

PROPOSED URGENCY ITEM (7A)

The Board of Port Commissioners (the "Board") will be asked to make a determination that the following matter is urgent. Upon a determination by a two-thirds vote of the members, or, if less than two-thirds of the members are present, a unanimous vote of those present, that there is a need to take immediate action which came to the attention of the body after the Agenda was posted, and that the need to take immediate action is required to avoid a substantial adverse impact that would occur if the action were deferred to a subsequent Special or Regular Meeting, the Board will hear the following matter in Open Session.

Item 7a:

Resolution Authorizing the Executive Director (1) to approve an assignment of the Non-Exclusive Preferential Assignment Agreement for Berths 25-26 from International Transportation Service, Inc. (ITS) to Ports America Outer Harbor Terminals, LLC (PAOH) upon confirmation that an Assignment and Assumption Agreement between ITS and PAOH will not adversely impact the Port's finances, (2) to negotiate and execute a supplemental agreement to the Non-Exclusive Preferential Assignment Agreement for Berths 25-26 with PAOH, and (3) to negotiate and execute a supplemental agreement to the Concession and Lease Agreement for Berths 20-24 all as set forth in the Agenda Report accompanying this item.

The basis for the urgency of the matter are as follows:

1. The Port has entered into a Non-Exclusive Preferential Assignment Agreement ("NEPAA") with ITS for the use and operation of Berths 25-26.
2. Berths 25-26 is the smallest container terminal in the Maritime Area, and ITS desired to expand its operations at Berths 25-26 into Berth 24 and in July, 2008, the Port granted IT'S a Space Assignment to use a portion of Berth 24. However, Berth 24 was part of the international competition for the Concession and Lease Agreement for Berths 20-24 which was ultimately won by PAOH. Upon the commencement of the lease term for PAOH's Concession and Lease Agreement for Berths 20-24, PAOH granted IT'S a license to continue to use a portion of

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Berth 24 up to August 1, 2010 (the "License"). PAOH is unwilling to extend that license, and ITS wishes to vacate Berths 25-26.

3. After the posting of the Agenda for the Board's July 20, 2010 meeting, PAOH and ITS sent the Port's Director of Maritime a joint letter advising him that PAOH and ITS had reached an agreement in principle by which ITS would assign its rights and obligations under the NEPAA to PAOH, subject to the Port's consent and approval. Critical business elements needed to complete the assignment and assumption of the NEPAA require that the License be extended for some period of time beyond August 1, 2010. The letter advised the Port that without some assurance that the proposed assignment would be approved, the license would not be extended.
4. If the Board were to approve an assignment of the NEPAA from ITS to PAOH, PAOH has requested certain modifications to the NEPAA, and the Port may also want additional changes. The NEPAA modifications should be agreed upon at least in form prior to the approval of the proposed assignment, but all terms and conditions of the NEPAA modification cannot be negotiated and agreed upon prior to the Board's next meeting on July 20, 2010.
5. Other modifications to the Berths 20-24 Concession and License Agreement will also be necessary, and those modifications cannot be negotiated and agreed upon prior to the Board's next meeting on July 20, 2010.
6. Authorizing the Executive Director to approve the proposed assignment and assumption agreement for Berths 25-26 from ITS to PAOH subject to the Port and PAOH reaching agreement on the terms and conditions of a supplemental agreement to the NEPAA for Berths 25-26 and a supplemental agreement to the Concession and Lease Agreement for Berths 20-24 would give the parties time to complete their negotiations and to execute (i) the assignment and assumption agreement of Berths 25-26 from ITS to PAOH, (ii) the supplemental agreement to the NEPAA for Berths 25-26 between the Port and PAOH, and (iii) the supplemental agreement to the Concession and Lease Agreement for Berths 20-24 between the Port and PAOH.

AGENDA REPORT

TITLE: Resolution authorizing the Executive Director (1) to approve an assignment of the Non Exclusive Preferential Assignment Agreement for Berths 25-26 from International Transportation Service, Inc. (ITS) to Ports America Outer Harbor Terminals, LLC (PAOH) upon confirmation that the Assignment and Assumption Agreement between ITS and PAOH (and related agreements) will not adversely impact the Port's finances, (2) to negotiate and execute a supplemental agreement to the Non Exclusive Preferential Assignment Agreement for Berths 25-26, and (3) to negotiate and execute a supplemental agreement to the Concession and Lease Agreement for Berths 20-24

AMOUNT: \$323,000 in Avoided Expenditures

PARTIES INVOLVED:

Corporate Name/Principal	Location
International Transportation Services, Inc. (ITS) / Michael Shanks	Oakland, CA
Ports America Outer Harbor Terminals (PAOH) / Jay Bowden	Oakland, CA

TYPE OF ACTION: Resolution

SUBMITTED BY: James Kwon, Director of Maritime

APPROVED BY: Omar Benjamin, Executive Director

SUMMARY

On July 16, 2010, the Port received a letter signed jointly by ITS and PAOH requesting the Port's consent to an assignment of the Berths 25-26 Agreement from ITS to PAOH. ITS and PAOH have been negotiating an agreement in anticipation of the expiration of the License Agreement between PAOH and ITS granting ITS a license to use a portion of Berth 24 through the end of August. Both parties have only recently come to agreement in principle, and their ability to finalize the agreement requires that the Board will consent to the proposed assignment. Without hearing this item at the July 20 meeting, ITS and PAOH would be unable to request the Board's prior approval, since no Board meetings are scheduled prior to August 31.

FACTUAL BACKGROUND

The Port and ITS entered into a Non Exclusive Preferential Assignment Agreement dated March 2, 2004 which provides ITS with certain rights to operate a marine terminal at Berths

25-26 ("the Berths 25-26 Agreement"). ITS refers to this terminal as the TransBay Container Terminal. ITS is affiliated with Kawasaki Kisen Kaisha, Ltd. ("K Line"), a Japanese shipping line which is one of the shipping lines calling at Berths 25-26. Berths 25-26 is approximately 1,138 ft long and cannot accommodate more than one vessel at time. The Berths 25-26 Agreement granted ITS a first right of negotiation to expand into Berth 24, but those first rights were initiated by the Port several years ago without reaching an agreement and therefore no longer exist.

However, since July 21, 2008, ITS has expanded the TransBay Container Terminal to include a portion of Berth 24, initially under a space assignment from the Port. Thereafter, the Port conducted an international competition for the concession and long-term lease rights to Berths 20-24. PAOH won that competition, and PAOH and the Port have since entered into a Concession and Lease Agreement for Berths 20-24 as well as a Crane Lease, with the term commencing January 1, 2010 ("the Berths 20-24 Agreement"). PAOH and ITS agreed to a license agreement for Berth 24 through August 31, 2010 which the Board approved on February 16, 2010.

ANALYSIS

ITS has agreed in principle to assign the Berths 25-26 Agreement to PAOH, and PAOH has agreed in principle to take on all the obligations of ITS as required under the Berths 25-26 Agreement, provided that certain business conditions are satisfied. If the Board authorizes, and ITS and PAOH execute, the Assignment and Assumption Agreement, Port staff will make copies of the executed documents available for the Board's review.

The term of the Berths 25-26 Agreement expires on June 30, 2013, though ITS has two five year options to extend the term, subject to agreement with the Port on the compensation provisions.

If it is assigned the Berths 25-26 Agreement, PAOH has expressed its intent to combine the TransBay Container Terminal with its current operations at Berths 20-24, creating a single marine terminal of approximately 210 acres of land, and Berth capacity for up to 4 large container ships. The expanded PAOH facility would be the largest marine terminal at the Port of Oakland.

In assigning the Berths 25-26 Agreement to PAOH, there are certain changes required to both the Berths 25-26 Agreement and the Berths 20-24 Agreement. The amendment will include, among other things, the following considerations:

K Line Guaranty

Under the Berths 25-26 Agreement, K Line provided to the Port a written guarantee of ITS' full performance of all its contractual obligations under the Berths 25-26 Agreement, including its payment obligations; the Port may enforce the provisions of the contract directly against K Line. If approved by the Board, the parties will amend both agreements to return the Guaranty to K Line and instead agree to cross default provisions between the Berths 20-24 Agreement and the Berths 25-26 Agreement. If PAOH were found in default under the Berths 25-26 Agreement, that default would then result in a default on the Berths

20-24 Agreement. Through the upfront payment and capital improvements completed thus far, PAOH has invested significantly in their Berths 20-24 premises and would be less likely to default on the contractual obligations they would inherit once assigned the Berths 25-26 Agreement.

Primary Use Definition

The compensation provisions of the Berths 25-26 Agreement include a minimum annual guarantee and additional revenue to the Port if container traffic exceeds a specified throughput (called a "breakpoint level"). In the Berths 20-24 Agreement, a similar provision exists with a different breakpoint and a different level of compensation. Since PAOH plans to operate both facilities as a single marine terminal, the ITS customers currently committed to Berths 25-26 may be handled at another Berth within the combined marine terminal. In order to protect the Port's ability to potentially receive additional revenue under the Berths 25-26 Agreement, these ITS customers which will continue doing business with PAOH will be considered primary users under the Berths 25-26 Agreement regardless of which Berth within the combined terminal they actually call.

Temporary Borrowing of Cranes

The Berths 25-26 Agreement includes a provision to allow for the temporary borrowing of cranes by an adjacent marine terminal, however since PAOH plans to operate both terminals as a single facility, these cranes will be frequently used throughout the Premises on a more permanent basis. The Port will allow cranes in the Berths 25-26 Agreement to be used on the Berths 20-24 premises without additional charges from the Port. Similarly for cranes leased to PAOH under the Berths 20-24 Agreement, no additional charges would be assessed by the Port for their use on Berths 25-26.

Options for Future Use of Berths 25-26

Under the Berths 25-26 Agreement, the Assignee must notify the Port between 3 and 12 months prior to the expiration of the Term of its intention to exercise the Option. If the Assignee does not exercise the Option, then PAOH, under the Berths 20-24 Agreement has the Option to expand the Berths 20-24 premises to include Berths 25-26. PAOH must provide this notice by April 15, two and a half months prior to the expiration of the Berths 25-26 term. If PAOH, under either agreement fails to exercise its options, the Port would have a very limited amount of time to re-let the property without an extended vacancy period. To reduce this risk, the Port has requested a full one year advance notice from PAOH under both the Berths 25-26 Agreement and the Berths 20-24 Agreement.

Crane Removal

The Port is required under the Berths 20-24 Agreement to remove three cranes at Berths 20-21 prior to December 21, 2010. PAOH has agreed to waive this requirement, should the Board assign the Berths 25-26 Agreement to PAOH.

Port staff intends to negotiate specific contract language around each of these points and execute supplemental agreements to the Berths 25-26 Agreement and the Berths 20-24 Agreement.

Port staff have insisted that PAOH also acknowledge that it will take responsibility for the design, construction and financing of shore power infrastructure, however due to the uncertainty of the exact cost of the work, PAOH has thus far been unable to make such a commitment. The Port and PAOH will continue to negotiate on shore power infrastructure responsibility, though there is not sufficient time to incorporate this change prior to the assignment and execution of these supplemental agreements.

BUDGET & FINANCIAL IMPACT

The assignment of the Berths 25-26 Agreement to PAOH as described above will have no direct financial impact on the Port. PAOH will be responsible for the compensation provisions in place under the Berths 25-26 Agreement. The current Minimum Annual Guarantee under the Berths 25-26 Agreement is \$8,410,365.

It appears that in the 7th contract year which ended June 30, 2010, ITS will have exceeded the breakpoint for the first time and the Port will receive an estimated \$200,000 in addition to the Minimum Annual Guarantee. Each of the current ITS customers, regardless of which Berth at the combined terminal they call, will be accounted for under the Berths 25-26 Agreement. This provision will ensure that Port will be compensated as it would have been if this assignment were not to occur.

The Port plans to commence demolition of three cranes at Berths 20-21 in September 2010. The estimated project cost for this work is \$323,000. The removal of these cranes is a condition of the Berths 20-24 Agreement. PAOH and the Port have agreed to remove this provision from the contract.

STAFFING IMPACT

No additional staff will be needed to accommodate this assignment.

SUSTAINABILITY

The operation of a combined terminal at Berths 25-26 will allow greater efficiencies at the terminal and may provide improved service to both ITS' and PAOH's existing customers through a greater economy of scale, efficient operations and reduced traffic congestion.

ENVIRONMENTAL

The action requested of the Board in this agenda report is to authorize the Executive Director to consent to the assignment of the Berths 25-26 Agreement between the Port and ITS to PAOH, and to enter into supplemental agreements on both the Berths 25-26 Agreement and the Berths 20-24 Agreement. These actions have been determined to be categorically exempt from the requirements of the California Environmental Quality Act (CEQA), pursuant to the State CEQA Guidelines and the Port CEQA Guidelines, according to Section 15301(p) of the Port CEQA Guidelines, which exempts renewals, extensions or amendments to leases or license and concession agreements or the execution of leases or license and concession agreements where the premises or licensed activity was previously

leased or licensed to the same or another person, and involving negligible or no expansion of use beyond that previously existing. Assigning the Berths 25-26 Agreement to PAOH and entering into supplemental agreements on the Berths 25-26 Agreement and the Berths 20-24 Agreement both meet the criteria for this exemption.

MARITIME AND AVIATION PROJECT LABOR AGREEMENT (MAPLA)

The matters contained in this Agenda Report do not fall within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA) and the provisions of the MAPLA do not apply.

OWNER CONTROLLED INSURANCE PROGRAM (OCIP)

No development activities are expected as a result of this assignment, so the OCIP will not apply.

GENERAL PLAN

This action does not meet the definition of "project" under the City of Oakland General Plan, and no conformity determination is required.

LIVING WAGE

Based upon a review of the terms of the agreement and information provided by the tenant, it appears that the living wage requirements set forth in Section 728 of the Charter of the City of Oakland apply to this agreement because the contract is for a value greater than \$50,000, as calculated under Section 728, and the tenant employs more than 20 employees working on Port-related work. Port Ordinance No. 3666, as amended, does not apply (tenancy agreements are not subject to Port Ordinance No. 3666).

OPTIONS

- Authorize the Executive Director (1) to approve an assignment of the Non Exclusive Preferential Assignment Agreement for Berths 25-26 from International Transportation Service, Inc. (ITS) to Ports America Outer Harbor Terminals, LLC (PAOH) upon confirmation that the Assignment and Assumption Agreement between ITS and PAOH (and related agreements) will not adversely impact the Port's finances, (2) to negotiate and execute a supplemental agreement to the Non Exclusive Preferential Assignment Agreement for Berths 25-26, and (3) to negotiate and execute a supplemental agreement for Berths 20-24.
- Do not authorize the assignment or the supplemental agreements.

RECOMMENDATION

It is recommended that the Board authorize the Executive Director (1) to approve an assignment of the Non Exclusive Preferential Assignment Agreement for Berths 25-26 between the Port and International Transportation Services, Inc. (ITS) to Ports America Outer Harbor Terminals, LLC (PAOH) upon confirmation that the Assignment and Assumption Agreement between ITS and PAOH (and related agreements) will not adversely impact the Port's finances, (2) to negotiate and execute a supplemental agreement to the Non Exclusive Preferential Assignment Agreement for Berths 25-26, and (3) to negotiate and execute a supplemental agreement for Berths 20-24.