

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CITY OF HOUSTON

V.

**AMERICAN TRAFFIC
SOLUTIONS, INC.**

§
§
§
§
§
§

CIVIL ACTION NO.

4:10 CV 4545

United States Courts
Southern District of Texas
FILED

NOV 15 2010

David J. Bradicy, Clerk of Court

COMPLAINT FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the City of Houston [Houston], plaintiff, complaining of American Traffic Solutions, Inc. [ATS], defendant, and respectfully shows the Court the following:

PARTIES

1. Houston¹ is a Texas home-rule municipal corporation, situated primarily in Harris County, Texas.

2. ATS is a Kansas corporation, doing business in Texas and may be given notice of this suit by serving summons together with a copy of this complaint attached upon its president, James D. Tuton, at his office and usual place of business, American Traffic Solutions, Inc., 7681 E. Gray Road, Scottsdale, Arizona 85254.

¹ In accordance with TEX. LOC. GOV'T CODE § 9.008(b), Houston respectfully requests this Court to take judicial notice of its published Charter and Houston's status thereunder as a Texas home-rule city.

JURISDICTION & VENUE

3. There is diversity of citizenship between the parties and the value of the right to be protected or the extent of the injury to be prevented in this matter exceeds \$75,000.00. Accordingly, this Court has jurisdiction over the claims brought in this suit pursuant to 28 U.S.C. § 1332(a)(1). Additionally, in accordance with Rule 57, FED. R. CIV. PROC. and 28 U.S.C. §§ 2201-2202, this is an action for declaratory judgment under the laws of the United States for the purpose of determining questions in actual controversy between the parties.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(2) & (b)(2), because the events giving rise to these claims occurred in this district.

INTRODUCTION

5. In 2006, Houston contracted with ATS to provide a photographic red light enforcement system and services. On November 2, 2010, Proposition 3, proposing a Charter Amendment that would continue the use of cameras to enforce traffic laws, was defeated. As a result of that election, Houston has terminated its contract with ATS. This suit requests a declaration by this Court regarding Houston's rights and obligations under the contract with ATS which was terminated as a result of the election.

FACTUAL BACKGROUND

A. The Ordinance.

6. On December 21, 2004, Houston's City Council adopted an ordinance authorizing the use of photographic traffic signal enforcement.² A copy of the Ordinance, as amended and as it was in effect on November 1, 2010, is attached hereto as Exhibit A.

B. The Contract.

7. On May 31, 2006, by Ordinance No. 2006-567, Houston's City Council approved and authorized a contract between Houston and ATS for a red light camera enforcement system and services [Contract]. A copy of the Contract is attached as Exhibit B. On May 27, 2009, by Ordinance No. 2009-461, Houston's City Council approved and authorized a first amendment to the Contract, a copy of which attached as Exhibit B-1.

C. The petition.

8. The only process for non-elected citizens to propose the repeal of an existing ordinance, the referendum process, is set forth in Article VII-b. § 3 of Houston's Charter. However, on August 9, 2010, a petition to

² Ordinance No. 2004-1312, adopted by Council on December 21, 2004, was later codified as Article XIX of Chapter 45 of the CITY OF HOUSTON CODE OF ORDINANCES entitled "Photographic Traffic Signal Enforcement Systems" [Ordinance]. and was later amended on May 31, 2006, by Ordinance No. 2006-566; on April 11, 2007, by Ordinance No. 2007-464; on August 29, 2007, by Ordinance No. 2007-985; and on January 9, 2008, by Ordinance No. 2008-27.

amend Houston’s Charter—under Chapter 9 of the TEXAS LOCAL GOVERNMENT CODE—to prevent the use of red light cameras to enforce traffic laws [Petition] was submitted to Houston’s City Secretary.³ On August 24, 2010, Houston’s City Secretary certified to City Council that the Petition met the requirements of Chapter 9 of the TEXAS LOCAL GOVERNMENT CODE.⁴ That same day, Houston’s City Council passed and adopted Houston Ordinance No. 2010-678, placing the measure on the ballot for the November 2, 2010 special election as Proposition #3.

D. The November 2, 2010, special election.

9. The ballot language of Proposition 3 was:

Shall the City of Houston continue to use red light cameras to enforce state or local laws relating to traffic safety?

In accordance with the requirements of TEX. ELEC. CODE § 67.001, *et seq.*, on November 15, 2010, Houston’s City Council canvassed the results of the November 2, 2010 special election and determined that a majority voted

³ As a home-rule city, Houston’s Charter is its organic act; it is the fundamental law of the municipality just as a constitution is the fundamental law of a state. Unlike ordinances, which can be enacted and repealed at will by the governing body (under Article VII of the Charter, copy attached as Exhibit C) or by the non-elected citizens of Houston (under Article VII-b of the Charter, copy attached as Exhibit D), Houston’s Charter can only be amended by a vote of the people in accordance with the procedures set forth in Chapter 9 of the TEXAS LOCAL GOVERNMENT CODE.

⁴ Once the City Secretary certifies that the petition meets the requirements of Chapter 9 of the Local Government Code, council has a ministerial duty to put the measure on the ballot.

“NO” on Proposition 3, thereby amending Houston’s Charter.

E. The controversy.

10. Confronted with an impending change to its Charter, on November 10, 2010, Houston provided written notice to ATS that, if—after Houston’s City Council had canvassed the results of the November 2, 2010, special election—Council were to find and determine that Proposition 3 had failed, then the Contract would be terminated. Exhibit E. ATS disagreed that Houston may terminate the Contract under these circumstances. Exhibit F. On November 15, 2010, following the canvass of the results of the election regarding Proposition 3 by Houston’s City Council, Houston notified ATS that the Contract had been terminated. Exhibit G.

CAUSE OF ACTION

11. Houston brings this action under Rule 57, FED R. CIV. P. and the declaratory judgment provisions of 28 U.S.C. §§ 2201-2202, and requests this Court, after consideration, to declare the rights and obligations of the parties under the express terms of the Contract. Specifically, a controversy has arisen between Houston and ATS with respect to the interpretation of certain terms and conditions of the Contract, and parties’ rights and obligations, with regard to termination of the Contract in light of the results of the election on the Proposition 3 measure. Houston believes that it has

acted reasonably and lawfully in terminating the Contract, but seeks a declaration with regard to its rights and obligations regarding the termination of the Contract under these circumstances. Such a declaration will provide clarity, remove uncertainty, avoid controversy and enhance the efficiency of the judicial process with regard to the parties' rights under the Contract.

PRAYER FOR RELIEF

FOR THESE REASONS, Houston respectfully requests that this Honorable Court enter a judgment articulating the rights and liabilities of the City under the Contract, as amended, and for such other and further relief to which Houston may hereinafter show itself to be justly entitled.

Respectfully submitted,

DAVID M. FELDMAN

City Attorney

LYNETTE K. FONS

First Assistant City Attorney for Litigation

By: 

Bertrand L. Pourteau, II

Sr. Assistant City Attorney

State of Texas Bar No. 16190300

Fed. I.D # 6553

P.O. Box 368

Houston, Texas 77001-0368

(832) 393-6463

(832) 393-6259 (Fax)

Attorneys for the City of Houston

Houston, Texas, Code of Ordinances >> - CODE OF ORDINANCES >> Chapter 45 - TRAFFIC >> ARTICLE XIX. - PHOTOGRAPHIC TRAFFIC SIGNAL ENFORCEMENT SYSTEMS >>

ARTICLE XIX. - PHOTOGRAPHIC TRAFFIC SIGNAL ENFORCEMENT SYSTEMS

[194]

Sec. 45-481. - Purpose

Sec. 45-482. - Definitions.

Sec. 45-483. - Imposition of civil penalty and fees.

Sec. 45-484. - Enforcement; procedures.

Sec. 45-485. - Administrative adjudication hearing; appeal.

Sec. 45-486. - Enforcement.

Sec. 45-487. - Disposition of revenue.

Secs. 45-488—45-500. - Reserved.

| Sec. 45-481. - Purpose

The purpose of this article is to implement photographic traffic signal enforcement systems in accordance with Chapter 707 of the Texas Transportation Code.

(Ord. No. 07-985, § 1, 8-29-07)

| Sec. 45-482. - Definitions.

As used in this article, the following words and terms shall have the meanings ascribed in this section, unless the context of their usage clearly indicates another meaning:

Owner of a motor vehicle means the owner of a motor vehicle as shown on the motor vehicle registration records of the Texas Department of Transportation or the analogous department or agency of another state or country.

Photographic traffic signal enforcement system means a system that:

- (1) Consists of a camera system and vehicle sensor installed to exclusively work in conjunction with an electronically operated traffic control signal; and
- (2) Is capable of producing at least two recorded images that depict the license plate attached to the front or the rear of a motor vehicle that is not operated in compliance with the instructions of the traffic control signal.

Recorded image means a photographic or digital image that depicts the front or rear of a motor vehicle.

Traffic control signal means a traffic control device as defined by Section 541.304 of the Texas Transportation Code.

| Sec. 45-483. - Imposition of civil penalty and fees.

- (a) The owner of a motor vehicle is liable for a civil penalty of \$75.00 if, while facing only a steady red signal displayed by an electronically operated traffic control signal located in the city, the vehicle is operated in violation of the instructions of that traffic control signal, as specified by Section 544.007(d) of the Texas Transportation Code.
- (b) An owner of a motor vehicle who fails to timely pay the civil penalty shall be subject to a late payment penalty of \$25.00.
- (c) An owner of a motor vehicle who pays a civil penalty or late payment penalty by credit card shall be assessed a processing fee in accordance with Chapter 132 of the Texas Local Government Code.

(Ord. No. 07-985, § 1, 8-29-07)

EXHIBIT

A

| Sec. 45-484. - Enforcement; procedures.

- (a) The police department, municipal courts judicial department, and the municipal courts administration department shall be responsible for the enforcement and administration of this article.

- (b) The police chief, the presiding judge of the municipal courts, and the chief clerk of the municipal courts shall establish and implement appropriate procedures to effect the policy of this article.
- (c) The imposition of a civil penalty under this article is initiated by the mailing of a notice of violation to the owner of a motor vehicle, pursuant to Chapter 707 of the Texas Transportation Code.

(Ord. No. 07-985, § 1, 8-29-07)

Sec. 45-485. - Administrative adjudication hearing; appeal.

- (a) An administrative adjudication hearing shall be held before an adjudication hearing officer pursuant to Chapter 707 of the Transportation Code.
- (b) Adjudication hearing officers shall be designated as follows: such officers shall be appointed by the mayor and confirmed by the city council for a term of two years, which term shall begin as of the date the appointment is confirmed by the city council. An adjudication hearing officer shall continue in office after his term has expired until he is reappointed or his successor has been appointed and qualified; provided, that no holdover period, regardless of duration, shall ever be deemed a reappointment of any adjudication hearing officer. If any office becomes vacant during a term, then a qualified person shall be appointed and confirmed for a new two-year term beginning on the date of appointment. Adjudication hearing officers shall be subject to removal at any time by the mayor without the consent of the city council. Adjudication hearing officers shall be subject to assignment by the presiding judge of the municipal courts.
- (c) Adjudication hearing officers shall have the authority to administer oaths and to issue orders compelling the attendance of witnesses and production of documents.
- (d) An order compelling the attendance of witnesses or production of documents may be enforced by the municipal courts judicial department.
- (e) A person who receives a notice of violation under this article may contest the imposition of the civil penalty specified in the notice of violation by filing a written request for an administrative adjudication hearing pursuant to Chapter 707 of the Transportation Code.
- (f) On receipt of a timely request for an administrative adjudication hearing, an adjudication hearing officer shall notify the contesting person of the date and time of hearing. The hearing shall be held within 45 days of such request.
- (g) The owner of a motor vehicle determined by an adjudication hearing officer to be liable for a civil penalty may appeal that determination to a judge by filing an appeal petition with the clerk of the municipal courts pursuant to Chapter 707 of the Texas Transportation Code. The petition shall be accompanied by the payment of an appeal fee, which fee shall be \$10.00 and which shall be refunded to an owner of a motor vehicle who prevails in an appeal.

(Ord. No. 07-985, § 1, 8-29-07; Ord. No. 08-27, § 2, 1-9-08)

Sec. 45-486. - Enforcement.

The city attorney is authorized to file suit to enforce collection of a civil penalty assessed under this article.

(Ord. No. 07-985, § 1, 8-29-07)

Sec. 45-487. - Disposition of revenue.

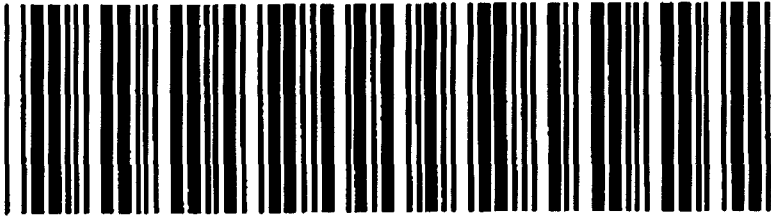
All penalties collected from the imposition of civil liability pursuant to this article first shall be expended to defray costs associated with the installation, operation, and maintenance of photographic traffic signal enforcement systems, and any remaining funds shall be deposited in accordance with Chapter 707 of the Texas Transportation Code. The city shall deposit its portion of the remaining funds in the police special services fund to be used in accordance with Chapter 707 of the Texas Transportation Code.

(Ord. No. 08-27, § 3, 1-9-08)

Secs. 45-488—45-500. - Reserved.

FOOTNOTE(S):

⁽¹⁹⁴⁾ **Editor's note**— Ord. No. 2007-985, § 1, adopted August 29, 2007, amended Ch. 33, Art. XIX, in its entirety to read as herein set out. Formerly, said article pertained to photographic traffic monitoring systems and derived from Ord. No. 04-1312, § 2, 12-21-04 and amendatory ordinances: Ord. No. 06-566, § 4, 5-31-06; Ord. No. 07-464, § 20, 4-11-07. ([Back](#))



City of Houston - Contracts

Contract #: C62248
Vendor Name: AMERICAN TRAFFIC SOLUTIONS, INC
Ordinance #: 2006-0567



#Name?

EXHIBIT

B



CITY OF HOUSTON

City Secretary

62248

Interoffice

Correspondence

To: Ms. Annise Parker
City Controller

From: Anna Russell
City Secretary

Dept: POLICE (10)

FUND: N/FUNDING

Date: June 27, 2006

Attn:

Subject: Contract

Dear Ms. Parker:

Term: Effec. CS date and remains in

The following are sent to you for handling to completion:

Effect for One (5) year

4 Letter Agreements relating to Section 3.1 of the Photo Red Light Camera Enforcement Agreement and copy of memo from Susan Taylor. Term, unless sooner terminated.

4 Agreements Renewal Term: Director may extend the original term

Between City and American Traffic Solutions, Inc. for (1) 5-year renewal w/30 days written notice.

Authorized by Ordinance 2006-0567

Passed on May 31, 2006

Executed by Mayor June 27, 2006

Vendor:

Tax ID#:

Yours Truly,

Anna Russell
City Secretary

CS = 4-28-06

AR:gg

cc: Chief Hurtt

06 JUN 27 AM 10:59

CONTROLLER'S

COPIES PICKED UP.

BY

[Signature]

DEPT REPRESENTATIVE

6/29/06

DATE

62248

City of Houston, Texas Ordinance No. 2006-567

AN ORDINANCE APPROVING AND AUTHORIZING A CONTRACT BETWEEN THE CITY AND AMERICAN TRAFFIC SOLUTIONS, INC. FOR A PHOTO RED LIGHT CAMERA ENFORCEMENT SYSTEM AND SERVICES; CONTAINING PROVISIONS RELATING TO THE SUBJECT; AND DECLARING AN EMERGENCY.

* * * *

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. The City Council hereby approves and authorizes the contract, agreement or other undertaking described in the title of this Ordinance, in substantially the form as shown in the document which is attached hereto and incorporated herein by this reference. The Mayor is hereby authorized to execute such document and all related documents on behalf of the City of Houston. The City Secretary is hereby authorized to attest to all such signatures and to affix the seal of the City to all such documents.

Section 2. The Mayor is hereby authorized to take all actions necessary to effectuate the City's intent and objectives in approving such agreement, agreements or other undertaking described in the title of this ordinance, in the event of changed circumstances.

Section 3. The City Attorney is hereby authorized to take all action necessary to enforce all legal obligations under said contract without further authorization from Council.

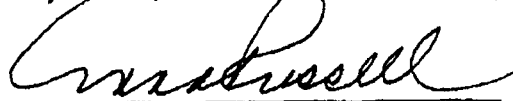
Section 4. There exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor; however, in the event that the Mayor fails to sign this Ordinance within five days after its passage and adoption, it shall take effect in accordance with Article VI, Section 6, Houston City Charter.

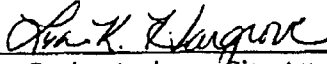
PASSED AND ADOPTED this 31st day of May, 2006.

APPROVED this _____ day of _____, 20____.

Mayor of the City of Houston, Texas

Pursuant to Article VI, Section 6, Houston City Charter, the effective date of the foregoing Ordinance is JUN 06 2006.


 City Secretary

(Prepared by Legal Dept. )
 (LKH:pr 5/17/06) Senior Assistant City Attorney
 (Requested by Chief of Police, HPD)
 (L.D. File No. _____)

H:\LKH\ORD\NC\ATSred.wpd

AYE	NO	
✓		MAYOR WHITE
••••	••••	COUNCIL MEMBERS
	✓	LAWRENCE
✓		JOHNSON
✓		CLUTTERBUCK
	✓	EDWARDS
	✓	WISEMAN
✓		KHAN
	✓	HOLM
✓		GARCIA
✓		ALVARADO
		<small>ABSENT - NOT OF CITY BUSINESS</small> BROWN
✓		LOVELL
	✓	SEKULA-GIBBS
✓		GREEN
	✓	BERRY
CAPTION	ADOPTED	

MAY 017 Rev.1/04

CAPTION PUBLISHED IN DAILY COURT
 REVIEW
 DATE: JUN 06 2006

THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

I. PARTIES

A. Address

THIS AGREEMENT FOR A PHOTO RED LIGHT CAMERA ENFORCEMENT SYSTEM AND SERVICES ("Agreement") is made by and between the CITY OF HOUSTON, TEXAS ("City"), a municipal corporation, and AMERICAN TRAFFIC SOLUTIONS, INC. a Kansas corporation doing business in Texas ("Contractor").

The initial addresses of the parties, which one party may change by giving written notice to the other party, are as follows:

City

City of Houston
Chief, Houston Police Department
P. O. Box 1562
Houston, Texas 77054

Contractor

American Traffic Solutions, Inc.
14861 North Scottsdale Road
Suite 109
Scottsdale, Arizona 85254

The Parties agree as follows:

B. Table of Contents

This Agreement consists of the following sections:

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American Traffic Solutions

480.368.0900 • Fax: 480.607.0901 • www.atsol.com • 14861 North Scottsdale Road • Suite 109 • Scottsdale, AZ 85254

C62248

06-0567

June 6, 2006

Mr. Frank Rodriguez
Purchasing Agent
City of Houston
City Hall Annex
90 Bagby
Houston, TX 77002

Re: Amendment to ATS Agreement for a Photo Red Light Camera Enforcement System and Services

Dear Mr. Rodriguez:

This letter is to confirm our agreement to modify the pricing terms of the above-referenced agreement. Specifically, Section 3.1 of Exhibit "G" should be modified to reflect a reduction in the monthly minimum of citations issued per month from 750 to 500. Section 3.1 should therefore be replaced with the following paragraph:

3.1 Minimum Fee:

The minimum fee the City shall pay Contractor during the initial term shall be equal to the sum of the fixed fees for equipment and maintenance costs plus the monthly citation processing costs based on a systemwide average of 500 issued citations per month.

Please feel free to contact me if you have any questions, or require further clarification.

Sincerely,

American Traffic Solutions, Inc.

James D. Tuton
President

ats contract amendment no 1

ATTEST/SEAL:



City Secretary

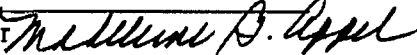
CITY OF HOUSTON, TEXAS

Signed by:



Mayor

COUNTERSIGNED BY:


City Controller 

APPROVED AS TO FORM:



Sr. Assistant City Attorney

L.D. File No.

DATE COUNTERSIGNED:



THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

I. PARTIES

A. Address

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The initial addresses of the parties, which one party may change by giving written notice to the other party, are as follows:

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City of Houston
Chief, Houston Police Department
P. O. Box 1562
Houston, Texas 77054

Contractor

American Traffic Solutions, Inc.
14861 North Scottsdale Road
Suite 109
Scottsdale, Arizona 85254

The Parties agree as follows:

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EXHIBITS

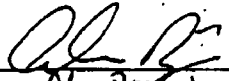
- A. Scope of Services**
- B. Equal Employment Opportunity**
- C. MWBE Subcontract Terms**
- D. Drug Policy Compliance Agreement**
- E. Certificate of No Safety Impact Positions**
- F. Drug Policy Compliance Declaration**
- G. Payments to Contractor**
- H. System Requirements**
- I. Violation Processing**
- J. Reports**
- K. Key Personnel**
- L. Intentionally Deleted**
- M. Equipment**
- N. Chain of Custody**
- O. Public Awareness Campaign**
- P. Citations Issuance/Collections Processing**
- Q. Letter of Credit**

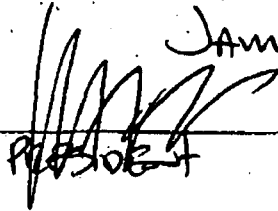
C. Signatures

The Parties have executed this Agreement in multiple copies, each of which is an original.

APPROVED AS TO FORM:

AMERICAN TRAFFIC SOLUTIONS, INC.

By: 
Name: Adam Drogosz
Title: Executive Vice President


By: 
James D. Tuton
President

ATTEST/SEAL:

CITY OF HOUSTON, TEXAS


City Secretary

Signed by:


Mayor Martha L. Stein

APPROVED:

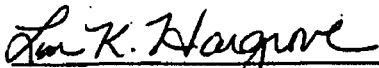
COUNTERSIGNED:


Chief, Houston Police Department


City Controller Madeline R. Appel

APPROVED AS TO FORM:

DATE COUNTERSIGNED:


Sr. Assistant City Attorney
L.D. File No.

6-28-06

II. DEFINITIONS

As used in this Agreement, the following terms have the meanings set out below:

"Agreement" means this contract between the Parties, including all exhibits and any written amendments authorized by City Council and Contractor.

"Approach" means one direction of travel of up to four lanes on a road or a traffic Intersection.

"City" is defined in the preamble of this Agreement and includes its successors and assigns.

"Citations" mean a Citation issued by a competent state or municipal law enforcement agent or agency or by a court of competent jurisdiction relating to a Violation documented or evidenced by the Photo Red Light Camera Enforcement System.

"Collection Revenue" means that revenue collected solely from the issuance of Citations, less court fees and returned check fees, as defined by City policy.

"Contractor" is defined in the preamble of this Agreement and includes its successors and assigns.

"Countersignature Date" means the date shown as the date countersigned on the signature page of this Agreement.

"Director" means the Chief of Police of the Houston Police Department, or the person he or she designates.

"Dummy System" means a non-operational Photo Red Light Camera Enforcement System that looks identical to operational cameras, but does not issue a Notice of Violation.

"Equipment" initially means those items of hardware and software described in Exhibit "M" which collectively monitor, or assist in monitoring, red light violations, traffic speed or

other traffic movements and issue Citations for traffic Violations or as otherwise enhanced or revised with the approval of the Director under this Agreement.

"HPD" means the City of Houston Police Department.

"Intersection" means the place or area where two or more streets intersect.

"Notice of Violation" means a notification or notice that is mailed to a violator that is photographed as running a red light at an Intersection Approach that is monitored by a Photographic Red Light Camera Enforcement System.

"Operational Time" means the actual time that a Photo Red Light Camera Enforcement System is monitoring traffic.

"Parties" mean all the entities set out in the Preamble who are bound by this Agreement.

"Person" or "Persons" means any individual, partnership, joint venture, corporation, trust, unincorporated association, governmental authority or political subdivision thereof or any other form of entity.

"Photo Red Light Camera Enforcement System" or "System" means that Equipment installed and utilized for monitoring red light Violations, traffic speed or other traffic movements and issue Citations for traffic Violations.

"Violation" means failure to obey an applicable traffic law or regulations, including, without limitation, failure to obey a traffic signal, operating a motor vehicle in excess of the posted speed limit, and operating a motor vehicle without displaying a valid license plate.

III. DUTIES OF CONTRACTOR

A. Scope of Services

In consideration of the payments specified in this Agreement, Contractor shall provide all labor, material, and supervision necessary to provide a complete end-to-end Photo Red Light

Camera Enforcement System, and other services as described in this Agreement and the Exhibits attached hereto. Specifically Contractor's services shall consist of completing the services set forth in Exhibit "A". Notwithstanding any dates, notice periods and other provisions contained in this Agreement or the Exhibits attached hereto, all services shall be performed in accordance with Chapter 45, Article XIX, of the City of Houston Code (the "Code") as amended from time to time.

Contractor shall not initiate any services under this Agreement until it receives a written Notice to Proceed for such services from the Director.

Contractor shall assign the key personnel identified in Exhibit "K" to work on the services to be provided under this Agreement. Contractor shall not replace any of these key personnel without the Director's prior written consent. Contractor shall notify Director if replacement is necessary due to an event outside Contractor's control, such as resignation, termination, illness or death.

The Contractor shall assign a Contractor Project Manager to this project. The Contractor Project Manager shall be the single point of contact responsible for all work undertaken by the Contractor. The Contractor Project Manager shall be dedicated solely to the City's project and shall maintain a substantial presence in Houston during the period of installation of the first fifty (50) cameras and thereafter for no less than four (4) months. At all times, the Contractor Project Manager shall be accessible by telephone and e-mail, shall address project issues in a timely manner and shall be on site in Houston whenever necessary to ensure the success of the project. Contractor shall also provide the Director with the name, e-mail address and telephone number of an alternate person that shall answer any questions if Contractor's Project Manager is not available.

B. RELEASE

CONTRACTOR AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S SOLE OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY.

C. INDEMNIFICATION

CONTRACTOR AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

- (1) CONTRACTOR'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS' (COLLECTIVELY IN NUMBERED PARAGRAPHS 1-3,

"CONTRACTOR") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;

(2) THE CITY'S AND CONTRACTOR'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT; AND

(3) THE CITY'S AND CONTRACTOR'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER CONTRACTOR IS IMMUNE FROM LIABILITY OR NOT.

CONTRACTOR SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR YEARS AFTER THE AGREEMENT TERMINATES. CONTRACTOR'S INDEMNIFICATION IS LIMITED TO \$500,000 PER OCCURRENCE. CONTRACTOR SHALL NOT INDEMNIFY THE CITY FOR THE CITY'S SOLE NEGLIGENCE.

D. INDEMNIFICATION PROCEDURES

(1) Notice of Claims. If the City or Contractor receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other party within 10 days. The notice must include the following:

- (a) a description of the indemnification event in reasonable detail,
- (b) the basis on which indemnification may be due, and
- (c) the anticipated amount of the indemnified loss.

This notice does not estop or prevent the City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice.

If the City does not provide this notice within the 10 day period, it does not waive any right to

indemnification except to the extent that Contractor is prejudiced, suffers loss, or incurs expense because of the delay.

(2) Defense of Claims

(a) Assumption of Defense. Contractor may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. Contractor shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Contractor must advise the City as to whether or not it will defend the claim. If Contractor does not assume the defense, the City shall assume and control the defense, and all defense expenses constitute an indemnification loss.

(b) Continued Participation. If Contractor elects to defend the claim, the City may retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. Contractor may settle the claim without the consent or agreement of the City, unless it (i) would result in injunctive relief or other equitable remedies or otherwise require the City to comply with restrictions or limitations that adversely affect the City; (ii) would require the City to pay amounts that Contractor does not fund in full, (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

E. Insurance

Contractor shall maintain in effect certain insurance coverage, which is described as follows:

(1) Minimum Insurance Requirements. Contractor shall maintain the following insurance coverage in the following amounts:

(Coverage)

(Limit of Liability)

Workers' Compensation

Statutory for Workers' Compensation

Employer's Liability

Bodily Injury by accident \$500,000 (each accident)
Bodily Injury by Disease \$500,000 (policy limit)
Bodily Injury by Disease \$500,000 (each employee)

Commercial General Liability:
Including Broad Form Coverage,
Contractual Liability, Bodily and
Personal Injury, and Completed
Operations

Bodily Injury and Property
Damage, Combined Limits of
\$1,000,000 each Occurrence
and \$1,000,000 aggregate

Automobile Liability Insurance
(for vehicles Contractor
uses in performing under this
Agreement, including Employer's
Non-Owned and Hired Auto
Coverage)

\$1,000,000 combined single limit

Crime Bond (covering Dishonesty, Disappearance and Destruction of property assets by Employees of Contractors), with the City of Houston named as "Loss Payee" as their interest may appear; with Form C, "inside and outside coverage" attached, covering theft of Contractor's and City's property or assets.

Defense costs are excluded from the face amount of the policy.
Aggregate Limits are per 12-month policy period
unless otherwise indicated.

- (2) Form of Policies. The Director may approve the form of the insurance policies, but nothing the Director does or fails to do relieves Contractor from its duties to provide the required coverage under this Agreement. The Director's actions or inactions do not waive the City's rights under this Agreement.
- (3) Issuers of Policies. The issuer of any policy (1) shall have a Certificate of Authority to transact insurance business in Texas or (2) shall be an eligible non-admitted insurer in the State of Texas and have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide.

- (4) Insured Parties. Each policy, except those for Workers' Compensation, and Employer's Liability, must name the City (and its officers, agents, and employees) as Additional Insured parties on the original policy and all renewals or replacements.
- (5) Deductibles. Contractor shall be responsible for and pay any claims or losses to the extent of any deductible amounts and waives any claim it may have for the same against the City, its officers, agents, or employees.
- (6) Cancellation. Each policy must state that it may not be canceled, materially modified, or nonrenewed unless the insurance company gives the Director 30 days' advance written notice. Contractor shall give written notice to the Director within five days of the date on which total claims by any party against Contractor reduce the aggregate amount of coverage below the amounts required by this Agreement. In the alternative, the policy may contain an endorsement establishing a policy aggregate for the particular project or location subject to this Agreement.
- (7) Subrogation. Each policy must contain an endorsement to the effect that the issuer waives any claim or right of subrogation to recover against the City, its officers, agents, or employees.
- (8) Endorsement of Primary Insurance. Each policy, except Workers' Compensation and Professional Liability (if any), must contain an endorsement that the policy is primary to any other insurance available to the Additional Insured with respect to claims arising under this Agreement.

(9) Liability for Premium. Contractor shall pay all insurance premiums, and the City shall not be obligated to pay any premiums.

(10) Subcontractors. Contractor shall require all subcontractors to carry insurance naming the City as an additional insured and meeting all of the above requirements except amount. The amount must be commensurate with the amount of the subcontract, but in no case less than \$500,000 per occurrence. Contractor shall provide copies of insurance certificates to the Director.

(11) Proof of Insurance.

(a) Prior to execution of this Agreement, Contractor shall furnish the Director with Certificates of Insurance, along with an Affidavit from Contractor confirming that the Certificates accurately reflect the insurance coverage maintained. If requested in writing by the Director, Contractor shall furnish the City with certified copies of Contractor's actual insurance policies.

(b) Contractor shall continuously and without interruption, maintain in force the required insurance coverages specified in this Section. If Contractor does not comply with this requirement, the Director, at his or her sole discretion, may

- (1) immediately suspend Contractor from any further performance under this Agreement and begin procedures to terminate for default, or
- (2) purchase the required insurance with City funds and deduct the cost of the premiums from amounts due to Contractor under this Agreement.

The City shall never waive or be estopped to assert its right to terminate this Agreement because of its acts or omissions regarding its review of insurance documents.

(12) Other Insurance. If requested by the Director, Contractor shall furnish adequate evidence of Social Security and Unemployment Compensation Insurance, to the extent applicable to Contractor's operations under this Agreement.

F. Licenses and Permits

Contractor shall obtain, maintain, and pay for all licenses, permits, and certificates required by any statute, ordinance, rule, or regulation.

G. Compliance with Laws

Contractor shall comply with all applicable state and federal laws and regulations and the City Charter and Code of Ordinances.

H. Compliance with Equal Opportunity Ordinance

Contractor shall comply with the City's Equal Employment Opportunity Ordinance as set out in Exhibit "B".

I. MWBE Compliance

Contractor shall comply with the City's Minority and Women Business Enterprise ("MWBE") programs as set out in Chapter 15, Article V of the City of Houston Code of Ordinances. Contractor shall make good faith efforts to award subcontracts or supply agreements in at least 10% of the total value of this Agreement to MWBEs. Contractor acknowledges that it has reviewed the requirements for good faith efforts on file with the City's Affirmative Action Division and will comply with them.

Contractor shall require written subcontracts with all MWBE subcontractors and shall submit all disputes with MWBEs to binding arbitration to be conducted in Houston, Texas, if directed to do so by the Affirmative Action Division Director. MWBE subcontracts must contain the terms set out in Exhibit "C". If Contractor is an individual person (as distinguished

from a corporation, partnership, or other legal entity), and the amount of the subcontract is \$50,000 or less, the subcontract must also be signed by the attorneys of the respective parties.

J. Drug Abuse Detection and Deterrence

(1) It is the policy of the City to achieve a drug-free workforce and workplace. The manufacture, distribution, dispensation, possession, sale, or use of illegal drugs or alcohol by contractors while on City Premises is prohibited. Contractor shall comply with all the requirements and procedures set forth in the Mayor's Drug Abuse Detection and Deterrence Procedures for Contractors, Executive Order No. 1-31 ("Executive Order"), which is incorporated into this Agreement and is on file in the City Secretary's Office.

(2) Before the City signs this Agreement, Contractor shall file with the Contract Compliance Officer for Drug Testing ("CCODT"):

- (a) a copy of its drug-free workplace policy,
- (b) the Drug Policy Compliance Agreement substantially in the form set forth in Exhibit "D," together with a written designation of all safety impact positions and,
- (c) if applicable (e.g. no safety impact positions), the Certification of No Safety Impact Positions, substantially in the form set forth in Exhibit "E."

If Contractor files a written designation of safety impact positions with its Drug Policy Compliance Agreement, it also shall file every 6 months during the performance of this Agreement or on completion of this Agreement if performance is less than 6 months, a Drug Policy Compliance Declaration in a form substantially similar to Exhibit "F." Contractor shall submit the Drug Policy Compliance Declaration to the CCODT within 30 days of the expiration of each 6-month period of performance and within 30 days of completion of this Agreement.

The first 6-month period begins to run on the date the City issues its Notice to Proceed or if no Notice to Proceed is issued, on the first day Contractor begins work under this Agreement.

(3) Contractor also shall file updated designations of safety impact positions with the CCODT if additional safety impact positions are added to Contractor's employee work force.

(4) Contractor shall require that its subcontractors comply with the Executive Order, and Contractor shall secure and maintain the required documents for City inspection.

K. Performance Bond

(1) Contractor shall furnish an initial performance bond for \$1,000,000 conditioned on Contractor's full and timely performance of all terms, conditions and covenants of this Agreement. The initial performance bond shall remain in place for one (1) year. Thereafter, Contractor shall furnish a performance bond for \$500,000 conditioned upon Contractor's full and timely performance of all terms, conditions and covenants of this Agreement. The second bond shall remain in place for one (1) year. Upon expiration of the second bond, Contractor shall furnish a third performance bond for \$250,000 conditioned upon Contractor's full and timely performance of all terms, conditions and covenants of this Agreement. Each bond must be in a form approved by the City Attorney and issued by a corporate surety authorized and admitted to write surety bonds in Texas. If the amount of the bond exceeds \$100,000, the surety must be listed on the current list of accepted sureties on federal bonds published by the United States Treasury Department or reinsured for any

liability in excess of \$100,000 by a reinsurer listed on the U.S. Treasury list.

- (2) For the fourth and fifth years of this Agreement and for the renewal period, if elected by the Director, Contractor may either furnish a performance bond in the amount of \$250,000 for such years conditioned upon Contractor's full and timely performance of all terms, conditions and covenants of this Agreement or an irrevocable letter of credit, substantially in the form attached to this Agreement as Exhibit "Q", payable upon presentation to a solvent bank or savings and loan in the initial principal amount of \$250,000 which shall be kept in full force and effect for the remainder of the term or renewal term as appropriate of this Agreement.
- (3) If Contractor has defaulted under the terms of this Agreement, has failed to cure such default and the Agreement has been terminated, the City shall have the right to enforce the performance bond or the letter of credit and apply the proceeds thereof to cover costs as may be incurred by the City as a result of the breach of contract and lost revenues resulting from such default. However, in no event shall enforcement of the bond or letter of credit be deemed an exclusive remedy of the City.
- (4) If Contractor has Contractor has delivered systems and services in accordance with the terms and conditions of this Agreement at all times during the first three years of this Agreement, the Director may release Contractor from its surety requirement at any point during years four (4)

through ten (10) in which case the bond or letter of credit will be released to Contractor.

L. Ownership of System

It is understood by the City that the Photo Red Light Enforcement System being installed by Contractor is, and shall remain, the sole property of Contractor, unless separately procured from Contractor. The Photo Red Light Enforcement System is being provided to City only under the terms and for the term of this Agreement.

M. Confidentiality of City Information

At all times, the Contractor will recognize the City's sole and exclusive ownership of all documents and information provided by the City or generated by Contractor based on information provided by the City relating to the services and the sole and exclusive right and jurisdiction of the City to control the use of this information.

(a) The Contractor agrees that neither it, or its employees, subcontractors, agents, or parent company shall disclose confidential information, to any person or to anyone except as necessary to perform the services under this Agreement, including other subsidiaries within Contractor without the expressed written permission of the City or unless required to do so by law.

(b) The Contractor shall further agree that in the event that any documents containing confidential information should be improperly used or be removed in any way from the possession or control of the Contractor or its subcontractors by anyone except the Director or authorized representatives, the Contractor shall immediately notify the City orally and in writing, and shall join with the Director at his request in taking such reasonable steps as the City may deem advisable to enjoin the misuse and regain possession of such confidential information, or

steps otherwise necessary for the protection of the City's rights and the confidentiality of the information.

(c) The Contractor agrees to return any and all data furnished and information derived hereunder promptly upon a request by the Director or his authorized designee.

(d) The Contractor shall provide the design and implementation of a security system which will protect both the physical documents and the confidential information contained therein from the time of Contractor's receipt until the delivery to the City. Security shall include, without limitation, fire protection, protection against smoke and water damage, alarm systems, locked files or other devices reasonable expected to prevent loss or unauthorized removal of documents and/or manually held data; passwords, access logs, badges, or other methods reasonably expected to prevent loss or unauthorized access to electronically or mechanically held data; limited terminal access, access to input documents and output documents, and design provisions to limit use of client or applicant name.

IV. DUTIES OF CITY

A. Payment Terms

The City shall pay and Contractor shall accept fees at the prices and the conditions set forth in Exhibit "G" for all services rendered by Contractor. Contractor's prices shall be revised as applicable by the service level performance standards all as set forth in Exhibit "G". All fees due to Contractor under this Agreement shall only be paid from Collection Revenue. Under no circumstances shall the current and past due fees due to Contractor in any one month exceed the service level performance standard established pursuant to Exhibit "G".

If a court issues an order prohibiting or enjoining the City in any way from issuing Citations or other penalties or fines for the Violations described in this Agreement, then the City

shall pay to Contractor for the period up to the date of the order all accrued and eligible fees, including the fixed monthly fees set forth in Exhibit "G". During the period the City is ordered or enjoined from issuing Citations or other penalties or fines for the Violations described in this Agreement, but not to exceed twelve (12) months, the City shall pay to Contractor, subject to allocation of funds therefore by City Council, the monthly fee of \$1,250.00 , prorated if required for part of any month. However, under no circumstances shall the City be obligated to pay Contractor more than ninety percent (90%) of the money that the program has generated from the inception of the Agreement up to the date of suspension for the period of the suspension.

During the period of the suspension, Contractor shall not be required to perform any service described in this Agreement during such period. Both Parties are excused from performance under this Agreement and shall not be in default while the court order is in effect.

Contractor shall submit monthly invoices to the City detailing the amount of fees Contractor is due for the prior month based upon the fees set forth in Exhibit "G" and showing if the fees owing are modified by the requirements of Exhibit "G".

B. Limit of Appropriation

The City has allocated no funds for this Agreement. All payments to Contractor under this Agreement, except as otherwise provided for in this Agreement, for services shall be made from Collection Revenue.

C. Taxes

The City is exempt from payment of Federal Excise and Transportation Tax and Texas Limited Sales and Use Tax. Contractor's invoices to the City must not contain assessments of any of these taxes. The Director will furnish the City's exemption certificate and federal tax identification number to Contractor if requested.

D. Access to Data

The City shall, to the extent permitted by law, allow Contractor to access and make copies of documents in the possession or control of the City or available to it that are reasonably necessary for Contractor to perform under this Agreement.

The City does not, however, represent that all existing conditions are fully documented, nor is the City obligated to develop new documentation for Contractor's use.

V. TERM AND TERMINATION

A. Term

This Agreement is effective on the Countersignature Date and remains in effect for one five (5) year term, unless sooner terminated under this Agreement.

B. Renewal Term

The Director may extend the original term of this Agreement for one (1) five-year renewal period by providing thirty (30) days' written notice of such renewal to Contractor.

C. Termination for Convenience by City

For the first three (3) years of this Agreement, the City may not terminate this Agreement for its convenience. Thereafter, the Director may terminate this Agreement at any time by giving 120 days' written notice to Contractor. The City's right to terminate this Agreement for convenience is cumulative of all rights and remedies which exist now or in the future.

On receiving the notice, Contractor shall, unless the notice directs otherwise, immediately discontinue all services under this Agreement.

TERMINATION OF THIS AGREEMENT IS CONTRACTOR'S ONLY REMEDY FOR THE CITY'S TERMINATION FOR CONVENIENCE, WHICH DOES NOT CONSTITUTE A DEFAULT OR BREACH OF THIS AGREEMENT. CONTRACTOR WAIVES ANY CLAIM