

AGENDA REPORT

Ordinance: Authorize the Executive Director to approve the Second Amendment to the Temporary Rental Agreement with West Oakland Pacific Railroad, LLC, to Provide Interim Switching Services at the Port's OHIT Phase 1 Yard, for an Initial Term of One Year through December 31, 2020, with One, 1-Year Option to Extend; Fixed Compensation of \$5,350 per Calendar Year Quarter; and Variable Compensation of \$133.75 per Rail Car in Excess of the Breakpoint. **(Maritime)**

MEETING DATE: 10/24/2019

AMOUNT: \$21,400 (annual)
Revenue

PARTIES INVOLVED: West Oakland Pacific Railroad, LLC
Chris Stotka, Vice President

SUBMITTED BY: John C. Driscoll, Director of Maritime

APPROVED BY: Danny Wan, Interim Executive Director

ACTION TYPE: Ordinance

EXECUTIVE SUMMARY

Effective January 1, 2018, the Port entered into a Temporary Rental Agreement (TRA) with West Oakland Pacific Railroad, LLC (WOPR) for interim rail switching services at the newly-constructed OHIT Phase 1 Yard, located on the Port-owned former Oakland Army Base property. In late 2018, the Board of Port Commissioners (Board) approved a First Amendment to the TRA. Key changes to the TRA included a 1-year term extension through 2019 and the implementation of a fixed and variable rent structure. Staff seeks the approval of the Board to further extend the TRA with modified terms, which would result in annual fixed rent of \$21,400 plus variable rent if the breakpoint were exceeded.

BACKGROUND

As part of its development of the Port-owned former Oakland Army Base (OAB), known as the Seaport Logistics Complex, the Port constructed a new 24-acre rail yard, comprising manifest and support tracks, to serve both Port customers and, eventually, City of Oakland (City) customers. The new rail yard (OHIT Phase 1 Yard) cost approximately \$100 million, partially funded by about \$80 million of State and Federal grant funding. The OHIT Phase 1 Yard became fully operational in late 2016.

In 2012, in anticipation of the future rail yard operations, the Port issued a request for qualifications and received five submissions from interested short line railroads, including Anacostia Rail Holdings (Anacostia) and Oakland Global Rail Enterprises (OGRE). OGRE is an affiliate of California Capital & Investment Group which is leading a portion of the City's development at the former OAB. The Port began negotiating with Anacostia; however, those negotiations were unsuccessful, and the Port and Anacostia agreed to terminate the negotiations in 2013. Since then, the Port has negotiated with OGRE but no agreement has yet been reached. Staff anticipates finalizing an agreement for long-term operations on the Port's OHIT Phase 1 Yard in the near future, along with a rail access agreement with the City. Completion of these rail operating and rail access agreements has been delayed based on a number of factors, including completion of the applicable rail infrastructure on both City- and Port-owned former OAB property, extended negotiations with OGRE regarding applicable operating rights and restrictions, and extended discussions with the City regarding access to the railyard for City OAB operations.

In 2016 and 2017, West Oakland Pacific Railroad, LLC (WOPR) and its related entities maintained various agreements with the Port and the Class 1 Railroads to handle sporadic, as-needed rail traffic at the OHIT Phase 1 Yard. Effective January 1, 2018, the Port and WOPR entered into a 1-year Temporary Rental Agreement (TRA) for continuous (though minimal) interim rail switching services. This agreement provided no rent or other compensation to the Port, but allowed WOPR to move rail cars to serve up to three current Port tenants. In late 2018, the Board approved a First Amendment to the TRA. Key changes to the TRA included a term extension through 2019 and the implementation of a fixed and variable rent structure, which resulted in \$20,000 of revenue to the Port (as fixed rent only; variable rent was never triggered).

The TRA expires on December 31, 2019, and an extension requires approval of the Board. As further discussed below, Staff is requesting an extension of the TRA, with modification of various terms.

ANALYSIS

The OHIT Phase 1 Yard is a new facility, not yet operating anywhere near capacity. Staff expects it will take several years to ramp up activity and generate appreciable revenue to the rail operator and the Port. Still, currently, the OHIT Phase 1 Yard serves three Port tenants and WOPR collects revenue under contractual arrangements with the Class I Railroads to provide rail service to these tenants.

Staff believes further extension of the TRA with WOPR is necessary to ensure business continuity, demonstrate performance to the grant funding agencies, and grow business. However, Staff also believes that various modifications to the terms are necessary for WOPR's continued use of the OHIT Phase 1 Yard. Staff discussed its proposed changes to the revenue structure and other terms with WOPR, who has agreed to a Second TRA extension with modifications, as follows:

Agreement: Second Amendment to TRA with WOPR, LLC, for interim switching services

Effective Date: January 1, 2020

Term, Term Extension, and Holdover: The term of the Second Amendment would cover the period January 1, 2020 through December 31, 2020. The Port's Executive Director, in his/her sole discretion, may extend the term for one additional year through Calendar Year 2021. If WOPR fails to vacate and surrender the Premises on or prior to the Termination Date, holdover provisions would take effect and during such holding over the Port could modify compensation with seven (7) days' notice before the expiration of any month, to be effective upon the expiration of such month. For comparison, the current TRA has a 1-year maximum term without a holdover provision.

Termination: Neither party has an early termination right. Per the current TRA, either party can terminate with 30-days' advance written notice.

Compensation: Fixed rent of \$5,350 per calendar year quarter (\$21,400 annualized) and variable rent of \$133.75 per railcar for any railcar in excess of a breakpoint of 240 railcars per quarter. The breakpoint resets on the first day of each quarter. This is a 7% increase to fixed and variable rent from the current compensation rates. There is no change to the breakpoint.

Escalations to Compensation: If the term of the TRA is extended by the Executive Director, effective January 1, 2021, Fixed and Variable Rent shall increase by the greater of 3%, percent change in CPI for the preceding 12-month period, or percent increase in the rate for land (paved/lit/fenced) in Item 10160 of Port Tariff 2-A over the preceding 12-month period.

Security Deposit: \$30,000. The current TRA has a \$20,000 security deposit requirement.

Maintenance: Port retains all maintenance responsibilities for the rail yard infrastructure. WOPR maintains its equipment. This is not a change from the current TRA.

Environmental: WOPR will comply with the Port's current form of Environmental Exhibit, including requirements to provide data to the Port, and confer with the Port regularly on air quality initiatives. This is not a change from the current TRA.

Business Development Plan: Within 60 days from the effective date of the proposed second amendment to the TRA, WOPR shall prepare and submit to the Port a comprehensive business development plan to increase throughput on the Premises on a near, medium, and long-term basis. The plan shall also detail scope, schedule, and costs of rail improvements that WOPR deems necessary to grow rail business. WOPR shall update this plan on a regular basis and meet with the Port biannually to review and discuss. This is a new requirement.

BUDGET & STAFFING

The proposed compensation terms would result in fixed revenue of \$5,350 per calendar year quarter, or \$21,400 annually. It is uncertain whether the breakpoint will be exceeded; if 2020 activity levels were equal to those currently projected for 2019, the breakpoint would not be exceeded. Therefore, Staff is currently assuming no variable rent during the term of the Second Amendment. No appreciable expense by the Port is anticipated during the term of the Second Amendment to the TRA.

MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)

The matters included 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.

STRATEGIC PLAN

The action described herein would help the Port achieve the following goals and objectives in the Port's Strategic Business Plan (2018-2022).

<https://www.portofoakland.com/wp-content/uploads/Port-of-Oakland-Strategic-Plan.pdf>

- Goal: Grow Net Revenues

LIVING WAGE

Living wage requirements, in accordance with the Port's Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), do not apply to this agreement as the tenant does not employ 21 or more employees working on Port-related work. However, the tenant will be required to certify that should living wage obligations become applicable, the tenant shall comply with the Living Wage Regulations.

SUSTAINABILITY

Port staff has reviewed the Port's 2000 Sustainability Policy and did not complete the Sustainability Opportunities Assessment Form. There are no sustainability opportunities related to this proposed action because it does not involve a development project, purchasing of equipment, or operations that present sustainability opportunities at this time, given the interim nature of the proposed TRA amendment.

ENVIRONMENTAL

CEQA Determination: The proposed Second Amendment with WOPR to extend the term of a TRA through December 31, 2020 with a 1-year option to extend, modify compensation, and change other Lease terms as described herein, was reviewed in accordance with the requirements of the California Environmental Quality Act (CEQA), and the Port CEQA Guidelines. This action is categorically exempt from CEQA pursuant to the Port CEQA

Guidelines, Section 15301(p), which exempts renewals, extensions or amendments to 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.

GENERAL PLAN

This action does not change the use of any existing facility, make alterations to an existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

OWNER-CONTROLLED INSURANCE PROGRAM (OCIP)

This action is not subject to the Port's Owner Controlled Insurance Program (OCIP) as it is not a capital improvement construction project.

OPTIONS

Staff has identified the following options for the Board's consideration:

- Approve the Second Amendment to the TRA with WOPR, extending the term up to two years (through December 31, 2021) and as otherwise described herein. This is the recommended option.
- Approve the Second Amendment to the TRA with WOPR, with different terms than those proposed, as may be directed by the Board.
- Do not approve the First Amendment to the TRA with WOPR. Under this option, WOPR would vacate the OHIT Phase 1 Yard and no longer serve Port customers effective January 1, 2020. The Port would pursue an arrangement with a Class I Railroad to provide switching service; in the event this were not possible, the Port would pursue an interim agreement for switching services with a different entity, which may result in service disruptions.

RECOMMENDATION

Authorize the Executive Director to approve the Second Amendment to the TRA with West Oakland Pacific Railroad, LLC to provide interim switching services at the Port's OHIT Phase 1 Yard, for:

- A term extension of one year, through December 31, 2020;
- One, 1-year term extension at the sole discretion of the Executive Director;
- Fixed compensation to the Port of \$5,350 per calendar year quarter;
- Variable compensation of \$133.75 per railcar for any railcar above a breakpoint of 240 railcars per calendar year quarter; and
- Other terms as described herein.