



**U.S. ELECTION ASSISTANCE
COMMISSION
OFFICE OF INSPECTOR GENERAL**

FINAL REPORT:

**ADMINISTRATION OF PAYMENTS
RECEIVED UNDER THE HELP AMERICA
VOTE ACT BY THE NEW MEXICO
SECRETARY OF STATE**

APRIL 1, 2003 THROUGH DECEMBER 31, 2006

**Report No.
E-HP-NM-01-07
May 2008**



U.S. ELECTION ASSISTANCE COMMISSION
OFFICE OF INSPECTOR GENERAL
1225 New York Ave. NW - Suite 1100
Washington, DC 20005

May 27, 2008

Memorandum

To: Thomas Wilkey
Executive Director

From: Curtis Crider
Inspector General

A handwritten signature in blue ink that reads "Curtis W. Crider".

Subject: Final Audit Report on the Administration of Help America Vote Act Funds by the New Mexico Secretary of State (Assignment No. E-HP-NM-01-07)

This report presents the results of the subject audit. The objectives of the audit were to determine whether New Mexico (1) expended Help America Vote Act (HAVA) payments in accordance with HAVA and related administrative requirements and (2) complied with the HAVA requirements for replacing punch card or lever voting machines, for appropriating a five percent match for requirements payments, for establishing an election fund, and for maintaining state expenditures for elections at a level not less than expended in fiscal year 2000.

The report identified the following issues needing management attention:

- ✓ The Office of the Secretary of State paid a contractor \$6,271,810 to create a public education campaign on voting matters. Because of uncertainty over the basis for paying the contractor, the lack of contractor support for all costs billed, and the payment for services billed but not performed, we questioned all contract payments.
- ✓ The Office of the Secretary of State used HAVA Section 101 funds of \$36,540 to pay for costs that were incurred prior to the period for which funds were available.
- ✓ Equipment purchased with HAVA funds was not adequately accounted for.
- ✓ New Mexico did not meet its five percent matching requirement of \$751,568 to qualify for HAVA Section 251 funds of \$14,279,790.
- ✓ Interest of \$147,799 earned on HAVA funds was not deposited timely into the state election fund.

- ✓ Program income realized from the use of equipment purchased with HAVA funds was not properly accounted for by the Office of the Secretary of State and county election offices.

In an April 30, 2008 response to the draft report (Attachment 1), the State generally agreed with our findings and recommendations and indicated that corrective actions had been completed or was underway.

Please provide us with your written response to the recommendations included in this report by August 1, 2008. Your response should contain information on actions taken or planned, including target dates and titles of Election Assistance Commission officials responsible for implementing the recommendations

Section 5(a) of the Inspector General Act (5 U.S.C. § App.3) requires the Office of Inspector General to list this report in its semiannual report to Congress.

If you have any questions regarding this report, please call me at (202) 566-3125.

BACKGROUND

HELP AMERICA VOTE ACT

The Help America Vote Act of 2002 (HAVA or the Act) created the U.S. Election Assistance Commission (EAC or Commission) to assist states and insular areas with the administration of Federal elections and to provide funds to states to help implement these improvements. HAVA authorizes payments to states under Titles I and II, as follows:

- ✓ Title I, Section 101 payments are for activities such as complying with Title III of HAVA for uniform and nondiscriminatory election technology and administration requirements, improving the administration of elections for Federal office, educating voters, training election officials and poll workers, and developing a state plan for requirements payments.
- ✓ Title I, Section 102 payments are available only for the replacement of punchcard and lever action voting systems.
- ✓ Title II, Section 251 requirements payments are for complying with Title III requirements for voting system equipment; and for addressing provisional voting, voting information, statewide voter registration lists, and voters who register by mail.

Title II also requires that states must:

- ✓ Have appropriated funds “equal to 5 percent of the total amount to be spent for such activities [activities for which requirements payments are made].” (Section 253(b) (5)).
- ✓ “Maintain the expenditures of the State for activities funded by the [requirements] payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000.” (Section 254 (a) (7)).
- ✓ Establish an election fund for amounts appropriated by the state “for carrying out the activities for which the requirements payment is made,” for the Federal requirements payments received, for “such other amounts as may be appropriated under law,” and for “interest earned on deposits of the fund.” (Section 254 (b) (1)).

**FUNDING FOR
NEW MEXICO**

HAVA funds received and expended by New Mexico are as follows:

<i>TYPE OF PAYMENT</i>	<i>AMOUNT RECEIVED</i>	<i>OUTLAYS</i>	
		<i>AMOUNT</i>	<i>AS OF¹</i>
101	\$5,000,000	\$8,121,734	12/31/06
251	14,279,790	6,001,737	9/30/06
Totals	\$19,279,790	\$14,123,471	

**FINANCIAL
MANAGEMENT
REQUIREMENTS**

To account for the payments, HAVA requires states to maintain records that are consistent with sound accounting principles, that fully disclose the amount and disposition of the payments, that identify project costs financed with the payments and with other sources, and that will facilitate an effective audit.

In addition, the Commission notified states of other management requirements. Specifically, the Commission required that states must:

- ✓ Comply with the *Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments* (also known as the “Common Rule” and published in 41 CFR 105-71).
- ✓ Expend payments in accordance with cost principles for establishing the allowability or unallowability of certain items of cost for federal participation issued by the Office of Management and Budget (OMB) in Circular A-87.
- ✓ Submit annual financial reports on the use of Title I and Title II payments.

OBJECTIVE

The objective of our audit was to determine whether New Mexico (1) expended HAVA payments in accordance with the Act and related administrative requirements and (2) complied with the HAVA requirements for establishing an election fund, meeting its matching share requirement, and maintaining state expenditures for elections at a level not less than the level expended in fiscal year 2000.

Specifically, we audited expenditures made from April 1, 2003 to December 31, 2006 and reviewed controls to assess their adequacy over the expenditure of HAVA funds. We also evaluated compliance

¹ EAC requires states to submit annual reports on the expenditure of HAVA Sections 101, 102, and 251 funds. For Sections 101 and 102, reports are due on February 28 for the activities of the previous calendar year. For Section 251, reports are due by March 30 for the activities of the previous fiscal year ending on September 30.

with certain HAVA requirements for the following activities:

- ✓ Accumulating financial information reported to EAC on the Financial Status Reports (Standard Forms number 269).
- ✓ Accounting for property.
- ✓ Purchasing goods and services.

We also determined whether New Mexico had complied with the requirements in HAVA applicable to Section 251 requirements payments for:

- ✓ Establishing and maintaining an election fund.
- ✓ Appropriating funds equal to five percent of the amount necessary for carrying out activities financed with Section 251 requirements payments.
- ✓ Sustaining the State's level of expenditures for elections.

The Appendix contains information on the audit scope and methodology.

RESULTS OF AUDIT

SUMMARY

The audit identified the following deficiencies:

1. The Office of the Secretary of State awarded a contract for a voter education campaign without following State procurement procedures for the award of professional services. The Office of the Secretary of State also paid the contractor \$6,271,810 on the basis of an understanding reached with the contractor that was not incorporated into the contract and which was different than the basis upon which the contract was awarded. Consequently, we questioned all contract payments.
2. The Office of the Secretary of State used HAVA Section 101 funds of \$36,540 to pay for costs that were incurred prior to the period for which funds were available.
3. Equipment purchased with HAVA funds was not adequately accounted for.
4. New Mexico did not meet its five percent matching requirement of \$751,568 to qualify for HAVA Section 251 funds of \$14,279,790.

5. Interest of \$ 147,799 earned on HAVA funds was not deposited timely into the state election fund.
6. Program income realized from the use of equipment purchased with HAVA funds was not properly accounted for by the SOS and county election offices.

During our audit, the Office of the Secretary of State took action to address some of these issues.

***VOTER
EDUCATION
CAMPAIGN
CONTRACT***

Our analyses of the award of and payments under the contract for voter education are presented in the following paragraphs.

Background

The Office of the Secretary of State used HAVA funds² to award a professional services contract to A. Gutierrez and Associates, Inc. (Gutierrez or Contractor) for a public education campaign on voting matters. An advertisement requesting proposals ran from August 8 through August 17, 2004 in the Albuquerque Journal. The Office of the Secretary of State evaluated two proposals and on August 24, 2004 informed Gutierrez that it would be awarded a contract. The contract became effective on September 9, 2004 after Gutierrez, the Secretary of State, and representatives of the Attorney General's Office, the Taxation and Revenue Department, and the Department of Finance and Administration signed the contract.

On August 26, 2004, the Office of the Secretary of State signed a letter from Gutierrez agreeing to change the basis of contract payment from services, charges, and time (based on agreed-upon hourly rates of \$75) to a 17 percent administrative fee. The August 26, 2004 letter did not specify the base to which the fee was applicable. Gutierrez included the administrative fee in billings that were based on forecasted costs.

The scope of the contract included planning, executing and managing media buys and producing voter education materials. The Office of the Secretary of State amended the contract twice, increasing the contract amount to \$5,948,750. Amendment 1, dated May 18, 2006, required

² Gutierrez was paid \$6,271,810 from the state election fund (Fund 903). HAVA Sections 101, 251, and 261 funds and interest earned on HAVA Section 101 and 251 funds were maintained in Fund 903. However, a separate accounting of the expenditures by source of funding was not available at the beginning of our audit. On May 14, 2007, New Mexico filed financial reports with EAC on the expenditure of HAVA Sections 101 and 251 funds. The Section 101 report included \$6,085,060 in HAVA Section 101 expenditures for the Gutierrez contract. The remaining contract payment of \$186,750 was recorded as a HAVA Section 261 expenditure.

Gutierrez to continue the public education campaign and produce a training video. Amendment 2, dated October 6, 2006, required Gutierrez to continue the public education campaign and produce a poll worker training video. The amendments did not extend the period of performance (September 9, 2004 through December 30, 2006).

Media buys included the purchase of 30-second spots³ and half-hour spots on television channels and cable television, 60-second spots on radio stations, and a newspaper insert and other advertising. The spots and the newspaper insert and advertising presented voter education information, such as material about registering to vote, early voting, absentee voting, voter identification requirements, and bilingual ballots to the media viewers, listeners, and readers in New Mexico. The scripts for the spots and the insert were prepared or contracted for by Gutierrez. Spots were presented in English, Spanish, and Navajo. Approximately 44,000 total spots were aired on or before the 2004 general, the 2006 primary, and the 2006 general elections.

The Office of the Secretary of State paid Gutierrez \$6,271,810 under the contract.

Contract Award

Under the regulations for professional services contracts, New Mexico agencies may contract for professional services without using the State centralized procurement office. According to the request for proposals, a professional services contract was to be award in accordance with the New Mexico procurement code regulations for competitive sealed proposals (1NMAC 5.2). A Request for Proposal (RFP) was issued on August 8, 2004, which required proposals to be submitted by August 20. Two proposals were evaluated and the Secretary of State notified Mr. Gutierrez of his firm's selection on August 24. However, we believe that the Secretary of State should have informed the State's centralized procurement office of the planned purchase and provided it with a copy of the RFP as provide for in the regulation (1NMAC 5.2 Section 29.3).

By not following the aforementioned requirements, competition may have been limited because the state purchasing agent was precluded from determining whether there were qualified firms available to submit proposals for this work.

³ Spots are air time purchased from the television or radio stations or cable television companies in which the stations or companies agree to run the video and/or audio advertisement produced and provided by the contractor.

Questionable Payments

Differing payment provisions and unsupported billings resulted in questionable payments to Gutierrez. The contract required Gutierrez to submit a detailed and certified statement of services, time, and charges to the Secretary of State supplemented by receipts for expenses within thirty days after the end of the month during which the services were performed.

Gutierrez, however, submitted the first invoice on September 10, 2004, one day after the effective date of the contract. The invoice was based on a plan and budget for \$2 million for the voter education campaign. The plan was to purchase television and radio spots and billboard space; to produce those advertisements; and to manage the voter education campaign. The invoice did not identify the period of time it covered, such as the November 2004 general election, but did specify that the billboard advertising would be for 6 months. Gutierrez, however, could not relate amounts billed to costs incurred and said that billboard advertisements were not obtained. Furthermore, the \$2,000,000 invoice included an administrative fee of \$365,000. The \$365,000 equals 22.3 percent of the \$1,635,000 (costs excluding fee) and is a higher rate than the 17 percent negotiated with the Secretary of State. Not only was the rate incorrect, but it was applied to the wrong amount. That is, the rate was applied to the \$2,000,000, which already included the \$365,000 fee. Thus, the rate was applied to both fee and forecasted costs.

Gutierrez submitted another invoice on July 15, 2005 for \$2 million. The invoice consisted of a media fee of \$1,485,000 for commercial airtime, video and CD ROM production, an administrative fee of \$365,000 for management services, and \$150,000 for creative services. The invoice did not identify the period of time that it covered nor was it substantiated by receipts or time charges. Instead, a one-page memorandum from Gutierrez dated May 11, 2006 was attached which indicated that \$2 million had been spent to date. We could not determine why an invoice dated July 15, 2005, was supported by a May 2006 list of expenditures.

The Office of the Secretary of State paid \$1,712,000 to Gutierrez on May 26, 2006, which was 8 days after Amendment 1 added \$1,762,000 to the contract. The payment was supported by a "2006 General Election Supplemental Activities Budget" for \$1,712,000. Included in the budget was \$330,000 to send a newspaper-type of mailer to 1.1 million plus registered voters. Gutierrez advised, however; that instead

of a mailer his firm placed ads in newspapers about voting rights. Included in the \$1,712,000 payment was \$185,000 for a training video. In that regard, we noted that Gutierrez submitted and was paid \$186,750 for an invoice dated October 10, 2006. The payment was made 14 days after Amendment 2 added \$186,750 to the contract for training video and for continuing the public education campaign. Since we were only provided one video, it appears that Gutierrez may have been paid twice for producing the same video.

Payment provisions for gross receipts taxes were imprecise. For example, Gutierrez claimed \$135,000 on April 19, 2005, or 6.75 percent of the \$2 million he received from the SOS in September 2004. The contract identified the gross receipts tax rate as 6.125 percent, not 6.75 percent. Furthermore, the contract covered three State fiscal years and the State issues new tax rates schedules semiannually. Based on the records Gutierrez provided to us, his firm paid gross receipts taxes to the Department of Taxation and Revenue for this contract of \$55,370. In comparison, Gutierrez billings included \$373,060 for gross receipts taxes.

In total, Gutierrez was paid \$6,271,810 which included \$1,029,540 in administrative fees and \$373,060 in gross receipts taxes. The amount paid for the voter education campaign exclusive of the management fee and taxes (i.e., for the production of scripts, tapes, compact discs and newspaper inserts and the purchase of air time) was \$4,869,210. If one were to assume that Gutierrez actually incurred \$4,869,210 in costs, it would have been reasonable then to calculate the administrative fee by multiplying \$4,869,210 times 17 percent. The product of this calculation is \$827,766; which is \$201,774 less than the amount billed for administrative fees. However, because the August 26, 2004 agreement does not identify the base(s) to which the rate should be applied, it is not clear how the fee should be determined.

When asked about his invoicing practices, Gutierrez provided an August 26, 2004 letter (Attachment 2) signed by him and the former Secretary of State that said "We have negotiated a flat rate of 17% for administrative costs associated with the performance of our media services contract." The Contractor told us that this 17 percent charge was more attuned to the advertising business. The former Secretary of State provided a memorandum dated September 2, 2004 (Attachment 3) from Gutierrez that she said was the basis for her agreeing to substitute the 17 percent administrative fee for the three hourly rates contained in the contract proposal. These two letters were not in the contract file maintained by the Office of the Secretary of State. According to the former Secretary of State, in a June 25, 2007 letter to us (Attachment 4) the contractor filed detailed media run sheets with

her office, and she and her staff verified that the initial invoices matched the subsequent media run sheets. However, there was no evidence that anyone compared the radio and television station invoices to the “invoices” that Gutierrez submitted to the SOS. Further, we found no record of the SOS’s comparison of run sheets to Gutierrez’s “invoices” and payments in the Gutierrez contract file. The June 25, 2007 letter also states that the former Secretary of State expected to enter into a fixed-price contract with Gutierrez. In our opinion, however, payment of a contractor on the basis of a fee more resembles a cost reimbursement than a fixed price arrangement.

To recap, the Secretary of State signed the contract on August 25, 2004, Gutierrez and the Secretary of State signed the letter changing the payment provisions on August 26, 2004 and Gutierrez signed the contract on August 31, 2004. The contract became effective on September 9, 2004 after it was signed by other appropriate state agency representatives. Section 17 of the contract states that the contract “incorporates all the agreements, covenants, and understandings between the parties concerning the subject matter, and all such agreements, covenants and understandings have been merged into it.” The contract, however; did not incorporate the provisions of the August 26, 2004 letter.

Because we were not sure of the effect of the August 26, 2004 letter on the contract, we asked the New Mexico’s Attorney General’s Office to review the letter and give us an opinion about whether the August 24, 2004 agreement that it referred to was valid and binding, whether the Attorney General’s Office had reviewed it as part of its initial review of the Gutierrez contract, whether the agreement resulted in a cost-plus-percentage-of-cost contract, and whether the former Secretary of State had the authority to execute an agreement that changed a key factor that was used to solicit, evaluate, and select a contractor in a procurement competition.

The Attorney General’s Office responded that New Mexico law authorizes it to provide legal advice to state organization and employees. However, the Office did advise that it had not reviewed the August 26 letter as a part of their review of the contract or the amendments. The letter also advised that the chronology of the signing of the documents :

...raises three issues as to how this transaction may have transpired. These issues involve principles of: (a) contract merger; (b) contract amendment; and (c) renegotiation of proposed contract terms. Any legal assessment of the validity of this agreement requires

consideration of these principles and the specific facts regarding the conduct of the parties to the agreement, both prior to and after execution of the contract documents.

Gutierrez's Records of Contract Costs

Financial records furnished by Gutierrez substantiated net costs of only \$2,618,496 and did not support any costs for Gutierrez or his staff.

We requested all records that pertained to this contract from the Contractor, copied them, returned the originals to Gutierrez, and scheduled the costs by activity. The records substantiated costs of \$2,618, 496 related to the voter education campaign. Also, we noted that there were no payroll or other records identifying the time the Contractor and his staff may have worked on the contract. Therefore, we asked the Contractor if any other records existed that he had not given to us in response to our original request, such as time sheets, daily logs, or diaries. In response, he provided us with a binder of scripts for the voter education advertisements and invoices for each script. The binder contained 44 copies of scripts in English and Spanish and 7 scripts in Navajo for radio and television announcements. The scripts covered various voting subjects such as absentee voting, voter rights, registering to vote, provisional ballots, and bilingual ballots. The binder also contained invoices showing an amount for production and for gross receipt taxes. For example, the invoice price for production of a 30 second television spot was \$7,500 in 2004 and \$8,500 in 2006. There were 189 invoices covering announcements for the 2004 general election, 2006 primary election, and the 2006 general election. Total price of the invoices was \$1,212,440.

We did not accept the invoices as valid proof of costs because they were not supported by evidence of costs incurred such as payroll, paid bills for production facilities, or cancelled checks. Furthermore, the Contractor told us that a television station in Albuquerque, New Mexico, permitted him to use the television studio facilities free of charge to record the video and audio compact disks (CDs). He said that the former Secretary of State stood in front of a blue screen and then he filled in the background behind her. The Contractor said that once the master video and audio CDs were made, he copied them and provided copies to the television, cable, and radio stations throughout New Mexico and El Paso, Texas. Thus, the activities covered by the invoiced amounts for production were not clear.

Once more, we asked the Contractor whether he had any other records

associated with this contract. The Contractor said that he would check records in storage and advised that it would take several weeks for him to search for those records. We checked back with Gutierrez after several weeks and he said that he had not looked for any other records.

Most of the records of actual costs were associated with advertising related to the 2004 general and the 2006 primary and general elections. The number of spots purchased was 44,588. Costs were also incurred for the production of a training video and a newspaper insert. The total costs of the goods and services Gutierrez purchased for the voter education campaign totaled \$2,618,496, excluding payments for gross receipts taxes of \$55,370.

In summary, records provided by Gutierrez evidenced costs incurred of \$2,618,496. The invoices submitted to the Office of the Secretary of State by Gutierrez did not reflect actual cost incurred in the performance of the contract because Gutierrez submitted only plans and budgets as a basis for payment. This conflicts with the terms of the contract which required Gutierrez to submit receipts to the Office of the Secretary of State and certify that he incurred costs billed. Furthermore, according to the contract, any hours worked by Gutierrez and his staff would be payable at the rate of \$75 per hour if submitted in a detailed and certified statement of services, time, and charges.

Payments in Excess of the Contract Amount

The Office of the Secretary of State paid Gutierrez \$323,060 more than the amount allowed by the contract. We attributed the overpayment to misinterpretation of the wording in the contract amendments concerning reimbursement of New Mexico gross receipts taxes.

Amendment 1 stated that total contract payments could not exceed \$5,762,000 exclusive of gross receipts taxes. Amendment 2 said that the total amount of the contract could not exceed \$5,948,750 inclusive of gross receipts taxes. Amendment 2 means that Gutierrez could not be paid more than \$5,948,750, even though the initial contract and Amendment 1 provided for payment of contract amount plus gross receipts taxes. However, before Amendment 2 was executed, Gutierrez had already been paid \$6,085,060. He subsequently billed \$186,750. Payment of this amount resulted in total payments to Gutierrez of \$6,271,810, which was \$323,060 more than the contract ceiling.

Comments From The Former Secretary of State and Gutierrez

We discussed the purchase of voter education services and this contract with the former Secretary of State, and with Gutierrez.

To clarify her position, the former Secretary of State provided us with a June 25, 2007 letter describing the procurement and her actions regarding the purchase of voter education services (See Attachment 4). In the letter, she said:

...Since I wrote the contract with the help of the State of New Mexico Attorney General I am comfortable describing the intent of this contract.

Upon receiving the HAVA funds, dedicated for the Public Education Campaign, I was concerned that the Office of the Secretary of State would be overwhelmed with the minutia of tasks that a “cost plus award fee contract” would entail. I understood that as Chief Elections Officer, I was solely responsible for the utilization of the [HAVA] funds. The Office and Staff are experts in elections, not advertising. Upon reviewing the task at hand I chose that the Contractor and the State would enter into a “fixed price contract.” The contractor would manage production, scheduling, scripts, the airtime purchases and all other work to be included within the “fixed price contract.” The Contractor would report to me regularly on their progress and seek my approval on all finished products. This relieved my staff from micro-managing the work performed within this contract.

I sought the assistance of the State of New Mexico Attorney General’s Office in developing the contractual agreement that would meet my needs for a fixed price agreement that would direct the Contractor to meet all of our goals for one fixed price. As it turned out, the AG’s office had previously developed a flat fee media services contract template that they used with their own Contractor, which was easily modified to fit our needs.

With regard to the total amount that Gutierrez received for his services, the former Secretary of State said:

The Agreement between the State of New Mexico and “A. Gutierrez & Associates” was for approximately \$5.9 million dollars plus the required gross receipts tax. The Contractor and my Office did not exceed the \$5.9 million dollars which paid for the verified completion of the New Mexico Public Education Campaign. The

Contractor provided a detailed report of airtime, distribution, identification of the media outlets where he aired the public education spots, and the amount of money that was to be paid to each station. I was assured the Contractor met his obligations by verifying his regular reports. This was especially critical to my Office as we were deeply involved in meeting all the other requirements of HAVA, along with New Mexico's own election reforms.

With regard to advance payments for services, she stated:

Because the majority of work under this contract was media buys, the work was paid for in advance of the running of the media ads. Upon completion of the ads being run, the contractor filed a detailed media run sheet with my office to further document work performed. My staff and I verified that the initial invoices matched the subsequent media run sheets.

She wrote further that:

A. Gutierrez & Associates followed my explicit instructions throughout the Public Education Campaign, and met the intent and language of the Contract between the Office of the Secretary of State and the Contractor. They briefed and reported to me regularly on all details. I was completely satisfied with this Contractor. It is clear that the State of New Mexico benefited from the New Mexico public Education Campaign (as I defined it and contracted for) and I attest that the HAVA funds were spent within the boundaries of my Statutory Authority.

It is a fact that the Contractor provided more than 43,000 public education radio and television advertisement spots aired in New Mexico during the three election year cycle.... The value of the airtime was approximated at \$22 million, far in excess of the cost of the agreement.

The Contractor explained that he and the former Secretary of State agreed to modify the basis of contract payment. He provided a letter dated August 26, 2004. (See Attachment 2), that he had prepared and that was agreed to by the former Secretary of State. In part, the letter says:

As per our discussion on August 24, 2004, we have negotiated a flat rate of 17% for administrative costs associated with the performance of our media services contract. As a full-service advertising agency, I will be in charge of facilitating all costs associated with your non-partisan voter education programs in all forms of media. As you suggested, this will streamline the billing process with your office.

There will, of course, be production costs. Additionally, there may also be costs associated with research, translation, duplication, postage, processing, travel as well as others that may arise as we proceed with this project.

To further explain the change in the fee arrangement, the former Secretary of State provided us with the memorandum dated September 2, 2004 from Gutierrez and signed by her (See Attachment 3). In it, the Contractor stated:

It is my belief that if we stuck to the \$75/hr. fee quoted in my agency's response to the RFP, or if we charged New Mexico industry standards, the production costs would skyrocket beyond control. Most of our New Mexico film industry workers are unionized, which would mean a very high hourly rate, plus a range of peripheral costs that would add greatly to the final production costs.

The former Secretary of State told us that she relied on the statements made by the Contractor that it would be better to agree to the 17 percent fee arrangement because it would result in a lower overall cost to the state.

When asked about the invoices that he submitted, the Contractor advised that he based his billings on budgets. When we asked the Contractor why he did not bill the SOS in accordance with the terms of the contract, the Contractor stated that he believed that the August 26, 2004 letter was an amendment to the contract and that the Office of the Secretary told him how to bill. Furthermore, he explained that it was not practical to bill monthly within 30 days of the end of each month because the services were provided in three distinct periods around the general election of 2004 and the primary and general elections of 2006.

If the revised payment provisions provide for the contractor to be paid on the basis of costs plus a percentage of costs, it would appear to violate state procurement laws. Specifically Part 13-1-149 of the New Mexico Procurement Code states... “that the use of a cost-plus-a-percentage-of-cost contract is prohibited except for the purchase of insurance.”

Recommendations

We recommend that the Election Assistance Commission require the New Mexico Secretary of State to:

1. Obtain assistance from the New Mexico Attorney General’s Office on the applicable contract provisions for determining the basis of payment to Gutierrez.
2. Based on the determination regarding the basis of payment to Gutierrez, calculate the amount that should be paid for the voter education services that were provided.
3. Return to the state election fund (Fund 903) any difference between the amount Gutierrez should have been paid in recommendation 2 above and what he was actually paid.
4. Calculate and pay interest into the election fund on the amount returned to the election fund in recommendation 3 for the period that it was missing from the fund.
5. Establish and implement procedures to ensure that the SOS follows applicable procurement laws, regulations, policies and procedures, and contract provisions in the future.

Secretary of State Response

The Secretary of State indicated that the SOS was working with the New Mexico Attorney General’s Office to address the issues identified in the report.

OIG Comments

None.

PREAWARD COSTS

The State used Section 251 funds of \$36,540 for costs that were incurred prior to the period of fund availability. The \$36,540 was paid to San Juan County for costs incurred in 2000 related to implementing

the Voter Registration and Election Management System (VREMS).

Office of Management and Budget Circular A-87, Attachment B, Section 31, states that to be eligible as pre-award costs, costs must be incurred:

. . . prior to the effective date of award directly pursuant to the negotiation and in anticipation of the award where such costs are necessary to comply with proposed delivery schedule or period of performance. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the award and only with the written approval of the awarding agency.

EAC has concluded that for costs to qualify as pre-award costs, they must be incurred pursuant to negotiation and in anticipation of grant award. That is, the cost must be included in a (later) approved state plan and incurred after Congress appropriated funding.

The state paid San Juan County on the basis of an agreement between the County and the Office of the Secretary of State that was signed in May 2005. The County submitted its bill to the Office on June 1, 2005. However, San Juan County incurred the costs in 2000, 2 years prior to passage of HAVA and thus, we concluded, before anticipation of award and the appropriation of Federal funds. Therefore, we questioned the \$36,540 paid to San Juan County.

Recommendation:

We recommend that the EAC require the Secretary of State to:

6. Reimburse the state election fund for the \$36,540 payment to San Juan County.
7. Pay interest to the Election Fund on the \$36,540 from the date it was received to the date it was returned to the Election Fund.

Secretary of State Response

The Secretary of State indicated that New Mexico would reimburse the HAVA fund for the \$36,540 plus interest.

OIG Comments

None.

***PROPERTY
MANAGEMENT-
EQUIPMENT***

The Office of the Secretary of State did not notify its counties that title to the equipment purchased with HAVA funds and delivered to the counties was to be vested in the counties. As a result, neither the SOS nor the offices of the county clerks at the five counties that we visited adequately accounted for the equipment. The Code of Federal Regulations, 41 CFR 105-71.132(d)(1) stipulates that property records must be maintained that include a description of the property; a serial number or other identification number; the source of property; who holds the title; the acquisition date; cost of the property; percentage of Federal participation in the cost of the property; the location, use and condition of the property; and any ultimate disposition data including the data of disposal and sale price of the property.

The State purchased equipment and software for VREMS and for voting equipment with HAVA and state funds. Equipment in support of VREMS included servers, scanners, printers, and computers. Voting equipment, which was purchased from Election Systems and Software, Inc. (ES&S), consisted of M-100 optical scanners, M-650 high speed scanners, AutoMark voting assistance machines, and supporting equipment such as tables and software licenses. Most of this equipment was delivered to New Mexico's 33 counties.

An information technology business analyst with the Office of the Secretary of State told us that the equipment belonged to the counties. County clerks at four of the five counties we visited said they believed that title to the property was vested with the Secretary of State because the state purchased the equipment and had not formally transferred title to the equipment to them. For that reason, the counties had not recorded the property in their accounting and property management systems. The other county clerk stated that she intended to add the equipment to the property management system of the county the next time their contractor completed a physical inventory of the county's personal property.

Two of the counties provided us with ES&S lists of the property that was delivered to their facilities. Two other counties gave us lists of equipment which county officials had prepared. One county did not prepare a list of HAVA equipment. An employee of the Information Systems Division of the Office of the Secretary of State also provided us with lists of the property for all counties in the State prepared by E.S. &S. When we compared the serial numbers on the lists to the serial numbers of the scanning machines and AutoMarks located at four of the five counties we visited, we found that the number of machines and the serial numbers of the machines did not agree in all cases.

During the audit, the SOS initiated the transfer of title to equipment located at the counties to the counties. The SOS has also initiated a procedure whereby SOS staff will perform random checks to ensure that the counties are complying with applicable requirements.

Recommendations:

We recommend that the Executive Director of the EAC direct the Secretary of State to:

8. Ensure that equipment located at the counties is properly recorded in accordance with 41 CFR 105-71.132(d) (1) of the Common Rule.
9. Resolve with the differences between equipment purchased and equipment delivered.

Secretary of State Response

The Secretary of State indicated that that the Office of the Secretary of State was working with the Attorney General’s Office to complete the transfer of the property to the counties. In addition, the Office of the Secretary of State conducted a test and inventory project to document all serial numbers of equipment delivered by the vendor during the purchase of voting equipment. During this process, the SOS discovered that the vendor did not deliver all of the equipment that was purchased with HAVA funds. The SOS is currently working with the vendor to resolve the matter.

OIG Comments

Based on the actions being taken by the SOS, we consider recommendation 8 resolved but not implemented. In addition, based on the response, we added recommendation 9 to ensure that difference between equipment purchased and equipment delivered is adequately resolved.

***STATE FIVE
PERCENT
MATCH***

New Mexico did not deposit into the State’s HAVA fund state matching funds of \$751,568 that were required as a condition to receiving HAVA Section 251 requirements payments of \$14,279,790.

To receiving HAVA requirements payments, Section 253(b)(5) of HAVA requires states to have:

. . . appropriated funds for carrying out the activities for which the requirements payment is made in an

amount equal to 5 percent of the total amount to be spent for such activities (taking into account the requirements payment and the amount spent by the State) . . .

Based on this requirement, New Mexico's matching requirement was \$751,568.⁴ Section 254 (b)(1)(A) of HAVA requires states to deposit the funds appropriated to match the requirements payment into a state election fund along with interest earned on deposits of the fund. However, an official of the Office of the Secretary of State said that the State is not permitted to commingle federal and State funds. Accordingly, the State matching funds were not deposited into the state election fund.

The Secretary of State responded that it was her understanding that the previous administration intended to use a portion of an \$11 million State appropriation for the purchase new voting machines as the State's matching requirement. That appropriation was never deposited into Fund 903, but it was spent on new voting machines in October 2006.

Recommendations:

10. We recommend that the Executive Director of the EAC direct the Secretary of State to specify the source of State matching funds of \$751,568.

Secretary of State Response

The Secretary of State indicated that the \$536,604 has been transferred from the General Fund to the HAVA fund, and interest deposited totals \$ 165,100. The Secretary of State indicated that the Office of the Secretary of State would work with the State Treasurer and the Department of Finance and Administration to determine the amount due to satisfy the match, plus interest.

OIG Comments

None.

INTEREST

Interest that should have been earning on deposits into the state election fund was not accumulated correctly. This occurred because the New Mexico State Treasurer did not timely transfer some monthly interest earned on HAVA funds into the state election fund. In addition, interest was not earned on the state's five percent matching

⁴ Federal Funds of \$14,279,790 divided by 95 percent equals total program funds of \$15,031,358. Funds of \$15,031,358 multiplied by 5 percent equals a \$751,568 matching requirement.

requirement of \$751,568 because matching funds were not deposited into an interest-bearing account. We estimated that interest of \$147,799 was owed as of December 31, 2006. HAVA requires that interest be deposited into the election fund of the State.

The Secretary of State, in response to the finding, requested that the New Mexico State Treasurer review the finding. The Treasurer indicated that he generally agreed with the finding, and that the funds had been deposited into the Election Fund.

Recommendations:

We recommend that the Executive Director of the EAC direct the Secretary of State to:

11. Confirm that the \$147,799 has been deposited into the election fund.

Secretary of State Response

The State Treasurer indicated that the interest earned on the HAVA funds have now been deposited into the HAVA fund.

OIG Comments

None.

***PROGRAM
INCOME***

Program income has not been properly computed or reported. According to the *Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments* (41 CFR 105-71.125), program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity during the grant period and includes items such as fees from the use or rental of real or personal property acquired with grant funds. The Uniform Administrative Requirements also stipulates, in part, that the costs incident to the generation of program income may be deducted from gross income to determine program income, if authorized by Federal regulations or the grant agreement.

In the case of the HAVA program, the grant-supported activity was the acquisition of voting machines and the development of the statewide voter registration databases. Specifically, New Mexico counties and the Office of the Secretary of State generated program income from charging for statistics on registered voters (public service requests or PSRs) generated from using the HAVA provided statewide voter registration database and from leasing HAVA financed voting machines to local governments. At two of the five counties we visited,

the county clerks stated that they had charged local governments for the use of voting machines. In three of the five counties that we visited, the county clerks told us that they had received income for the PSRs. In addition, an employee of the Office of the Secretary of State provided us with a schedule of the income that the Office of the Secretary of State had received for PSRs.

The county proceeds from the sale of PSRs and from the local governments' use of voting machines have been deposited into the general funds of the counties. The proceeds from the sale of PSRs by the State have been deposited into the general fund of the State.

We consider the revenue from the sale of PSRs and the use of voting equipment financed with HAVA funds to be program income. As such, it should be reported on the Financial Status Reports (SF-269s) submitted by the Office of the Secretary of State and disposed of in accordance with federal requirements.

The Office of the Secretary of State and the county clerks that we visited were unaware that the revenue we identified was program income. Furthermore, they were unaware of the requirement regarding program income.

When we notified the Secretary of State of this finding, she provided us with a listing of all program income generated using HAVA equipment. The listing also contained costs incurred by the counties to generate the program income. It disclosed that the costs associated with the generation of program income far exceeded gross program income received.

Recommendations:

12. We recommend that the Executive Director of the EAC require the Secretary of State to continue to obtain from the County Clerks gross program income and the cost of producing that income. If any net income is reported, the SOS should direct the County Clerks to use the income for HAVA activities.

Secretary Of State Response

The SOS indicated that there was no program income for 2007 and 2008. In addition, the SOS has worked with all of the County Clerks on guidance in reporting program income on a yearly basis.

OIG Comments

None.

SCOPE AND METHODOLOGY

To accomplish our objective, we reviewed:

- ✓ The prior single audit report and other reviews related to the Secretary of State's financial management systems and the HAVA program for the last 2 years.
- ✓ Policies, procedures and regulations for the New Mexico Secretary of State's management and accounting systems as they relate to the administration of HAVA programs.
- ✓ Inventory lists of all equipment purchased with HAVA funds.
- ✓ Major purchases.
- ✓ Supporting documents maintained in the accounting system for payments made with HAVA funds.
- ✓ Support for reimbursements to counties.
- ✓ Certain New Mexico laws that impacted the election fund.
- ✓ Appropriations and expenditure reports for State funds used to maintain the level of expenses for elections at least equal to the amount expended in fiscal year 2000 and to meet the five percent matching requirement for section 251 requirements payments.
- ✓ Information regarding source/supporting documents kept for maintenance of effort and matching contributions.

We also interviewed appropriate Office of the Secretary of State employees about the organization and operation of the HAVA program.

We conducted our review in accordance with *Government Auditing Standards* issued by the Comptroller General of the United States. As such, we included tests and procedures as considered necessary under the circumstances to evaluate the Division's controls over the administration of HAVA payments. Because of inherent limitations, a study and evaluation made for the limited purposes of our review would not necessarily disclose all weaknesses in administering HAVA payments.



01 12 05:00

Attachment 1

MARY HERRERA
SECRETARY OF STATE

DON FRANCISCO TRUJILLO II
DEPUTY SECRETARY OF STATE

STATE OF NEW MEXICO

April 30, 2008

Mr. Curtis Crider
Inspector General
U.S. Election Assistance Commission
Office of the Inspector General
1225 New York Ave. NW – Suite 1100
Washington, DC 20005

Dear Mr. Crider:

In response to your findings dated March 24, 2008, requesting our written comments by April 30, 2008:

The Office of the Secretary of State awarded a contract for voter education campaign without following state procurement procedures for the award of professional services. The Office of the Secretary of State also paid the contractor \$6,271,810 on the basis of an understanding reached with the contractor that was not incorporated into the contract and which was different than the basis upon which the contract was awarded. Consequently, we questioned all contract payments.

1. The Office of the Secretary of State paid the contractor (Gutierrez & Associates) \$6,271,810.00. The amount paid to Gutierrez & Associates totals \$6,271,810.00 from the period of August 25, 2004 to October 20, 2006. I have questioned how this vendor received this bid per the NM State Procurement Code. This has been turned over to the New Mexico Attorney General's Office for investigation. Invoices totaling the \$6,271,810.00 appear to be drafted by Gutierrez & Associates with no evidence that the services were provided to the state of New Mexico. During the exit meeting held between the Office of the Inspector General, New Mexico Attorney General staff, Legislative Council Staff and the New Mexico Secretary of State and staff on April 21, 2008. It was brought to our attention that the Attorney General staff was given copies or original invoices in binders totaling \$2,618,496. I cannot verify that amount due to the fact that I am not in receipt of original or copies of any original invoices. In addition, we have attempted to acquire the master video and audio CDs paid for by HAVA, to update a video for this year's election from Wonderboy Productions and owner Charlie O'Dowd; however, he has informed us he has them in his possession and would not turn them over because he had a contract with the former Secretary of State only to produce the 1,000 copies of DVDs/CDs. We are unable to find any such contract. The state has no ownership of the master video or audio CDs. During the exit meeting Assistant Attorney General, Elizabeth Glenn, informed the group that New Mexico contracts have "a not to exceed amount" that is required by the Department of

Finance and Administration for all professional service contracts. To date, this has not been provided in writing.

The Office of the Secretary of State used HAVA Section 101 funds of \$36,540 to pay for costs that were incurred prior to the period for which funds were available.

2. The Office of the Secretary of State used HAVA Section 101 funds of \$36,540 to pay for costs that were incurred in 2000. A letter was sent requesting a refund from San Juan County on April 17, 2007; however, the San Juan County Clerk provided the Secretary of State with a copy of documentation that the funds were to be paid by state funds. San Juan County did not reimburse the Secretary of State for the \$36,540. I concur that the state of New Mexico must reimburse HAVA funds in the amount of \$36,540, plus interest back to the date it was charged to the Election Fund (see Exhibit #1).

Equipment purchased with HAVA funds was not adequately accounted for.

3. Equipment purchased with HAVA funds was not adequately accounted for. The Office of the Secretary of State has initiated a transfer of all voting equipment to the 33 counties. So far ten (10) counties have accepted ownership. The Office of the Secretary of State is working with the Attorney General's Office to complete the transfer. In addition, the Office of the Secretary of State conducted a test and inventory project during the months of March 2007 through June 2007 to document all serial numbers of equipment delivered by the vendor during the purchase of the voting equipment. The Office of the Secretary of State discovered that ES&S did not deliver all equipment purchased by HAVA funds which included 88 Bins, 101 PCMCIA Cards, and eight Version One of the Auto Marks, that were delivered to two counties. A total of 8 Version One need to be replaced. The Secretary of State's Office is currently working with ES&S to receive all equipment purchased by HAVA funds. To date, ES&S has not delivered all equipment purchased by HAVA funds.

New Mexico did not meet its five percent matching requirement of \$751,568 to qualify for HAVA Section 251 funds of \$14,279,790.

4. The state match totaled \$751,568. This requirement was a condition to receive HAVA 251 funds in the amount of \$14,279,790. The former administration did not comply. The only amounts of interest found transferred by the State Treasurer on September 16, 2006, totaled \$36,252.81, and on December 31, 2006, an additional \$1,231.61 was transferred into fund 903.

During the current administration the following amounts were transferred into fund 903:

. 3/16/2007	\$ 87,253.09	Interest Earned
. 3/27/2007	429,500.00	From General Fund
. 4/30/2007	49,023.36	Interest Earned
. 6/27/2007	107,104.00	From General Fund
. 7/02/2007	28,823.65	Interest Earned

April 30, 2008
Page 3

These deposits reflect a transfer from General Fund in the amount of \$536,604 into Fund 903, and interest deposited totals \$165,100.10. The Secretary of State will have to work with the State Treasurer and Department of Finance and Administration to determine the amount due to satisfy the match, plus interest. I concur that the \$11,000,000 state funds were appropriated and expended in 2006 for the purchase of voting equipment. Section 251 funds were made available in 2004. The state of New Mexico must satisfy the remaining match requirement, plus interest owed (see Exhibit #2).

Interest of \$147, 799 earned on HAVA funds was not deposited timely into the state election fund.

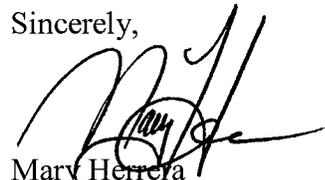
The State Treasurer researched and responded to this finding (see attachment #3).

Program income realized from the use of equipment purchased with HAVA funds was not properly accounted for by the Secretary of State and county election offices.

6. For 2007, the current administration reported no program income for the counties. In addition, the current administration worked with all 33 County Clerks on guidance in reporting program income on a yearly basis. To date, there is no program income to report for 2008. This is reflected on the SF269 report.

Please feel free to contact me if you have any questions.

Sincerely,



Mary Herrera
Secretary of State

c: Hon. Gary King, Attorney General
Hon. Hector Balderas, State Auditor
Kathryn Miller, Cabinet Secretary, Department of Finance and Administration
David Abbey, Director, Legislative Finance Committee

Attachments

Exhibit 1 and Exhibit 2 withdrawn by the Office of Inspector General.



STATE OF NEW MEXICO
OFFICE OF THE TREASURER

2019 Galisteo Building K
P.O. Box 608
Santa Fe, New Mexico 87505

Phone: (505) 955-1120
FAX: (505) 955-1195

April 24, 2007

Honorable Mary Herrera
Secretary of State
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

Subject: Interest due Fund 903, Help America Vote Act (HAVA)

Dear Ms. Herrera:

I am in receipt of your letters dated April 4 and April 10, 2007, regarding the U.S. Election Assistance Commission (EAC) audit findings and the interest amount due of \$147,799 to Fund 903.

The State Treasurer's Office staff worked closely with the EAC investigator, supplying backup documentation for the initial account set-up for Fund 903 along with the subsequent interest rate calculations and distributions. Upon review of the Summary of HAVA Fund Interest Earned compiled by the investigator, the State Treasurer's Office is in agreement with the report, with explanations noted, as follows:

- 1) *The interest payments for April 2003 through November 2003 were made one or more months late.* The State Treasurer's Office (STO) received an initial account set up authorization from the Department of Finance and Administration (DFA) dated January 22, 2004, with a letter of instruction from the Secretary of State dated January 14, 2004. The State Treasurer's Office calculated and distributed interest from April 2003 through December 2003 upon receipt of this instruction.
- 2) *The interest payment for June 2004 (paid in July 2004) was \$300 greater than the amount earned.* This was a STO error resulting from a calculation based on 31 days for June instead of 30 days.
- 3) *The interest payments for June, July, September and December 2005 were made one month late.* This delay was a result of the monthly closings being delayed at DFA.

Honorable Mary Herrera

Secretary of State

April 24, 2007

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- 4) *The May 2006 interest payment was made three months late (in September 2006). Same explanation as #3.*
- 5) *The June 2006 interest payment was made two months late (in September 2006). Same explanation as #3.*
- 6) *The July through December 2006 interest payments have not been made. The interest due Fund 903 for July 2006 through December 2006 has been entered on PeopleSoft (SHARE) in the amount of \$87,253.09 and is pending DFA posting. As this amount will soon be recorded on Fund 903, it should be deducted from the amount due per item 6 (\$97,119.71).*
- 7) *Regarding the State's match to the HAVA grant. The match amount was not deposited into Fund 903 for the entire grant period. STO was able to calculate and distribute interest only on amounts reflected in Fund 903. The EAC investigator confirmed on April 18 that the required matching funds due from the State to the HAVA fund were finally deposited on September 11, 2006, and spent. Therefore, the interest calculated for the last half of October through January 2007, \$11,522.55 (\$1,596.21 + \$3,297.21 + \$3,257.25 + \$3,371.88), can be deducted from the amount due per item 7 (\$49,910.32).*

The final amount representing interest owed is \$49,023.36 (\$147,799 - \$87,253.09 - \$11,522.55). A letter instructing DFA to credit Fund 903 for interest earned in this amount will be sent by STO this week.

With regard to the Notice of Finding and Recommendations (NFR) on interest, the Treasurer's Office would like to clarify several points:

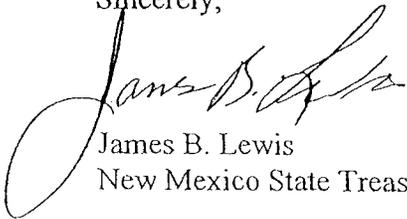
- 1) The prior Treasurer was not involved with, nor did he direct, the investment of the overnight repurchase program, from which the interest rate for apportionment to Fund 903 was based. The overnight repurchase transactions were completed by the State's fiscal agent bank in accordance with State statute. The rate selected was the best rate offered from at least three brokers.
- 2) All interest earned by the State was distributed to the statutorily authorized funds in proportion to the average monthly balance of the funds; no additional interest was withheld or misdirected from the monthly distributions.
- 3) Interest is calculated by the State Treasurer's Office only on balances in the statutorily authorized funds. If the State's HAVA match was not correctly deposited to Fund 903, then the amount could not earn interest.

Honorable Mary Herrera
Secretary of State
April 24, 2007
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- 4) The interest calculation process has changed, and distributions delayed for the current fiscal year, due to the implementation of SHARE. The State Treasurer's Office has worked diligently with the DFA to develop a satisfactory alternative method, which is currently being utilized, to calculate the average balances for the statutorily authorized funds until such time as the SHARE functionality for this process is tested and operational.

Please let the Treasurer's Office know if you have any concerns about the explanations listed or the calculation of final interest amount due. If my staff or I can be of further assistance, please advise.

Sincerely,



James B. Lewis
New Mexico State Treasurer

A. Gutierrez & Associates, Inc.

**610 Gold Ave. SE
Albuquerque, NM 87102
505-342-2626**

August 26, 2004

The Honorable Rebecca Vigil-Giron
New Mexico Secretary of State
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

Madame Secretary:

Let me again express my sincere thanks for your confidence in A. Gutierrez & Associates, Inc. (AGA) in selecting us to administer and manage the HAVA Voter Education Program for New Mexico. We are honored.

As per our discussion on August 24, 2004, we have negotiated a flat rate of 17% for administrative costs associated with the performance of our media services contract. As a full-service advertising agency, I will be in charge of facilitating all costs associated with your non-partisan voter education programs in all forms of media. As you suggested, this will streamline the billing process with your office.

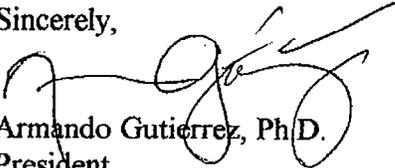
There will, of course, be production costs. Additionally, there may also be costs associated with research, translation, duplication, postage, processing, travel as well as others that may arise as we proceed with this project. Moreover, I want to make note of the fact that you are in agreement that I may hire sub-contractors on an as-needed basis without written approval from you. Since many of your voter education messages to the public will be time-sensitive, this will expedite our work.

Finally, as you emphasized, in order to avoid any appearance of impropriety or partisanship, I will not undertake any candidate or party specific campaigns for the duration of this contract.

If you are in agreement with these clarifications, please sign and return to me.


Rebecca Vigil-Giron, Secretary of State

Sincerely,


Armando Gutierrez, Ph.D.
President

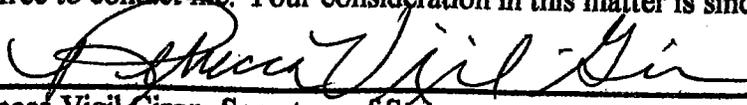
**A. Gutierrez & Associates, Inc.
610 Gold Ave.
Albuquerque, NM 87102
505-342-2626**

MEMORANDUM

**To: Rebecca Vigil Giron, Secretary of State
From: Armando Gutierrez
Date: September 2, 2004
Re: Production Costs**

A quick note based on our meeting last week regarding the Voter Education advertising we are scheduled to begin soon. It is clear to me that, given the many complex issues facing voters, we will be required to produce a large number of television and radio commercials. Add to this the fact that virtually all will be in both English and Spanish, with some of our radio ads also in Dine. This will, of course, necessitate more funds to be devoted to production than we had originally anticipated. To be sure, we will still have quite substantial buys, and coupled with the bonus spots we are negotiating, you can be assured that all New Mexico voters will be well-educated about the voting process. It is my belief that if we stuck to the \$75/hr. fee quoted in my agency's response to the RFP, or if we charged New Mexico industry standards, the production costs would skyrocket beyond control. Most of our New Mexico film industry workers are unionized, which would mean a very high hourly rate, plus a range of peripheral costs that would add greatly to the final production costs. You will recall that in our meeting I referenced the fact that just months ago I produced one, :30 second commercial for another state agency that cost some \$131,000. That agency insisted I use a specific production company, thus the high cost. Having said that, however, it is not unusual in today's production marketplace.

Hence, as we agreed, I will produce and direct all of your spots and negotiate and manage costs to keep them within reason. I have a long working relationship with many production people here in New Mexico and, particularly given that we will do a good number of spots throughout the course of this contract, I believe I can get the best rates and professionals possible, ensuring not only quality production values, but reasonable costs. Please sign below to our agreement. I will obviously keep you apprised of progress as we move along. Should you have any questions at any time, feel free to contact me. Your consideration in this matter is sincerely appreciated.



Rebecca Vigil Giron, Secretary of State

Rebecca Vigil-Giron

June 25, 2007

Mr. Curtis Crider
Inspector General
Election Assistance Commission
1225 New York Avenue, NW, Suite 1100
Washington, DC 20005

Dear Inspector General Crider:

Thank you for the opportunity to respond to issues that were raised during the on-site meeting with your representative, Mr. Joseph Ansnick. I met with your representative and answered his questions to the best of my ability on the contract performed by "A. Gutierrez & Associates." This Corporation contracted with my Office to develop and execute the State of New Mexico's HAVA Public Education Campaign. There were questions over the intent of the media services agreement between myself, as Chief Elections Officer for New Mexico, and A. Gutierrez & Associates. Since I wrote the contract with the help of the State of New Mexico Attorney General I am comfortable describing the intent of this contract.

Upon receiving the HAVA funds, dedicated for the Public Education Campaign, I was concerned that the Office of the Secretary of State would be overwhelmed with the minutia of tasks that a "cost plus award fee contract" would entail. I understood that as Chief Elections Officer, I was solely responsible for the utilization of the funds. The Office and Staff are experts in elections, not advertising. Upon reviewing the task at hand I chose that the Contractor and the State would enter into a "fixed price contract." The contractor would manage production, scheduling, scripts, the airtime purchases and all other work to be included within the "fixed price contract." The Contractor would report to me regularly on their progress and seek my approval on all finished products. This relieved my staff from micro-managing the work performed within this contract.

I sought the assistance of the State of New Mexico Attorney General's Office in developing the contractual agreement that would meet my needs for a fixed price agreement that would direct the Contractor to meet all of our goals for one fixed price. As it turned out, the AG's office had previously developed a flat fee media services contract template that they used with their own Contractor, which was easily modified to fit our needs. In my role as Chief Elections Official for the State of New Mexico, I spent a considerable amount of time explaining to the Contractor what our desired messages for the Public Education Campaign and how I expected these to be expressed.

The Agreement between the State of New Mexico and "A. Gutierrez & Associates" was for approximately \$5.9 million dollars plus the required gross receipts tax. The Contractor and my Office did not exceed the \$5.9 million dollars which paid for the verified completion of the New Mexico Public Education Campaign. The Contractor provided a detailed report of airtime, distribution, identification of the media outlets where he aired the public education spots, and the amount of money that was to be paid to each station. I was assured the Contractor met his obligations by verifying his regular reports. This was especially critical to my Office as we were deeply involved in meeting all the other requirements of HAVA, along with New Mexico's own election reforms.

There were four criteria elements my Office used to ensure prudent accounting principles were used in the management of this contract: first, the tasks that I assigned to the contractor were billed using an invoice; second, every invoice was verified by me and my accounting staff to assure that the work was scheduled and satisfactory prior to my recommendation to pay; third, my accountants forwarded the bill to the New Mexico Department of Finance (DFA) for payment, and fourth, the DFA verified accounting was correct, that sufficient funds were available in my account, and upon their approval they paid these invoices on behalf of my Office. Because the majority of work under this contract was media buys, the work was paid for in advance of the running of the media ads. Upon completion of the ads being run, the contractor filed a detailed media run sheet with my office to further document work performed. My staff and I verified that the initial invoices matched the subsequent media run sheets.

A. Gutierrez & Associates followed my explicit instructions throughout the Public Education Campaign, and met the intent and language of the Contract between the Office of the Secretary of State and the Contractor. They briefed and reported to me regularly on all details. I was completely satisfied with this Contractor. It is clear that the State of New Mexico benefited from the New Mexico Public Education Campaign (as I defined it and contracted for) and I attest that the HAVA funds were spent within the boundaries of my Statutory Authority.

It is a fact that the Contractor provided more than 43,000 public education radio and television advertisement spots aired in New Mexico during the three election year cycles, 2004 General Election, 2006 Primary and 2006 General Election. The value of the airtime was approximated at \$22 million, far in excess of the cost of the agreement.

The success of the Public Education Campaign was measured by the Voters of the State of New Mexico. After a politically motivated inquiry, just after the 2004 General Election, from United States Senator Pete Domenici of New Mexico on the use of the federal funds, I responded on December 14, 2004 to then Election Assistance Commission Chairman DeForest B. Soaries, Jr., "*There was a statewide increase of 26% in voter turnout... This represents an additional 160,373 persons voting. In Voter Registration: Over 131,839 new voters joined the rolls.*" In the response dated February 16, 2005, back to Senator Dominici, Election Assistance Commission Chair Gracia Hillman wrote, "*After reviewing the advertisements and the Secretary's response to our questions, we believe that New Mexico has not violated HAVA in the use of Title I*

funds for purposes of developing and running the advertising campaign in question".
The same contractor, A. Gutierrez and Associates performed Voter Education advertising during the above period. I did not change my directions to A. Gutierrez and Associates for this later period in question by your Office.

I request that you consider these statements as you prepare your preliminary report. Since the States were not provided with any training, guidance or specific instructions for the implementation of the Help America Vote Act as it related to Voter Education, it was incumbent upon each of the States to create our own program of work and to tailor them according to the landscape of our populations. I would like to recommend that in the future recipients of Federal programs are given training, guidance and specific instructions to curtail any future concerns or confusion.

If you have further questions regarding HAVA related activities that occurred during my tenure as the Secretary of State, and more importantly during my administration of the HAVA federal funds, I request the opportunity to address your questions in those matters as well. Unfortunately, the newly elected Secretary of State has no knowledge of my implementation of the HAVA funds for the State of New Mexico, and will not consult with me for my input due to political issues between us. I further request that you provide me with a copy of the completed preliminary report.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Vigil-Giron". The signature is written in a cursive, flowing style with a long horizontal flourish at the end.

Rebecca Vigil-Giron
New Mexico Secretary of State
1987-1990, 1999-2002, 2003-2006

Cc: Assistant Inspector General Joseph Ansnick

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