

**BOARD OF PORT COMMISSIONERS  
CITY OF OAKLAND**

10/08/2020  
Item No.: 6.3  
MCR/msr



ORDINANCE APPROVING AND AUTHORIZING THE EXECUTIVE DIRECTOR TO EXECUTE THE FOLLOWING AGREEMENTS WITH EVERPORT TERMINAL SERVICES, INC.: (1) A FIRST SUPPLEMENTAL AGREEMENT TO THE NON-EXCLUSIVE PREFERENTIAL ASSIGNMENT AGREEMENT ("NEPAA") FOR THE BERTH 34 BACKLANDS TO EXTEND THE TERM THROUGH JUNE 30, 2023; AND (2) A FIFTH SUPPLEMENTAL AGREEMENT TO THE NEPAA FOR BERTHS 35 THROUGH 38 TO ADDRESS CRANE RESPONSIBILITIES AND OTHER ISSUES.

**WHEREAS**, the Board of Port Commissioners ("Board") has reviewed and evaluated Agenda Report Item 6.3 dated October 8, 2020, 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 expired on June 30, 2018, and has been in month-to-month holdover since the expiration ("Berth 34 NEPAA"); and

**WHEREAS**, the Port and Everport have negotiated a Fifth Supplemental Agreement to the Berths 35-38 NEPAA and a First Supplemental Agreement to the Berth 34 NEPAA to align the term of the agreements, address the delivery and operation of a new tenant-owned crane, adjust certain compensation and reporting requirements, and other provisions as 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 Fifth Supplemental Agreement to the Berths 35-38 NEPAA and a First 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;

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");

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 First Supplemental Agreement to the Berth 34 NEPAA to extend the term through June 30, 2023, and to set fixed monthly rent at \$1,772,626 through the June 30, 2023, expiration date.

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

1. Eliminate Interior Point Intermodal ("IPI") compensation and reporting provisions through the end of the term on June 30, 2023;
2. Provide that Everport will, at Everport's sole cost, purchase and place into service a new gantry crane no later than December 31, 2022;
3. Provide that the Port will, at the Port's sole cost, remove Port-owned crane, Crane X-437, by December 31, 2021, to accommodate the new Everport-owned crane. If the new crane is not placed into service by December 31, 2022, Everport will reimburse the Port for total costs incurred in removing Port-owned Crane X-437 by February 15, 2023;
4. Allow for an annual crane rental credit in the amount of \$279,995 through the expiration of the Berths 35-38 NEPAA on June 30, 2023, for a total rent credit of \$559,990;
5. Remove Everport's right to sell and the Port's obligation to purchase Everport's cranes at the end of the term; and

6. Should Everport decide to raise any of its cranes, require Everport to obtain the Port's approval for the crane raising design and submit documents for the Port's approval.

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 Board. 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.

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**President.**

**Attest:** \_\_\_\_\_

**Secretary.**

**Approved as to form and legality:**

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**Port Attorney**