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May 6, 2015

Narrative of Formal Complaint Filed with Texas Attorney General

RE: Formal complaint against the Smith County Commissioners Court regarding matters related to a “professional services agreement” with American Traffic Solutions, Inc. executed on January 28, 2015, by County Judge Joel P. Baker.

Grassroots America has the following concerns regarding the aforementioned contractual agreement, which recently came to light. The following nine points represent a summary of those concerns and the basis for those concerns, which we have forwarded to the Office of the Texas Attorney General. We have requested an investigation by the Office of the Texas Attorney General.

1) Constitutionality? We question the constitutionality of the use of traffic cameras based on Texas Attorney General's Opinion No. GA-0846, citing Section 542.2035 of the Transportation Code, which prohibits a municipality from implementing or operating "an automated traffic control system with respect to a highway or street under its jurisdiction for the purpose of enforcing compliance with posted speed limits." Counties, unlike cities, have no general ordinance-making authority; therefore, it is reasonable to conclude that ***if municipalities are prohibited from implementing speed cameras, counties are definitely on tenuous legal grounds to enter into a contract for such a system.*** In the absence of statutory authority granted in the Texas Constitution or in state statutes, counties are not allowed to construct for themselves their own permissions, authority, and jurisdictions.

In addition, we believe these speed cameras, maintained by a for-profit company, are in violation of the US Constitution's Sixth Amendment, which provides due process under the law, including facing an accuser and the ability to confront the accuser's testimony in court. ***Unlike law enforcement officers, these for-profit companies have not sworn an oath to defend the Constitution.***

Under the Representations and Warranties Section of the ATS contract (Section 10.2), the agreement proclaims: "ATS and Customer represent that the use of ATS' property by the Customer, as outlined in the Agreement, is a legal undertaking under applicable Texas law and will not violate any applicable federal, state, or local law or regulation. Based on our aforementioned objections and those that follow, we strongly disagree with this representation by ATS, Inc.

2) Violation of TOMA, Legality of Process and Subsequent Legitimacy of Contract? We question the **legality of the process** by which this matter was discussed in an August 12, 2014, closed session and

approved without revealing details in public. We believe the **closed session** and the agenda listing violate the Texas Open Meetings Act; (August 12, 2014, agenda and meeting minutes attached).

The Texas Open Meetings Act requires that an agenda notice describe the subject matter to be discussed or acted upon with enough specificity that a member of the general public will know what is to be discussed. A cursory review of the August 12, 2014, agenda reveals a failure to comply with TOMA on many agenda topics – not just the one under consideration within this complaint.

In addition, various public statements made by Smith County Commissioners raise the question: “When did the Commissioners Court approve the terms of the final agreement signed by County Judge Joel P. Baker on January 28, 2015? In media and public statements, at least three county commissioners have stated they never saw the final contract. This is particularly troubling since the agreement executed by County Judge Joel Baker clearly states on page 9, Section 17, captioned “**Prior Agreement Suspended**” – “This Agreement constitutes the sole and only agreement of the Parties and supersedes any prior understanding, written or oral, between the Parties respecting the written subject matter.” Given the statements made by at least three county commissioners who say they never saw the final contractual language, a reasonable person would ask “Were the People’s interests lawfully represented throughout this contractual process? **We do not believe the People’s interests were statutorily or morally represented nor protected because the details of the final contract – which serve to legally-bind and commit the assets of the People – were allegedly unknown by the People’s duly elected county commissioner representatives.**

Without the final contract coming back to the full Commissioners Court for approval, it would appear that the commissioners had no knowledge of the final terms of the agreement BEFORE it was signed by County Judge Joel P. Baker. **This is either a failure to exercise care of fiduciary duty, or an agreement was made in the August 12, 2014, closed executive session (or a subsequent closed session) that essentially gave the County Judge free rein.** In either case, this agreement has all the hallmarks of “an arbitrary and capricious action” on the part of one or more members of the Smith County Commissioners Court, and thus the said contract could well be deemed void and ineffective by a controlling legal authority.

While we are very concerned about the terms of the **10-year contract** with a **5-year auto renew** clause, we are even more concerned about ***what the commissioners knew and when they knew it.*** Because of the way this matter was stated on the agenda, discussed in the closed session, and treated in the open portion of the meeting (where a vote was taken), a member of the public had no way of knowing what was actually taking place with this traffic camera project. ***A contract or agreement executed out of compliance with the Texas Open Meetings Act is in legal jeopardy.***

Finally, in addition to the potential TOMA violations, the expenditure of any “up front” fees cited in the agreement without the formal approval of the final contract by the full Commissioners Court seems to run afoul of sections of the Local Government Code – statutes which vest the Commissioners Court with the legal authority and the fiduciary responsibility to act as a

governmental body with sole expenditure authority. It is the Commissioners Court as a body that exercises the legislative functions of the County – not the County Judge acting unilaterally.

Unfortunately, we believe that only a review of the executive (closed) session recording by the Texas Office of Attorney General will ultimately reveal the truth.

3) Lack of Due Diligence and Breach of Fiduciary Duty? We are concerned about the lack of a bid process for a service that is clearly not limited to a sole source nor seems to fit the legal definition of "professional services" as described in the contract. The agreement sets forth a **10-year agreement** with a **5-year auto renew** clause with a private company that could cost the county a significant sum of money, particularly during the first weeks of implementing the cameras – the initial "Warning Period" phase. [ATS, Inc. Agreement, Page 11, Exhibit A Service Fee Schedule] Without a competitive bid process or a formal request for qualifications or a request for proposals, ***how did the Commissioners Court fulfill their fiduciary duty of care for the taxpayers?***

In addition, was this contract for a 10-year term with a 5-year auto renew clause, which requires a 120-day advance notice to prevent auto-renewal, *in the best interest of the taxpayers?* In county government business, a 10-year contract is far too long if the goal is best price and value for the taxpayers. We are also troubled by Section 21, captioned "Exclusivity" on page 9, which states: "Customer agrees that it will not contract directly with another entity or person engaged in or offering any enforcement business, product, or services during the term of this Agreement."

A "duty" means a legal obligation that is owed or due to another and needs to be satisfied. It is an obligation for which someone else has a corresponding right.

We fail to see how such a long-term contract meets the duty of care for taxpayer assets, the duty of loyalty to the taxpayer, and the duty of compliance with "commonsense" policy that works in the ultimate best interest of all county taxpayers. The taxpayers of Smith County have a right to expect due diligence and transparency from their elected officials.

The County Judge and Commissioners are, in the eyes of the law, fiduciaries. A fiduciary owes to another the duties of good faith, trust, confidence, and candor, and a fiduciary must exercise a high standard of care in managing another's money or property. We believe there has been a tremendous lapse of care to fulfill fiduciary duty to the taxpayers, **and it is a lapse we cannot overlook**. Once a pattern of such behavior is allowed to be established by elected officials, it becomes part of the institutional culture – a culture than runs counter to the fundamental philosophy of the American constitutional form of representative government, which adheres to the principle that ***government is the servant and not the master of the people***, and is therefore accountable to the people.

4) Why are Smith County's 2015 contract costs so much higher than those reported for Kaufman County's 2014 contract with the very same vendor? According to a May 2, 2015, *Tyler Morning Telegraph* news report, Kaufman County's initial cost per camera during the "warning" phase is \$2,900 per camera. The paper reported the following from an interview with Kaufman County Judge

Bruce Wood and Kaufman County Commissioner Jimmy Vrzalik (<http://www.tylerpaper.com/TP-News+Local/218937/kaufman-county-official-on-program-dont-do-it>):

“Wood said the program was at a break-even point and that the county was working through contract stipulations to ensure it is in compliance with ATS requirements.

But Vrzalik said the program has not recouped the initial \$2,900 per camera, or \$14,500, plus \$2 per citation contractual cost for the first month, a ‘warning’ month, where vehicles were cited but not billed by ATS.

The cameras have been in operation since December.”

On page 11 of the Smith County agreement, Exhibit A Service Fee Schedule, the Warning Period Service Fees are listed as “\$8,700 per camera per month, plus \$2 per issued notice” (citation). Perhaps there is a good reason for the **\$5,800 difference** (higher cost per camera) for the 2015 ATS Smith County contract compared to the 2014 Kaufman County contract; ***however, the people of Smith County are not privy to that information because the terms of this contract and the important details of this project were never discussed in public.***

5) Violation of Transportation Code? We are concerned with the County Judge’s appointment of the county fire marshal to administer the speed camera program, which is NOT in concert with state law in reference to who can legally administer county traffic enforcement. Transportation Code Sec. 701.002 states: (a) A county traffic officer: (1) must be deputized by the sheriff or a constable of the county in which the officer is employed; (2) must give a bond and take an oath of office as other deputy sheriffs; (3) must **work under the direction of the sheriff.**

In Smith County, we know – based on his public comments in opposition to the speed camera project – that Smith County Sheriff Larry Smith is not willing to supervise the Fire Marshal or anyone in the administration of a county traffic camera program. The Sheriff has made it clear in public statements that he believes traffic cameras may well be unconstitutional, and at the very least, the use of such cameras run contrary to his professional opinion that traffic enforcement is about public safety – not generating tickets. Without the sheriff’s supervision of this program, pursuant to the aforementioned section of the Transportation Code, we question how this program can be implemented.

We also question whether a county fire marshal can lawfully hold a dual-commissioned officer role. In other words – we question the legality of Judge Baker’s proposed administration of the program and believe this arrangement sets up Smith County for significant litigation, and thus, significant legal defense costs for county taxpayers who will foot those bills.

6) A Revenue-Driven Quota System for Camera Placement? We question language and terms in the agreement (Section 4 - Fees and Payment & Section 5 – Site Selection Analysis and Notice to Proceed) which seem to indicate a revenue-driven decision-making process that tilts dangerously toward a quota system for traffic citations. Transportation Code § 720.002 prohibits traffic-offense quotas.

7) No Support from Municipalities, School Districts, and the Smith County Tax Assessor/Collector – does this mean taxpayers face stiff financial penalties and fees as outlined in the agreement? The fact that Tyler Mayor Martin Heines, the Tyler City Council, and Police Chief Gary Swindle were never consulted about the project before a contract was executed is extremely disappointing and problematic because it brings to mind the legal descriptor “arbitrary and capricious.” Based on media accounts of interviews with officials from other municipalities and school districts, many of them were also in the dark and/or opposed the idea of traffic cameras. Mayor Heines and the Tyler City Council are so opposed to cameras being placed inside the Tyler City limits that the Mayor notified the Smith County Judge and Commissioners in an April 25th letter, “We are firmly opposed to the use of this program within our jurisdiction **and will use our resources to oppose its implementation in the school zones within the city limits.**” The letter continued, “We are firm believers in a unified city and county, but this potentially disastrous program by the county that impacts our citizens was moved forward without any input from us.” Heines further indicated the city’s municipal court will refuse to handle the tickets on behalf of the county.

In addition, a contract term Smith County has failed to meet is the cooperation of Smith County Tax Assessor/Collector Gary Barber. The vendor – American Traffic Systems, Inc. – wants the Tax Assessor/Collector’s office to be its enforcement division, by withholding vehicle registrations for nonpayment of the tickets, which are to be civil citations. Mr. Barber gave media statements that he would not pursue scofflaws that would deny vehicle registrations for civil citations. A signed contract without local buy-in seems to indicate that taxpayers may incur stiff financial penalties and fees as outlined in the agreement. In addition, the cost of Mr. Barber’s office acting as the enforcement division for this traffic camera system has never been publicly discussed, but adding such duties to Mr. Barber’s office would indeed be an additional cost to the taxpayers.

8) No state statute exists that authorizes locally issued civil penalties for speeding violations! County Judge Joel P. Baker continues to talk about traffic camera citations issued by these speed cameras as being civil citations. While Sec. 707.002 of the State Transportation Code authorizes local authorities to issue civil penalties for red light cameras, we find no **such authorization exists in state law for speeding violations.** [Note: State senators with pending bills and amendments to ban all traffic enforcement cameras in Texas, sent us this finding. The finding was vetted by the Texas Legislative Council during the bill preparation process.]

9) Public statements made by the County Judge are in conflict with contract language. Why? In various statements to the media, County Judge Joel Baker keeps saying he will put up five cameras, but the contract calls for a minimum of 10 cameras and up to 20 cameras (Exhibit D), ***and it’s unclear what cancellation or modification of the contract would cost county taxpayers.*** On page 14 of the agreement, under Section 1.3, General Customer Implementation Requirements, it is stated that “within seven business days of the Effective Date of this Agreement (January 28, 2015), the Customer **shall** provide ATS with the name, title, mailing address, email address and phone number” of a list of eleven county and municipal representatives that would be essential to implement the program. Since several of these specified individuals have been declared non-participatory, it is becoming obvious that implementation will be difficult, and is at the very least, behind schedule as specified in the contract. This delay brings us to Section 1.3.1 of the contract, which states, “Once a Notice to Proceed is granted to ATS in writing or by email, the Customer **shall not** issue a stop work order to

suspend activity on the implementation process unless Customer reimburses ATS for costs incurred up to the date the stop work order is issued." These conflicts between what Judge Baker says in public commentary and what the contract reads should be addressed and reconciled in an open Commissioners Court meeting, yet they have not been addressed. However, we do understand that the County Judge and Commissioners discussed the ATS, Inc. traffic camera matter in yet another closed session yesterday (May 5, 2015).

Conclusion

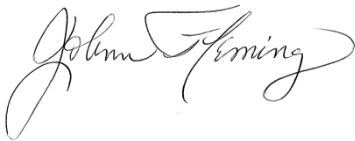
Texas Government Code, Title 5, Open Government; Ethics, Subtitle A, Open Government, Chapter 552, Public Information, Subchapter A. General Provisions, Section 552.001 Policy; Construction (a) reads: *"Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. **The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.**"*

As clearly described in this narrative, which is the basis of a formal complaint filed with the Office of the Texas Attorney General, neither the spirit of the law nor the letter of the law as set forth in the above quote have been met by the Smith County Commissioners Court in this situation. **We have therefore asked for a full investigation by the Office of the Texas Attorney General.**

We have also sent a copy of this complaint narrative to the Smith County District Attorney, Matt Bingham, by way of First Assistant District Attorney April Sikes.

As a self-retired Smith County Commissioner and an open government advocate, it is my desire to get answers for the people of Smith County.

On behalf of the Board of Directors of Grassroots America – We the People,



Executive Director

Attached: 08/12/14 Smith County Commissioners Court Agenda & Minutes, 1/28/15 contract with ATS, Inc.