

## **[DRAFT] AGENDA REPORT**

**[DRAFT] Ordinance:** Adopt a Labor Peace Rule for Certain Operational Services Agreements Executed Pursuant to a Request for Proposal. **(SRD)**

**MEETING DATE:** [Click here to enter a date.](#)

**AMOUNT:** [Choose an item.](#)

**PARTIES INVOLVED:** Various Future Providers of Certain Operational Services for the Port

**SUBMITTED BY:** Amy Tharpe, Director of Social Responsibility

**APPROVED BY:** Danny Wan, Executive Director

**ACTION TYPE:** Ordinance

### **EXECUTIVE SUMMARY**

This Agenda Report seeks the Board's adoption of a Labor Peace ("LP") Rule that would require that agreements for certain Operational Services contain labor peace provisions to protect the Port's proprietary and economic interests. Operational Services Agreements are defined as those executed pursuant to a formal Request for Proposal and primarily provide the following services on Port property: (1) automobile and/or truck tractor parking services; (2) real-time security video monitoring services at the seaport or security guard services; (3) comprehensive janitorial services for Port buildings in Jack London Square that serve Port tenants, customers, or the public; (4) comprehensive building engineering and maintenance services for Port buildings in Jack London Square that serve Port tenants, customers, or the public; (5) airport shuttle services; and/or (6) airport curbside management services.

### **BACKGROUND**

On February 13, 2020, staff presented an Information Report proposing an LP Rule that would apply to certain operational service agreements entered into pursuant to a formal Request for Proposal ("RFP"). During this meeting, the Board requested that staff evaluate whether the LP Rule sufficiently protected the Port's interests in avoiding labor disruptions, ensuring continuity of service, and remaining economically competitive. Staff conducted further research and refined the categories to which the LP Rule would apply, as well as identified additional procurements that would be covered. This Agenda Report discusses the legal framework of LP rules, the originally proposed LP Rule, and the additional types of operational services agreements proposed to be added to the LP Rule. Staff recommends the Board adopt a Labor Peace Rule for Certain Operational Services in light of the Port's strong proprietary interests in minimizing labor disruptions for such operational services.

## **A. Legal Framework of Labor Peace Rules**

Generally, an LP Rule is a requirement that a business, such as an operational service provider, enter into an LP agreement with organizations that represent or seek to represent the business's employees ("Labor Organization"). While there is no prescribed form of an LP agreement, such an agreement must include binding and enforceable provisions prohibiting such Labor Organizations and its members from engaging in strikes, pickets, or any other forms of economic interference for the duration of the LP agreement.

If a business's employees are already represented by a labor organization, the applicable collective bargaining agreement may fulfill the required LP agreement. If the employees are not represented, an LP agreement may contain other terms that have been negotiated between the business and the Labor Organization. An LP agreement would not require that a business's employees join or remain in a union, which is subject to separate legal procedures, but rather that the Labor Organization and its members agree to refrain from engaging in strikes, pickets, or any other forms of economic interference.

LP agreements operate in the realm of private employers and employees. As discussed below, however, public agencies may require LP agreements in its procurements with private businesses under certain circumstances.

## **B. Authority of Public Agencies to Adopt Labor Peace Requirements**

The National Labor Relations Act ("NLRA"), not local law, generally governs labor relations between private employers and employees. The NLRA either explicitly regulates such labor relations or allows certain aspects of such labor relations to be determined by the free play of economic forces. Thus, as a matter of federal law, public agencies are generally preempted from involving themselves in the labor relations of private businesses by, for example, requiring employers to enter into agreements with labor organizations.

In limited circumstances, however, a public agency may require LP agreements to the extent the agency is acting as a "market participant" and engaged in the procurement of goods or services for its own business interests. In that circumstance, the public agency is free to pursue the efficient procurement of needed goods and services as one might expect of a private business in a similar situation. Because public agencies acting as market participants function as commercial establishments, they have proprietary interests in efficiently procuring goods and services by avoiding undue labor disruptions, as well as providing services that are competitive and attractive to the marketplace. On the other hand, public agencies must avoid taking actions that are tantamount to regulating private labor relations.

The courts have established specific rules for determining whether a public agency is validly acting as a market participant or invalidly acting as a regulatory body in imposing LP requirements. Public agency LP requirements are permissible if they fulfill the following two requirements:

1. The LP requirement must reflect the agency's own interest in efficient procurement of needed goods and services, as measured against the typical behavior of similarly situated private parties; and

2. The LP requirement must be narrowly tailored to such interest so that it overcomes the inference that the primary goal of the LP requirement was to encourage a general policy rather than address a specific proprietary problem.

In other words, public agencies may impose LP rules to bolster their own efficient procurement by reducing the risk of labor disruptions. But such LP rules must be narrowly tailored to such procurements and are intended to be a limited exception to the general rule that public agencies should not regulate labor relations between private employers and employees.

### **C. Labor Peace Requirements at the Port**

LP requirements are not new at the Port. In the past, the Port has subjected various operational service contracts to a Labor Peace Rule through different mechanisms. For example, Resolution 17-35, adopted on May 18, 2017, applied a Labor Peace Agreement Policy to all Airport concession tenancy agreements in light of the Port's proprietary interests in the efficient and uninterrupted operation of Airport concession operations. In other circumstances, the Port applied a similar LP Rule to specific operational services, such as the one entered into pursuant to an RFP for parking management in Jack London Square, through contractual requirements. Because of the general federal law prohibition against regulation of labor relations, the Port has applied LP rules only where it has deemed them necessary to ensure the efficient procurement of specific services. Labor peace for construction services is addressed through the Maritime and Aviation Project Labor Agreement ("MAPLA"), which is not the subject of this Report.

Among the many agreements entered into by the Port, those relating to certain operational services entered into pursuant to a formal RFP have the greatest potential to impact continuity and quality of service to the Port, thereby also impacting the Port's competitiveness in the marketplace. As discussed further below, these operational services are those relating to certain parking, security, janitorial, building engineering/maintenance, airport curbside management, and airport shuttle activities. In the absence of a labor peace assurance, interruption of these services poses the greatest risk to the Port's proprietary activities and therefore are the most appropriate for coverage by an LP agreement. The Port has a strong financial and proprietary interest in reducing the risk of labor disruptions in such operational services and ensuring that the Port's business operations continue to smoothly and effectively serve the Port's business interests as well as allow it to serve the public.

## **ANALYSIS**

### **A. Originally Proposed Labor Peace Rule**

On February 13, 2020, staff presented an Information Report proposing an LP Rule that would apply to operational service agreements entered into pursuant to a formal RFP in the following four service areas for which the Port's proprietary interests are strong in avoiding labor disruption, ensuring continuity of service, efficiently procuring services, and ultimately maintaining the Port's economic competitiveness.

1. Automobile and/or Truck Tractor Parking Services. These services entail parking management services on Port property for parking of motor vehicles such as automobiles and truck tractors.
  - a. Examples of past procurements include Airport Public Parking Management Services (RFP 17-18/02), which pertained to management of the airport's over 6,900 public parking stalls, and Seaport Drayage Truck Parking/Container Depot Management Services (RFP 19-20/16), which pertained to management of drayage truck parking in the seaport for approximately 2,100 parking stalls and 1,000 daily gate transactions.
  - b. The Port has a strong proprietary interest in maintaining these services, which directly provide revenue to the Port in terms of parking and/or management fees. These services require on-site and in-person personnel who must continually monitor and manage parking operations. Labor disruptions would greatly impact these services and thereby deprive the Port of the core value of such services. Moreover, parking services are highly competitive – customers have choices where to park – and therefore, the Port must ensure that parking services are adequately, efficiently, and competently provided to maintain current customers and attract new ones.
2. Security Guard Services. These services entail personnel providing on-site patrol and other security services.
  - a. Examples of past procurements include Maritime Security Patrol Services (RFP No. 18-19/17), which pertained to 24/7 unarmed security and patrol services to provide safe and efficient vehicular flow in the maritime area and report suspicious criminal activity, and Airport Security Guard Services (RFP No. 18-19/20), which pertained to routine and on-call security guard services in support of the Airport Security Program.
  - b. On-site security guard services are critical to the security of Port operations in the airport, seaport, and commercial real estate holdings, all of which serve numerous tenants, customers, and members of the public and which provide the Port with revenue. The Port, as would a private company procuring security guard services, has a strong proprietary interest in ensuring that such services are not subject to labor disruptions so that it can maintain its business operations and ultimately its market competitiveness. Even the slightest interruptions in these services could have dramatic impacts on Port business.
3. Janitorial Services for Port Buildings. These services entail janitorial services for Port buildings through on-site personnel.
  - a. This category was derived from past procurements for the Port headquarters, such as Janitorial Services for 530 Water St. and Other Port Assets (RFP No. 15-16/02), which pertained to providing weekday janitorial services at the Port headquarters and related buildings such as the Washington Street Garage, which are occupied and used by Port tenants and visitors to Jack London Square.

- b. These services provide on-site and continuous janitorial services to Port buildings that serve Port tenants, customers, and/or the public. Janitorial services are by nature performed by personnel, are needed regularly, and cannot be effective when deferred or interrupted. Accordingly, the Port, as would a private company, has a strong proprietary interest in procuring janitorial services without the undue risk of labor disruptions. Customers have choices which visitor-serving businesses they frequent. Such guarantee would strengthen the Port's ability to serve its tenants, customers and public, and ultimately benefit the Port's revenues and market competitiveness.
- 4. Comprehensive Building Engineering and Maintenance Services for Port Buildings through Full-Time Personnel. These services entail comprehensive (and not merely specialized or limited) building engineering and maintenance services for Port buildings through dedicated full-time personnel who are available to respond to needs 24/7.
  - a. This category was derived from past procurements for the Port headquarters, such as Building Engineering and Maintenance Services (RFP No. 18-19/06), which pertained to full-time building engineering and facility maintenance services, including serving as the first responder for building and facility problems 24/7/365 at the Port headquarters, adjacent parking garages, and other buildings in and around Jack London Square.
  - b. Similar to janitorial services, these services are on-site, continual, and critical to the provision of adequate services to the Port's tenants, customers, and the public, many of whom may seek similar services by leasing and purchasing from the Port's competitors. The building engineering and maintenance services proposed to be included in the LP Rule are those that are comprehensive and performed through full-time personnel, rather than those services that may be for specialized or limited portions of building engineering and maintenance and/or performed by part-time employees, in which case the Port's proprietary interest in the LP Rule cannot be automatically assumed.

During the February 13, 2020 meeting, the Board requested that staff evaluate which RFPs were not covered by the proposed LP Rule to ensure that the Port's proprietary interests in avoiding labor disruptions were sufficiently protected.

## **B. Review of Past RFPs that Could Have Benefitted from Labor Peace Assurances**

In response to the Board's request, staff reviewed all Port RFPs over the past five years (i.e., since FY2016-17). These totaled approximately 30 RFPs, which, as discussed further below, are in addition to other forms of Port procurements. From this review, staff identified two additional RFPs that involved operational services for the Port acting as a market participant that staff believes should be covered under the proposed LP Rule because a similarly situated private business would likely also wish to ensure labor peace for such services. Staff proposes adding the following operational services to the revised Port LP Rule (attached to this Agenda Report).

1. Airport Shuttle Bus, Ground Transportation, and Curbside Management Services (RFP 17-18/03). This RFP was to provide personnel who managed airport curbside operations and operated airport shuttles.
  - a. These services are critical to the movement of passengers through the airport and, as such, ultimately impact the Port's revenues and competitiveness with other airports. The Port has a strong proprietary interest in procuring these services without the undue risk of labor disruptions, which would eviscerate the core value provided by such curbside management and shuttle bus operations. Because these services involve continual, in-person presence of personnel to manage the airport curbside and drive shuttle buses, even temporary labor disruptions could greatly impact the continual flow of airport passengers.
  - b. *Proposed Revision:* Staff proposes adding "Airport shuttle services" and "Airport curbside management services" (which includes ground transportation) as additional categories of operational services agreements procured through RFPs subject to the proposed LP Rule.
2. Port Security Operations Center Staffing (RFP 17-18/24). This RFP was to provide dedicated personnel to continually monitor security camera footage in the maritime area, including public roadways, at all times.
  - a. These services benefit the Port's maritime activities as well as those of the Port's tenants and customers who interact with the Port's seaport. Continuous, real-time monitoring of security camera footage is essential for effective security enforcement and would be greatly impacted by labor disruptions. The Port, as would any private proprietor, would seek to ensure uninterrupted security monitoring when procuring such services. Effective security enforcement also ultimately supports the Port's revenues by maintaining current and soliciting new tenants, developers, and customers, thereby also increasing its market competitiveness.
  - b. *Proposed Revision:* Staff proposes adding "real-time security video monitoring services at the seaport" to the description of "security guard services" covered under the proposed LP Rule.

Additionally, the review of past RFPs clarified the past examples from which the categories of the LP Rule derived. Staff proposes adding the following clarifications to more closely reflect the RFPs to which they would relate:

1. *Proposed Revision:* Staff proposes clarifying that all categories to be covered by the LP Rule are those for services "on Port property".
2. *Proposed Revision:* For janitorial services, staff proposes clarifying that such services are "comprehensive" and that the "Port Buildings" referenced are for those "in Jack London Square that serve Port tenants, customers, or the public".
3. *Proposed Revision:* For building engineering and maintenance services, staff proposes clarifying that the "Port Buildings" referenced are for those "in Jack London Square that serve Port tenants, customers, or the public".

Besides the types of RFPs covered under the originally proposed LP Rule and the two additional RFPs identified above, staff does not propose extending coverage under the LP Rule to any of the other types of services solicited. In reviewing the past five years of RFPs, the remaining RFPs that would not be covered fell into the following four general categories:

1. Engineering. This category encompasses professional services relating to engineering, planning, environmental, and related services that did not relate to any operational services. Examples include RFPs for As-Needed Aviation Planning Consulting Services (RFP 17-18/14), Aviation Noise Consulting Services (RFP 18-19/15), and Oakland International Airport Stormwater Treatment Assessment (RFP 19-20/22).
2. Finance. This category encompasses professional services in support of the Port's finance, accounting, and related functions. Examples include RFPs for Safety Services for Owner Controlled Insurance Program (RFP 16-17/16), Letter of Credit or Revolving Credit (RFP 18-19/07), and Bond Underwriting Services (RFP 19-20/24).
3. Information Technology ("IT"). This category encompasses professional services supporting the Port's various IT functions or other functions that utilized technology. Examples include RFPs for Web-Based Labor Compliance/Workforce Tracking System and Living Wage Compliance System (RFP 16-17/02), Oracle E-Business Suite Upgrade to R12.2.x (RFP 16-17/17), and Digital Display Content Management System (RFP 18-19/08).
4. Other Departmental RFPs. This category encompassed all other RFPs involving various professional services for singular events and specialized activities. Examples include RFPs for Forum Facilitator and Administrative Services (RFP 16-17/05), Airspace Consultant (RFP 16-17/14), Asset Management Consultant (RFP 17-18/06), Maritime and Project Labor Agreement Consulting Services (RFP 17-18/26), Airport Mapping and Interactive Wayfinding (RFP 18-19/18), and Federal Government Advocacy Services (RFP 20-21/01).

The Engineering, Finance, IT, and Other Departmental RFPs described above all included services that were professional, specialized, off-site, and/or temporal rather than operational, and therefore would not trigger the same proprietary interests that would be benefited by labor peace assurances as a critical component of their procurement. Nor would a private business typically require LP agreements as a condition of obtaining such services.

### **C. Labor Peace Rule Would Not Apply in Any Other Circumstances**

The proposed LP Rule would only apply to specified services solicited through RFPs, as defined under the Port's Purchasing Ordinance (No. 4576), and not to bids or RFQs. As background, RFPs are typically required where services do not have clearly defined specifications and therefore the Port provides proposers with a general scope of services, submission requirements, and the evaluation criteria. The RFP is awarded based on their scope of

services, price, and competency level. Accordingly, operational services that meet the threshold fit best under an RFP.

Alternatively, the proposed LP Rule would not apply to the two other types of solicitations outlined in the Purchasing Ordinance – bids and RFQs – because they are primarily reserved for non-operational services or procurement of goods and supplies made or manufactured at non-Port locations. First, the Port issues bids in which selection is primarily price-based because the scope of services or specifications are clearly defined. Thus, bids are usually reserved for purchases of goods or supplies or for public works projects. Second, the Port issues Requests for Qualifications (RFQs) in which the selection is based on demonstrated competency and not on price. Select professional services are reserved for RFQs, such as services of architects, landscape architects, engineers, environmental engineers, land surveyors, construction project managers, and attorneys. Bids and RFQs would not be the appropriate vehicle to contain the type of operational services identified and analyzed in this Agenda Report.

Finally, the proposed LP Rule would only apply to operational services contracts entered into by the Port as the primary purchaser of the services and would not apply to real property leases or licenses or to permittees because these contracts or permits do not involve the purchase of services. Port construction contractors are also not covered by the proposed LP Rule because they are governed by MAPLA.

#### **D. Summary of Proposed Labor Peace Rule for Certain Operational Services**

The proposed Labor Peace Rule, as expanded according to the discussion above, would apply to an agreement between the Port and an operator selected pursuant to an RFP to provide primarily the following six services on Port property:

1. Automobile and/or truck tractor parking services;
2. Real-time security video monitoring services at the seaport or security guard services or;
3. Comprehensive janitorial services for Port buildings in Jack London Square that serve Port tenants, customers, or the public;
4. Comprehensive building engineering and maintenance services through full-time personnel for Port buildings in Jack London Square that serve Port tenants, customers, or the public;
5. Airport shuttle services; and/or
6. Airport curbside management services.

All six categories were carefully tailored to address the on-site, operational, and critical services procured in prior RFPs for which the Port has a strong proprietary interest in preventing labor disruptions. These categories directly impact the Port's economic interest in maintaining current or soliciting future revenue. Ultimately, ensuring the continuity of such services increase the competitiveness of the Port in the marketplace across all of its business lines. Shipping lines,



airlines, and commercial real estate tenants all make choices as to which locations to transact with. Such choices are based, in significant part, upon the certainty of factors such as site access and parking, as well as adequate security, janitorial, and building services. These services are completely dependent on the presence of on-site personnel and, therefore, the risk of labor disruptions to such services are great. The proposed LP Rule aims to protect the Port's interests in ensuring that such services are provided without interruption, ultimately supporting the Port's overall economic activities and viability.

The form of the proposed LP Rule is attached to this Agenda Report and is based on the form currently used for airport concessionaires under Port Resolution No. 17-35. The proposed LP Rule would apply to agreements with operators providing covered operational services ("Operators") for which the RFP was first issued on or after its effective date. Some of the more prominent features of the LP Rule include:

1. Operators must have in place an LP agreement prior to executing the agreement for Operational Services with the Port and at all times thereafter for the duration of the contract.
2. If the Operator and Labor Organization are unable to agree to a LP agreement within 30 days of the Labor Organization's written request, the Operator may request that the Executive Director relieve them of its obligation if a hearing officer, appointed by the Executive Director, finds that Operator attempted to reach agreement with a labor organization but that such labor organization either refused to negotiate one or placed conditions that were arbitrary and capricious.
3. Department Directors will investigate complaints alleging violations of the Rule and will take appropriate actions to enforce compliance, including referring matters to the Port Attorney for civil or other action. The Port may also terminate an Operational Services Agreement with a 30-day notice to cure if the Operator fails to enter into the required LP agreement. Challenges to the applicability of the Rule may be brought to the Board only after first seeking an exemption from the Department Director.
4. Exemptions from the proposed LP Rule include Operators with existing bargaining units; agreements between the Port and a public agency or the Port's tenant, licensee, or permittee; and any RFPs for which the Port has not received any responsive proposals or in which the Department Director determines that the risk to the Port's financial or other nonregulatory interest resulting from labor/management conflict is so minimal or speculative so as not to require an LP agreement to achieve such interest.

## **E. Conclusion**

Staff believes the proposed Labor Peace Rule provides the Port greater certainty in operations and a more efficient procurement process for specific operational service areas. This further strengthens the Port's RFP process while protecting the proprietary interest of the Port in obtaining certain critical operational services without the threat of labor disruptions.

## **BUDGET AND STAFFING**

Adopting the proposed Labor Peace Rule should not have a revenue impact to the FY2020-21 Operating Budget, or future budgets. The proposed action does not have any staffing impact. The form of the proposed LP Rule is attached to this Agenda Report. The proposed LP Rule is based off the Labor Peace Rule that currently applies only to Airport concession services contracts (approved by the Board through Resolution No. 17-35), and is designed to address any potential labor disruptions that could arise in six specific operational service areas for which agreements are adopted pursuant to a formal RFP as defined in the Port's Purchasing Ordinance (Ordinance No. 4576).

## **MARITIME AND 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>)

The 2 strategic goals addressed by this recommendation are:

- Goal: Strengthen Safety and Security
- Goal: Serve Our Community

## **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 because the requested action is not an agreement, contract, lease, or request to provide financial assistance within the meaning of the Living Wage Regulations.

## **SUSTAINABILITY**

Port staff have 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 presents sustainability opportunities, including adaptation to sea level rise.

## **ENVIRONMENTAL**

The action was reviewed in accordance with the requirements of the California Environmental Quality Act (CEQA). CEQA only requires analysis of activities that are defined as a "project."

Approving the Labor Peace Rule for Certain Operational Services as described in this Agenda Report does not involve any commitment to any specific project that may result in a potentially significant physical impact on the environment is not a project pursuant to Section 15378(b)(5) of the CEQA Guidelines. Therefore, approving the actions described in this Agenda Report are not a project under CEQA.

### **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**

- Adopt a Labor Peace Rule for Certain Operational Services in the form attached to this Agenda Report. This is the recommended action.
- Adopt a Labor Peace Rule for Certain Operational Services, but under different terms and conditions from the form attached to this Agenda Report.
- Do not adopt a Labor Peace Rule for Certain Operational Services.

### **RECOMMENDATION**

Staff recommends that the Board adopt a Labor Peace Rule for Certain Operational Services in the form attached to, and as further described in, this Agenda Report.