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BOARD OF PORT COMMISSIONERS CITY OF OAKLAND

RESOLUTION APPROVING AND AUTHORIZING THE
EXECUTIVE DIRECTOR TO ENTER INTO AN
EXCLUSIVE NEGOTIATING AGREEMENT WITH
EAGLE ROCK AGGREGATES, INC. FOR THE
DEVELOPMENT AND LEASE OF A BULK SAND AND
AGGREGATE MARINE TERMINAL AT BERTHS 20-22,
WITH A NON-REFUNDABLE FEE UP TO \$500,000.

WHEREAS, the Board of Port Commissioners ("Board") has reviewed and evaluated Agenda Report Item 6.3 dated May 9, 2019, 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, 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 RESOLVED AS FOLLOWS:

Section 1. The Board hereby finds and determines as follows:

A. The Port owns the submerged lands, berthing areas, and docks related to Berths 20-22 and approximately 20 acres of the uplands adjacent to the docks at Berths 20-22 (the "Proposed Premises"); and

B. The Port currently uses the Proposed Premises for ancillary maritime purposes, but the Proposed Premises are not currently being rented by or to a maritime terminal operator; and

C. Eagle Rock Aggregates, Inc. ("Eagle Rock") is a wholly-owned subsidiary of U.S. Concrete, Inc., and Eagle Rock currently imports sand and aggregates for the local San Francisco Bay Area regional construction market from British Columbia, Canada at a smaller marine bulk terminal located in Richmond, California. The imported sand and aggregate are used primarily in ready-mix concrete plants for construction projects in the San Francisco Bay region, including the City of Oakland; and

D. Eagle Rock wishes to expand its operations and has approached Port staff about the possibility of leasing the Proposed Premises for the development and operation of a maritime bulk terminal for the import, export, and distribution of imported sand and aggregate in bulk; and

E. Port staff now propose entering into an exclusive negotiating agreement ("ENA") with Eagle Rock under the following key terms and conditions:

(i) **Term of ENA:** Eleven (11) months, effective May 10, 2019. Eagle Rock and the Port may agree in writing to extend the term of the ENA by an additional 3 months if both parties have reached substantial agreement on the material terms of a Non-Exclusive Preferential Assignment Agreement ("NEPAA") by March 31, 2020.

(ii) **Proposed Premises:** The proposed premises consists of Berths 20-22 and approximately 20 acres of Berth 20, 21, and 22 backlands.

(iii) **Termination Rights:** Either party may terminate with 30 days' written notice to the other 6 months after the effective date of the ENA.

(iv) **Access to Proposed Premises:** The Port will grant Eagle Rock rights of access to the Proposed Premises during normal business hours to perform non-invasive investigation as part of their due diligence. If Eagle Rock wishes to perform any invasive investigation (e.g., below ground), Eagle Rock will have to obtain the Port's prior written permission.

(v) **Consideration:** Eagle Rock will pay the Port a non-refundable monthly fee of \$20,833.33 per month for each month the ENA is in effect up to a maximum of \$250,000. If the parties reach substantial agreement on the terms of a NEPAA prior to the expiration of the ENA, Eagle Rock will pay the Port an additional one-time, non-refundable fee of \$250,000 as a condition precedent to the Port's duty to calendar the proposed lease for the Board's consideration.

(vi) **Port's Right to Continue Using the Proposed Premises:** The Port will retain the right to continue to use and lease the Proposed Premises on a month-to-month basis during the term of the ENA. Currently, the backland land area is being used for ancillary maritime purposes, and Berth 22 is used as a "flex berth" for the temporary berthing of vessels or use by other container terminals on an as-needed basis.

Section 2. The Board hereby:

A. Approves the proposed ENA with Eagle Rock as described hereinabove and in the Agenda Report; and

B. Authorizes the Executive Director to (i) execute the ENA, subject to approval as to form and legality by the Port Attorney, and (ii) make such minor additions, modifications, or corrections as necessary to implement the ENA 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. The proposed approval of the ENA was reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"), and the Port CEQA Guidelines. The proposed approval is exempt from CEQA requirements pursuant to CEQA Guidelines, Article 19, Section 15061(b)(3) which refers to the general rule that where it can be seen with certainty that there is no possibility that the proposed action may have a significant effect on the environment, the proposed action is not subject to CEQA. As the proposed approval of the ENA commits the Port and **Eagle Rock** to a limited period of exclusive negotiations on the Proposed Premises and does not include the approval of any project for the site nor any change in land use, the proposed ENA approval is not subject to CEQA. If the proposed ENA is approved, the Port and Eagle Rock will each use good faith efforts to negotiate and agree on a project scope which will serve as a basis for environmental review pursuant to CEQA.

Section 4. This resolution is not evidence of and does not or constitute (a) a contract, or 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 Board. Unless and until a separate written agreement is duly executed on behalf of the Board as authorized by this resolution, is signed as approved as to form and legality by the Port Attorney, and is delivered to the other contracting party, there shall be no valid or effective agreement.

Section 5. This resolution shall become effective immediately upon adoption by the Board.