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Department of Industrial Relations
OD Legal Unit (SF)
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February 29, 2012

VIA FEDERAL EXPRESS

Christine Baker, Director
Department of Industrial Relations
Office of the Director – Legal Unit
455 Golden Gate Avenue, Suite 9516
San Francisco, CA 94102

**Re: Appeal of Coverage Determination
Public Works Case No. 2011-028
Professional Services Agreement between American Traffic Solutions, Inc. and
City of South San Francisco**

Dear Ms. Baker:

Pursuant to section 16002.5 of Title 8 of the California Code of Regulations, American Traffic Solutions, Inc. (“ATS”) hereby appeals the Department of Industrial Relations’s (“Department”) public works coverage determination dated January 31, 2012 (“Determination”).¹

FACTS

In 2006, ATS entered into a Professional Services Agreement (“Agreement”) with the City of South San Francisco (“City”) to provide services related to monitoring red light traffic violations.² The purpose of the Agreement is succinctly described on the first page: the City

¹ At this time, ATS does not request a hearing on this appeal, as it is ATS’s understanding that the facts set forth in the Determination that are material to the coverage question are not in dispute. In the event any interested party attempts to introduce additional facts, ATS reserves its right to request a hearing.

² The Agreement consists of the Professional Services Agreement dated October 6, 2006, and Amendment One to Professional Services Agreement dated November 10, 2009. ATS submitted a copy of the Agreement to the Department in connection with its request for a coverage determination.



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engaged ATS because it “desire[d] to use ATS’s Axisis™ System to monitor red light violations, traffic speed or other traffic movements and to issue citations for traffic violations.” (Agreement at 1.)

ATS’s scope of services is set forth in Exhibit A, Section 1, which describes ATS’s implementation and operations responsibilities. (Agreement at 7-8.) Under the Agreement, ATS installs the cameras at designated locations, provides regular technician site visits to perform routine maintenance, and repairs non-functioning systems as needed. (Agreement at 7.)

The specific services to be provided by ATS include:

- Assisting the City with public information and outreach campaign strategies;
- Providing a secure website accessible to citation recipients for purposes of allowing violation image and video viewing;
- Providing the City with an automated web-based citation processing system;
- Sending warnings and notices to violators;
- Providing an online court processing module (if the City does not integrate ATS data into its court system);
- Providing a system allowing the City to run and print reports which include specifically identified categories of information;
- Seeking records from out of state vehicle registration databases;
- Providing a helpline to help the City resolve any problems encountered regarding the camera system and/or citation processing; and
- Providing the City with a local expert witness to testify to the accuracy, technical operations, and effectiveness of the Axisis™ System. (Agreement at 7-8.)

Under the Agreement, the City does not operate the camera systems. Rather, the Agreement provides that the City will appoint a project manager to coordinate the City’s responsibilities under the Agreement, will designate a municipal court manager responsible for



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oversight of all court-related program requirements and will perform other administrative functions. (Agreement at 9.)

The Agreement's Service Fee Schedule obligates the City to pay ATS a monthly Service Fee per intersection in the amounts of \$4,995 for two lanes and \$5,395 for four lanes. The Agreement specifies that these public funds do not pay for any work associated with the installation of the cameras, but rather compensate ATS for its provision of the following specifically enumerated services:

Axisis™ RLC-300 Red Light Camera System monitoring front and rear images up to 4 lanes, Axisis™ LIVE digital video system for monitoring 1 direction of travel, data entry, In State registered owner acquisition, final quality control review, access to web-based Axisis™ VPS for Police Review, 1st notice printing in color, postage and mailing, electronic notice file transmission to court system, evidence packages for scheduled hearings.

(Agreement at 11.)

**THE INSTALLATION OF THE CAMERA SYSTEM WAS NOT A PUBLIC WORK
BECAUSE IT WAS INCIDENTAL TO THE PROVISION OF SERVICES**

For public work status to attach to this project, Labor Code section 1720(a)(1) requires that the installation of the camera systems be paid for in whole or in part out of public funds. It is clear that payments made by the City under the terms of the Agreement are not payments *for* installation. As set forth in the fee schedule to the Agreement, the payments made by the City are explicitly for the services provided by ATS in connection with the operation of the red light traffic program, and not for the installation of the camera systems. Under the terms of the Agreement, not one penny of public funds was used to pay for the installation of the camera systems. Public funds are paid only for the services set forth in the fee schedule.

It is well settled that where a contractor performs construction work that is incidental to the contractor's provision of services under a contract, the project is not a public work. (*McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576.) In *McIntosh*, public funds were used to pay for services under an agreement between Helicon, Inc., a provider of residential care services for emotionally disturbed minors, and the County of Riverside. (*McIntosh, supra*, 14 Cal.App.4th at 1586.) The agreement required Helicon to construct and operate the facility. (*Ibid.*) The key consideration for the court was whether the agreement specified that public funds were to be used to pay for operation and/or construction work. (*Ibid.*) Despite the fact that the contract



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required Helicon to construct the residential care facility, the court held the construction to be *incidental* to the provision of services. (*Ibid.*)

In PW 2008-025, the Department reviewed an agreement in which the Humane Society Silicon Valley agreed to construct and operate an animal community center for the City of Sunnyvale. The city paid an initial “capital payment” and an annual “host fee and live animal cost.” (PW 2008-025, *Construction of Animal Community Center, Humane Society Silicon Valley* (Aug. 5, 2009).) The Department determined that despite the fact that the agreement entailed construction work, it *specifically stated* that the host fee and live animal cost payments were for the provision of on-going services for animals. (*Ibid.*) Because the construction was merely incidental to the ongoing services that were the basis of the agreement, the Department concluded the project was not a public work.

As in *McIntosh* and *Humane Society Silicon Valley*, the ATS Agreement details ATS’s implementation and operation services, and specifically limits the use of public funds to payments for services. That ATS’s installation work is ancillary to the intent and purpose of the Agreement is evidenced by the Service Fee Schedule, where each cost element relates to the operation of the Axisis™ System, such as monitoring images, data entry, quality control, giving access to the City’s police for the web program and creating evidence packages and sending citations to the violators. The basis and intent of the Agreement are also clear from the recitals in the Agreement, which state that the City “desires to use the Axisis™ System to monitor red light violations, traffic speed or other traffic movements and to issue citations for traffic violations.” (Agreement at 1.) Under the *McIntosh* court’s analysis, the Agreement is for services related to red light enforcement, not for installation, and therefore is not a public work.

In determining that the installation work was a public work, the Department concluded that the facts of this case are purportedly distinguishable from the facts of *McIntosh* and *Humane Society Silicon Valley* (Determination at 4) because in this case “the work involved in installing and maintaining the Camera Systems is specifically required by the Agreement and is *essential* to the functioning of the program.” (Determination at 5.) Contrary to the assertion in the Determination, the essential facts in *McIntosh* and *Humane Society Silicon Valley* are indistinguishable from the present case. In *McIntosh*, the agreement required the construction of a residential care facility for emotionally disturbed minors, and public funds were used to pay for the minors’ care and treatment. In *Humane Society Silicon Valley*, the agreement required the construction of a facility to care for animals, and public funds were used to pay for the provision of services to those animals. In the present case, the Agreement requires ATS to install the camera systems, and public funds are used to pay for the monitoring and other services ATS provides. The Determination notes that the work involved in installing and maintaining the camera systems is specifically required by the Agreement, but this fact is not distinguishable



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from *McIntosh* and *Humane Society Silicon Valley* -- the work involved in constructing the facilities in *McIntosh* and *Human Society Silicon Valley* was also specifically required by those agreements.

The Department also supports its conclusion that the installation of the camera systems is a public work on the grounds that the installation work is "essential" to the functioning of the program. (Determination at 5.) As the Determination observed, "[p]lainly, you cannot have a 'red light camera enforcement system' without installing and maintaining cameras and related equipment at designated intersections." (Determination at 5.) ATS does not dispute that installation of the equipment is essential to providing the services under the Agreement. That fact, however, is not determinative, which is clear from *McIntosh* and *Humane Society Silicon Valley*. To use the Department's parlance, plainly you cannot have a residential care facility for emotionally disturbed minors without constructing the residential care facility (*McIntosh*), and plainly you cannot have an animal community center without constructing the animal community center (*Humane Society Silicon Valley*). Construction of the residential care facility for emotionally disturbed minors in *McIntosh* and the animal community center in *Humane Society Silicon Valley* were essential to the functioning of those respective programs, yet those projects were correctly determined not to be public works. Similarly, ATS's installation of the camera systems is essential to the functioning of the red light program, but that does not transform the contract for the provision of services to a public works contract.

Under these facts and applicable law, the installation of the camera systems under the Agreement was incidental to the provision of services and was not a public work.

**THE MAINTENANCE OF THE CAMERA SYSTEMS IS NOT A PUBLIC WORK
BECAUSE THE AGREEMENT IS NOT A CONTRACT LET FOR MAINTENANCE
WORK AND BECAUSE THE MAINTENANCE WORK IS NOT PERFORMED ON A
PUBLICLY OWNED OR PUBLICLY OPERATED FACILITY**

In order for the prevailing wage laws to apply to ATS's maintenance work, the Agreement must be a "contract let for maintenance work." (Labor Code section 1771.) The Agreement is not a contract let for maintenance work. Rather, it is a contract let for the provision of services relating to the operation and administration of the City's red light photo enforcement program. The information and documents that the City submitted to the Department in this matter confirm that the purpose of the Agreement is not for ATS to provide maintenance to public property, but rather for ATS to operate a program intended to increase public safety through the enforcement of traffic laws associated with red light traffic signal violations at the City's most dangerous intersections. (See, e.g., July 19, 2006 Staff Report; Resolution No. 14-2010.)



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ATS must perform routine maintenance to its cameras and related equipment in order to carry out the objectives of the Agreement. The Agreement provides that ATS will “repair a non-functional Camera System... repair Axis VPS System... provide preventative maintenance checks consisting of lens cleaning, camera, strobe and controller enclosure cleaner; inspection of exposed wires; and general system inspection and maintenance.” (Agreement at 7.) This work serves to maintain the system so that it will operate properly, but this maintenance work is incidental to the true purpose of the Agreement - - the provision of services. Because maintenance work is incidental to the true purpose of the Agreement, this is not a contract “let for maintenance work.”

Additionally, the maintenance work is not performed on a publicly owned or publicly operated facility. Preliminarily, the Department’s suggestion that there is no requirement that maintenance work be performed on a publicly owned or publicly operated facility to be considered a public work (Determination at 5-6) directly contradicts the Department’s previous interpretations of the definition of “maintenance.” The Department has repeatedly and consistently opined that for maintenance work to be a public work, it must be performed on a publicly owned or publicly operated facility.³ (See, e.g., PW 2005-026, *Tree Removal Project, County of San Bernardino Fire Department* (Nov. 18, 2005) (“California Code of Regulations title 8, section 16000, which sets forth the definition of maintenance, limits coverage of maintenance to work performed on a publicly owned or publicly operated facility”); PW 2004-013, *Dry Creek Joint Elementary School District* (Dec. 16, 2005) (California Code of Regulation, title 8, section 16000; which sets forth the definition of maintenance, limits coverage of maintenance to work performed on a publicly owned or operated facility including realty or on a permanently attached fixture”); PW 2009-008 *Homeless Sites Debris Removal and Disposal* (Jun. 5, 2009) (“under the definition of maintenance quoted above, the work in question must be to preserve, protect and keep a publicly owned or operated facility in safe and continually usable condition”); PW 2008-038, *Solar Photovoltaic Distributed Generation Facility, Santa Cruz School District* (Apr. 21, 2010) (“the regulatory definition of maintenance requires that the work be done on a ‘publicly owned or publicly operated facility’”); PW 2009-005, *Solar Photovoltaic Distributed Generation Facility, West County Waste Water District* (Apr. 21, 2010) (“the regulatory definition of maintenance requires that the work be done on a ‘publicly owned or publicly operated facility’”).)

³ Indeed, in the Determination the Department contradicts itself by implying that maintenance work can be found a public work even if it is not performed on a publicly owned or publicly operated facility (Determination at 5-6), and in the next paragraph stating that there is a “requirement” under section 16000 that the facility be publicly owned or operated.



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The Department concludes that the maintenance work at issue here is a public work because the City "operates" the program pursuant to Vehicle Code section 21455.5(c).⁴ However, the regulatory definition of "maintenance" contemplates that maintenance work will be performed on a "facility" that is publicly owned or operated (8 Cal. Code Regs. § 16000), so the fact that the City arguably operates the red light enforcement program is irrelevant. The relevant question is who operates the equipment that ATS maintains. Under the Agreement, ATS owns the equipment and ATS, not the City, operates the equipment on a 24 hour basis. (Agreement at 7.) In reality, the City does not "operate" the equipment at all, and its "operational" obligations under the Agreement are limited to tasks such as providing information to ATS and performing administrative functions to ensure that ATS is properly maintaining and operating the systems. (Agreement at 9-10.) The Agreement does not require or even contemplate that the City perform any actual operation of the camera systems, rather it oversees and ensures that ATS properly maintains and operates the equipment. For this reason, notwithstanding the use of the term "operate" in Vehicle Code section 21455.5(c), the equipment on which ATS performs maintenance work is not operated by the City.

For the foregoing reasons, neither the installation nor the maintenance of the subject project is a public work.

Very truly yours,

Anthony J. DeCristoforo

AJD:mrd

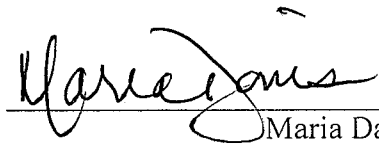
cc: See attached service list

⁴ The Determination does not and cannot conclude that the City owns the equipment on which the maintenance work is performed.

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- BY FIRST CLASS MAIL:** I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the U.S. Postal Service. In the ordinary course of business, correspondence would be deposited with the U.S. Postal Service on the day on which it is collected. On the date written above, following ordinary business practices, I placed for collection and mailing at the offices of Stoel Rives LLP, 500 Capitol Mall, Suite 1600, Sacramento, California 95814, a copy of the attached document in a sealed envelope, with postage fully prepaid, addressed as shown on the service list. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing contained in this declaration.
- BY FACSIMILE:** On the date written above, I caused a copy of the attached document to be transmitted to a fax machine maintained by the person on whom it is served at the fax number shown on the service list. That transmission was reported as complete and without error and a transmission report was properly issued by the transmitting fax machine.
- BY HAND DELIVERY:** On the date written above, I placed a copy of the attached document in a sealed envelope, with delivery fees paid or provided for, and arranged for it to be delivered by messenger that same day to the office of the addressee, as shown on the service list.
- BY EMAIL:** On the date written above, I emailed a copy of the attached documents to the addressee, as shown on the service list.
- BY OVERNIGHT MAIL:** I am readily familiar with my employer's practice for the collection and processing of correspondence for overnight delivery. In the ordinary course of business, correspondence would be deposited in a box or other facility regularly maintained by the express service carrier or delivered to it by the carrier's authorized courier on the day on which it is collected. On the date written above, following ordinary business practices, I placed for collection and overnight delivery at the offices of Stoel Rives LLP, 500 Capitol Mall, Suite 1600, Sacramento, California 95814, a copy of the attached document in a sealed envelope, with delivery fees prepaid or provided for, addressed as shown on the service list.
- (Federal Courts Only)** I declare that I am employed in the office of a member of this court at whose direction this service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on February 29, 2012, at Sacramento, California.



Maria Davis

1 **DECLARATION OF SERVICE**

2 I declare that I am over the age of eighteen years and not a party to this action. I am
3 employed in the City and County of Sacramento and my business address is 500 Capitol Mall,
Suite 1600, Sacramento, California 95814.

4 On February 29, 2012, at Sacramento, California, I served the attached document(s):

5 **Appeal of Coverage Determination**
6 **Public Works Case No. 2011-028**
7 **Professional Services Agreement between American Traffic Solutions, Inc. and City of**
8 **South San Francisco**

9 on the following parties:

10 11 12	Ralph Lightstone Labor & Workforce Development Agency Legislative Deputy Director 801 K Street, Suite 2100 Sacramento, CA 95814	Maria Robbins, Acting Chief Dept Of Industrial Relations Div Of Labor Statistics & Research 455 Golden Gate Avenue, 9th Floor San Francisco, CA 94102
13 14 15 16	Julie A. Su Labor Commissioner Dept Of Industrial Relations Div Of Labor Standards Enforcement 455 Golden Gate Avenue, 9th Floor San Francisco, CA 94102	Diane Ravnik Dept Of Industrial Relations Div Of Apprenticeship Standards 455 Golden Gate Avenue, 10th Floor San Francisco, CA 94102
17 18 19 20	Len Welsh, Acting Chief Counsel Dept Of Industrial Relations Office Of The Director — Legal Unit 455 Golden Gate Avenue, 9th Floor San Francisco, CA 94102	Barry Nagel, City Manager City Of South San Francisco 400 Grand Avenue South San Francisco, CA 94083
21 22	Jason Rosenberg, Assistant City Attorney City Of South San Francisco 575 Market Street, Suite 2600 San Francisco, CA 94105	Jennifer Epstein, Human Resources Manager 371 Bel Marin Keys Blvd, Suite 200 Novato, CA 94949
23 24 25	Amie Bergin, Deputy Labor Commissioner Division Of Labor Standards Enforcement 2031 Howe Avenue, Suite 100 Sacramento, CA 95821	