

AGENDA REPORT

Ordinance: Approval of the 9th Supplemental Agreement with BNSF Railway Company at the Joint Intermodal Terminal to Extend the Lease to December 31, 2024; Modify Compensation Resulting in \$3.8 Million of Additional Fixed Revenue; and Modify Certain Deferred Maintenance Obligations (**Maritime**)

MEETING DATE: 9/30/2021

AMOUNT: \$3.8 million
Revenue

PARTIES INVOLVED: Burlington Northern Santa Fe, Fort Worth, Texas
Randy Harvell, Director – Intermodal Operations

SUBMITTED BY: Bryan Brandes, Maritime Director

APPROVED BY: Danny Wan, Executive Director

ACTION TYPE: Ordinance

EXECUTIVE SUMMARY

BNSF Railway Company has been leasing the 84-acre Joint Intermodal Terminal from the Port since 2002. The lease was most recently amended in April 2019 to, among other matters, extend the term to December 31, 2023 and require BNSF to perform certain deferred pavement maintenance by June 30, 2021. For various reasons, BNSF did not perform this maintenance as required and has requested an extension to December 31, 2023 to perform the maintenance. Staff has negotiated with BNSF and recommends an amendment to the lease that would grant BNSF's request for more time to perform deferred maintenance and extend the term of the lease to December 31, 2024.

BACKGROUND

BNSF has been leasing the Joint Intermodal Terminal Facility (JIT, also known as Oakland International Gateway or OIG) since 2002 (Exhibit A). The Port built the facility at a cost of \$72 million with a mix of cash, bonds and grant money. There have been eight Supplemental Agreements since the initial lease commenced in 2002. The lease was most recently amended in April 2019 to extend the term to December 31, 2023, increase compensation, and require BNSF to perform certain pavement maintenance (that it previously deferred) by June 30, 2021.

BNSF plans its annual capital budget in the fall of the previous year. Due to the volume uncertainty following the onset of the COVID-19 pandemic, BNSF adjusted and reduced its overall capital plans for 2020 and 2021. The adjusted capital plan required that BNSF's engineering team re-prioritize its projects, giving priority to the greatest need and impact to operations. One of the postponed projects was the JIT deferred maintenance.

As of the writing of this report, BNSF plans to complete the deferred maintenance at the JIT in 2022 and 2023 but may be able to advance some of the 2022 work into 2021. BNSF currently estimates all the deferred maintenance to cost about \$5 million.

ANALYSIS

The impacts of the COVID-19 pandemic on business operations across industries are well documented. Port Staff believes that BNSF's reasons for not completing the deferred maintenance as planned is reasonable. However, Staff has a strong interest in making sure the maintenance does occur before the lease expires on December 31, 2023. Therefore, Staff proposed an amendment to the lease with BNSF that includes the following key terms:

- A one-year term extension to December 31, 2024.
- A four percent increase to the lift rates and the minimum annual guarantee ("MAG" or annual fixed rent) in 2024; the MAG grows from about \$3.7 million in 2023 to \$3.8 million in 2024.
- Deferred maintenance must be completed by December 31, 2023.
- A detailed pavement condition map and pavement maintenance workplan completed in January 2021 are included as attachments to the lease, to guide and benchmark actual work performed by BNSF. Actual work plans must be submitted to the Port for approval.

BUDGET & STAFFING

Compared to the current lease, the proposed lease amendment results in one additional year of minimum guaranteed revenue and is generally consistent with the Port's 5-year revenue projections. The proposed action does not have any staffing impact.

MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)

The proposed lease amendment with BNSF does 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. However, the work performed by BNSF, or its contractors, may fall within the scope of the MAPLA only to the extent the Port issues a building permit for construction and it exceeds \$150,000 in value.

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.portoakland.com/wp-content/uploads/Port-of-Oakland-Strategic-Plan.pdf>

Goal: Modernize and Maintain Infrastructure

LIVING WAGE

Based on the lease and information provided by the Agenda Report, living wage requirements may apply to this lease because the agreements are for a value greater than \$50,000. The condition of the tenants employing 21 or more employees must also be met for the tenants, and, will be required to certify that should living wage obligations become applicable, tenants shall comply with the Living Wage Regulations. In addition, future construction work under this agreement will be subject to prevailing wage requirements.

SUSTAINABILITY

The proposed lease amendment does not directly offer sustainability opportunities, but BNSF remains subject to the Port's Environmental Responsibilities Exhibit of the lease, which includes an enhanced Air Quality section. Specifically, BNSF agrees to use best efforts to operate the least polluting emission sources, provide an inventory of equipment used on the Premises and operational data, and discuss and evaluate the feasibility of using zero-emissions equipment.

ENVIRONMENTAL

The proposal to authorize the Executive Director to execute a lease amendment with BNSF for the Joint Intermodal Terminal facility was reviewed in accordance with the requirements of the California Environmental Quality Act ("CEQA"). The proposed lease is categorically exempt from CEQA pursuant to CEQA Guidelines, Section 15301, which exempts the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use.

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 three options for the Board's consideration:

1. Approve the 9th Supplemental Agreement with BNSF to extend the lease for the JIT to December 31, 2024, modify compensation, and modify certain deferred maintenance obligations. This is the recommended option.
2. Approve the 9th Supplemental Agreement with BNSF under different terms than those outlined in this Agenda Report.
3. Do not approve 9th Supplemental Agreement with BNSF as described herein. Under this option, BNSF would be out of compliance with its lease, but would still be required to complete deferred maintenance. It would not plan to complete the work until December 31, 2023, which is the last day of the current lease term.

RECOMMENDATION

Approve the 9th Supplemental Agreement with BNSF Railway Company at the Joint Intermodal Terminal to Extend the Lease to December 31, 2024; modify compensation resulting in \$3.8 million of additional fixed revenue; and modify certain deferred maintenance obligations.

EXHIBIT A

Site Location Map for Joint Intermodal Terminal

