

PORT ORDINANCE NO. 4627

ORDINANCE APPROVING THE FOLLOWING AGREEMENTS WITH EVERPORT TERMINAL SERVICES, INC.: (1) A SECOND SUPPLEMENTAL AGREEMENT TO THE NON-EXCLUSIVE PREFERENTIAL ASSIGNMENT AGREEMENT ("NEPAA") FOR THE BERTH 34 BACKLANDS; AND (2) A SIXTH SUPPLEMENTAL AGREEMENT TO A SEPARATE NEPAA FOR BERTHS 35 THROUGH 38 TO EXTEND THE DEADLINE TO DEMOLISH CRANE X-437, CORRECT ERRORS IN COMPENSATION TERMS, AND ALLOW NOTICING BY ELECTRONIC COMMUNICATIONS.

WHEREAS, the Board of Port Commissioners ("Board") has reviewed and evaluated Agenda Report Item 6.1 dated November 18, 2021, and related agenda materials ("Agenda Report"), has received the expert testimony of Port of Oakland ("Port") staff, and has provided opportunities for and taken public comment; and

WHEREAS, Everport Terminal Services, Inc. ("Everport") operates Berths 35-38, commonly known as the Ben E. Nutter Container Terminal ("Nutter Terminal"), pursuant to a non-exclusive preferential assignment agreement ("Berths 35-38 NEPAA") that expires on June 30, 2023; and

WHEREAS, Everport also leases approximately fifteen (15) acres of adjacent backland at Berth 34 under a separate NEPAA that expires on June 30, 2023 ("Berth 34 NEPAA"); and

WHEREAS, the Port and Everport have negotiated a Sixth Supplemental Agreement to the Berths 35-38 NEPAA and a Second Supplemental Agreement to the Berth 34 NEPAA to extend the deadline to demolish Crane X-437, correct errors in compensation terms, and allow noticing by electronic communication, as further described in the Agenda Report; and

WHEREAS, in acting upon this matter, the Board has exercised its independent judgment based on substantial evidence in the record and adopts and relies upon the facts, data, analysis, and findings set forth in the Agenda Report and in related agenda materials and in testimony received; now, therefore

BE IT ORDAINED by the Board of Port Commissioners of the City of Oakland as follows:

SECTION 1. The Board hereby finds and determines:

A. The proposed action to approve the Sixth Supplemental Agreement to the Berths 35-38 NEPAA and a Second Supplemental Agreement to the Berth 34 NEPAA was reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"). This action is exempt from CEQA under Section 15301 of the CEQA Guidelines, which exempts the operation, leasing, licensing, and minor alteration of existing structures and facilities, involving negligible or no expansion of existing or former use; and

B. The respective premises for the Berths 35-38 NEPAA and Berth 34 NEPAA are each subject to the California Tidelands Trust doctrine as developed by common law, California legislative acts, and case law (collectively, the "**Tidelands Trust**") and are part of the "Port Area" as defined in Section 725 of the Charter of the City of Oakland ("City Charter"); and

C. Section 706 of the City Charter gives to the Board the complete and exclusive power and duty for and on behalf of the City of Oakland ("City") to make provisions for the needs of commerce, shipping, and navigation of the Port and to promote the development, construction, and operation of all water front properties including piers, wharves, sea walls, docks, and other improvements; and

D. The proposed amendments are consistent with the Port's duty to use and manage Port property in accordance with the Tidelands Trust, and the private use of Port property pursuant to these proposed supplemental agreements will not interfere with the Tidelands Trust.

SECTION 2. The Board hereby authorizes the Executive Director of the Port ("Executive Director") to:

A. Execute on behalf of the Board a Second Supplemental Agreement to the Berth 34 NEPAA to update notice requirements to allow for noticing by electronic communications.

B. Execute on behalf of the Board a Sixth Supplemental Agreement to the Berths 35-38 NEPAA to:

1. Extend the deadline for the Port to demolish Port-owned crane, Crane X-437, to April 30, 2022; and
2. Modify the compensation table (Table 4.2 in the Berths 35-38 NEPAA as amended) to correct the Local/All Cargo Breakpoint Level in Contract Years 16 through 20; and
3. Update notice requirements to allow for noticing by electronic communications.

C. Make such additions, modifications, or corrections as necessary to implement the proposed supplemental agreements or to correct errors, subject to the limitations set forth herein and provided that any such addition, modification, or correction does not materially differ from the terms and conditions set forth herein and in the Agenda Report.

SECTION 3. This Ordinance is not evidence of and does not create or constitute (a) a contract, or the grant of any right, entitlement or property interest, or (b) any obligation or liability on the part of the Board or any officer or employee of the Port. Unless and until separate written agreements are duly executed on behalf of the Board as authorized by this Ordinance, is signed as approved as to form and legality by the Port Attorney, and is delivered to other contracting party, there shall be no valid or effective agreement.

SECTION 4. This Ordinance shall take effect on the date of its final adoption; provided, however, that if a petition protesting the adoption of this Ordinance is timely and duly submitted to the elections official of the City of Oakland in the manner required under California Elections Code § 9237, the effective date of this Ordinance shall be suspended, and all actions authorized by this Ordinance shall be null and void.

The Board of Port Commissioners, Oakland, California, November 18, 2021. Passed to print for one day by the following vote: Ayes: Commissioners Butner, Colbruno, Lee, Leslie, Martinez, Story, and President Cluver - 7. Noes: 0.

Daria Edgerly

Secretary of the Board