

Order 47-05/06

Passage: 8/15/05 9-0

JILL C. DUSON (MAYOR)(A/L)
PETER O'DONNELL (A/L)
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CITY OF PORTLAND
IN THE CITY COUNCIL

WILLIAM R. GORHAM (1)
KAREN A. GERAGHTY (2)
DONNA J. CARR (3)
CHERYL A. LEEMAN (4)
JAMES I. COHEN (5)

**ORDER AUTHORIZING MEMORANDUM OF AGREEMENT
WITH THE CITY AND MAINE DEPARTMENT OF TRANSPORTATION
RE: MARGINAL WAY PROPERTY**

IT IS HEREBY ORDERED, that the City Manager is hereby authorized to execute the City-State Memorandum of Agreement with the Maine Department of Transportation in substantially the same form as Attachment 1 hereto for the purposes of completing the Bayside Rail purchase and transferring Marginal Way property to the State; and

BE IT FURTHER ORDERED, that the City Manager and the Finance Director are authorized to execute any documents required in order to implement this Memorandum of Agreement.

FUNDING, MANAGEMENT AND OPERATING AGREEMENT

between the

CITY OF PORTLAND

and the

MAINE DEPARTMENT OF TRANSPORTATION

regarding the

DEVELOPMENT OF WATERFRONT PASSENGER AND CARGO

TRANSPORTATION FACILITIES

PORTLAND, MAINE

This AGREEMENT is entered into on this ____ day of _____ 2005, by and between the STATE OF MAINE, acting by and through its DEPARTMENT OF TRANSPORTATION with offices in Augusta, Maine (referred to herein as "MDOT" or "Department") and the CITY OF PORTLAND, a body corporate and politic located in the County of CUMBERLAND, State of MAINE (referred to herein as "City") regarding the OCEAN GATEWAY PROJECT (the "Project") described below.

WHEREAS the centerpieces of this agreement are the development of the pier and landside facilities currently located at the former Bath Iron Works Facility at the east end of Commercial Street, Portland, Maine, and the pier and the cargo facility currently known as the International Marine Terminal located on Commercial Street near the east side of the Casco Bay Bridge in Portland, Maine;

WHEREAS the DEPARTMENT will (1) manage the construction of the proposed pier and landside facility adjacent to Commercial Street at or near the premises previously referred to as Maine State Pier and Bath Iron Works facility (referred to herein as "PASSENGER TERMINAL") for the purpose of facilitating passenger transportation and (2) enhance the existing pier and landside facility adjacent to Commercial Street at or near the International Marine Terminal (referred to herein as "CARGO TERMINAL") for the purpose of providing increased cargo transportation, (3) obtain permits, prepare design specifications, solicit bids, let contracts, and manage the project development and construction of the PASSENGER TERMINAL and the CARGO TERMINAL which, together, comprise the Project;

NOW, THEREFORE, the parties hereby agree to the following terms and conditions.

1. GENERAL ROLES OF THE PARTIES

1.1 MDOT. The Department shall obtain all necessary environmental permits, assist the City in obtaining local permits, direct the development of the Project, procure designs and contract specifications, let bids, direct contracting activities, and administer the Contract for the construction of the Project. The Department shall not be responsible for any fees associated with the issuance of local permits as outlined in Section 4 of this Agreement. The City hereby grants

to the Department all reasonable and necessary authority to construct the Project, including permission for the Department's representatives to enter and have access to the property where the Project will be constructed.

1.2 City. The City shall be the owner and the operator of the PASSENGER TERMINAL and the CARGO TERMINAL. The City will provide matching funds in the amount of Two Million (\$2,000,000) as follows: (1) at the time the contract for the construction of the Project is awarded, the City shall pay Five Hundred Thousand Dollars (\$500,000) to the Department; (2) when the construction of the Project is 50% completed, the City shall pay One Million Dollars (\$1,000,000) to the Department, and (3) when the construction of the Project is 75% completed, the City shall pay Five Hundred Thousand Dollars (\$500,000) to the Department. The City shall make a good faith effort to obtain additional funds in the form of a DECD grant in the amount of Five Hundred Thousand Dollars (\$500,000), and to apply the grant proceeds to the project as allowed by the terms of the grant agreement. The City may grant certain property rights, easements and security to MDOT for the development of the PASSENGER TERMINAL and the CARGO TERMINAL. The City hereby grants the Department all rights necessary to contract with contractors to perform the work required to complete the Project. To the extent that the City has a role in the Project, the City shall be responsible for its own costs associated with the City's role in administering any part of the Project. The Department may not obligate the City to pay more money than Two Million Five Hundred Thousand Dollars (\$2,500,000) without the City's agreement. The City's obligation to pay Two Million Five Hundred Thousand Dollars (\$2,500,000) may not be reduced without agreement of the Department. MDOT and the City agree that to the extent the City funds any of the forgoing obligations with the proceeds of tax-exempt bonds, such proceeds will be allocated to street, traffic, sewer and other infrastructure improvements portions of the Project and not to any portion of the Project used by any nongovernmental user on a basis other than use by the general public.

2. SCOPE OF PIER CONSTRUCTION PROJECT

2.1 Functional Design of Pier. The Department shall work cooperatively with the City to develop a PASSENGER TERMINAL and a CARGO TERMINAL that will adequately handle present and future passenger and cargo operations.

3. BUDGET - PUBLIC INVESTMENT LIMITATION

The Department shall have no obligation to expend more than Eight Million Nine Hundred Seventy-Six Thousand Dollars (\$8,976,000) to design, construct and perform all associated work related to the PASSENGER TERMINAL and the CARGO TERMINAL (the "Budget"). The Department will make a good faith effort to obtain additional funds for the Project in an amount that shall not exceed Seven Million Five Hundred Twenty-Four Thousand Dollars (\$7,524,000). Spending limitations will be attached to some of these additional funds so that part of this money will be earmarked for specific items of work and will not be permitted to be spent for other items. The City may at its own initiative solicit additional funding from state, federal, or other sources for the purpose of supporting the Project. With the City's approval these additional funds may be added to the Project's total fund availability and be managed according to the terms of this agreement. In the event that the City fails to comply with state or federal laws, rules and regulations and such failure results in the obligation to repay some or all of the Project funds, the City agrees to hold the Department harmless and to be solely responsible for such repayment.

4. PERMITTING

4.1 General. MDOT, as agent for the City, shall apply for all necessary permits for the construction and operation of the PASSENGER TERMINAL and the CARGO TERMINAL, including those from the Army Corps of Engineers and the Maine Department of Environmental Protection. MDOT shall provide the City with copies of correspondence and permit applications generated by MDOT related to permitting. The Department shall be responsible for payment of all state and federal permitting fees out of the Project funds and the City shall not be responsible for payment of those fees.

4.2 Local Permits. The City shall waive all fees that may be incurred in any and all phases of the process of applying for and obtaining permits that are approved or issued by the City and, to the extent that fees are incurred or are not waived for said permits, the City shall be responsible for any and all of those fees, and further the City may use the matching funds it has previously committed to the project for such fees.

5. DESIGN

5.1 General Cooperation. The parties shall cooperate according to the terms of this Agreement to develop a completed Project on time and within budget. The City shall be notified of and invited to attend all substantive project-related meetings and conferences.

5.2 Unique Product Handling Requirements. The City and the Department shall, as soon as practicable, jointly identify the components, utility design systems, appurtenances, amenities and traffic considerations outside and within the PASSENGER TERMINAL and the CARGO TERMINAL that are required or prudent to meet the needs of the vessel types and product and handling requirements of anticipated users of the PASSENGER TERMINAL and the CARGO TERMINAL.

5.3 Preliminary Design. The Department shall cause to be prepared Preliminary Design plans for the PASSENGER TERMINAL and the CARGO TERMINAL. Preliminary Design plans will be considered complete when 30% of the final design is reached. The City shall have the opportunity to review and request modifications to the Preliminary Design. The Department, in its discretion, shall determine whether such modifications will be incorporated into the design considering, among other things, whether such change would significantly impact the Department's ability to pay for this Project, whether the modifications are consistent with the Project intent and whether the modifications are consistent with the Department's overall development plans. If such modifications are not incorporated because the Department determines that the overall budget will be exceeded, the Department agrees to make said modifications if the City and the Department reach a mutually acceptable agreement for the allocation and payment of the costs of such modifications. The amount of said costs shall be determined by the Department. The parties shall indicate in writing whether they agree with the preliminary design and to what items of said design the parties disagree.

5.4 Intermediate Design. The Department shall cause to be prepared Intermediate Design plans for the PASSENGER TERMINAL. Intermediate Design plans will be considered complete when 60% of the final design is reached. The City shall have the opportunity to review

and request modifications to the Intermediate Design. The Department, in its discretion, shall determine whether such modifications shall be incorporated into the design pursuant to the same terms set forth in Section 5.3 above. The parties shall indicate in writing whether they agree with the Intermediate Design and to what items of said design the parties disagree.

5.5 Final Design. The Department shall cause to be prepared Final Design plans for the PASSENGER TERMINAL. Final Design plans will be considered complete when 90% of the final design is reached. The City shall have the opportunity to (1) review the Final Design, (2) request modifications for the Final Design, and (3) approve the Final Design. The Department, in its discretion, shall determine whether such modifications shall be incorporated into the design considering, among other things, whether such change would significantly impact the Department's ability to pay for this Project, whether the modifications are consistent with the Project intent and whether the modifications are consistent with the Department's overall development plans. If such modifications are not incorporated because the Department determines that the overall budget will be exceeded, the Department agrees to make said modifications if the City and the Department reach a mutually acceptable agreement for the allocation and payment of the costs of such modifications. The parties shall indicate in writing whether they agree with the Final Design and with which items of said design the parties disagree if any.

5.6 Preparation of Bid Documents.

5.6.1 Base Bid & Alternatives. The bid form shall include a base bid for those renovation and construction items agreed upon by the parties during the development of the Project's design that are within available funding limits. Additionally, the bid form shall contain bids on other renovation and construction items in order to provide flexibility within the bid documents to allow the integration into the Project of as many alternative items as possible within the Project funding constraints (the "Alternative Bid Items"). The Department, in its discretion, shall determine which Alternative Bid Items shall be accepted and the priority that will be assigned to each Alternative Bid Item as the Alternative Bid Items are incorporated into the Project. The City shall indicate in writing if it disagrees with the selection of particular Alternative Bid Items and the priority assigned to each said Item. To the extent an alternative bid item affects the ownership and/or operational responsibilities and liabilities of the City, the Department shall use its best efforts to satisfy City concerns.

5.6.2 Review by the City. The Department shall incorporate the final design plans into Bid Documents including the Contract to be entered into by the Contractor. The City shall have the opportunity to review and request modifications to the Bid Documents. The Department, in its discretion, shall determine whether such modifications shall be incorporated into the Bid Documents pursuant to the same terms set forth in Section 5.3 above. The City shall indicate in writing if it disagrees with specific items within the Bid Documents, and the Department shall use its best efforts to satisfy City concerns.

5.7 Engineer's Estimate. The Department shall cause an engineer's estimate to be prepared for the Project at each stage of the design process. The City shall have the opportunity to review and comment on the engineer's estimate as rendered. The City shall keep said estimates confidential as required by 23 MRSA § 63.

6. BIDDING

6.1 Contracting Party. The parties anticipate that the Department shall enter into the Contract for construction of the PASSENGER TERMINAL. The City shall have the right to prior review of all contracts.

6.2 Applicable Procedures. The parties shall use the advertising, bidding and contracting procedures set forth in 23 M.R.S.A. §753 and in the Department's Standard Specifications, Revision of December 2002.

6.3 Eligibility to Bid. In order to be eligible to bid on the construction contracts for the PASSENGER TERMINAL, contractors must comply with the Department's Prequalification Procedure.

6.4 Review, Acceptance and Rejection of Bids. Within 72 hours after bid opening, representatives of the City and the Department will consult and evaluate base bids and bid alternatives. The City and the Department will determine whether there exist sufficient funds within the Budget to pay for construction of the Project. The Department may, in its discretion but in consultation with the City, reject or accept any bids as permitted by the 23 M.R.S.A. §753 or the Department's Standard Specifications, Revision of December 2002. In the event that the bids exceed available funds, the Department may, in its discretion but in consultation with the City, reject all bids, redefine the scope of the Project and rebid part or all of the Project, or suspend construction until sufficient funds are found.

6.5 Contracts shall require the Contractor to name the City as well as the Department as additional insured on its insurance.

7. CONSTRUCTION ADMINISTRATION

7.1 General Authority. The Department shall administer the Contract for the construction of the Project. All standard procedures utilized by the Department's Multimodal Program shall be utilized. These include the provisions for contractor's application for payment, approval of such applications for payment, and change orders.

7.2 Cooperation. The parties shall cooperate with each other in good faith in every reasonable way toward the mutually agreed upon goal of constructing a quality Project on time, within budget, and in accordance with the Contract. The City shall have the right to review the Department's construction administration documentation at all reasonable times.

7.3 Contract Modifications. No changes to the Contract may be made unless the change is memorialized in a Contract Modification pursuant to the Department's Standard Specifications, Revision of December 2002. The City shall have the right to review any Contract Modification. The Department will confer with the City prior to any Contract Modifications. The Department shall have the authority to execute the Contract Modification and proceed with prosecution of the Work without concurrence from the City.

7.4 Differing Site Conditions. If the Contractor encounters differing site conditions, the Department, in consultation with the City, shall utilize all applicable contractual provisions to minimize impact to the Budget, after consultation with City.

7.5 Construction Overruns. If the Department reasonably projects that costs will exceed the Budget, or if costs actually exceed said Budget, then the Department and the City agree to cooperate with each other in good faith to diligently seek additional funding from public and/or private sources. If such funding is not available, the Department shall have the authority to redefine the scope of the Project or suspend Work so as to meet the Budget.

7.6 Construction Staging Area. The City agrees to grant to the Department a temporary construction license on the land in the vicinity of the PASSENGER TERMINAL and the CARGO TERMINAL for construction staging purposes. The Department agrees to coordinate and cooperate with the City to minimize any disruption of the operations of the adjacent ferry, parking and cargo operations, and to require its Contractor to do so.

7.8 Completion. Completion of the Project is deemed to occur when the Department determines that the PASSENGER TERMINAL and the CARGO TERMINAL, as constructed, conform to the Contract Documents and are capable of receiving all ships that the PASSENGER TERMINAL and the CARGO TERMINAL were designed to accommodate upon completion. The Department shall provide the City with at least thirty (30) days prior written notice of the Department's estimated date of Project completion and, as of the date of said notice, provide the City access thereto for the purpose of installing the City's equipment, machinery and fixtures for the operation of the PASSENGER TERMINAL and the CARGO TERMINAL. The City and the Department shall use their best efforts to effect completion of the Project within established schedules developed during the design and construction processes.

7.9 Indemnification. The Department shall require its Contractors to defend, indemnify and hold harmless the Department and the City, their agents and employees from any and all claims, actions or liabilities of any nature whatever arising out of the negligence or any other act or omission of the City or the Department or their agents, servants, employees or independent contractors in the construction of the PASSENGER TERMINAL and the CARGO TERMINAL.

8. GENERAL PROVISIONS

8.1 Oral Statements Not Enforceable. The parties hereby agree that no oral representations or agreements related to the undertakings set forth in this Agreement exist, and that no party may enforce any oral promise unless it is contained in this Agreement or in a document signed by the parties, nor can any change, forbearance, or other accommodation relating to this Agreement or any other Project document be enforced, unless it is in writing and signed by the parties. The City also understands that any future promise, contract, or agreement of the Department relating to any other transaction between the City and the Department cannot be enforced in court unless it is in writing and signed by the City and the Department.

8.2 Counterparts. This Agreement shall be executed in two (2) counterparts, each of which shall be deemed an original and all collectively but one and the same instrument.

8.3 Modification; Entire Agreement. This Agreement may not be changed, altered, amended, modified, limited or extended orally or by agreement between the parties hereto unless such agreement is expressed in writing and signed by the parties.

8.4 Paragraph Headings. The headings at the beginning of each of the paragraphs herein are solely for the purposes of convenience and identification and are not to be deemed or construed to be part of this Agreement.

8.5 Severability. If any term, clause or provision of this Agreement is judged to be invalid and/or unenforceable, the validity and/or enforceability of any other term, clause or provision in this Agreement shall not be affected thereby and the parties shall use their good faith efforts to fully effect the transactions and terms contemplated herein.

8.6 Additional Documents. The parties hereto mutually agree to undertake such activities and execute such other additional contracts, instruments and other written documents (including modifications to or revisions of this Agreement) as may be reasonably requested in order to assure compliance with all of the terms, provisions and conditions of this Agreement.

8.7 Indemnification. The City agrees to indemnify, defend and save harmless the State, its officers, agents and employees from any and all claims, costs, expenses, injuries, liabilities, losses and damages of every kind and description (hereinafter in this paragraph referred to as “claims”) resulting from or arising out of any action or inaction of its employees, agents, or subcontractors. This indemnification does not extend to a claim that results solely and directly from (i) the Department’s negligence or unlawful act, or (ii) action by the City taken in reasonable reliance upon an instruction or direction given by an authorized person acting on behalf of the Department. Nothing in this indemnification provision shall constitute a waiver of any defense, immunity, or limitation of liability that may be available to the City under the Maine Tort Claims Act (14 M.R.S.A. § 8101 et. seq.).

8.8 Miscellaneous. This Agreement shall be construed in accordance with Maine law, shall be effective when duly executed by the parties named below, shall be binding upon and inure to the benefit of the successors and assigns of the parties, and shall not be modified except by written agreement executed by each of the parties hereto.

8.9 Termination and Expiration. This Agreement may be terminated by either party under any of the following circumstances: (a) either party breaches its obligations or agreements hereunder or notifies any other party that it does not intend to proceed further with the implementation, operation or financing of the Project after written notice thereof and ten days opportunity to cure, (b) any legal action or proceeding is commenced challenging the issuance of any bonds used to fund the Project, and such action or proceeding is not dismissed with prejudice prior to the advertisement for bids, or (c) there is a material adverse change in the Project, the Project location or the financial condition of Department. In the event of any such termination, no party shall have any further obligations to the other except as otherwise provided in this Agreement.

9. MANAGEMENT AND MAINTENANCE AFTER COMPLETION

9.1 Use. For a period of twenty (20) years after completion of the Project as determined by the Department, the City covenants and agrees to manage and promote the PASSENGER

TERMINAL and the CARGO TERMINAL in such a manner as to maximize general cargo and passenger handling capability of the PASSENGER TERMINAL and the CARGO TERMINAL.

9.2 Maintenance/Reversion of Title. For said twenty (20) year period, the City further agrees to maintain and operate the completed PASSENGER TERMINAL and the CARGO TERMINAL at all times in a safe and sanitary manner and in compliance with all Federal, State and municipal laws, ordinances, rules and regulations, and to require any third-party with whom it deals or contracts to do the same. If the City fails to comply with its obligations as set forth in this section 9, the Department shall issue a Notice of Default and shall provide City with a six (6) month opportunity to cure the default. In the event that the City does not cure the default within the six month period, but has undertaken reasonable efforts to do so, the City may request an extension of time to cure the default, not to exceed six (6) months, which extension shall not be unreasonably denied. If the default is not cured within the cure period or within any extensions thereto, the City shall, at the sole election of the Department, either (1) convey title to the PASSENGER TERMINAL and the CARGO TERMINAL to the State of Maine and relinquish all rights to ownership and management of the PASSENGER TERMINAL and the CARGO TERMINAL or (2) repay to the Department the full amount that was expended on the Project.

9.3 Funding Maintenance. The City further agrees for said twenty (20) year period to fund routine maintenance and operational costs from fees and other revenues generated by the PASSENGER TERMINAL and the CARGO TERMINAL to keep those facilities in a condition equivalent to the condition that they were in at the time of completion of the Project, normal wear and tear excepted.

IN WITNESS WHEREOF by signing this document, the parties promise to be bound by all the terms and conditions of this Agreement as of the date this Agreement is last signed below.

MAINE DEPARTMENT OF TRANSPORTATION

Date Signed

By: David A. Cole, Commissioner

CITY OF PORTLAND

Date Signed

By:

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