at 579.

140. See *Colorado v. U.S. Dep't of Just.*, 455 F. Supp. 3d 1034, 1047 (D. Colo. 2020) (holding that it was improper for the Attorney General to impose immigration-related conditions on certain grants when Congress explicitly rejected such conditions in the statute); see also *New York v. United States*, 505 U.S. 144, 167 (1992).

141. See U.S. ELECTION ASSISTANCE COMM'N, TEMPLATE FOR STATE REQUESTS FOR SECURITY FUNDS 1 (2023), https://www.eac.gov/sites/default/files/Grants/FY23_Hava_App_Packet/Template%20-%20FY23%20State%20Request%20and%20Certification.pdf [<https://perma.cc/7R69-AQEU>].

142. *Grants Management and Oversight*, U.S. ELECTION ASSISTANCE COMM'N, <https://web.archive.org/web/20230315015937/https://www.eac.gov/payments-and-grants/grants-management-and-oversight> [<https://perma.cc/KYP9-KVFQ>] (last visited July 22, 2023). But see *NASS Resolution on Principles for Federal Assistance in Funding of Elections*, NAT. ASS'N OF SECRETARIES OF STATE (Feb. 4, 2019), <https://www.nass.org/node/1557> [<https://perma.cc/7GZB-AP8Y>] (calling on Congress to "recognize the authority of states in administering elections . . . [and noting that] funding provided under [HAVA] is not subject to [EAC] rules, regulations, or requirements . . .").

143. See *Colorado*, 455 F. Supp. 3d at 1054; see also *New York*, 505 U.S. at 167 ("Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending . . .").

B. State Level Procurements for Voting Equipment Are Inconsistent and Ineffectual

Procurement methods across the country vary, which creates potential issues for prospective vendors, state and local governments, and voters. Given the EAC's statutory mandate under HAVA to oversee the administration of federal elections, in conjunction with Congress's constitutional authority to regulate state election administration, a standardization of these practices can and should be pursued at a federal level.¹⁴⁴

In Arkansas, the state's RFP and process for their statewide voting system procurement were criticized by both state legislators and competing election technology companies due to transparency issues and the cryptic nature of the Arkansas solicitation's requirements.¹⁴⁵ One competitor's executive noted that "the [solicitation's] requirements . . . seem to be written for a very specific solution, rather than an open competition of modern solutions from multiple providers."¹⁴⁶ The procurement process was thrown further into controversy due to potential conflicts of interest, as the front-running offeror, Election Systems & Software, had retained a consulting firm during the process that employed a recent chief deputy of the Arkansas Secretary of State.¹⁴⁷ In discussing the standards for their procurement, an Arkansas Secretary of State spokesperson noted that "[w]e aren't subject to state procurement requirements as a constitutional office, so most of this process is at our discretion, which is where that authority comes from."¹⁴⁸ Were the Secretary of State bound to procedural requirements under HAVA in exchange for the future disbursement of EAC funding, many of these controversies could have been avoided. By applying standards for a competitive FAR Part 15 negotiated procurement, Arkansas's election procurement could have gone quite differently: requirements would have been far more detailed, and due to the FAR's competition requirements, there would have been additional competition opportunities beyond a process resulting in a sole-source procurement.¹⁴⁹ By going further and applying the additional changes proposed in this Note for evaluation criteria and source selection, the process would have been improved by including a cross-sectional panel of election administrators, voting rights experts, and election security and cybersecurity professionals to make the decision in the best interests of the voters.¹⁵⁰

144. *Payments and Grants*, *supra* note 91; U.S. GOV'T ACCOUNTABILITY OFF., GAO01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 4-5 (2001) ("The Elections Clause is broadly worded and has been broadly interpreted by the courts.").

145. Michael R. Wickline, *Voting Equipment OK'd for State Bid*, ARK. DEMOCRAT (Apr. 30, 2015), <https://www.arkansasonline.com/news/2015/apr/30/voting-equipment-ok-d-for-state-bid-201> [<https://perma.cc/W7E4-Z39T>].

146. *Id.*

147. *Id.*

148. Wickline, *supra* note 145.

149. *See id.*; *see* FAR 15.203(a); *see also* FAR 1.102(b) ("The Federal Acquisition System will . . . satisfy the customer by . . . promoting competition . . .").

150. *See* FAR 15.203(a); *see also* ARK. REQUEST FOR PROPOSAL, *supra* note 63, at 13 ("SOS reserves the right . . . to award the bid to best serve the interest of the SOS.").

Beyond the procurement procedures in states directly analyzed in this Note, other states across the country have either recognized internal weaknesses in their procurements of voting equipment or otherwise maintain processes that contribute to nationwide non-uniformity and ineffectuality. In New York, an audit conducted by the state comptroller found a variety of deficiencies in local election boards' procurement of paper ballots, stemming from a lack of "sufficient guidance" on best practices.¹⁵¹ The comptroller estimated that the use of competitive bidding and better projections of the requirements could have saved approximately \$10,000,000 during the audit period.¹⁵² In Pennsylvania, the Philadelphia City Controller conducted a similar investigation into the city's procurement processes and exposed how poorly and corruptly procurements had been conducted.¹⁵³ Prospective vendors were continuously engaging with local decisionmakers in the leadup to the procurement, creating significant conflicts of interest, and the procurement itself was found to be deeply flawed;¹⁵⁴ it was found to have been rushed, there was pressure to select a specific vendor, and there was a lack of transparency in the process.¹⁵⁵ Many of these issues could have been avoided were Philadelphia subject to detailed federal procurement guidelines requiring impartiality of contracting officers and source selection authorities, which may form the basis of a protest if any of these duties were breached.¹⁵⁶

Other states' practices fail to properly value the technical aspects of contractor proposals and even the procurement process in its entirety. In Bay County, Florida, a procurement for election equipment and technology was conducted via sealed bidding, with the award granted to the bidder with the lowest price, preventing the use of any technical evaluation beyond a determination of responsiveness.¹⁵⁷ Connecticut's recent statewide invitation for bids for a voter accessibility-related procurement followed a similar format.¹⁵⁸ A priority was placed on "microbusinesses," mirroring federal small business

151. N.Y. OFFICE OF THE STATE COMPTROLLER, LOCALITIES' PROCUREMENT OF PAPER BALLOTS 1 (2013), <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2015-13s36.pdf> [<https://perma.cc/6N7A-R6ER>].

152. *Id.* at 5.

153. PHILA. CITY CONTROLLER, VOTING TECHNOLOGY PROCUREMENT INVESTIGATION 1–2 (Sept. 25, 2019), <https://controller.phila.gov/wp-content/uploads/2019/09/VOTING-TECHNOLOGY-PROCUREMENT-INVESTIGATION-PUBLIC.pdf> [<https://perma.cc/BX8T-B86E>].

154. *Id.* at 20, 22–24.

155. *Id.* at 22–25.

156. See FAR 3.101-1 ("Government business shall be conducted . . . with *complete impartiality and with preferential treatment for none.*") (emphasis added); FAR 1.102-2 ("Government acquisition personnel are [encouraged to communicate] with industr[ial players] . . . so long as those exchanges . . . do not promote an unfair competitive advantage to particular firms."); see also FAR 33.103 ("protests to the agency"); FAR 3.11 ("Preventing Personal Conflicts of Interest").

157. BAY COUNTY BOARD OF COUNTY COMMISSIONERS, ITB No. 15-13, 3 (Feb. 26, 2015), https://www.eac.gov/sites/default/files/eac_assets/1/28/Bay%20County%20ITB%20for%20Election%20Equipment%20and%20Software.pdf [<https://perma.cc/DR8S-J7VD>].

158. CONN. DEP'T OF ADMIN. SERV., ITB #12PSX0377 1, 7 (Nov. 16, 2012), https://www.eac.gov/sites/default/files/eac_assets/1/28/Connecticut1%20-%2011.16.12%20-%20Invitation%20to%20Bid%20-%20Maintain%20Voting%20Accessibility%20System.pdf [<https://perma.cc/RKG7-YL3C>].

priorities, but nonetheless focused almost entirely on cost as the government's evaluation scheme.¹⁵⁹ In each of these instances, the method of contracting chosen had a direct link to the evaluation of technical factors, or lack thereof. Since Florida's "butterfly ballots" in the 2000 presidential election, no competitive procurement has been conducted for the ballot design that some argue swayed the result of the election.¹⁶⁰ Instead, Palm Beach County and the American electorate took a chance on a self-designed and untested ballot design that resulted in thousands of errantly casted votes.¹⁶¹

C. New Procurement Guidelines for EAC Appropriations

The next time that Congress authorizes funds for the EAC to distribute to states, there must be additional conditions on this funding requiring a renewed focus on voting rights, election security, and alignment with federal procurement best-practices. To achieve this goal, Congress can simply add an additional subsection under Title III of HAVA, which sets forth requirements for states to meet to be eligible for grant distribution by the EAC. By amending Title III, Congress can standardize election-related procurement practices for states requesting discretionary federal funding, refining an otherwise disjointed process.¹⁶²

Broadly, the amendment to Title III must include a requirement that states and localities utilize competitive negotiated procurements under FAR Part 15, therein pledging use of full and open competition to the maximum extent practicable.¹⁶³ Beyond this general mandate, which in and of itself would improve existing state processes, adding specific required evaluation criteria that place value on the enhancement of ballot access and election security would further improve the election process. In addition to utilizing a cross-sectional panel of experts as a source selection authority, these changes would ensure that these values are reflected in every stage of the electoral and procurement processes.

More specifically, all procurements for election infrastructure by states should be conducted per a "highest technically rated offerors with a fair and reasonable price" evaluation scheme. This evaluation process would place a much-needed emphasis on the technical elements of offerors' proposals, while still ensuring that price is not entirely disregarded in the process to avoid grounds for protest.¹⁶⁴

159. *Id.* at 7; *see also* FAR 19.

160. Wand, *supra* note 9, at 794, 803 ("Was the butterfly ballot pivotal in the 2000 presidential race? The evidence is very strong that it was . . . Al Gore would have won a majority of the . . . votes in Florida."); *see also* FAR 1.102-2 (The [Federal Procurement] System should . . . encourage innovation and local adaptation where uniformity is not essential.).

161. Wand, *supra* note 9, at 794, n.5, 795 ("Buchanan[, a third party candidate in the 2000 presidential race,] received about 2,800 more votes than were to be expected . . .").

162. *See supra* Part II.B, III.C.

163. *See* FAR 15; *see also* FAR 6.1 (prescribing "the policy and procedures that are to be used to promote and provide for full and open competition").

164. *See* Sevatec, Inc., B-413559.3 et al., 2017 WL 106133, at *6 (Jan. 11, 2017) (holding that the use of a "highest technically rated offeror with a fair and reasonable price" is permissible for negotiated procurements under FAR part 15); *see also* Sumaria Systems, Inc., B-418796, 2020 WL

In addition, the evaluation of each solicitation should include factors related to prospective contractors' approaches to cybersecurity as well as evaluations of the voting access-related consequences of any proposed system. Cybersecurity is particularly crucial, given past and present domestic and global cyber threats to our electoral system.¹⁶⁵ Ensuring that the many moving parts of an election are accounted for in terms of their hardware and software security extends to the procedures used by local and state-level governments to procure this infrastructure.¹⁶⁶ In 2019, the Brennan Center released a cybersecurity guide for the most crucial aspects of the election procurement and administration process; key areas included source code disclosure, regular penetration testing, and foreign nexus disclosure, among others.¹⁶⁷ An example of a solicitation including this sort of evaluation can be found in Colorado's 2013 statewide voting system procurement, where questions asked of all offerors included, "What independent security audits has your proposed system received," and "How does your system prevent unauthorized . . . applications from running?"¹⁶⁸ Another determinative aspect of their procurement was a requirement that "no element of this RFP and resulting contract [including subcontractors] will be completed in whole or part outside of the United States of America."¹⁶⁹ The other mandatory factor to include is an evaluation of any potential changes to voting rights and accessibility as a result of changes to voting technology, the voter registration processes, or ballot design, which all have an impact on the voting rights of Americans.¹⁷⁰

Finally, during the source selection phase of a procurement, a multidisciplinary panel of experts, including election security and voting rights experts, must be utilized to make the final award recommendation to the contracting officer. Such an evaluation panel, already utilized to an extent in states such as Michigan and Colorado, would ensure that the interests of the disenfranchised

5544560, at *1, *7 (Comp. Gen. Sept. 9, 2020) (extending the doctrine of 'highest technically rated offeror with a fair and reasonable price' to task orders under FAR subpart 16.5); *see also* KPMG LLP, B-420949, 2022 WL 16921986, at *9 (Nov. 7, 2022) ("When conducting a tradeoff, an agency may not so minimize the impact of price as to make it a nominal evaluation factor because the essence of the tradeoff process is an evaluation of price in relation to the perceived benefits of an offeror's proposal.").

165. *See* NAT. COUNTERINTEL. & SEC. CTR., FOREIGN THREATS TO U.S. ELECTIONS: ELECTION SECURITY INFORMATION NEEDS 2 (2020), https://www.dni.gov/files/ODNI/documents/DNI_NCSC_Elections_Brochure_Final.pdf. [<https://perma.cc/B5BL-PFVH>].

166. *See* CHRISTOPHER DELUZIO, BRENNAN CTR., A PROCUREMENT GUIDE FOR BETTER ELECTION CYBERSECURITY 1–2 (Mar. 22, 2019), <https://www.brennancenter.org/our-work/policy-solutions/procurement-guide-better-election-cybersecurity> [<https://perma.cc/CJ9S-J99W>].

167. *Id.* at 2, 7, 9.

168. COLO. UNIFORM VOTING PROCUREMENT, *supra* note 45, at 29–30; *see also* Deluzio, *supra* note 166, at 2.

169. COLO. UNIFORM VOTING PROCUREMENT, *supra* note 45, at 13.

170. *See Election Administration Project*, BRENNAN CTR., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/election-administration> [<https://perma.cc/F5GQ-YN5R>] (last visited July 4, 2023).

and the security of our electoral system are directly at the table during the final stages of a procurement.¹⁷¹

The cumulative effect of these large- and small-scale changes to state procurements of voting technology will improve the uniformity of state procurement practices and ensure that voters from any given state can maintain a similar sense of assurance that their vote was not simply cast on the cheapest ballot, being processed through the cheapest machine, that the government could buy. A procurement approach focused on awarding to the lowest bidder is not inherently bad, as it is often more streamlined and cost-efficient, often requiring “little subjective analysis.”¹⁷² However, this approach fails to value higher levels of quality, therefore failing to reflect the government’s goals with regard to election infrastructure.¹⁷³

IV. CONCLUSION

In conclusion, state-level procurement practices for election infrastructure vary significantly between states, and many individual processes do not place any qualitative or quantitative value on the policy objectives of expanding voting rights and improving election security. Given Congress’s and the EAC’s authority to prescribe election administration-related requirements for discretionary federal funding to states, it would be in the best interests of the American voters to ensure that any future appropriation of funds to the EAC require states to implement certain practices regarding the procurement of election infrastructure. These practices reflect both federal procurement regulations and policy preferences both in the field of government procurement and beyond. By amending Title III of HAVA and adding additional statutory requirements for states to follow, Congress can exert its constitutional authority over the administration of elections and empower the EAC to administer funding to states in a way that improves state and local election administration procedures as well as nationwide efficiency and uniformity in procurement.

171. See COLO. UNIFORM VOTING PROCUREMENT, *supra* note 45, at 36; Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 1.

172. HEIDI M. PETERS & ALEXANDRA G. NEENAN, CONG. RSCH. SERV., IF10968, DEFENSE PRIMER: LOWEST PRICE TECHNICALLY ACCEPTABLE CONTRACTS 1 (2023).

173. *Id.*