



City Council Agenda

MEETING DATE: FEBRUARY 3, 2009 1200
R=2/11
P=2/11

TO: CITY COUNCIL/CITY MANAGER

FROM: KIMBERLY HALL BARLOW, Assistant City Attorney

SUBJECT: NESTOR RED LIGHT CAMERA AGREEMENT

Approved for Agenda:


City Manager's Office

SUMMARY

The purpose of this item is to approve a short amendment to the Nestor Red Light Camera agreement. The Appellate Division of the Superior Court issued a judgment on November 21, 2008 dismissing a red light camera citation because the Appellate Panel judge concluded that a provision in the existing contract improperly gives a financial incentive to Nestor to increase the number of citations issued and paid through the use of the red light camera equipment. While the City is evaluating whether any steps can or should be taken with respect to the Judgment, we recommend that the provision which the court found objectionable be suspended in its operation until the decision is corrected or a revised contract provision can be negotiated.

RECOMMENDATION

That the Council approve the Addendum Number Five to the Nestor agreement.

PROPOSED COSTS

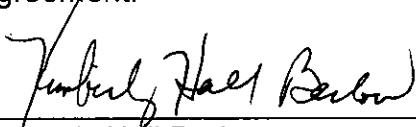
None.

DISCUSSION

The Council approved a contract amendment to the Nestor agreement, referred to as Addendum Number 3, in January 2007, which took effect on May 1, 2007. Part of that addendum included a provision for an annual financial review of the safety program, with the parties agreeing to renegotiate service fees and/or take other steps to insure that the program operates as a safety program. This is the portion of the Agreement

which the appellate division's ruling addressed, determining that the language "indirectly ties" fees to Nestor to the revenue generated by the program. Unfortunately, for reasons which remain unclear, the City Attorneys' office never received any notice regarding the appeal. The court docket indicates that the clerk was sending notices to the District Attorneys' Office instead. However, the District Attorney's Office did not advise the City of the notices. The City did not learn of the judgment until it was already final. We are taking steps to attempt to ensure that notice of these appeals are sent to the City rather than the District Attorney, who does not prosecute the cases. In the meantime, we felt it would be prudent and appropriate to suspend the language to which the Court objected while we determine if steps can be taken to set aside the judgment and/or while we determine whether alternative language can be included in the agreement to meet the City's needs of ensuring the program operates as intended.

While we believe that had we been aware of the appeal, the outcome might have been different, we do want to ensure that our contract with Nestor does not violate the provisions of the California Vehicle Code. We have therefore negotiated with Nestor the terms of Addendum Number 5 to revise the language in the final paragraph of section 4.2 of the Agreement. Although Nestor is not the party who assesses the data generated by the camera and determines whether or not to issue tickets, the goal of this addendum is to eliminate any concern that Nestor has a financial incentive to generate additional tickets for review and issuance by City police officers. We therefore recommend that the Council approve Addendum Number Five to the Nestor Agreement.



Kimberly Hall Barlow
Assistant City Attorney

**ADDENDUM NUMBER FIVE
TO
TRAFFIC SIGNAL VIOLATION VIDEO-ENFORCEMENT
SYSTEM SERVICES AGREEMENT**

This Addendum Number Five is made and entered into this ____ day of _____, 200__ (“**Effective Date**”) by and between Nestor Traffic Systems, Inc., a Delaware corporation having a place of business at 42 Oriental Street, Providence, RI 02908 (“**NTS**”), and the City of Fullerton, a municipal corporation of the State of California having an address of 303 West Commonwealth Avenue, Fullerton, CA 92832 (the “**Municipality**”, and together with NTS, the “**Parties**”, and each singularly, a “**Party**”).

WHEREAS, the Parties entered into a Traffic Signal Violation Video-Monitoring System Services Agreement on June 19, 2002, as amended by Addendum Number One on March 31, 2003, as further amended by Amendment Number Two on December 31, 2003, as further amended by Amendment Number Three on January 16, 2007, and as further amended by Addendum Number Four on November 6, 2007 (as so amended, the “**Agreement**”); and

WHEREAS, the Parties now wish to further amend the Agreement to address a recent California Superior Court Appellate Division decision.

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Pursuant to the Judgment on Appeal from the Superior Court, County of Orange, North Justice Center, as issued on November 21, 2008 by The Honorable Robert J. Moss, Presiding Judge, in Case No. 30-2008-93057 (the “**Decision**”), a portion of Section 4.2 of Addendum Number Three (the “**Cost Neutral Provision**”) is hereby suspended and shall no longer be in effect so long as the Decision is considered controlling law in the State of California, as to the City of Fullerton. Specifically, the parties suspend the operation of the following language in Section 4.2: “and agrees to renegotiate its service fees (down or up, but not to exceed the service fees in Section 4.1) if it is determined that fees paid to NTS exceed net program revenues being realized.” and “If the parties are unable to agree on a renegotiated fee, the CITY will have the right to terminate the agreement upon thirty (30) days written notice with no termination or cancellation fee.”

2. The final paragraph of Section 4.2 shall now read:

This program will be operated as a safety program. In addition, most communities regularly look for ways to create efficiencies and control spending. For these reasons, NTS will perform an initial annual performance and financial review of the program on the first anniversary of this Addendum, and every twelve months after the first annual review to determine whether the program is continuing to improve public

safety in the City. If requested by NTS, the CITY agrees to provide alternate intersection approaches and subject to mutual agreement, support the relocation of approaches where the program is not effective.

3. If and when the Decision is overturned, overridden by the Legislature, or for any other reason whatsoever is no longer controlling California law as to the City of Fullerton and if and when a Cost Neutral Provision is allowed under California Vehicle Code Section 21455.5(g), the Parties agree that the Cost Neutral Provision of the Agreement shall automatically go back into effect and shall require the parties to meet and confer regarding the monthly fees paid by the Municipality to NTS if required under the suspended provisions of section 4.2. The provision does not require the parties to agree on any specific fees, but simply to meet and confer.
4. All terms not defined herein shall have the same meaning and use as set forth in the Agreement.
5. All other terms, conditions and provisions of the Agreement, as amended, not in conflict with this Addendum Number Five shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties hereto have set their hand by their duly authorized representative as of the day and year first written above.

NESTOR TRAFFIC SYSTEMS, INC.

By: _____

Name: Clarence A. Davis

Title: Chief Executive Officer

CITY OF FULLERTON, CALIFORNIA

By: _____

Name:

Title: Mayor