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**UNITED STATES DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO BRANCH**

KM Enterprises, Inc., an Illinois
 corporation, and Rodney Kris Morgan,

 Plaintiffs,

v.

Global Traffic Technologies, LLC, a Delaware
 limited liability company; Global Traffic
 Technologies, Inc., a Delaware corporation,

Defendants.

CASE NO.:

COMPLAINT

COMPLAINT

Pursuant to Federal Rule of Civil Procedure 3, Plaintiffs KM Enterprises, Inc. ("KME") and Rodney Kris Morgan ("Morgan") (collectively, "KME"), by their undersigned attorney, file this Complaint against Defendants, Global Traffic Technologies, Inc. ("GTT Inc."), a Delaware

1 corporation, and Global Traffic Technologies, LLC (“GTT, LLC”) a Delaware limited liability
2 company (collectively, “GTT”), as follows:

INTRODUCTION

- 4 1. This is an antitrust action brought to prevent injuries and to recover for injuries to Plaintiff
5 as a result of Defendants’ monopolization and attempted monopolization in violation of
6 Sections 1 and 2 of the Sherman Act, 15 U.S.C. §2 and Sections 4, 14 and 16 of the
7 Clayton Act, 15 U.S.C. §§14, 15 and 26. Plaintiff’s injuries and threatened injuries are of
8 the type that the antitrust laws are intended to prevent. This action seeks damages,
9 injunctive relief, costs of suit and reasonable attorneys’ fees pursuant to Sections 4 and 16
10 of the Clayton Act, 15 U.S.C. §§15 and 26. The action also alleges related state law claims
11 involving common questions of fact.
12
- 14 2. The action alleges antitrust causes of action related to Defendants’ monopolization and
15 attempted monopolization activity. The monopolization involved impropriety in
16 competitive bidding on public contracts in violation of antitrust price fixing prohibitions.
17 The monopolization activity included conduct amounting to or similar to illegal tying in
18 which a competitor manipulates the market for its product by requiring that maintenance of
19 its obsolete product is tied to upgrades and future purchases of a new product for which
20 there is market competition. Patent misuse and sham litigation are also alleged.
21
- 23 3. KME and GTT are competitors in the Emergency Vehicle Preemption (“EVP”) and Transit
24 Signal Priority (“TSP”) market. Generally, they distribute and install equipment that
25 preempts traffic signals so that emergency and transit vehicles may pass on a green light
26 while other traffic is directed to stop. EVP involves emergency vehicles, while TSP
27 involves buses and light rail.
28

- 1 4. Here, GTT engaged in a market manipulative de facto sole source scheme in which it
2 encouraged and aided public agencies to draft specifications for GTT's obsolete optical
3 product, and then informed the agencies that the product was no longer available. It replaced
4 the obsolete product with a "dual" product (optical and GPS), which placed two products
5 separately within one housing. That served as a bridge between the obsolete optical product
6 and the new GPS version. This aced KME out of each of those regional markets as KME's
7 GPS product is incompatible with GTT's GPS product and vice versa
- 9 5. In several instances, on information and belief, GTT influenced the results of a competitive
10 bid in its favor by learning the low bid and beating that price, by gifts, lobbying and grant-
11 writing assistance to agencies as an incentive and/or by a campaign of disinformation
12 concerning the quality of KME's equipment and/or the features of GTT's equipment, among
13 other means, including discussion of GTT's pending patent litigation against KME. The
14 improper influence of the results of applicable competitive bidding processes amounting to
15 unlawful price fixing. On information and belief, agency freedom of choice was limited by
16 GTT in providing inaccurate information that agencies were free to ignore statutes and
17 regulations governing competitive bidding as non-violative of antitrust laws, basing its
18 advice on inapplicable law.

21 JURISDICTION AND VENUE

- 22 6. This action is instituted under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26,
23 for damages and to secure injunctive relief against Defendants for violations of §2 of the
24 Sherman Act as alleged herein.
- 26 7. Jurisdiction is conferred upon this Court by 28 U.S.C. §§1331 and 1337 and by Sections 4
27 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26. Venue is proper in this District pursuant
28 to §§12 and 16 of the Clayton Act, 15 U.S.C. §§22 and 26, and 28 U.S.C. §1391(b)-(d).

1 GTT transacts business, is found, and/or has agents in this District; a substantial part of the
2 events giving rise to Plaintiff's claims occurred, and a substantial portion of the affected
3 interstate trade and commerce described herein has been carried out, in this District.

4 8. The Court has jurisdiction over the state law claims under 28 U.S.C. §1367, because those
5 claims are so related to the federal claims that they form part of the same case or controversy,
6 and under 28 U.S.C. §1332 because the amount in controversy exceeds \$75,000, and Plaintiff
7 and Defendants are headquartered in different states.

8 9. The Court has jurisdiction over each of the Defendants by virtue of their nationwide contacts
9 and business activities, including their contacts and activities within this district.
10

11 **PARTIES**

12 **A. The Plaintiffs.**

13 10. Plaintiff KM Enterprises, Inc., d/b/a Emtrac Systems is an Illinois corporation located in
14 Mount Vernon, Illinois.

15 11. Plaintiff Rodney Kris Morgan is an individual who resides in Belle Rive, Illinois.
16

17 **B. The Defendants.**

18 12. Defendant GTT, Inc. is a Delaware corporation, whose registered agent is CT Corporation
19 Systems, Inc., 100 S. 5th Street #1075, Minneapolis, Minnesota 55402. The corporation's
20 Chief Executive Officer may be served with process at 7800 Third Street North, Oakdale,
21 Minnesota 55128.
22

23 13. Defendant GTT, LLC is a Delaware limited liability company, whose registered agent is CT
24 Corporation, 100 S. 5th Street #1075, Minneapolis, Minnesota 55128. The corporation's
25 manager may be served with process at 7800 Third Street North, Oakdale, Minnesota 55128.
26

27 14. Various persons whose identities are at this time unknown to Plaintiffs, participated as co-
28 conspirators and/or participated in agreements in violations alleged herein and performed

1 acts and made statements in furtherance thereof. When Plaintiffs learn the identities of such
2 participants, Plaintiffs will seek leave to amend this complaint to add such participants as
3 defendants.

4 15. The acts charged in this Complaint have been done by some or all of the Defendants and
5 their co-conspirators or agreement participants, or were authorized, ordered or done by
6 Defendants' respective officers, agents, employees or representatives while actively engaged
7 in the management of each Defendants' business or affairs.

8
9 16. Each Defendant is liable for the acts done in furtherance of the alleged conspiracy or
10 unlawful agreement by distributors of the Opticom product and by contractors involved in
11 bidding the publics at issue in this case. Said distributors were acting under the direction,
12 control and supervision of Defendants.

13
14 **C. Joint and Several Liability.**

15 17. GTT, Inc. directly participated in the wrongful acts alleged herein.

16 18. Alternatively, GTT, Inc. controlled, directed and supervised GTT, LLC and is thus liable for
17 the acts of GTT, LLC.

18
19 19. Alternatively, GTT, LLC's acts are attributable to GTT, Inc. because GTT, Inc. exercised
20 complete domination over GTT, LLC's decision making, treating the corporation as a mere
21 instrumentality or alter ego.

22 20. Alternatively, GTT, Inc. and GTT, LLC share substantially identical elements, including two
23 or more of the following: (1) management; (2) business purposes; (3) operations; (4)
24 equipment; (5) customers; (6) supervision; and (7) ownership, among other factors such that
25 the corporate veil should be pierced and/or single enterprise theory should apply making the
26 entities jointly and severally liable for the wrongdoing alleged herein.
27
28

TRADE AND COMMERCE

1 21. The activities of Defendants, as described in this Complaint, were within the flow of, and
2 substantially affected, interstate commerce. During the time period covered by this
3 Complaint, Defendants used the instrumentalities of interstate commerce to carry out their
4 unlawful activities.

5 **A. The Relevant Product Market**

6
7 22. The relevant product market is the United States market for traffic preemption equipment
8 used to control traffic signal priority for emergency vehicles and transit vehicles (bus,
9 trolley). The market includes the maintenance market for optical and radio frequency
10 equipment as well as the manufacture, distribution and sale of GPS equipment.

11
12 23. The available evidence shows that GTT at the time of the 2010 patent suit, *Global Traffic*
13 *Technologies, LLC v. Emtrac Systems, Inc.*, 2010- CV-4110 (D.Minn.), had a dominant
14 position in the relevant market by virtue of its purchase from 3M of the existing optical
15 business. At that time, KME was gaining a substantial position in the GPS market. Shortly
16 after the campaign of disinformation and other anticompetitive conduct began in about
17 October, 2010, KME's position in the US GPS market declined to nearly zero percent.

18
19 24. KM Enterprises, Inc. was not included as a defendant in the September 30, 2010 lawsuit.
20 Rodney Kris Morgan was sued as President and Director of Emtrac Systems, Inc. in the
21 September 30, 2010 complaint. Allegations against Rodney Kris Morgan were limited to his
22 involvement as President and Director of Emtrac Systems, Inc., which was dismissed as a
23 party. KM Enterprises, Inc. sued GTT on November 5, 2010 for declaratory judgment of
24 non-infringement and invalidity of the patent named in the September 30, 2010 lawsuit.

25
26 25. By virtue of its improperly asserted power to exclude competition in the relevant market as to
27 its GPS product and its saturation of the market of installed obsolete infrared equipment,
28 GTT at all relevant time possessed monopoly power in the relevant market.

B. Antitrust Injury and Other Cognizable Harm

26. GTT's anticompetitive conduct in tampering with the competitive bidding process on public contracts by limiting the free choice of agencies involved, as hereinafter described, as a material cause of substantial harm to competition in the relevant market. KME's product is superior to and more advanced than GTT's product and costs less. Nevertheless, GTT's conduct has caused the loss of numerous contracts, the loss of opportunity to bid and interference with the competitive bidding process on jobs bid. But for GTT's conduct, KME would have been a competitive force among traffic preemption contracts bid and solicitations that were canceled due to protest would have been completed after applying competitive procedures pursuant to regulations.

27. GTT's violations of §§1 and 2 of the Sherman Antitrust Act and Section 3 of the Clayton Act, as herein described, are a material cause of injury to Plaintiff's business and property, in the nature of lost profits and diminished capital value of Plaintiff's business. Specifically, GTT's conduct has materially caused Plaintiff to be awarded fewer contracts and to earn lower profits. But for GTT's anticompetitive conduct, Plaintiff would have enjoyed far greater sales. Indeed, prior to GTT's conduct in disseminating disinformation about KME, Plaintiff's sales in the affected products were growing at a high rate due to KME's superior quality and low relative cost. But after the disinformation began, sales growth slowed to a halt.

FACTUAL ALLEGATIONS**A. Overview and Background**

28. Kris Morgan, President of KME invented the Emtrac Systems traffic preemption equipment more than 24 years ago and has worked to market, develop and distribute the product since that time.

1 29. Research and development of the product, including software development, in addition to its
2 manufacturing take place in McLeansboro, Illinois, by contract with KME in association with
3 a separate corporation.

4 30. KME produces the Emtrac Systems product which functions to preempt traffic signals for
5 emergency vehicles, but also performs data collection functions as Emtrac GPS technology
6 complies with the National Intelligent Transportation System Architecture goal of automated
7 vehicle location, computer-aided dispatch systems, remote vehicle and facility surveillance
8 and traffic incident management systems. KME was formed in 2007. Together with its
9 predecessor, it has offered the GPS capable version of its product since 2004. Before 2004,
10 KME manufactured and distributed a non-GPS version of the equipment which worked using
11 Radio Frequency signals.
12
13

14 31. An investment group purchased the marketing rights to GTT's product from The 3M
15 Company ("3M") in 2007 and formed GTT. GTT owns the Opticom System which is an
16 optical signal priority system, which was widely installed by 3M. 3M developed and
17 patented a GPS version of its equipment in 1995 and purchased additional patented GPS TSP
18 and EVP technology in about 2001. The 3M system was not substantially marketed until
19 2007 when GTT obtained the rights as part of an \$80 million asset purchase.
20

21 32. Before the GPS version of the EVP and TSP products were marketed, 3M dominated the
22 field with a saturation of approximately 97% of in-place EVP equipment with its Opticom
23 system over KME's much smaller in-place percentage for its Radio Frequency version.
24

25 33. Until GTT sued KME in October, 2010 for alleged violation of its patent, which involved
26 GTT's application of the GPS technology, KME had a market share of about 60-70% of the
27 GPS market. KME was consistently winning head to head tests of the GPS equipment.
28

1 34. KME's market share went to nearly zero immediately after the anticompetitive conduct
2 began.

3 35. The GPS versions of KME (Emtrac Systems) and GTT (Opticom) equipment are not
4 interoperable, although the Emtrac Systems equipment is interoperable with in place infrared
5 Opticom equipment.
6

7 **B. Federal regulations allow municipal freedom of choice apart from the**
8 **competitive bidding regulations only upon approval of the State**
9 **Transportation Department.**

10 36. The Federal Aid Highway Act ("Act") provides for federal-state cooperation in the
11 construction of highways. 23 U.S.C. §§101-166.

12 37. Pursuant to the Act, the Secretary of the United States Department of Transportation
13 ("Secretary") is required to enter into formal project agreements with State departments of
14 transportation ("STD") formalizing conditions of project approval regarding plans,
15 specifications and estimates submitted to the Secretary for his approval. 23 U.S.C. §106.
16

17 38. With regard to participation in a project funded under the Act by or in cooperation with a
18 subdivision of the State (such as a municipality), the Act provides that the Secretary may rely
19 on representations made by the STD with respect to the arrangements or agreements made by
20 the STD. 23 U.S.C. §106(b)(2).
21

22 39. Similarly, the Act provides that the Secretary may rely on representations made by the STD
23 with respect to arrangements or agreements made by a subdivision of the State. *Id.* The
24 term "construction" includes installation of traffic control systems. 23 U.S.C. §101(3)(G).
25

26 40. Construction under the Act shall be undertaken by the respective STD or under its direct
27 supervision; construction work and labor are to be performed under the direct supervision of
28 the STD. 23 U.S.C. §114(a). Funds appropriated to a State may be obligated for
infrastructure-based intelligent transportation systems, capital improvements, and capital and

1 operating costs for traffic monitoring, management and control facilities. 23 U.S.C.
2 §103(b)(6)(H),(O).

3 41. Construction of a Federal-aid highway or a portion of such a highway shall be undertaken by
4 the STD or under the direct supervision of the STD. 23 U.S.C. §114(a). It shall be
5 performed under the direct supervision of the STD in accordance with the laws of that State
6 and applicable Federal laws. *Id.*

7
8 42. Payment of federal funds is made to the STD or to its designee. 23 U.S.C. §§121, 124. The
9 STD is responsible to implement a State strategic highway safety plan, which includes
10 installation of a priority control system for emergency vehicles at signalized intersections. 23
11 U.S.C. §148(a)(3)(B)(xii), (a)(5), and (a)(6).

12
13 43. Federal regulations have been promulgated that apply only to projects funded pursuant to the
14 Federal Aid Highway Act. 23 C.F.R. §§ 635.101-417.

15 44. These regulations include requirements applicable to sole source authorization and
16 competitive bidding. *See, e.g.*, 23 C.F.R. §635.411 (STD is responsible for requesting sole
17 source authorization from the Division Administrator, which must be obtained as a condition
18 for federal funds participation); 23 C.F.R. §635.114 (STD is responsible to assure free, open,
19 and competitive bidding and for alternative demonstration to Division Administrator that an
20 emergency exists or that other method is appropriate); 23 C.F.R. §635.114 (STD is
21 responsible for establishing and seeking approval for procedures for contractor responsibility
22 criteria to be approved by Division Administrator and to request concurrence in award of
23 Federal-aid contract); 23 C.F.R. 635.113(b)(STD is responsible to prepare tabulations of bids
24 and forward them to Division Administrator with the requirement to show the three low
25 bids).

1 45. Most of the projects at issue in this case are regulated by federal law. 23 C.F.R. §§940.1-13.

2 Funding and administration of ITS projects are under the direction of the STD. 23 C.F.R.

3 §940.13, citing 23 C.F.R. §940.11 and 23 U.S.C. §§106, 133.

4 46. Sole source procurement funded by the Federal Aid Highway Act is governed by 23 C.F.R.
5 635.411, which states:

6 (a) Federal funds shall not participate, directly or indirectly, in payment for any
7 premium or royalty on any patented or proprietary material, specification, or
8 process specifically set forth in the plans and specifications for a project, unless:

9 (1) Such patented or proprietary item is purchased or obtained through
competitive bidding with equally suitable unpatented items; or

10 (2) The State transportation department certifies either that such patented or
proprietary item is essential for synchronization with existing highway facilities,
11 or that no equally suitable alternate exists; or

12 (3) Such patented or proprietary item is used for research or for a distinctive type
of construction on relatively short sections of road for experimental purposes.

13 (b) When there is available for purchase more than one nonpatented,
nonproprietary material, semifinished or finished article or product that will fulfill
14 the requirements for an item of work of a project and these available materials or
products are judged to be of satisfactory quality and equally acceptable on the
15 basis of engineering analysis and the anticipated prices for the related item(s) of
work are estimated to be approximately the same, the PS&E for the project shall
16 either contain or include by reference the specifications for each such material or
product that is considered acceptable for incorporation in the work. If the State
17 transportation department wishes to substitute some other acceptable material or
product for the material or product designated by the successful bidder or bid as
18 the lowest alternate, and such substitution results in an increase in costs, there will
19 not be Federal-aid participation in any increase in costs.

20 (c) A State transportation department may require a specific material or product
when there are other acceptable materials and products, when such specific choice
21 is approved by the Division Administrator as being in the public interest. When
the Division Administrator's approval is not obtained, the item will be
22 nonparticipating unless bidding procedures are used that establish the unit price of
each acceptable alternative. In this case Federal-aid participation will be based on
23 the lowest price so established.

24 (d) Reference in specifications and on plans to single trade name materials will
25 not be approved on Federal-aid contracts.

26 23 C.F.R. 635.411.

27 47. Federal Transit Administration projects are governed by the following: California State

28 Contracting Manual §10.00; 49 C.F.R. 18, FTA Circular 4220.1F; FTA Master Agreement

1 MA(18); *Federal Fiscal Year 2012 Certifications and Assurances for Federal Transit*
2 *Administration Assistance Programs California Department of Transportation Division of*
3 *Mass Transportation*, www.dot.ca.gov/hq/MassTrans/Docs-pdfs/5311/2012dmtcerts.pdf; 2
4 C.F.R. 225 (MB Circular A-87); 48 U.S.C. §5302(a)(8); 49 U.S.C. §5324(h); 49
5 U.S.C. Ch. 53; 49 U.S.C. §5325(a); 49 C.F.R. part 31.

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7 48. The California Department of Transportation defers to federal procurement statutes and
8 regulations.
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C. Monopoly and attempted monopoly.

49. GTT approached KME in 2009 to discuss obtaining production rights to KME's Emtrac System. GTT met with KME twice in Mt. Vernon, Illinois and once in San Antonio, Texas to request an agreement wherein GTT would sell the Emtrac GPS System under the Opticom label. The discussions were not productive and GTT was not granted any rights to private label or sell KME's Emtrac GPS System. After GTT was unable to secure rights to private label or sell KME's Emtrac GPS System, GTT continued to attempt to compete against the Emtrac GPS System. Before October, 2010, customers substantially chose the Emtrac GPS System.

St. Paul, Minnesota, December, 2010.

50. On or about December, 2010, St. Paul, Minnesota issued a federally funded solicitation for bids for equipment to be placed on its rail lines. Influenced and assisted by GTT, specifications required an "Opticom M754 four (4) channel phase selector" and proceeded to describe the equipment manufactured by GTT.

51. Competitors were locked out of the bid because the specifications identified the model number and brand. This took place without federal agency approval required by the regulations and in the face of the fact that GTT was no longer producing the Opticom model number specified.

52. A side by side test had been planned for the purpose of comparing the GTT and KME products. GTT falsely promised to provide a dual phase selector at no charge. St. Paul cancelled the test and purchased the GTT product on that basis.

53. KME was locked out of the market.

1 54. On information and belief, freedom of choice of the agency officials was limited by actions
2 of GTT and/or its affiliates to achieve an anticompetitive result.

3 ***Brookhaven, New York, May, 2011.***

4 55. In May, 2011, Town of Brookhaven, Traffic Preemption Control System Pin No. 1757.43,
5 Invitation to Bid #11039 was released to solicit bids for about 400 intersections in the Town
6 of Brookhaven, New York.

7
8 56. Four prime contractors bid the job, including Hinck Electrical Contractor, Inc., who was
9 awarded the contract.

10 57. The prime contract was in the amount of about \$1.8 million, while the subcontract for the
11 purchase of traffic preemption equipment was in the amount of more than \$1.5 million. The
12 approximate \$300,000 to the prime contractor was to cover installation of the equipment, in
13 cooperation with the subcontractor.

14
15 58. The first set of specifications for the solicitation identified as Town of Brookhaven, Traffic
16 Preemption Control System Pin No. 1757.43, Invitation to Bid #11039, were so tightly
17 written around Global Traffic Technologies that the Federal Highway Administration
18 required that the Town of Brookhaven rewrite the specifications before being granted
19 permission to bid the project.

20
21 59. The Emtrac Systems GPS traffic preemption equipment met the specifications of the
22 solicitation.

23
24 60. On June 1, 2011, KME submitted bids to four contractors for the job: Commander Electric,
25 Eldor Traffic Signal Contracting, Johnson Electric and Hinck Electric ("Hinck").

26 61. GTT's May 27, 2011 quote to at least two other contractors bidding on the Brookhaven job
27 was \$2,688,242.50. GTT also quoted a price to Hinck at that time. KME learned of the bid
28 amount on November 15, 2011.

1 62. KME's bid was in the amount of \$1,526,250.00.

2 63. The project bids were opened on June 2, 2011.

3 64. By June, 2011, KME had suffered the effects of the false allegations related to the pending
4 litigation on proposed sales for more than 8 months. Employees who agreed to work were
5 doing so without pay in hopes of a turnaround.
6

7 65. On June 2, 2011, D'Alessandro contacted all four contractors that turned in bids and asked
8 whether KME's price was low and whether the contractor used KME's numbers.

9 66. All contractors, except Hinck, stated to D'Alessandro during those conversations that KME's
10 price was the lowest.

11 67. Hinck stated to D'Alessandro that when Hinck received a formal contract it would be talking
12 to him.
13

14 68. Morgan met with Paul Stram of Hinck Electric in New York on July 26, 2011. During the
15 meeting, Stram and Morgan discussed the Brookhaven project.

16 69. Stram informed Morgan that GTT had requested the opportunity to update its bid as it had
17 allegedly "bid too much equipment."
18

19 70. A bid of "too much equipment" would have been unlikely as the necessary number of units
20 was stated in the specifications. Morgan requested the opportunity to update his bid if GTT
21 were allowed to do so.
22

23 71. The revised quote given by GTT to Hinck was \$1,450,040.60, about \$70,000 below KME's
24 bid and \$1.2 million below GTT's first bid. KME learned of the bid amount on November
25 15, 2011.

26 72. On August 4, 2011, Morgan contacted Stram by telephone and Stram told him that Global
27 Traffic Technologies ("GTT") would be awarded the contract.
28

73. During the Federal Highway Administration investigation, Hinck provided to the agency a purported email containing the quoted figure with a June 1, 2011 date, contrary to other evidence that indicates that the email was created after July 26, 2011.

74. On information and belief, freedom of choice of the agency officials was limited by actions of GTT and/or its affiliates to achieve an anticompetitive result.

Overland Park, Kansas, July, 2011.

75. Meanwhile, the dual equipment ploy continued to undermine KME's sales. KME began to request permission to bid on jobs with regard to which the Opticom system was named on the specifications.

76. On or about July, 2011, City of Overland Park ("Overland Park"), Metcalf Avenue/Shawnee Mission Parkway Bus Corridor, Transit Signal Priority (ST-1346), Tiger Grant KS-78-0001-4c ("Solicitation") was placed for bids.

77. In its steadfast intention to specify the name brand "Opticom" system, the City of Overland Park went to great lengths, influenced and assisted by GTT.

78. GTT had already announced that the Opticom infrared system was no longer available. On information and belief, the purpose was to lock out competitors and offer the dual equipment, thereby claiming future GPS system installations for the region.

79. The Overland Park specifications for the Solicitation included:

721	Optical Detector	6 units
762	Phase selector	15 units
764	Phase selector	13 units
794T	Emitter	15 units
	ST 1349	

84. Both phase selectors specified were phase selectors were dual unit selectors that accommodate both optical and GPS capability.

1 85. Bids were due on the Solicitation at 2 pm July 19, 2011. Overland had failed to respond
2 to KME's repeated requests for permission to bid. As a result, KME's competitor,
3 Global Traffic Technologies ("GTT") was the sole bidder for the project.

4 86. At 2:30 pm on July 19, 2011, KME served via email and certified mail to Overland a
5 letter of protest identifying the lack of protest procedures and failure of Respondent to
6 acquire a sole source waiver.

7
8 87. Thereafter on July 19, 2011, Overland made a determination to amend its solicitation to
9 provide a protest procedure.

10 88. On July 25, 2011, in compliance with the protest procedures, KME filed a formal protest
11 and served it via hand delivery and certified mail.

12
13 89. The protest identified several defects in the Solicitation that impeded competitive bidding
14 required by federal law.

15 *a. Respondent wrongfully failed to authorize bidding by Petitioner in violation of*
16 *federal law.*

17 90. On June 22, 2011, ACT Traffic Solutions, KME's distributor, contacted the consulting
18 engineer's representative, Todd Fredericksen, of OA Consulting, requesting permission
19 to present information to the Project Manager regarding Emtrac Systems' conformity
20 with specifications for ST-1346.

21 91. On June 27, 2011, ACT Traffic Solutions contacted the Project Manager, Brian Scovill,
22 via email with a carbon copy to OA Consulting, concerning a request for approval to
23 submit an alternate product in conformity with bid specifications for ST-1346. KME
24 attached information about Emtrac Systems and requested a meeting and other
25 communication.

26
27 92. On July 6, 2011 and July 7, 2011, KME, again, contacted the City and the Consulting
28 Engineer with information about Emtrac Systems' ability to conform to specifications.

1 93. KME complied with ST-1346 IB-6 requirements for Substitution in its written
2 communication with Respondents on June 22, June 27 and July 6 and July 7, 2011.

3 KME, again, requested permission to submit a bid within the time limits set forth in
4 Addendum 3, by sending a written request on July 25, 2011.

5 94. Brett Lievers, of ACT Traffic Solutions, spoke with Brian Scovill, City of Overland Park,
6 Bruce Wacker, Assistant Traffic Engineer, and Todd Fredericksen, OA Consulting via
7 telephone seeking permission to submit a bid.

8 95. KME did not receive a response from OA Consulting granting or denying permission to
9 submit a bid.

10 96. Bruce Wacker stated in an email dated July 7, 2011 that the City of Overland Park did not
11 want to consider Emtrac Systems for the Project.

12 97. No protest procedure was included in ST-1346 before the deadline for bids.

13 98. On July 14, 2011, ACT Traffic Solutions and Emtrac Systems served a letter of protest to
14 the City of Overland Park, Johnson County Transit and OA consulting raising the
15 following issues: 1) lack of protest procedure; 2) failure to comply with fair and open
16 competition requirements; 3) failure to comply with sole source requirements. Petitioners
17 further requested permission to submit a bid.

18 99. Brian Scovill, City of Overland Park, responded via email dated July 15, 2011 that the
19 City of Overland Park was looking into the matter.

20 100. On July 18, 2011, ACT Traffic Solutions contacted the Respondents via email
21 addressing the lack of protest procedures and failure of the Project Manager to respond to
22 Petitioners' written request for permission to bid pursuant to ST-1346, IB-6.

23 101. Federal Transit Administration, Guidance Circular, 4200 Procurement, Number
24 C 4220.1E, Third Party Contracting Requirements ("Guidance Circular 4220.1E"),
25
26
27
28

1 Section 7, *General Procurement Standards Applicable to Third-Party Procurements*, ¶d,
 2 states:

3 d. Ensuring Most Efficient and Economic Purchase. Grantee procedures shall
 4 provide for a review of proposed procurements to avoid purchase of unnecessary or
 5 duplicative items. Consideration should be given to consolidating or breaking out
 procurements to obtain a more economical purchase.

6 Guidance Circular 4220.1E, Section 7(d).

7 102. Pursuant to Section 7(d), Petitioners protest the specification requiring dual phase
 8 selector technology as being duplicative and unnecessary and as unnecessarily limiting
 9 the Respondents to future upgrades using Opticom products when superior, less
 10 expensive technology compatible with current systems is available through Emtrac
 11 Systems. Exhibit A.

12 103. Guidance Circular 4220.1E, Section 8(a)(6) states:

14 8. COMPETITION.

15 a. Full and Open Competition. All procurement transactions will be conducted in a
 16 manner providing full and open competition. Some situations considered to be
 restrictive of competition include, but are not limited to:

17 ...

(6) Specifying only a "brand name" product instead of allowing "an equal" product
 to be offered without listing its' salient characteristics.

18 Grantees define the salient characteristic in language similar to the following:

19 (a) 'Original Equipment Manufacturer (OEM) part #123 or approved
 20 equal that complies with the original equipment manufacturer's
 requirements or specifications and will not compromise any OEM
 21 warranties'; or

22 (b) 'Original Equipment Manufacturer part #123 or approved equal
 23 that is appropriate for use with and fits properly in [describe the
 bus, engine, or other component the part must be compatible with]
 and will not compromise any OEM warranties'..."

24 Section 8(a)(6)

25 104. Pursuant to Section 8(a)(6) KME protested the failure of the agency to follow
 26 required contract procedures in stating specifications for ST-1346. Specifically, the
 27 specifications required a brand name product instead of an equal product to be offered
 28

1 without listing its' salient characteristics as defined in the Guidance Circular, which
2 delineates required terms of the Project contract.

3 105. Instead, KME was informed, pursuant to ST-1346, that permission of the
4 Consulting Engineer would be required in order to submit a bid using an alternative
5 product. No official response was received to the written request, except a telephone
6 statement by Todd Fredericksen, of OA Consulting, describing the reaction of the City of
7 Overland Park to the request, as follows:
8

9 "The consultant and the city had a meeting to discuss Emtrac as an alternate product
10 to Opticom. The signal technician slammed his fist on the table complaining about
11 having to learn a new system, complaining about maintaining another system, and
12 complaining about not having local support if they allow us to bid. We are concerned
13 about the reliability of radio communication as it doesn't have a good track record.
14 The Opticom system is tried and true. It's not my decision; you need to contact the
15 city."

16 106. In addition, KME received the following communication from Wacker via email
17 on July 18, 2011:

18 Brett,
19 I know we are not interested in the Emtrac for pre-emption. We are utilizing the
20 Opticom detectors we have on system already to take care of pre-emption and the
21 bus priority without having to install dual systems in the field.

22 The only thing we might be interested in hearing more about is the queue jump
23 technology. Do you have any references for locations where you have installed this
24 technology?

25 107. Section 8(c) states:

26 c. Written Procurement Selection Procedures. Grantees shall have written selection
27 procedures for procurement transactions. All solicitations shall:

28 (1) Incorporate a clear and accurate description of the technical requirements for the
material, product, or service to be procured. Such description shall not, in
competitive procurements, contain features which unduly restrict competition. The
description may include a statement of the qualitative nature of the material, product
or service to be procured, and when necessary, shall set forth those minimum
essential characteristics and standards to which it must conform if it is to satisfy its

intended use. Detailed product specifications should be avoided, if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient characteristics of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.

(2) Identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.

Section 8(c).

108. Pursuant to FTA Circular Guidance Section 8(c), Petitioners protest Respondents' failure to provide written procurement selection procedures that comply with the Guidance Circular requirements. Specifically, ST-1346 contained features that unduly restricted competition in that it requires the brand name, Opticom, without allowing bids from distributors of equal products with the required "brand name or equal" language. It further included detailed product specifications. ST-1346 did not clearly state the specific features of the named brand which must be met by offerors of alternate products.

109. Section 8(d) states that "grantees shall not preclude potential bidders from qualifying during the solicitation period, which is from the issuance of the solicitation to its closing date." Section 8(d).

110. KME protested the failure of the City of Overland Park and OA Consulting to grant permission for Petitioners to bid.

111. Section 9(c) states:

9. METHODS OF PROCUREMENT. The following methods of procurement may be used as appropriate:

...

c. Procurement by Sealed Bids/Invitation for Bid (IFB). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

...
 (c) Two or more responsible bidders are willing and able to compete effectively for the business;

Section 9(c).

112. Pursuant to Section 9(c), KME protested Overland's failure to comply with the conditions for use of the Procurement by Sealed Bids method that requires two or more responsible bidders which are willing and able to compete effectively for the business. If Overland were to have provided permission for Emtrac to submit a bid, this condition may have been met. As of this date, however, GTT is the only company who can bid for the job.

113. Section 9(h) states:

(h) Procurement by Noncompetitive Proposals (Sole Source). Sole Source procurements are accomplished through solicitation of a proposal from only one source...

(1) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:

(a) The item is available only from a single source;

(b) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(c) FTA authorizes noncompetitive negotiations—e.g., if FTA provides a joint procurement grant or a research project grant with a particular firm or combination of firms, the grant agreement is the sole source approval;

(d) After solicitation of a number of sources, competition is determined inadequate; or

(e) The item is an associated capital maintenance item as defined in 49 U.S.C. §5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to FTA:

1. that such manufacturer or supplier is the only source for such item; and

2. that the price of such item is no higher than the price paid for such item by like customers.

Section 9(h)(1).

114. Pursuant to Section 9(h)(1), KME protested Overland's failure to comply with applicable sole source requirements for use of Procurement by Noncompetitive Proposal.

Specifically, a competitive proposal is feasible in this case, as the Emtrac Systems

1 product meets or exceeds specification requirements. Thus the item is not available from
2 only one source. In addition, there was no emergency that would justify use of
3 noncompetitive solicitation, as evidenced by the fact that the Agency was using an
4 apparent competitive process. ST-1346. FTA had not authorized sole source
5 procurement. ST-1346. Finally, no certification in writing to FTA had been made in
6 compliance with subsection (e) and none is appropriate as a comparable item is available.
7

8 115. KME protested Overland's failure to provide a cost analysis in compliance with
9 Section 10(a) in the event Overland continued to pursue an unauthorized sole source
10 procurement procedure.
11

12 116. KME represented that the Emtrac product meets or exceeds specification
13 requirements, permission to bid should have been allowed to bid.

14 *b. Overland failed to respond to KME's protest pursuant to applicable procedures and*
15 *wrongfully cancelled the solicitation.*

16 117. Overland ignored KME's properly filed protest and did not address the issues
17 raised therein.

18 118. The Protest Procedure required that the protest be served on the Project Manager.
19 The Specifications and Addendum #3 identified the Project Manager as David Eickman
20 of Olsson Associates. Petitioner's Protest dated July 25, 2011 was served via hand
21 delivery and certified mail to David Eickman in compliance with the protest procedure.
22

23 119. On information and belief, Overland, by its Project Manager, failed to provide a
24 written determination regarding its decision on the protest by about August 10, 2011
25 (allowing two days for deliver by certified mail required in the protest procedure). The
26 Project Manager did not provide a written determination regarding any decision on
27 Petitioner's letter dated July 19, 2011 pursuant to any applicable protest procedure. In
28

1 any case, the July 19, 2011 protest was approved by the City Engineer in providing
2 Addendum #3 which provided protest procedures.

3 120. In a letter dated July 29, 2011, the City Engineer, Brian Scovill identified himself
4 as the Project Manager and addressed the July 19, 2011 letter of protest in a
5 determination that cancelled the solicitation.

6
7 121. On August 9, 2011, Daniel Miller, who identified himself as the City Engineer
8 stated in a letter that it approved the Project Manager's recommendation disapproving the
9 petition dated July 19, 2011. The City Engineer stated in the letter that it had cancelled
10 the solicitation on which the protest was based on July 27, 2011.

11
12 122. The FTA granted authorization for noncompetitive negotiations for brand name
13 products on August 9, 2011

14 *c. Overland's misleading grounds for request for noncompetitive negotiations*
15 *perpetrated a fraud on the FTA and on KME; alternatively, Overland's request for*
16 *noncompetitive negotiation was inappropriate.*

17 123. The FTA's August 4, 2011 source selection determination is not consistent with
18 the best value determination required by 48 C.F.R. 15.101 as technical and past
19 performance considerations indicate that the Emtrac product offered by Petitioner should
20 play a dominant role in source selection.

21
22 124. Application of the tradeoff process provided in 48 C.F.R. 15.101-1 indicates that
23 the determination allowing noncompetitive negotiation as to the GTT product requested
24 by Respondents is inappropriate and that the Emtrac product offered by Petitioners
25 because Emtrac generally offers a lower price than GTT and is more highly technically
26 rated than GTT consistent with Regional Architecture policy and National Architecture
27 implementation. See, *Federal Transit Administration, ITS Policy*, Federal Register, Vol.
28 66, No. 5.

1 125. The specifications for the Solicitation included:

2 721 Optical Detector 6 units
 3 762 Phase selector 15 units
 4 764 Phase selector 13 units
 5 794T Emitter 15 units
 6 ST 1349

7 126. The Opticom Equipment listed in the FTA authorization does not differentiate
 8 between Phase selectors 762 and 764.

9 127. In fact, 762 phase selectors are optical only phase selectors and 764 phase
 10 selectors are dual unit selectors that accommodate both optical and GPS capability.

11 128. If the goal of the project is to provide current interoperability with existing
 12 regional systems, GPS technology would not be necessary. If GPS capability is planned
 13 as part of proper maintenance of the regional architecture (see paragraph 50 *supra*), then
 14 the most cost effective approach would be to upgrade the entire system with GPS
 15 technology rather than to add to existing outdated technology with a plan for future
 16 utilization of GPS technology. This is true in light of Regional Architecture policy
 17 regarding updated obsolete technology as well as conformity to the National Architecture
 18 as defined in the United States Department of Transportation Final Report-April 2011.
 19 *Intelligent Transportation Systems (ITS) Standards Program Strategic Plan for 2011-*
 20 *2014*, FHWSA-JPO-22-052, Final Report-April 2011.

21 129. One interesting aspect of this Solicitation is the addition of an Ethernet ports. It is
 22 assumed this is to facilitate communication to local intersections from a central computer.
 23 This is an update to the existing optical system.

24 130. In addition, the Solicitation provides for replacement of optical phase selectors to
 25 be placed at intersections as part of the update to allow communication with the central
 26 computer.
 27
 28

1 131. The stated reason for not changing the entire project to GPS is that the fire trucks
2 use optical emitters.

3 132. If the concern is interoperability with local fire trucks, then the dual phase
4 selectors would not be necessary, as they envision future use of GPS technology. If the
5 noncompetitive solicitation is allowed for purchase of dual unit phase selectors and
6 emitters, it would violate rules related to competition in bid regulations as it applies to
7 future installation of GPS technology.

8 133. It would be cost effective and consistent with the Regional Architecture as well as
9 the National Architecture to allow competitive bidding for installation of the GPS
10 technology to replace the obsolete optical equipment. This would cost less than a two-
11 step replacement envisioned in this noncompetitive Solicitation, which provides updating
12 of obsolete optical equipment with the plan of updating the equipment to GPS in the
13 future.

14 134. Existing fire equipment could continue in place without change in planned update
15 while the updated GPS-equipped buses are put in place.

16 135. Interoperability among agencies within a region does not determine the continued
17 use of obsolete technology in a manner inconsistent with federal policy, as maintenance
18 is required to prevent such a situation.

19 136. “ITS integration can only be achieved by purchasing open architecture, non-
20 proprietary, standard equipment.” United States Department of Transportation, Federal
21 Transit Administration, *Dear Colleague Letter*, Number C-96-18.

22 137. Overland requested the authority for noncompetitive negotiations before the
23 protest process had been completed or even implemented.

24 138. Authorization was granted on August 4, 2011.

1 139. Even up to the deadline for bids at 2 pm July 19, 2011, Overland Park had failed
2 to respond to KME's repeated requests for permission to bid. As a result, GTT was the
3 sole bidder for the project.

4 140. KME's protest was ignored while Overland Park cancelled the solicitation and
5 was granted sole source approval. The FTA, upon being informed of the issues, reversed
6 the sole source determination and directed Overland Park to comply with regulations as
7 to future projects.
8

9 141. GTT, on or about January, 2012, influenced Johnson County Transit, Overland
10 Park, by its distributor, an agent, to set forth specifications for infrared phase selectors,
11 with regard to which KME could not bid.
12

13 142. On information and belief, dual phase selectors were provided instead.

14 143. On information and belief, freedom of choice of the agency officials was limited by
15 actions of GTT and/or its affiliates to achieve an anticompetitive result.
16

17 *Stockton, California, August, 2011.*

18 144. On or about August, 2011, GTT assisted the city of Stockton, California, which
19 has an existing Opticom System, with the development of specifications for a federally
20 funded solicitation to install EVP's in several of its intersections. The specifications
21 required: "Opticom, Model #721, EVP/TSP optical detector on existing mast arms."
22

23 145. No competitors could bid the job under the circumstances.

24 146. GTT had informed its customers that it no longer distributed the Opticom product,
25 yet the solicitation proceeded. Instead of the solicited product, the City was provided a
26 "dual system," which is two different sets of equipment marketed as a single unit. One
27 product within the casing can read optical signals. The other product within the casing
28

1 can read GPS signals. The City was inaccurately informed that this was provided at no
2 additional charge.

3 147. Remarkably, KME's GPS product serves as a dual system for optical and GPS
4 signals. It has been commercially available since 2006, before GTT was formed.
5 Nevertheless, KME was not qualified to bid as the solicitation specified an Opticom
6 model number.

7
8 148. On subsequent pages of the specifications the following was required: "furnish
9 and install GPS antenna equipment."

10 149. On information and belief, freedom of choice of the agency officials was limited
11 by actions of GTT and/or its affiliates to achieve an anticompetitive result.
12

13 *Anaheim, California, September, 2011.*

14 150. At the request of the City of Anaheim, KM Enterprises, Inc. installed a test
15 intersection with the Emtrac Systems Emergency Vehicle Preemption system in July,
16 2009.

17
18 151. On October 2, 2010, the City Engineering Department sent an email to the two
19 participating companies—KME and GTT—providing specifications for the proposed
20 work. The solicitation for bids requested contractor information demonstrating
21 compatibility with the City of Anaheim's specifications.
22

23 152. The deadline for submission of bids was October 13, 2010 at 5 pm. The bids were
24 opened on October 14, 2010.

25 153. Nextech Systems, an independent Emtrac Systems distributor was the low bidder.

26 154. After that time, the project was delayed by requirements for product testing,
27 which was successfully completed by KME, with preference for the Emtrac Systems
28 product indicated by fire personnel who became familiar with the equipment's functions.

1 155. The City Traffic Engineer informed KME at that time that the two competing
2 systems were functioning equally.

3 156. Subsequently, KME was informed by the City Fire Department requested that a
4 dual emitter be included as a requirement for the project.

5 157. On or about September, 2011, the City of Anaheim requested a dual emitter in
6 addition to the equipment specified.

7
8 158. The request was an addition to the scope of work for which the bid was submitted
9 under California Public Contracts Code §20103, which states that the "lowest bid shall be
10 the lowest bid price on the base contract without consideration of the prices on the
11 additive or deductive items." Thus the contract was required to be awarded to the
12 responsible bidder who submitted the lowest bid. *Id.*

13
14 159. KM Enterprises, Inc. offered to provide a dual emitter for no additional cost to the
15 City of Anaheim. There was no previous service of any kind of traffic preemption
16 equipment to the area, so interoperability was not a valid concern. Also, KME offered a
17 product that was interoperable with the optical product and the dual product. This was
18 explained to the City of Anaheim.

19
20 160. On August 5, 2011, an official of the City of Anaheim told a Nextech
21 representative that the City would purchase the equipment from GTT.

22 161. On information and belief, freedom of choice of the agency officials was limited
23 by actions of GTT and/or its affiliates to achieve an anticompetitive result.

24
25 ***West Carrollton, Ohio, 2011 and Bellefontaine, Ohio, March, 2012.***

26 162. In March, 2012, Bellefontaine, Ohio issued City Project No. 12-01, ODOT PID
27 No. 89026, Federal No. E11048, State Job No. 479287.
28

1 163. The low bidder was Perram Electric at \$230,600, basing its bid on the Emtrac
2 Systems product.

3 164. The officials from Bellefontaine refused to award the contract to KME despite the
4 low bid because they had previously been sued by 3M for patent infringement for the
5 Priority One product.

6
7 165. KME was given permission to bid on an Emergency Vehicle Preemption project
8 in West Carrollton, Ohio, in 2011. KME met the specifications and provided the lowest
9 bid. KME bid the project twice and low bidder both times.

10 166. The project was funded with Federal Aid Highway Act funds.

11 167. The Fire Chief informed KME that nevertheless they were going to purchase the
12 Opticom product.

13
14 168. The individual told KME that they had previously bought a product from Midwest
15 Traffic called Priority One and that 3M alleged patent infringement and sued the City for
16 purchasing an allegedly infringing product. The City of West Carrollton, accordingly the
17 individual refused to purchase a product against which patent infringement was alleged.

18
19 169. In this case, however, although GTT alleged infringement and included a request
20 for injunctive relief in the complaint, no injunction was sought during the relevant time.
21 There was no request that KME or any of its distributors stop selling the Emtrac product.

22 170. In addition to the patent litigation explanation, KME was told by the West
23 Carrollton official that because GTT wrote the grant that resulted in project funding, the
24 City owed it to GTT to purchase the product from it.

25
26 171. On information and belief, the City's freedom of choice was limited with
27 disinformation that prevented KME from competing in the market, although GTT
28

1 benefited from KME's participation in the bidding process as KME's participation
2 allowed access to federal grant funding.

3 *Moreno Valley, California, November, 2012.*

4 172. In Moreno Valley, California a similar approach was taken with regard to
5 provision of a dual emitter and a dual phase selector (collectively, "dual equipment"),
6 which were falsely represented by GTT to have been provided at no additional charge
7 after the advertised specification for the optical equipment by model number.
8 Interestingly, the specified single units were no longer commercially available or no
9 longer being manufactured.

10
11 173. The Emtrac Systems product met the specifications and two distributors of the
12 product provided the low bid and second lowest bid. The competitive bidding process
13 was ignored and the contract was awarded to GTT's distributor.

14
15 174. In other words, the specs for the Moreno Valley project essentially required a
16 single trade name. There was de facto identification of the Opticom product by product
17 features that were distinguishable from Emtrac Systems features which perform the same
18 function and there was no valid reason for the distinction. Despite the fact that the specs
19 are tightly written round the Opticom product, the bids offered using the Emtrac Systems
20 product fulfilled the specs nevertheless. The contract should have been lawfully
21 awarded.
22

23
24 175. Approval of the Division Administrator had not been obtained.

25 176. There were two competitors in the bidding process and both GPS products are
26 proprietary.

27 177. On information and belief, freedom of choice of the agency officials was limited by
28 actions of GTT and/or its affiliates to achieve an anticompetitive result.

1 **Monterey, California, December, 2012.**

2 178. On November 16, 2012, Respondent Monterey-Salinas Transit issued Invitation
3 for Bids #13-07 *Bus Rapid Transit Signal Priority Components* ("IFB #13-07").

4 179. The bids were opened on December 10, 2012 and the Notice of Award was issued
5 on December 17, 2012.

6 180. Two companies provided bids.

7 181. The winning bid was submitted by JAM Services, Inc., proposing to supply
8 "Opticom" GPS traffic signal priority equipment manufactured by Global Traffic
9 Technologies, LLC ("GTT"), which is distributed by Advanced Traffic Products, Inc. In
10 addition, JAM Services, Inc., pursuant to its bid, proposed to supply firmware provided
11 by Seimens, Inc., through its distributor Western Systems.
12

13 182. Cal Signal Corp was the disappointed bidder, offering "Emtrac Systems" GPS
14 traffic signal priority equipment produced by KM Enterprises, Inc. for which Cal Signal
15 Corp is the authorized distributor. In addition, Cal Signal Corp proposed to supply
16 firmware provided by Seimens, Inc., for which Western Systems is the distributor.
17

18 183. Each item of equipment bid constituted a capital expenditure funded with a
19 Federal Transit Administration grant.
20

21 184. Cal Signal Corp timely filed a bid protest on December 21, 2012, objecting to
22 unauthorized sole source specifications, items bid which were not specified, and price
23 collusion.
24

25 185. The sole source specifications sought firmware only manufactured by Seimens
26 and distributed in Northern California by Western Systems.

27 186. No sole source justification was documented by the agency.
28

1 187. If open specifications had been used for the firmware, the entire system could
2 have been upgraded with more advanced technology at a cost savings to the Agency.

3 188. Alternatively, Caltrans offers a value added engineering proposal method that
4 allows upgrade of all controllers throughout Monterey and provides access to the latest
5 technology.

6
7 189. Instead, rather than bid the software directly from the distributor, as is typical in
8 the industry, the agency included the firmware bid with the invitation to bid the traffic
9 signal priority equipment.

10 190. Michael Smith is the Chief Executive Officer of Western Systems, Inc. and is the
11 Vice President, Secretary and Treasurer of Advanced Traffic Products, Inc. Michael
12 Smith's wife, Edie Smith, is President and Chairman of Advanced Traffic Products, Inc.
13 Michael Smith owns Western Systems, Inc. Michael Smith and Edie Smith own
14 Advanced Traffic Products, Inc.
15

16 191. Both companies are located at 109 SE Everett Mall Way, Everett, Washington,
17 98208.
18

19 192. Michael Smith acted in derogation of corporate forms with regard to the facts set
20 forth herein.

21 193. Alternatively, Michael Smith was a controlling person as to Advanced Traffic
22 Products, Inc. and Western Systems with regard to transaction at issue in this case.

23 194. Alternatively, Jam Services, Inc. was a controlling person as to Advanced Traffic
24 Products, Inc. and Western Systems with regard to the transaction at issue in this case.

25 195. With regard to the bids, pursuant to forms provided on page 6 of the IFB #13-07,
26 bid items 1, 5 and 8 were the sole source items produced by Siemens distributed by
27 Western Systems.
28

196. The bids for those items from Jam Services, Inc. are as follows:

Item 1: Traffic Control System, Amount: \$95,648.00

Item 5: Furnish TSP/QJ Firmware and Program Controller, Amount: \$46,095.00

Item 8: Furnish TSP/QJ Operations Plan, Amount: \$10,500.00.

197. The bids for those items from Cal Signal Corp are as follows:

Item 1: Traffic Control Signal, Amount: \$121,242.00

Item 5: Furnish TSP/QJ Firmware and Program Controller, Amount: \$85,575.00

Item 8: Furnish TSP/QJ Operations Plan, Amount: \$20,380.00.

198. Western Systems bid to Cal Signal was as follows:

Item 1: Traffic Control Signal, Amount: \$111,541.25

Item 5: Furnish TSP/QJ Firmware and Program Controller, Amount: \$78,750.00

Item 8: Furnish TSP/QJ Operations Plan, Amount: \$18,750.00.

199. Cal Signal Corp does not know the amount bid from Western Systems included in the Jam Services, Inc. bid. The difference in amounts between the bid for the Siemens firmware from Western Services to Cal Signal Corp and the amount bid by Jam Services for that equipment was \$56,798.25.

200. If Cal Signal Corp would have bid the prices for the Siemens items that were bid by Jam Services, Inc., Cal Signal Corp's bid would have been \$251,228. That amount is \$31,495 less than the winning bid.

201. The difference was explained by Western Systems in a letter drafted by Michael Smith in response to Cal Signal Corp's bid protest. The letter was dated January 8, 2013 and addressed to the Attorney General's Office (Cal Signal's Bid Protest documents had been copied to Stephen Ramirez at the attorney general's office). Western Systems had bid two different prices for the Siemens firmware for each of the two ultimate bids.

1 202. On information and belief, Western Systems bid an amount at or less than
2 \$152,243 to Advanced Traffic Products, Inc. and bid an amount of \$227,197 for the same
3 equipment to Cal Signal Corp.

4 203. Advanced Traffic Products, Inc. is the distributor of the traffic signal priority
5 product that that is one of the two products competing in the market—Opticom,
6 manufactured by GTT.

7
8 204. Michael Smith, as decision maker for the Siemens firmware distributor as well as
9 for the Opticom traffic signal priority distributor, provided numbers prior to the blind bid
10 opening which decided in advance who would be awarded the contract.

11 205. Michael Smith and Advanced Traffic Products, Inc. have a financial stake in the
12 Opticom product being the chosen product for the project.

13
14 206. In his January 8, 2013 letter, Michael Smith explained the price difference.

15 207. Jam Services, Inc. received its bid from Advanced Traffic Products, Inc. and not
16 from Western Systems. JAM adopted the Western Systems January 8, 2013 letter in the
17 response.

18
19 208. One factor, he said, was the fact that an employee of Advanced Traffic Products
20 named Tim Sullivan is a Siemens Certified Technician and also an IMSA Level III
21 Technician. According to Smith, Tim Sullivan also has experience on a similar project in
22 an installation in Stockton, California in which that agency upgraded their traffic
23 management systems which included the Siemens software.

24
25 209. The fact that the Stockton project also involved installation of the Opticom
26 product produced by GTT is referenced in the letter endorsing Sullivan. That project
27 involved a solicitation with specifications which improperly required the Opticom
28

1 product. As a result, the Emtrac Systems product was not eligible to compete on that
2 project.

3 210. Michael Smith, on behalf of Western Systems, also touted the Advance Traffic
4 Products sales staff located in northern California who would be available to support the
5 project.

6
7 211. Smith stated that specific tasks could be assigned to Advanced Traffic Products
8 (also owned and managed by Smith), such as "field modifications/service." Because of
9 the availability of Tim Sullivan through Advanced Traffic Products, Western Systems
10 said its bid included the cost of only 15 of the 35 purchased intersections in its bid to
11 Advanced Traffic Products. The differential in amount bid to Cal Signal Corp included
12 the additional cost of field support that Western Systems purportedly would have to
13 provide on the additional 20 intersections. In other words, if Advanced Traffic Products
14 got the job, 20 intersections would be serviced by Tim Sullivan for Advanced Traffic
15 Products and Western Systems would only have to service 15 intersections. If Cal Signal
16 Corp got the job, all 35 intersections would have to be serviced by Western Systems,
17 according to Smith. In addition, Western Systems padded the Cal Signal Corp bid to
18 include time anticipated for its traffic engineer to learn the Emtrac operations.
19
20

21 212. Additionally, Smith explained that the higher amount bid to Cal Signal Corp was
22 explained by Western Systems' lack of experience and deficient knowledge with regard
23 to the Emtrac Systems traffic signal priority equipment compared to the Opticom
24 produced by GTT. This justified to Western Systems a favorable bid to the company co-
25 owned by Western Systems' 100% shareholder and a higher bid to the distributor of the
26 competing product.
27
28

213. On January 16, 2013, Respondents denied Cal Signal Corp's bid protest.

1 214. On January 22, 2013, Cal Signal Corp appealed.

2 215. On February 4, 2013, the MST Board of Directors appointed a hearing officer and
3 scheduled a hearing.

4 216. On March 15, 2013, Respondents denied the appeal. The specifications did not
5 include an item for "field modifications/service."

6 217. Cal Signal Corp has IMSA Level III Technicians on its staff.

7 218. The Emtrac Systems product has been successfully installed using Siemens
8 firmware in Brampton, Ontario, Canada and in Minneapolis, Minnesota. The installation
9 was rather simple and the Siemens distributor in those regions had no apparent problem
10 accommodating the Emtrac equipment.

11 219. In its letter to the attorney general, Western System described interface between it
12 and Advanced Traffic Products that apparently is intended to explain the arm's length
13 nature of the transaction. Smith stated that in July, 2012, Western Systems discontinued
14 its Northern California sales staff. Coincidentally, Advanced Traffic Products purportedly
15 had a job opening for a sales position in Northern California. Western Systems named
16 Advanced Traffic Products its distributor for the Siemens traffic signal cabinet when Tim
17 Sullivan began working for Advanced Traffic Products. Traffic controller cabinets were
18 not part of this solicitation.

19 220. According to the company websites, copyrighted 2013, Tim Sullivan is a
20 representative for Western Systems. He is not listed on the Advanced Traffic Products
21 website.

22 221. The specifications call for queue jump capabilities. The queue jump capability
23 would have been complete if the Emtrac product would have been purchased, as the
24 interface is virtual. As the Opticom product has been chosen, cuts will have to be made in
25

1 the concrete to install additional equipment from another vendor to make the queue jump
2 capability of the Opticom product functional. Payment for queue jump imbedded
3 electronics was provided in a previous solicitation and awarded to JAM, allowing for a
4 lower bid.

5 222. Western Systems painted Cal Signal Corp in a false light in reckless disregard of
6 the truth in its statement in the letter which said: "Also, with regard to the project risk, we
7 have no concerns about payment timing or credit risk with regard to ATP, but cannot say
8 the same about Cal Signal."

9 223. On information and belief, Western Systems', Advanced Traffic Products' and
10 Jam Services, Inc.'s conduct was controlled and otherwise influenced by GTT.
11

12 224. Their excuse for their conduct was that it did not violate the antitrust laws.
13

14 225. On information and belief, freedom of choice of the agency officials was limited
15 by actions of GTT and/or its affiliates to achieve an anticompetitive result.
16

17 ***Jacksonville, Florida, February, 2012.***

18 226. Another de facto sole source tactic spearheaded by GTT took place in
19 Jacksonville, Florida and Amador County, California, among other agencies. GTT
20 through its distributors, as agents, influenced agencies to specify the GTT patented left
21 turn signal mechanism.

22 227. The Jacksonville, Florida specifications required a 24 VDC power supply on the
23 card rack. If no card rack exists, an external card rack must be supplied, which also must
24 be powered at 24 VDC, according to the specifications. The Solicitation states:
25

26 "The Vehicle Detector Assembly will be ...installed directly into a card rack
27 located within the controller cabinet. If no card rack exists, an external card rack and
28 power supply must be provided...The Vehicle Detector Assembly will be powered
from +24 DVC."

Solicitation p. 26.

1 “The card rack will contain a 24 volt VDC power supply...”
2 Solicitation p. 28.

3 The specification described the Opticom GPS product. The KME product has an external card
4 rack which operates on 120 volts AC. While the specification appears to allow an external card
5 rack, it essentially precludes it, thus setting forth a requirement that only GTT can supply.

6
7 228. The specifications also required a turn signal status, which was tied to the turn
8 signal and caused a preemption of the traffic signal to the left or the right depending on
9 the direction of the turn signal. The Solicitation stated:

10 “i. Turn signal status: Indicates the status of the turn signal at the beginning of the
11 hold time.”
12 Solicitation p. 27.

13 “The vehicle detector assembly will relay a priority request to the next adjacent
14 intersection based on the intended direction as indicated by the vehicle’s turn signal.”
Solicitation p. 28; See also, pp. 30, 31.

15 KME’s product uses zones to transmit the signal from the vehicle to the intersection. GTT’s
16 product is based upon a predetermined route, which requires that the vehicle hit points on the
17 route in order for the intersection to give the vehicle priority. Thus the turn signal status is
18 important with regard to the GTT technology. It is not needed with the KME technology,
19 however, which can accomplish communication involving a turn through zone placement. A
20 zone placed after the turn to the left or right will signal for preemption to the next approaching
21 intersection. Thus, the products perform the same functions and competition should not be
22 restricted.
23

24
25 229. The specifications require a two-color LED indicator for High and Low priority
26 display.

27 The Solicitation states:
28

1 “The vehicle detector assembly shall be capable of displaying a two-color LED
2 indicator (one for High priority and another for Low priority) for each channel to
display active calls.”

3 Solicitation p. 27.

4 This two-color display is only seen if someone opens the cabinet at the intersection. On the KME
5 product, low priority is indicated with a flashing light and high priority is indicated by a solid
6 light. Each product performs the function of indicating high and low priority.

7 230. The specification excluded products that require critical system parameters to be
8 downloaded to each vehicle. The Solicitation states:

9
10 “Critical system parameters such as preemption zones, range settings, call hold
11 times, shall reside in each vehicle detector assembly. Changes to these parameters
shall not require the need to download these parameters to each vehicle in the
12 system.”

13 Solicitation p. 30.

14 The GTT product is intersection based, while the KME product is vehicle based. As a result, the
15 critical system parameters are downloaded to the vehicle for the KME system. Functionally,
16 each product provides for the storage and utilization of critical system parameters.

17 231. The specifications described the GTT product exclusively throughout the
18 Solicitation. An example is the detailed description of what the activity screen will
19 display. The Solicitation stated:

20
21 “The central software shall provide a real-time activity screen which will provide the
following information...”

22 Solicitation p. 31.

23 “The vehicle detector assembly interface software shall provide menu displays that
24 enable the following...”

25 Solicitation p. 28, 29, 30.

26 “Priority Control Management Software...”

27 Solicitation p. 30, 31, 32.

28 The software applications set forth in the specifications described the GTT product to the
exclusion of the KME product. With regard to these features, KME is completely different from

1 GTT, although they perform the same functions in terms of transit vehicle preemption and
2 emergency signal priority.

3 232. The specifications require three references for qualification of bidders. The
4 references must be within the continental United States. The Solicitation states:

5 "The bidders shall provide proposals for only systems installed in the continental
6 United States..."
7 Solicitation p. 32.

8 "B. References. (10 points) A currently functioning application of the technology
9 proposed in this bid in the US..."
Solicitation p. 36.

10 Agencies in Canada had obtained expert consultation reports and had done head to head testing
11 of the equipment the subject of this Solicitation and references from them would provide
12 valuable information that would be useful in this procurement. The Solicitation excluded those
13 references and places KME at a disadvantage for no good reason.

14 233. The specifications allowed JTA, after initial bid to request the "best and final"
15 quote of a bidder. Solicitation, p. 39. This was not allowed by federal or state law and is
16 a basis for a determination that the procurement is to be treated as a sole source
17 procurement. FTA C 4220.1F, p.V-5. FTA assistance may be used to support a sole
18 source award only if the award can be justified under FTA's third party contract
19 standards for sole source awards. *Id.* A sole source award may not be based solely on
20 the unique capability of the offeror to provide the specific property or services proposed.
21 FTA C 4220.1F, p. VI-1. It also allows the favored competitor to influence the award
22 and could amount to Reverse Bid-Rigging. See, *Clark Construction Company, Inc. v.*
23 *Pena*, 930 F. Supp. 1470 (M.D. Ala. 1996)

24 234. The Solicitation suggested that it would cover additional areas and agencies. This
25 was an impermissible action under the Common Grant Rules. FTA C 4220.1F, p. V-6.
26
27
28

1 235. During the protest process, KME offered open specifications which would have been
2 authorized by state and federal law, but KME's protest was unsuccessful.

3 236. Under the proposed open specifications, either product could have been chosen. KME
4 also proposed a head to head comparison of the two lowest bids, which is allowed under
5 the regulations.
6

7 237. The choice of specifications was not based upon the contents of the specifications. On
8 information and belief, the freedom of choice of the agency was limited by GTT, directly
9 or through its affiliate, to obtain and anticompetitive advantage.

10 238. KME's suggestions were rejected.

11 239. As a result competitors, including KME could not bid.

12 240. On information and belief, the freedom of choice of the agencies was limited by actions
13 of GTT in influencing the specification items by requiring an insignificant patented
14 mechanism in order to obtain sole source authorization. This amounted to unlawful tying.
15
16

17 ***Ventura County, California, November, 2012.***

18 241. Ventura County created a "Request to Waive Bidding Requirements" form and
19 filled it out, setting forth several reasons for its choice of the Opticom product to be
20 installed in several hundred intersections in three municipalities. Not only did Ventura
21 County ignore state and federal procurement regulations. It also ignored open meeting
22 laws in choosing Opticom as its sole source.
23

24 242. The project would not have qualified for sole source authorization if it would
25 have been lawfully sought.
26
27
28

1 243. The reasons set forth in a written explanation for its decision demonstrate that the
2 County of Ventura and the three municipalities involved were misled. The information
3 upon which the ultra vires sole source decision was based was factually inaccurate.

4 244. On information and belief, the freedom of choice of the agencies involved in this
5 decision was limited by misleading information and other means such the agencies were
6 pressured to avoid lawful procurement mechanisms.
7

8 245. KME was not allowed to bid the project.

9 *Lodi, California, February, 2012*

10
11 246. The low-bidding contractor in this case was Steiny & Company, Inc.

12 247. The Solicitation specified the following with regard to its advertisement for bids
13 for traffic preemption equipment:
14

15 **6-218 MODULATED LIGHT SIGNAL DETECTION SYSTEM**-Emergency
16 vehicle preemption shall be 3M "Opticom" Model 752 phase selector unit or
17 approved equal completely wired in a controller cabinet and optical detector units
(3M Model 721 or approved equal) mastarm mounted per signal plans.

18 248. The specifications were approved by the FHWA Division Administrator.

19 249. The Emtrac product met the specifications for this Solicitation.

20 250. The Opticom product, produced by GTT was KME's competitor on the project.

21 251. KME produces a phase selector unit that is a functional equivalent of the
22 "Opticom" Model 752 and which is compatible with any such equipment in place.

23
24 252. Steiny & Company ("S&C") requested a bid for the product from KME distributor,
25 CSC, and used the figure in computing its bid. S&C conditioned the use of the KME
26 product in its prime contract bid was contingent upon the agency's approval of the
27 product, and conditioned upon CSC's agreement to supply the more expensive
28 "Opticom" product if the agency did not approve the installation. The condition is

1 commonly required for contractors to be willing to use a product other than Opticom in
2 their bids.

3 253. S&C was the low bidder on the project.

4 254. Lodi repeatedly refused to approve the Emtrac product in satisfaction of the
5 specifications.

6 255. S&C agreed to use the Opticom product and was awarded the contract.

7 256. The GTT Opticom vendor notified Lodi that the specified Model 752 is no longer
8 available.

9
10 257. The GTT Opticom vendor replaced the Model 752 with a Model 762 for the same
11 price. The Model 752 is an obsolete optical product. GPS technology has largely replace
12 the optical and radio frequency products. The Model 762 is a "dual unit" which places
13 two products (GPS and optical) separately within one housing. That serves as a bridge
14 between the obsolete optical product and the new GPS version. KME also markets a
15 GPS product and a dual unit. KME's GPS product is incompatible with GTT's GPS
16 product and vice versa and, as set forth hereinafter, regulations apply that cause a local
17 installation to have regional ramifications.
18

19
20 258. As a result of Lodi's Solicitation policy, CSC was required to supply the Opticom
21 product for the job and was required to purchase it at list price from the GTT distributor.

22 259. GTT controlled and limited the free choice of Lodi through various means of
23 misinformation intended to hinder competition.

24
25 260. Defendants ignored requirements imposed by federal law in awarding the contract
26 to GTT's distributor. This is tantamount to a sole source procurement in violation of 23
27 C.F.R. §635.101*et seq* and 23 C.F.R. §635.411, in particular.
28

1 261. Sole source procurement is not available pursuant to federal law under the
2 circumstances.

3 262. In this case, competitive bidding was required on this Solicitation pursuant to 23
4 C.F.R. 635.411. Thus federal funding of the project was conditioned upon proper
5 application of the competitive bidding regulations applicable to use of Federal Aid
6 Highway Act funds. See, 23 C.F.R. §635.101*et seq* ; 23 C.F.R. 635.411. In other words,
7 KME was the low bidder, but Lodi directed that the contractor order GTT equipment, ignoring
8 the condition upon the use of federal funds by the Federal Highway Administration.
9

10 263. Because only two competitors met the specifications and because full and open
11 competition was required by the Federal Highway Administration, de facto sole source
12 determination was not allowed in this case. In other words, portraying a competitive
13 process, then denying the official result is inappropriate.
14

15 264. The contract should have been awarded in compliance with federal law.
16

17 *Brea, California, June, 2013.*

18 265. KM Enterprises is a supplier of both Optical and Radio/GPS preemption systems
19 that work with the legacy optical system that the City of Brea currently was using.

20 266. Brea's traffic engineer after learning of KME's intention to bid Emtrac optical
21 equivalent system, posted an addendum change from the optical specified product to a
22 sole source Radio/GPS System, manufactured by Global Traffic Technologies.

23 267. KM Enterprises has been prejudiced in that the specifications have been so tightly
24 written around Global Traffic Technologies product that the City's policy "to ensure the
25 acquisition of quality goods and services at the lowest total cost to", that "Purchasing
26 [will] oversee the competitive bidding process and supplier selection for all City
27 departments."
28

1 268. That “the Purchasing Division is dedicated to the promotion of fairness and open
2 competition with the procurement process” is being circumvented because only one
3 untested manufacture’s system (Global Traffic Technologies) can be purchased.

4 269. With the City’s full and open competition requirement, and no pre-approval from
5 the Federal Highway Administration, sole source determination was allowed in this case.
6 If the project was funded with local funds, the solicitation violates state and local
7 competitive bidding laws, as well.

8 270. The first previously published set of specifications for the solicitation identified as
9 TRAFFIC CONTROL TECHNOLOGY IMPROVEMENT PROGRAM (PHASE 1) CIP
10 PROJECT No. 7705 (“Solicitation”), would have allowed an alternative optical system to
11 bid. The project engineer, a part-time, contract consultant, re-wrote the specifications
12 around Global Traffic Technologies GPS/System, which was not tested or evaluated by
13 the City Engineer or the City Fire department.

14 271. Ron Stocking, of the fire department did not agree with the traffic engineers
15 researched and recommendation for sole source specifications. No research or testing has
16 been performed to evaluate these products.

17 272. The Emtrac Systems GPS traffic preemption equipment meets the specifications
18 of the solicitation and should have been allowed to bid.

19 273. The solicitation TRAFFIC CONTROL TECHNOLOGY IMPROVEMENT
20 PROGRAM (PHASE 1) CIP PROJECT No. 7705. The City improperly modified the
21 terms of the specifications without implementing appropriate procedural steps. The City
22 made a sole source procurement in violation of the federal law.

23 274. On information and belief, freedom of choice of the agency officials was limited
24 by actions of GTT and/or its affiliates to achieve an anticompetitive result.
25
26
27
28

Jonesboro, Arkansas, August, 2014.

275. The City of Jonesboro, Arkansas issued Invitation to Bid No. 2014:22 regarding GPS emergency preemption equipment and Management Software.

276. Emtrac Systems was the low bidder.

277. There was no protest mechanism, but KM Enterprises, Inc. objected via email and letter to City officials.

278. KME offered user recommendations and side by side testing, with no response.

279. The contract was awarded to the GTT's distributor of the Opticom product with no explanation to KME.

280. Tactics similar to the ones documented herein were employed with regard to numerous agencies throughout the United States, including Long Beach, Garden Grove, Riverside, San Bernardino, Irvine, Corona, Chino, San Marcos, Oceanside, Newport Beach, Carlsbad and San Pablo, among other agencies.

281. On information and belief, the agencies' freedom of choice was limited by GTT's actions because competition with GTT by accessing agencies with proprietary specs would have required KME to violate state and federal law.

282. Additionally, on information and belief, the agencies' freedom of choice was limited by GTT's actions because GTT threatened action against the agencies for KME's alleged infringement of GTT's patent, which was the subject of pending federal litigation in the District of Minnesota. GTT further provided disinformation to the agencies as to the result of an agency choice of the Emtrac Systems equipment if GTT were successful in its patent infringement action by inaccurately stating, variably, 1) that KME was under injunction and was unlawfully offering its product for sale, that 2) if the agency installed the Emtrac Systems product, it would have to be ripped out and replaced if GTT were

1 successful in its lawsuit, 3) that if an agency chose the Emtrac Systems product it would
2 not have available future maintenance because KME would be out of business, and 4)
3 other untrue statements.

4 283. This disinformation was particularly damaging as GTT did not seek injunctive
5 relief in its Minnesota lawsuit, which it filed in September, 2010 and was brought to a
6 jury nearly three years later. Injunctive relief was alleged in GTT's complaint and
7 amended complaint, but was not requested until after a jury verdict in September, 2013.
8 Then GTT sought and obtained an injunction against the sale of the Emtrac Systems
9 product on November 8, 2013 which ended on January 7, 2014, when the patent expired.
10 At no time prior to November 8, 2013 did GTT ask KME or any of its independent
11 distributors to stop selling the Emtrac Systems product.
12

13
14 284. GTT benefited by KME's continued participation in the market as having a
15 competitor in the competitive bidding process as a facial matter accommodated public
16 funding mechanisms and made sole source justification documentation necessary.
17

18 285. At all relevant times, KME pursued its valid defenses to the patent infringement
19 lawsuit.

20 286. Thus, GTT impermissibly broadened the physical or temporal scope of the patent
21 grant and has done so in a manner that has anticompetitive effects.

22 287. KME reserves its claim for sham litigation if and when that claim may be timely
23 raised.
24

25 288. On information and belief, freedom of choice of the agency officials was limited
26 by actions of GTT and/or its affiliates to achieve an anticompetitive result.

27 **CLAIMS FOR RELIEF**

28 **COUNT I**

**Violation of 15 U.S.C. §1
Contract or Combination in
Restraint of Trade**

289. Plaintiffs incorporate paragraphs 1 through 288 as if fully set forth as part of this Count

I.

290. Plaintiffs are informed and believe and on that basis allege that GTT orchestrated arrangements and entered contracts that unreasonably restrain trade in the EVP and TSP market, including but not limited to agreements to encourage KME to bid on Federal Aid Highway Act, Federal Transit Administration and similar transportation projects funded with federal, state and local funds in order to be eligible for said funds without complying with sole source documentation requirements upon which the funding was conditioned.

291. During the bidding process, persuaded agencies to incorporate components of the Opticom product produced by GTT in such a way as to exclude the Emtrac Systems product from competition. Because of KME's compliance with applicable statutes and regulations, KME did not have an opportunity to tout its specifications in competition with GTT prior to bid opening.

292. As a result of the unlawful contracts and agreements with contractors and others initiated by GTT through its affiliates and distributors, KME was prevented from participating in the bidding process or encouraged to participate and then rejected after providing the lowest bid.

293. GTT was also involved in unlawful tying.

294. GTT asserted monopoly power during the relevant time by virtue of its assertions against KME and Kris Morgan in a lawsuit alleging patent infringement. GTT otherwise had a predominant share of the TSP and EVP market by virtue of its 2007 purchase of the infrared Opticom which saturated the market prior to the time that GPS products became

1 prevalent in the market in 2007. Thus a substantial amount of interstate commerce was
2 affected.

3 295. As a result of GTT's actions in violation of 15 U.S.C. §1, KME has been injured in its
4 business and property in an amount to be determined at trial, which amount is to be trebled
5 in accordance with 15 U.S.C. §15.
6

7 296. As a result of GTT's actions in violation of 15 U.S.C. §1, KME has suffered and will
8 continue to suffer irreparable harm, including but not limited to harm to its business
9 reputation and goodwill. KME is informed and believes and on that basis alleges that GTT
10 threatens to continue its wrongful actions, and unless restrained and enjoined, will do so.
11 KME's remedy at law is not by itself adequate to compensate KME for the harm inflicted
12 and threatened by GTT.
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Count II
Violation of 15 U.S.C. §2
Monopolization

297. Plaintiffs incorporate paragraphs 1 through 288 as if fully set forth as part of this Count II.

298. At all relevant times, GTT possessed monopoly power in the relevant market by virtue of its saturation of the infrared TSP and EVP market and by improperly asserted monopoly power of the GPS TSP and EVP market. GTT possessed the power to exclude competitors from the relevant market.

299. By its anticompetitive conduct, GTT willfully maintained its monopoly power in the relevant market using restrictive or exclusionary conduct, rather than by means of greater business acumen, and injured Plaintiff thereby. It was GTT's conscious object to further its dominance in the relevant market by and through its campaign of disinformation and interference with the competitive bidding process in public contracts throughout the United States. GTT acted by and through distributors and contractors over which GTT exerted direction and control and/or through agency relationships.

300. GTT's conduct constitutes an anticompetitive scheme to acquire and maintain monopoly power in the relevant market. The scheme includes but is not limited to conspiracy or agreements in restraint of trade.

301. GTT's willful maintenance of monopoly power has made it difficult or impossible for competitors, such as Plaintiff herein, to engage in fair competition.

302. The natural and probable consequence of the conduct, which was plainly foreseeable to GTT, was to exclude or destroy competition in the relevant market resulting in injury to Plaintiff's business and property including the loss of past, present

1 and future profits, by loss of customers and potential customers, by the loss of goodwill
2 and product image and by the prospective destruction of Plaintiff's business.

3 303. Plaintiff has suffered irreparable injury by reason of the acts, practices and
4 conduct of GTT alleged above, and will continue to suffer such injury until and unless the
5 Court enjoins such acts, practices and conduct. This threat of future injury to KME's
6 business reputation, rightful market share and goodwill requires injunctive relief to
7 prevent continued losses and diminution of KME's business.

8
9 304. KME has no adequate remedy at law because KME's because ITS regulations are
10 currently being implemented affecting regional decisions throughout the country such
11 that traffic safety is being affected by GTT's wrongful conduct. In addition, KME's
12 anticipated loss of reputation, goodwill and rightful market share cannot be fully
13 compensated in money damages.
14

15
16 **COUNT III**

17
18 **Violation of 15 U.S.C. §2**
19 **Attempted Monopoly**

20 305. Plaintiff incorporates paragraphs 1 through 288 as if fully set forth as part of this
21 Count III.

22 306. GTT's conduct was unreasonably exclusionary.

23 307. By its campaign of disinformation and specific interference with the competitive
24 bidding process of public contracts, GTT induced agencies to ignore bidding regulations
25 in equipment choice or to prepare sole source specifications for GTT equipment with the
26 specific intent on the part of GTT to achieve monopoly power in the relevant market. It
27 was GTT's conscious object to exclude competition in the relevant market. These
28

1 practices have no legitimate business justification. GTT acted by and through distributors
2 and contractors over which GTT exerted direction and control and/or through agency
3 relationships.

4 308. The natural and probable consequence of the conduct, which was plainly
5 foreseeable to GTT, was to exclude or destroy competition in the relevant market
6 resulting in injury to Plaintiff's business and property including the loss of past, present
7 and future profits, by loss of customers and potential customers, by the loss of goodwill
8 and product image and by the prospective destruction of Plaintiff's business.

9
10 309. There is a dangerous probability that, unless restrained, GTT's course of conduct
11 will succeed, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

12
13 310. Plaintiff has suffered irreparable injury by reason of the acts, practices and
14 conduct of GTT alleged above, and will continue to suffer such injury until and unless the
15 Court enjoins such acts, practices and conduct.

16 311. Plaintiff has suffered irreparable injury by reason of the acts, practices and
17 conduct of GTT alleged above, and will continue to suffer such injury until and unless the
18 Court enjoins such acts, practices and conduct. This threat of future injury to KME's
19 business reputation, rightful market share and goodwill requires injunctive relief to
20 prevent continued losses and diminution of KME's business.

21
22 312. KME has no adequate remedy at law because KME's because ITS regulations are
23 currently being implemented affecting regional decisions throughout the country such
24 that traffic safety is being affected by GTT's wrongful conduct. In addition, KME's
25 anticipated loss of reputation, goodwill and rightful market share cannot be fully
26 compensated in money damages.
27
28

Count IV

**Violation of Section 3 of the Clayton Act,
15 U.S.C. §14**

313. Plaintiff incorporates paragraph 1 through 288 as if fully set forth as part of this Count IV.

314. KME is informed and believes and on that basis alleges that GTT has offered for manipulated the competitive bidding process, as an entity and by its affiliates, representatives, distributors in such a manner as to fix prices resulting in hinderance of KME's ability to compete in the market.

315. GTT controls a predominate share or monopoly power in the EVP and TSP market and a substantial amount of interstate commerce is affected. GTT's illegal conduct has harmed consumers.

316. As a result of the actions of GTT in violation of 15 U.S.C. §14, GTT has been injured and continues to be injured in its business and property in an amount to be proven at trial, which amount is to be trebled in accordance with 15 U.S.C. §15.

317. As a result of the actions of GTT in violation of 15 U.S.C. §14, KME has suffered and will continue to suffer irreparable harm, including but not limited to harm to its business reputation and goodwill. KME is informed and believes and on that basis alleges that GTT threatens to continue its wrongful actions, and unless restrained and enjoined, will do so. KME's remedy at law is not by itself adequate to compensate KME for the harm inflicted and threatened by GTT.

COUNT IV

**Violation of California Business and
Professional Code §§16720 and 16726**

318. Plaintiff incorporates paragraphs 1 through 288 as if fully set forth as part of this Count IV.

319. Plaintiffs are informed and believe and on that basis allege that GTT orchestrated arrangements and entered contracts that unreasonably restrain trade in the EVP and TSP market, including but not limited to agreements to encourage KME to bid on Federal Aid Highway Act, Federal Transit Administration and similar transportation projects funded with federal, state and local funds in order to be eligible for said funds without complying with sole source documentation requirements upon which the funding was conditioned.

320. During the bidding process, persuaded agencies to incorporate components of the Opticom product produced by GTT in such a way as to exclude the Emtrac Systems product from competition. Because of KME's compliance with applicable statutes and regulations, KME did not have an opportunity to tout its specifications in competition with GTT prior to bid opening.

321. GTT was also involved in unlawful tying.

322. GTT controls a predominant share of the TSP and EVP market. Consequently, a substantial amount of interstate commerce is affected in that market. GTT's illegal conduct has harmed consumers.

323. As a result of the unlawful contracts and agreements with contractors and others initiated by GTT through its affiliates and distributors, KME was prevented from

1 participating in the bidding process or encouraged to participate and then rejected after
2 providing the lowest bid.

3 324. As a result of GTT's actions in violation of the California Business and
4 Professions Code, KME has been injured and continues to be injured in its business and
5 property in an amount to be determined at trial, which amount is to trebled in accordance
6 with California Business and Professions Code §16750.
7

8 325. As a result of GTT's actions in violation of California Business and Professions
9 Code §16720, KME has suffered and will continue to suffer irreparable harm, including
10 but not limited to harm to its business reputation and goodwill. KME is informed and
11 believes and on that basis alleges that GTT threatens to continue its wrongful actions, and
12 unless restrained and enjoined, will do so. KME's remedy at law is not by itself adequate
13 to compensate KME for the harm inflicted and threatened by GTT.
14

15 **Count V**
16 **Violation of California Business and**
17 **Professions Code §16727**

18 326. Plaintiff incorporates paragraphs 1 through 288 as if fully set forth as part of this
19 Count V.

20 327. KME is informed and believes and on that basis alleges that GTT has influenced agencies
21 include specification items by requiring an insignificant patented mechanism in order to
22 obtain sole source authorization, such as left turn signals and other items as set forth in
23 paragraphs 181 through 186 herein.
24

25 328. GTT controls a predominant share of the TSP and EVP market and a substantial amount
26 of interstate commerce is affected. GTT's conduct has harmed consumers.

27 329. As a result of GTT's actions in violation of California Business and Professions Code
28 §16727, KME has been injured and continues to be injured in its business and property in

1 an amount to be proven at trial, which amount is to be trebled in accordance with
2 California Business and Professions Code §16750.

3 330. As a result of GTT's actions in violation of California Business and Professions Code
4 §16727, KME has suffered and will continue to suffer irreparable harm, including but not
5 limited to harm to its business reputation and goodwill. KME is informed and believes and
6 on that basis alleges that GTT threatens to continue its wrongful actions, and unless
7 restrained and enjoined, will do so. KME's remedy at law is not by itself adequate to
8 compensate KME for the harm inflicted and threatened by GTT.
9

10 **Count VI**
11 **Violation of California Business and**
12 **Professions Code §17200**

13 331. Plaintiff incorporates paragraphs 1 through 288 as if fully set forth herein.

14 332. By its willful acts to exclude KME from the EVP and TSP market in violation of the
15 federal and California antitrust laws, GTT has engaged in unlawful and unfair business
16 practices actions in violation of California Business and Professions Code §17200. KME
17 has suffered injury in fact and has lost money or property as a result of GTT's illegal
18 conduct.
19

20 333. As a result of GTT's actions in violation of California Business and Professions Code
21 §17200, GTT has been unjustly enriched at KME's expense. Therefore, KME is entitled to
22 obtain an accounting and restitution from GTT in an amount to be determined at trial.
23

24 334. As a result of GTT's actions in violation of California Business and Professions Code
25 §17200, KME has suffered and will continue to suffer irreparable harm, including but not
26 limited to harm to its business reputation and goodwill. KME is informed and believes and
27 on that basis alleges that GTT threatens to continue its wrongful actions, and unless
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1 restrained and enjoined will do so. KME's remedy at law is not by itself adequate to
2 compensate KME for the harm inflicted by GTT.

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4 **RELIEF REQUESTED**

5 335. Plaintiffs demand the following relief:

- 6 A. Judgment in its favor of KME and Rodney Kris Morgan and against GTT;
7 B. Compensatory damages, trebled as to the federal claims, in an amount to be determined
8 at trial;
9 C. An order or decree preliminarily and permanently enjoining the anticompetitive
10 conduct set forth herein;
11 D. Restitution and/or disgorgement of GTT's unjust enrichment;
12 E. Punitive or exemplary damages, where applicable;
13 F. Costs, including attorneys' fees;
14 G. Pre- and post-judgment interest;
15 H. Further relief as the Court deems appropriate.

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18 **JURY DEMAND**

19 Plaintiffs demand a trial by jury on all issues so triable.

20 Dated: November 4, 2014.

21
22 Respectfully submitted,

23
24 /s/ Jana Yocom
Attorney for Plaintiffs

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26
27 /s/ Martin Zurada
Local Counsel for Plaintiffs
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