

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board	:	
of Elections, Stuart L. Ulsh, in his	:	
official capacity as County	:	
Commissioner of Fulton County and	:	No. 277 M.D. 2021
in his capacity as a resident, taxpayer	:	No. 3 MAP 2022
and elector in Fulton County, and Randy	:	
H. Bunch, in his official capacity as	:	
County Commissioner of Fulton County	:	
and in his capacity as a resident,	:	
taxpayer and elector of Fulton County,	:	
Petitioners/Appellees	:	
	:	
v.	:	
	:	
Secretary of the Commonwealth,	:	
Respondent/Appellant:	:	

MEMORANDUM & ORDER

NOW, October 27, 2023, upon consideration of Respondent/Appellant’s (Secretary) Application to Enter Proposed Final Appointment Order (Application), Petitioners/Appellees’ (collectively Fulton County or County) response, and the Secretary’s further reply, the Secretary’s Application is GRANTED as modified in the Special Master’s October 27, 2023 Final Appointment Order.

On September 15, 2023, the Special Master issued a Preliminary Appointment Order selecting Pro V&V, Inc. (Pro V&V) to serve as the neutral third-party escrow agent of the voting machines at issue as directed by the Supreme Court’s decision in *County of Fulton v. Secretary of the Commonwealth*, 292 A.3d 974, 1020 (Pa. 2023). The Preliminary Appointment Order, *inter alia*, directed the Secretary to file a Proposed Final Appointment Order setting forth all terms relating to the escrow

arrangement with Pro V&V and including certain necessary terms required by the Special Master. (See Preliminary Appointment Order, 9/15/2023 ¶1.) On October 10, 2023, the Secretary filed the instant Application and attached a Proposed Final Appointment Order executed by Pro V&V proposing final terms to govern the escrow arrangement. On October 17, 2023, the County filed a timely response to the Secretary’s Proposed Final Appointment Order.

In its response, the County largely relodges challenges to the Special Master’s decision to select Pro V&V to serve as the neutral third-party escrow agent for the reasons the County set forth on the record during the August 28, 30, and 31, 2023 impoundment hearing and in its Closing Arguments and Objections filed September 6, 2023. To the extent those arguments, which were previously considered and rejected, are lodged again here, they are denied for the same reasons set forth in the Special Master’s Preliminary Appointment Opinion and Order.¹ In the latter portion of the response, the County makes five “itemized objections” to the Secretary’s Proposed Final Appointment Order, which the Special Master addresses in turn. (See County’s Response at 11-15.)

The County’s first itemized response objects to the definitions section in Paragraph 1 of the Secretary’s Proposed Final Appointment Order to the extent that it “include[s] Pro V&V as the best ‘neutral’ entity to provide the escrow services commanded by the Pennsylvania Supreme Court’s order. . . .” (*Id.* at 11 ¶ 1.) However, Paragraph 1 of the Secretary’s Proposed Final Appointment Order does not define “Pro V&V” or any other term as the best neutral entity to provide escrow services. To the extent the County reasserts its argument that Pro V&V is not

¹ To the extent the County’s response could be liberally read as a request for reconsideration of the Special Master’s Preliminary Appointment Order, any request for reconsideration is untimely filed. See Pa.R.A.P. 2542.

suitably neutral to serve as escrow agent, that argument has been explicitly rejected in the Special Master's Preliminary Appointment Opinion and Order and will not be entertained again here. (*See* Preliminary Appointment Opinion and Order at 50-54.)

The County's second itemized objection is two-fold. First, the County objects to Paragraph 2 of the Secretary's Proposed Final Appointment Order to the extent it assumes that Pro V&V's Alabama facility is a neutral location. Next, the County objects to the inventorying process described in Paragraph 2.2 of the Proposed Final Appointment Order, alleging that Pro V&V is not competent to perform the functions noted and the very act of inventorying would compromise the voting machines to the point that the County could not rely on those machines' evidentiary value in pending litigation against Dominion Voting Systems, Inc. (Dominion). Both arguments are contrary to the evidence adduced at the impoundment hearing, and were previously considered and rejected in the Special Master's Preliminary Appointment Opinion and Order. (*Id.* at 46-50.)


Third, the County alleges the appointment of Pro V&V is not the most cost-effective option and challenges the transport of the voting equipment across several state lines to reach the Alabama facility. The Special Master rejects the County's argument regarding the cost of Pro V&V's escrow service in accordance with the Preliminary Appointment Opinion and Order. (*Id.* at 54-56.) To the extent the County is concerned with jurisdictional uncertainties during the transport of the voting machines, Section 5.1 of the Final Appointment Order provides that "[a]ll disputes or motions regarding this Order or the Escrow Services shall be governed by the substantive and procedural law of the Commonwealth of Pennsylvania." (Final Appointment Order ¶ 5.1.)

Fourth, the County objects to Paragraph 4.1 of the Secretary’s Proposed Final Appointment Order to the extent it requires Pro V&V’s counsel to enter an appearance in this matter. The County vaguely avers that allowing Pro V&V to secure legal counsel will “automatically shield [Pro V&V] from any and all liabilities that it might incur or bring upon itself vis-à-vis Fulton County with respect to handling of the voting machines, the breach of contract action involving Fulton County and Dominion, and any other future legal proceeding in which Pro V&V may be asked to testify or produce evidence and documents pertinent to the execution of its services as the purported entity providing the ‘neutral’ escrow services.” (County’s Response at 14 ¶ 4.) The County further states that “allowing Pro V&V to form a lawyer-client relationship in this Court for purposes of the performance of its services and agreement with the parties, including Fulton County, will make it impossible for Fulton County to seek recourse against Pro V&V in any future legal proceeding. . . .” (*Id.*) Initially, the Special Master notes that the Secretary’s Proposed Final Appointment Order includes Paragraph 4.1 at the Special Master’s direction “so that the Court may appropriately communicate with counsel for Pro V&V directly.” (*See* Preliminary Appointment Order ¶ 1(e).) Moreover, not even a charitable reading of this provision could be interpreted to function as shielding Pro V&V from liability or render any future legal recourse an impossibility, and therefore the Special Master rejects this underdeveloped and unsupported challenge.

In a similar vein, the County’s fifth and final itemized objection challenges Paragraph 5 of the Secretary’s Proposed Final Appointment Order on the grounds that the language allows Pro V&V to waive or avoid liability for actions and conduct occurring outside the Commonwealth of Pennsylvania. Again, this argument is

underdeveloped and does not align with the actual language included in Paragraph 5 of the Secretary's Proposed Final Appointment Order. To the extent the County is concerned that Pro V&V will avoid liability because the escrow will take place outside of the Commonwealth of Pennsylvania, the Final Appointment Order includes a choice of law provision and Pro V&V has consented to the jurisdiction of the Pennsylvania courts, thus alleviating any such concerns. (*See* Secretary's Proposed Final Appointment Order, Ex.1 (consenting to jurisdiction); Final Appointment Order ¶ 5.1 (setting forth choice of law provision).)

For the reasons articulated above, the Special Master hereby grants the Secretary's Application as modified and enters the subsequent Final Appointment Order.



RENÉE COHN JUBELIRER, President Judge of the
Commonwealth Court of Pennsylvania Appointed as
Special Master