
**ADDENDA NO. 1
TO THE
REQUEST FOR COMPETITIVE SEALED PROPOSALS (“RFP”)
CITY OF KETCHIKAN, ALASKA**

**CONTRACT NO. 19-36
REDEVELOPMENT OF PORT OF KETCHIKAN BERTHS I, II, III AND IV AND OTHER INFRASTRUCTURE WITHIN THE
CITY**

The following Addenda No. 1 is issued to the Request for Proposal Procurement by the City of Ketchikan, Contract 19-36.

The Addenda consists of:

1. A revised RFP document incorporating the City's desire to include the operations of Berth IV as part of the Concession Type Approach. Because Berth IV is mentioned in multiple places of the document, the entire document is provided with the modification. For brevity, Appendices A through I remain unchanged and are not being reissued as part of this Addenda, however they are still a valid part of the RFP.
2. The document includes the Specimen Draft Agreements for both the Concession Agreement (Appendix J) and the Preferential Agreement (Appendix K) – this release was anticipated in the RFP document.
3. Appendix L is also provided which is City Ordinance 08-1597 that provides the City's criteria for the assignment of cruise ship berths.

Nothing else has been amended and no changes have been made to the schedule.



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Appendices

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Appendix A	Registration Form
Appendix B	Form of Offer
Appendix C	Background Information on the City of Ketchikan, Alaska
Appendix D	City Ordinance 19-1899
Appendix E	City Ordinance 19-1902
Appendix F	Survey Point Holdings Lease
Appendix G	"City of Ketchikan Planning and Port Improvements" report by Moffat & Nichol ("M&N Plan") dated December 30, 2016
Appendix H	Map of Port Area and Berths
Appendix I	Cruise Market Study

New appendices issued as part of Addenda 1

Appendix J	Specimen – Concession Agreement
Appendix K	Specimen - Preferential Berthing Agreement
Appendix L	City Ordinance 08-1597

1 INTRODUCTION

This RFP presents an opportunity for interested parties (“Proponents”) to submit a Proposal which will be used by the City of Ketchikan to select a Partner(s) to enter into detailed negotiations for the development of the City’s cruise facilities which include Berths I, II III and IV, and may include the adjacent upland facilities and other projects as described herein.

1.1 Background of the City of Ketchikan

The City of Ketchikan, incorporated in 1900, is the fifth largest city in Alaska. Located on Revillagigedo Island in Southern Southeast Alaska, and within the boundaries of the Tongass National Forest, Ketchikan is 680 miles north of Seattle, Washington, and 230 miles south of Alaska’s capital, Juneau. Ketchikan is the largest city located within the Ketchikan Gateway Borough and occupies five square miles with a population of 8,125 residents. A more detailed description of the City is included in Appendix C.



The City owns Berths I, II and III which are operated by the City’s Port and Harbors Department. The City operates Berth IV under a lease agreement with the Ketchikan Dock Company.

1.2 Ketchikan’s Cruise Tourism Industry

Today, Ketchikan’s most dominant economic sector is tourism and its popularity as a major port of call for large cruise ships and their passengers continues to grow. The number of paying passengers arriving by large cruise ships has increased from 236,000 in 1990 to 1,073,923 in 2018. The most recent forecast for 2019 estimates that 46 cruise ships will make 544 stops and bring a record breaking 1.149 million cruise visitors to the community. The growth in tourism has led local government and private businesses to make significant investments in the land-based facilities and port infrastructure necessary to accommodate the needs of the industry. The City invested over \$40 million dollars in 2006 to expand and improve its port berthing facilities. Private companies have invested millions of dollars to develop a retail complex at the former Spruce Mill property and Berth IV and its adjacent ground transportation area. The City recently completed phase four of a \$26 million four-phase project to upgrade Berths I and II.



The City of Ketchikan's cruise business has grown up with the Alaska cruising industry and has become one of the 3 marquee cruise ports in the region. Ketchikan as a destination provides for numerous activities from shore excursions to fishing and flightseeing, as well as a robust downtown core with retail options and unique sights and venues. Situated at the southernmost port of Southeast Alaska, Ketchikan is often the gateway or last port in the Alaska itinerary pattern. Ketchikan fits well in a variety of patterns including the round trip and open jaw cruises that are most popular from both Seattle and Vancouver. In addition, the port is also used by smaller pocket exploration vessels sailing within Alaska waters as a port of call and homeport.

A full market study of the cruise industry in the City was prepared for the City and it is included in Appendix I of this RFP as reference. Any Proponent is cautioned to develop their own independent evaluation and forecasts of the industry for their own use and preparation of a response to this RFP. The City or its Consultants makes any representation to the Proponents on the use of this document. A few summary charts from the study are shown below.

Figure 1 illustrates the cruise passenger levels in Ketchikan from 2000 – 2019 projected. There has been a 10-year growth of 2.1% compound annual growth rate (CAGR) and a 5-year growth rate of 5.4%.

Figure 1 - Cruise Passenger Traffic in Ketchikan, 2000 – 2019

Source: B&A

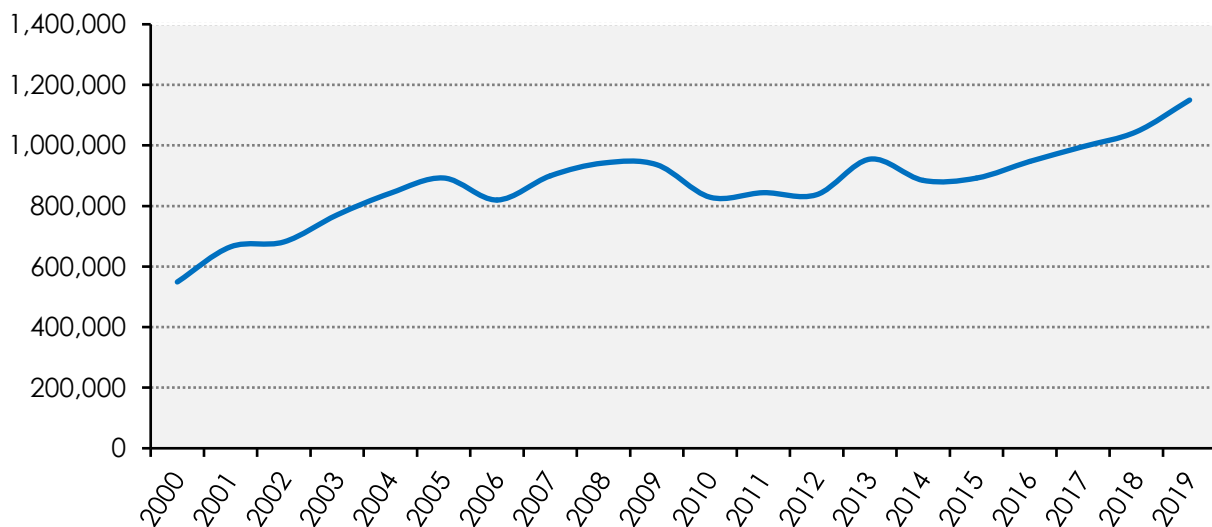
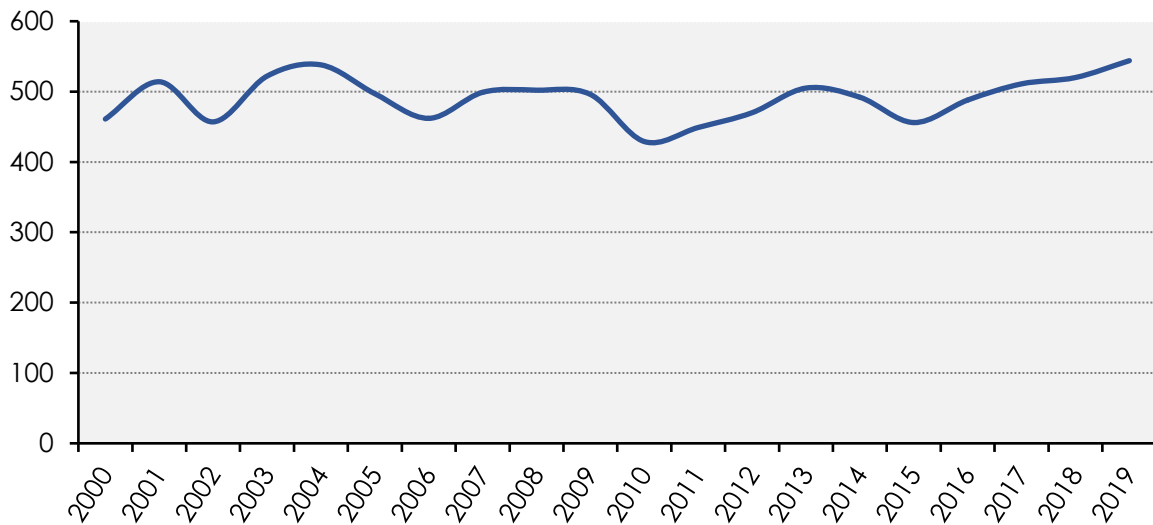


Figure 2 shows the number of corresponding cruise calls.

Figure 2 - Cruise calls in Ketchikan, 2000 – 2019

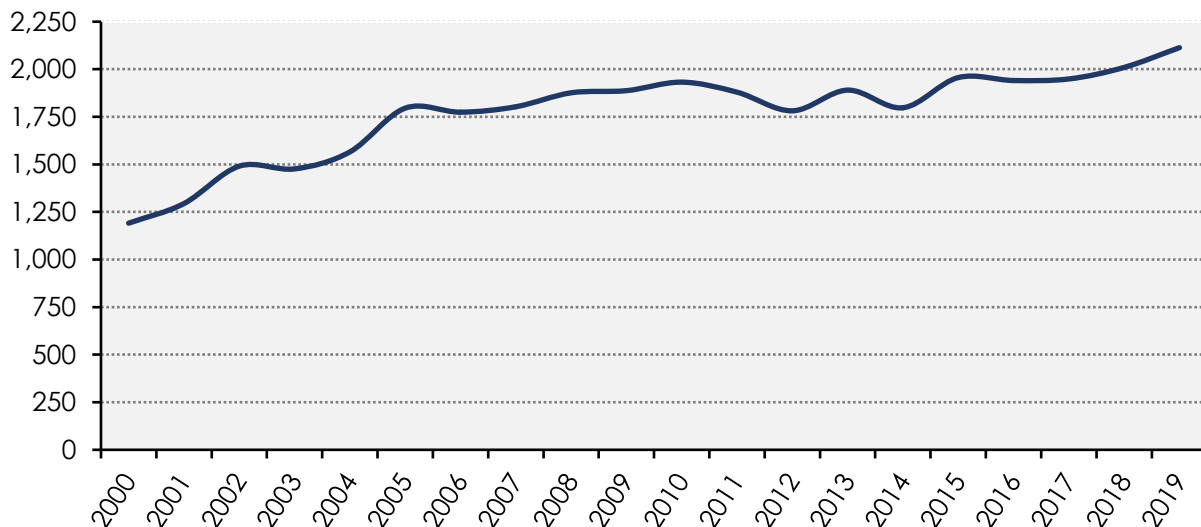
Source: B&A



Growth for the region and Ketchikan has primarily occurred through the deployment of larger ships over the period (923-passenger per vessel growth) vs. an additional 83 total calls or approx. 4 added calls per annum. This is illustrated in Figure 3 which shows the average passenger capacity per vessel call.

Figure 3 - Passengers per cruise call, 2000 – 2019

Source: B&A



Starting in 2017, the market has also seen the introduction of additional vessels which are resulting in the higher growth rates.

Responding to the growth of the industry, and the size of vessels now in the market, the City has been working for the past few years to find the best solution to allow the port to be able to handle the larger ships. The City commissioned and approved the report titled “City of Ketchikan Planning and Design of Port Improvements” dated December

30, 2016 by Moffatt & Nichol (the “M&N Plan”) which is described in this RFP and is included in Appendix G. This Plan was developed and approved prior to the Ward Cove announcement as described below.

I.3 Ward Cove

All cruise traffic in Ketchikan is currently handled at the City docks and Berth IV (privately held by Survey Point Holdings). At times, cruise ships still anchor and lighter passengers from the channel when berths are not available. In early 2019, an announcement was made by a local private company of their intent to build a two-berth cruise facility in the “Ward Cove” site north of the Port and outside City limits, and that they are partnering with Norwegian Cruise Lines (NCL) to bring their ships to the new berths and are actively soliciting other cruise lines to also utilize the facility. This project, if completed, will have a material effect on the number of ships and passengers that will come to the City docks in the future.

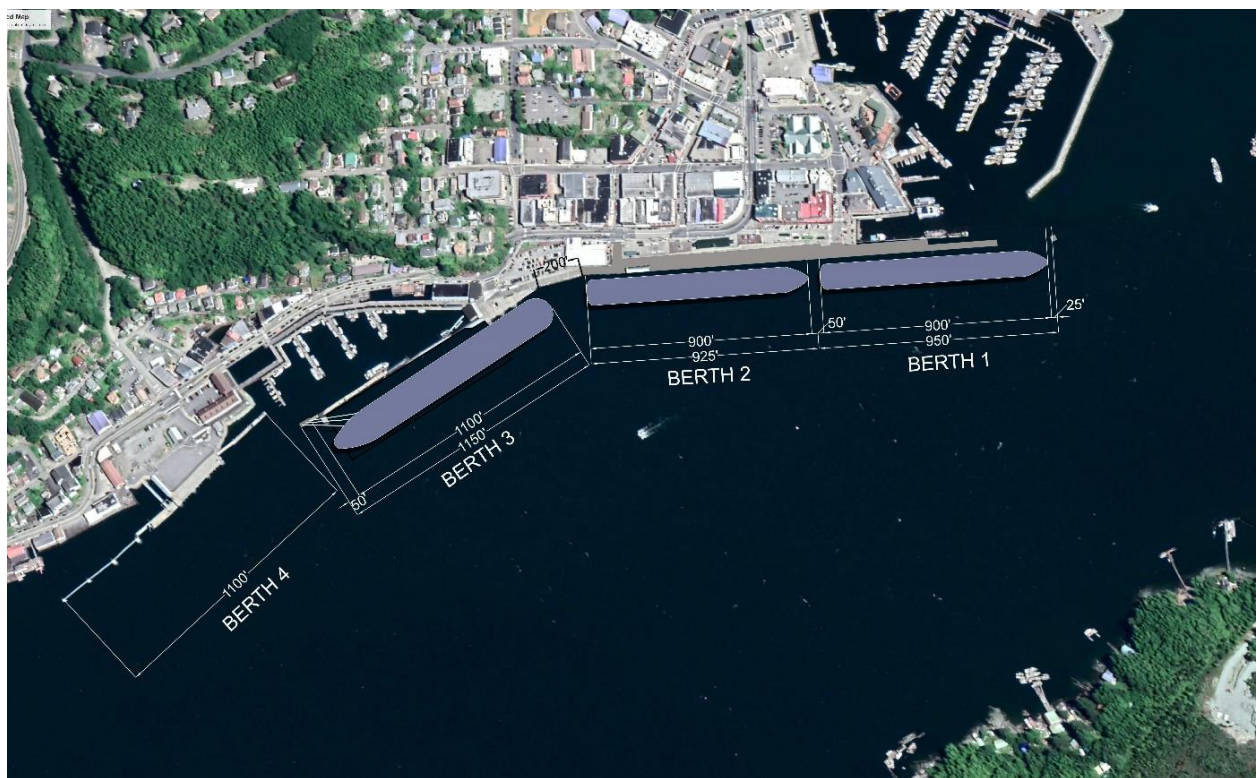
2 CURRENT FACILITIES

2.1 General description of existing facilities

The City has 4 berths in its Central Business District. Berths I, II and III, (the “Berths”) which are the subject of this RFP are owned and operated by the City. Berth IV is privately owned and leased long-term by the City from Ketchikan Dock Company under a lease which controls operations, uplands and uses. The Berth IV lease agreement documents are included in Appendix F as a reference. The Berths are adjacent to downtown Ketchikan on the shore of Tongass Narrows. The infrastructure is primarily configured to receive cruise ships and passengers.

The berths have varied lengths, but in general have the dimensions as shown in Figure 4 below. Because of the marginal nature of berths I and II, those two berths can accommodate a variety of different ship lengths and the demarcation line between berths I and II fluctuates. In general, the linear length of berths I and II combined is 1,875', berth III is 1,000' and berth IV is 1,100'. There is an approximate 200' gap between berths II and III which is used to handle lines that serve those vessels.

Figure 4 – Dimensions of cruise berths I, II, III and IV



Berths I and II are pile-supported fixed wharf facilities, while Berths III and IV are combination pile-supported dock and barge-style float facilities. A detailed description is included in the M&N Plan. The following are excerpts from that report:

2.2 Berths I and II

The Berths I and II totals approximately 1,450' long. The northernmost 375', referred to in the original construction documents as the *Berth I Addition*, is nominally 26' wide as originally constructed. A series of recent rehabilitation projects (circa 2012) expanded the usable concrete deck area to a nominal width of approximately 66'. The intermediate 806', referred to in the original construction documents as *Berth I South*, is nominally 50' wide. The southern 271' (nominal) length of dock (referred to in the original construction documents as the *Berth I South Extension*) is nominally 26' wide. Available construction documentation indicates that Berths I and II were designed for a nominal 135 ft-kips of shoreward berthing energy, based on an 800' LOA x 125' beam x 70,000 DWT (displacement) design vessel. Mooring points, in the form of single- and double-bitt bollards are located along the lengths of Berths I and II.

2.3 Berth III

Berth III consists primarily of a steel barge-type float, laterally restrained by two reaction dolphins, referred to on the construction drawings as *Barge Float Mooring Dolphins*. Berth III constructed in 2007 is detailed in a design drawing set (circa 2006) entitled *Port Berth Reconfiguration*. The barge measures 300' long and 50' wide and has a freeboard of approximately 8'; constructed of a steel plate shell, with internal angle truss framing. Two outboard pile hoops constructed of HSS 16x16 square tube frame assemblies are welded to the float, and each hoop assembly is compartmentalized to accommodate three 48" diameter steel guide piles. The inner surface of the guide pile compartments is lined on all sides by energy-absorbing arch fenders. Each arch fender has an Ultra High Molecular Weight Polyethylene (UHMWPE) low-friction shield at the pile contact face. Available construction documents indicate that Berth III was designed for a nominal 260 ft-kips of shoreward berthing energy, based on the quarter-point berthing at any one dolphin of a 1,000' LOA design vessel. Berth III was reportedly designed to resist a maximum net combined (seaward) pull of all lines totaling 1,250 kips: a 350-kip net seaward pull on each of three discrete breasting/mooring points; and 200-kips net seaward pull on one dock-mounted mooring dolphin.

Currently the City is underway with additional work to remove a hazard to navigation known as the Berth II Rock Pinnacle situated just off shore adjacent to Berth II. That work will be completed within the next 12 months.

2.4 Berth IV

Berth IV is the newest facility in the City with a total length of 1,100'. Although Berth IV has an overall length of 1,100,' it was designed to accommodate vessels up to a maximum of 1,000' and a displacement of 65,000 tons (143,300 kips).

2.5 Limits of Upland Area included in this RFP

This RFP covers Berths I, II, III and IV and their adjacent uplands (the "Port Uplands"). The property adjacent to Berths I, II and III (or the "Concession Area") are generally shown

in the Figure 5 below. This Concession Area will be leased to the successful Proponent that is interested in a Concession Agreement. Those Proponents interested in a Preferential Berth Agreement will not be leasing any of the Concession Area. The Berth IV uplands are leased by the City and the City will only be allowing the successful Proponent to operate the berth in accordance with the City's lease with Ketchikan Dock Company.

Within the area there are certain existing leases, agreements and operations of entities that provide services to tourists, including the operation of the Ketchikan Visitors Bureau and several independent tour providers and businesses operating out of small booths. Proponents will be responsible to continue to honor the terms of those leases and work with the City to accommodate any existing tenants.

Figure 5 – General Limits of Concession Area (for Concession Agreements only)



The limits of the "Concession Area" will be legally defined in a final survey to be prepared by the City. The Concession Area will generally follow the limits shown in Figure 5 above. A more detailed drawing is included in Appendix H of this RFP. The Concession Area includes all upland and tidelands necessary to operate the Berths and includes additional tidelands to the south and west of the existing Berths to allow for the construction of the "Project" as defined in Section 4. The Concession Area provides access for the operation of the three Berths.

Proponents are informed that within the Concession area there are certain public rights-of-way that may be preserved by the City but will not interfere with the operation of the Berths. Access to and from Berth III to the adjacent streets will continue as exists today.

3 CITY'S OBJECTIVES AND GOALS

The City's guiding principles for its cruise business will help evaluate the proposals based on the Proponents ability to support these principles. The principles reflect the City's agenda to serve the cruise industry balancing environmental, financial and social goals. The City has expressed a desire that the successful proposal needs to reflect a "holistic" solution to manage cruise growth to create a better experience to the guests while at the same time improving the experience and quality of life for residents that are impacted by the traffic and addressing impacts on the City's infrastructure and services that affected by the cruise visitors.

In general, the City expects that proponents in developing and operating the cruise facilities will prioritize the following key principles and project elements:

3.1 Overall goals

3.1.1 Financial

- i. The Proponent is expected to fund all the improvements and repairs and any additions necessary to the Proponent's operations without any support or guarantees from the City.
- ii. Leverage the financial return of the cruise business to support a diverse maritime economy.

3.1.2 **Growth** – the Proponent is expected to maximize the use of the City's Berths I, II, III and IV and the adjacent lands to serve maritime needs and operate in a manner to meet the market demands during the period of the Agreement(s) as well as operate under the guidelines in the Agreements.

3.1.3 Expand the connection to the waterfront for all

- i. Maintain, where allowed by Law continuous access to the waterfront to residents.
- ii. Coordinate access to public spaces, downtown connectivity and other areas of interest.
- iii. Work with the City and the Coast Guard to prepare and administer a Security Plan that can provide public access.
- iv. Acknowledge historical and cultural roots of the region in any development and work with the community to achieve a balanced plan.
- v. Support participation and access to the economic opportunity benefits of cruise development to the residents of the City by promoting locally owned businesses.
- vi. Support neighboring businesses ability to benefit from cruise development.

3.1.4 Implement leading edge environmental stewardship practices and facilities

- i. Develop long-term sustainable operations of the berths.
- ii. Promote operations that minimize air emissions, insure water quality and protect the ecosystems.

- iii. Engage with key local stakeholders in support of environmental priorities and initiatives established by the City.

3.1.5 Transportation

- i. Manage the ground transportation of passengers to minimize impact on the City's infrastructure and residents.
- ii. Seek alternative vehicle parking and off-site staging and marshalling.
- iii. Minimize impact to surrounding community and existing businesses.
- iv. Implement multi-modal transportation solutions that benefit the residents of Ketchikan.

3.2 Marine goals

The objective of the City is to provide sufficient berth space with the appropriate length at the appropriate time to meet the demand, while at the same time managing the industry's growth to acceptable levels for the City and residents. The City has identified a desire to proceed with the construction of the new Berth I (only) as provided in the M&N Plan. The City is not seeking for the development of the Berth II improvements shown in the M&N Plan. In addition, the City also requires funding and executing a plan to provide cathodic protection systems to the existing berths. A detailed description of the project is provided in Section 4.

It is important to provide context to the need for the improvements to Berth I. Prior to the Ward Cove announcement, the City believed that current and forecasted demand required that the City expand Berths I and II from the existing combined length of 1,875' to a new total of 2,350' which would allow a ship with 1,150' LOA (i.e. Bliss or Quantum) and a second ship with 1,100' LOA class ship to berth simultaneously. This would be done through the development of two new floating docks and berths immediately adjacent to the existing Berths I and II. The plan provided for Berth III to remain as is, capable of handling a vessel of less than 950' LOA. The goal at that time was then for the City to have four berths with the following berth lengths:

- Berth I – 1,250' long
- Berth II – 1,100' long
- Berth III – 1,000' long
- Berth IV – 1,100' long

Since the plan was finished, the announcement of the Ward Cove project materially affects the supply of berths to meet the demand. If Ward Cove is built, the overall needs of Ketchikan (Downtown and Ward Cove combined) are being met for the immediate future by the additional two berths being proposed. Therefore, the need to expand berths I and II may not be as immediate or financially viable; however, certain additional improvements would be needed including potential expansion of Berth III to accommodate longer vessels.

3.3 Commitment to fund the overall off-site plan

The City is seeking a Proponent(s) that recognize the on-site and off-site impacts that cruise traffic creates within the City. In this regard, the City is planning specific projects, that when implemented, will mitigate issues and improve passenger and resident experience. The City has established a target budget of \$35 million which the Proponent(s) should include as part of its financial proposal to be paid fully by the Proponent(s) as a project cost. It is anticipated, that these moneys will be placed in trust with the City, and be used as part of the City's Capital Program through its normal processes.

More details as to the type and schedule of the projects will be part of the detailed negotiations with the preferred Proponent(s).

3.4 Restrictions and Limitations

The City is seeking a Proponent(s) that recognizes that in a City the size of Ketchikan, its waterfront is an important component of daily life. Residents have a special relationship with the Berths as they are commonly used for walking, fishing, and other activities. In this regard, the City will propose as part of any Agreement that the Proponent will need to maintain this public access as it exists today, subject to normal Coast Guard approvals. In addition, the Proponent(s) will only have control of the Berths and/or Concession Area when they are used to serve the needs of the cruise industry with cruise ships alongside, or during the period before or after a cruise needed to set up or take down cruise-related equipment. At all other times, control of the Berths and/or Concession Area remains in the hands of the City, and the City may choose at its discretion any use, activities, restrictions, limitations or controls during those times. It is anticipated that those periods will include the entire off-season cruise period as well as night time use, or days that there are no ships in Port.

The City does not anticipate or wish for a Proponent to propose commercial development on the Concession Area.

4 DESCRIPTION OF THE PROJECT

This solicitation is the process through which the City intends to select a Proponent(s) to enter into a long-term agreement to undertake the development of the Project as described below. Two types of Agreements are available to the interested Proponents as described in Section 5 of this RFP. Under a Concession Agreement, the City is interested in entering into a partnership in which the Proponent would lead the development of the Project and be responsible for equipment and future operations of the facility; the City would collaborate in design and permitting as well as operations. In a Preferential Agreement, the City is seeing a Proponent that will commit the financial resources for the City to lead the development of the Project.

The "Project" is defined as follows and includes four (4) Parts as outlined below:

- Part 1 – Marine works to expand berth capacity.
- Part 2 – Improvements to the Port Uplands within the Project area to improve the passenger experience, transportation solutions and other ideas which the Proponent may propose to increase visitor and resident satisfaction.
- Part 3 – The construction of a cathodic protection system for the existing berths as well as any upgrades to the current facilities.
- Part 4 – Funding of the City's upland Off Site Improvement Projects.

4.1 Part I – Marine Works

The City's preferred marine works plan for this RFP are:

- Berth I – Implement the M&N Concept for a new floating berth.
- Berth II – Stay as-is.
- Berth III – Proponent may propose to increase berth length from the current 1,000'.
- Berth IV – Stay as-is

The berths need to be operated in such a way to achieve maximum flexibility and utilization to allow cruise line customers to use them.

4.1.1 Alternative Marine Works Solution

The Proponent may propose to the City an "Alternative Solution" which may include any combination of alternative design and development, changes to the phasing of the work, including delaying the work to Berths I and II, or proceeding with the original Berth I proposal as shown in the M&N plan.

Should the Proponent propose any project different than the approved M&N plan, such design and improvements will be made solely at the Proponents risk and the City is not under any obligation to accept the Alternative Solution.

Should the Proponent provide their own Alternative Solution that deviates from the City's previous plan or propose any extensions of Berth I to the south different than as provided in the M&N Plan it will be subject to the City's approval. The Proponent, at their own risk will be responsible for obtaining the necessary permits and approvals as well as any additional costs for any mitigation associated with impacts on that area of Tongass Narrows including impacts on Thomas Basin and navigation to other marine activities in that area.

4.2 Part 2 - Port Upland Improvements

With any modification to the berths to increase capacity, the Port Uplands need to be improved to handle that capacity. The Proponents need to provide and fund a plan that will maximize the larger numbers of passengers to be handled within the Port Uplands. This includes additional restroom facilities, signage, and any improvements to safety assure the flows of passengers and crew. The ground transportation area should be capable of accommodating more than 5,000 passengers per vessel per call. The City does not anticipate or wish for a Proponent to propose commercial development on the Concession Area or Port Uplands.

No improvements are envisioned in the area adjacent to Berth IV, and any use needs to be consistent with the underlying lease agreement the City has with Ketchikan Dock Company for the use of that property.

4.3 Part 3 - Improvements to Current Infrastructure

The City has performed studies showing the condition of the existing marine infrastructure. Those are included in the M&N Plan. The City has identified that the current Berths need a Cathodic Protection system which the City has estimated to cost \$15 million. Such costs should be included as part of the Proposal and paid as part of the Project Costs.

4.4 Part 4 - Off-site Improvements

The City is planning specific projects, that when implemented, will mitigate impacts from the project and will improve passenger and resident experience. The City has established a minimum target budget of \$35 million which the Proponent(s) should include as part of its financial proposal to be paid fully by the Proponent(s) as a project cost. It is anticipated that these monies will be placed in trust with the City and be used as part of the City's Capital Program through its normal processes. Proponents are free to propose a higher payment to the City.

5 PROPOSED COMMERCIAL TERMS

The City intends that the revenues generated will largely derive from Port Fees and any ancillary revenues. The current passenger fees can be found in the City of Ketchikan Municipal Code which currently is approximately \$7.00 per passenger (the “City Passenger Fee”). Currently the City is planning on modifying the City Passenger Fee. Those funds are currently collected by the City and used to pay operational costs as well as repayment of debt and lease commitments. The City Passenger Fee will be still collected and retained by the City under any of the two types of agreements described below.

The City is willing to receive two types of proposals: a “Concession” type or a “Preferential Berth” type proposal. A description of both follows:

5.1 Concession Type Approach

In a Concession Proposal, the City will entertain Proposals to invest, build and operate the Project for a term under the following conditions:

- 5.1.1 Type – Concession of cruise operations of Berths I, II and III and the Concession Area which will be leased to the Proponent.
- 5.1.2 Term – not more than 20 years plus (I) 10-year extension, except for Berth IV, whose term will also be no more than what is provided in the current lease agreement between the City and Ketchikan Dock Company.
- 5.1.3 Cost – Proponent will be responsible for proposing a capital program that includes all four (4) parts as described in Section 4.
- 5.1.4 Construction – Proponent will be responsible for the design and construction of Parts 1, 2 and 3 of the Project as described in Section 4. Proponent will be responsible for any construction cost overruns. All improvements will be subject to the approval by the City once the proponent submits a master plan and capital plan. The Proponent will be responsible for all required permitting.
- 5.1.5 Risk – All investment will be at the sole risk of the Proponent without any guarantees from the City.
- 5.1.6 Operations –
 - i. Proponent will operate the facility subject to the restrictions described in the RFP.
 - ii. Proponent will operate the berths and their assignment to provide a level, transparent berthing allocation process to all potential customers. No preferential berthing will be allowed for any cruise company without the prior approval of the City Council.
- 5.1.7 Berth requests – The Proponent will be responsible for receiving and assigning berths based on an agreed upon fair and transparent system. The City reserves the right to participate in decisions that may occur when there are scheduling conflicts. Berth allocations shall be consistent with the requirements of the Berth IV lease and City Ordinance 08-1597 included as Appendix L.

- 5.1.8 Pricing – Proponent will propose a pricing strategy as part of its proposal that will allow the proponent to recover its investment, operational costs and profit through an additional passenger fee. The City will not share its current passenger fee as may be amended from time to time with the Proponent. The City's current fees are shown in Ordinance 19-1902 and included in the Appendix. The City may in its sole discretion discuss use of the City passenger fees for projects that benefit the City, passengers, and Concession holder. Recognizing that there may be additional revenue opportunities deriving from the Project; the City is open to ideas of the Proponent to obtain additional ancillary revenues.
- 5.1.9 The Proponent is expected to collect fees on the City's behalf and make the necessary payments to the City. The Agreement might include a negotiated sharing of other fee(s) of any ancillary revenue.
- 5.1.10 Marketing – The City will participate with the Proponent in marketing the facility.

The Draft Specimen Concession Agreement is included as Appendix J which describes these terms in more detail.

5.2 Preferential Berthing Approach

In a Preferential Berthing approach, the City will entertain Proposals from interested Proponents to invest and or commit funding for the Project under the following conditions:

- 5.2.1 Type – Preferential berth guarantee for either, Berths I & II, Berth III or the combined Berths I, II & III and the applicable upland area.
- 5.2.2 Term – not more than 20 years plus (1) 10-year extension.
- 5.2.3 Cost – Proponent will be responsible for providing sufficient funding guarantees for the full term of the agreement to the City to allow the City to implement the Project, or the Proponent may propose an upfront payment for the improvements for the totality of the Project. The proponent's preferential berth proposal may vary depending on which berthing scheme it chooses, but it needs to provide sufficient funding for the City to undertake the following:
- i. Cost of the improvements to the berth or berths that the Proponent is interested in and
 - ii. For each berth that the Proponent is interested, the proposal needs to include a commitment of sufficient funding at a minimum of one third (1/3) of the costs for Parts 3 and 4 of the Project.
- 5.2.4 Construction – The City will be responsible for the design and construction of the Project as described in Section 4. Improvements will be mutually agreed upon between the Proponent and the City.
- 5.2.5 Risk – Should the Proponent propose annual payments; the City will raise the necessary capital relying on the unconditional guarantees provided by the Proponent.
- 5.2.6 Pricing – The Proponent will propose the additional port fees and the Minimum Annual Guarantees (“MAG”) that it is willing to commit in order to secure the Preferential Rights. Guarantees need to be sufficient to allow for the City to obtain the necessary financing including financing costs, reserves, and meet coverage ratio as established by the lenders which the City may use. The City

will not share its current passenger fee as may be amended from time to time with the Proponent. The City's current fees are shown in Ordinance 19-1902 and included in the Appendix.

5.2.7 Operations

- i. City will operate the facility
- ii. Berth requests – The City, or its agent, will be responsible for receiving and assigning berths subject to the Preferential Berthing commitments.
- iii. Preferential rights will provide for the City sufficient time to be able to assign the Berths to any other customer upon the expiration of preferential berthing rights

5.2.8 Marketing – The City will be responsible for marketing the facility.

5.2.9 Subleases and licenses shall be subject to approval of the City Council.

The Draft Specimen Preferential Berthing Agreement is included as Appendix K which describes these terms in more detail.

5.3 Form and Terms

The City proposes to negotiate Agreement(s) with the selected Proponent(s) for the terms as stipulated above. The Agreements would also set out agreed-upon parameters for modifying rates into the future and will set out other rights and liabilities of the parties. If a Concession Approach is chosen, the most likely form of an agreement for the Project is a lease, However, the City will consider other proposed arrangements as appropriate.

The City has issued the Agreements to the Proponents which will govern the transaction.

6 REQUIREMENTS FOR RFQ SUBMISSION

The City is seeking concise responses highlighting the Proponent's information in a way that they can be compared, as such the City requires that each Proponent follow the guidelines described below.

- The Response should be limited to no more than 50 pages (single sided), not counting any covers, dividers, title page, index, Bid Form, Proposal Security Documentation or Appendices.
- It is suggested that the document be dedicated 50% to the Background Sections (6.1 thru 6.4) and the balance for the detailed proposal, however, the Proponent may use the allocated pages as desired.
- The Response should be specific as to financial commitment, guarantees and operation, rather than provide generalities and concepts so as to allow the City a fair opportunity to evaluate the Responses
- The Proponent will clearly identify if their Proposal is for a Concession Type Agreement or a Preferential Berthing Agreement, and for which Berths the Proponent is interested in having a Preferential Berthing Agreement.
- The Proponent will identify if any of the documents are "CONFIDENTIAL" which will be subject to the guidelines as provided in Section 7.3 of this RFP

The proposal should include the following:

6.1 Cover Letter

The Proponent shall provide a cover letter that sets out the structure and members of its team and the location of the Proponent's home office.

6.2 Description of Alignment with the City's Objectives

The City is interested in the Proponent's view on how the Proponent can support the City's goals as described in Section 3. Include the following:

- 6.2.1 Operational approach.
- 6.2.2 Environmental sustainability approach.
- 6.2.3 Community participation approach.
- 6.2.4 Transportation approach.
- 6.2.5 The City would like to know how the Proponent envisions the role of the facility within the City waterfront.
- 6.2.6 Future growth by explaining how the Proponent believes its team can facilitate the securing and maintaining the optimal market position.

6.3 Team Members and Qualifications

The Proponent shall provide a narrative description of its team as follows:

- 6.3.1 List of the operations team, roles & responsibilities and the background of each.

-
- 6.3.2 If not all team members are known, describe your approach to assembling a team as identified in the operations team.
- 6.3.3 The Proponent shall discuss the allocation of responsibilities between the team members, establishing how each of the required elements of the Project will be addressed including:
- i. The lead Proponent, or, if a joint venture, Proponents, and the legal relationships between the team members and experience working together.
 - ii. The equity sponsor or sponsors and the proposed allocation of equity contributions.
 - iii. In an organization chart, the responsibilities and relationships of team members with lead individuals identified.
 - iv. In an appendix (which will not count towards page limit), resumes of key individuals and their relevant experience.
- 6.3.4 Background explaining the Proponents commitment to developing proactive environmentally sustainable practices.

6.4 Operating Experience (for Concession only)

For a Concession Type Proposal, the Proponent will set out how it will operate the Project referring to any team members intended to be involved in operations and maintenance activities and experience in the operation of cruise facilities generally. The City seeks to evaluate the Proponent's operating experience and requests information for up to three projects for which the Proponent has provided similar services within the past three years.

- 6.4.1 The contractual relationship between the owner of the berths and the Proponent.
- 6.4.2 Term of the operating contract and key business terms.
- 6.4.3 Period of time Proponent has provided services, the term of the operating contract (if any) and the services provided.

6.5 Development Experience (for Concession only)

For a Concession Type Proposal, provide a minimum of two case studies of successful completion of cruise capital projects where the Proponent or team members had a primary or secondary role in project completion.

- 6.5.1 Describe in detail the role of the Proponent, risks assumed, time frames for project design, permitting and construction, and the involvement of key members of the proposed development team.
- 6.5.2 If there was a public partner to the project, discuss how input was received from the public partner into both the design and construction phases of the project and how differences were resolved. The City may request proponents furnish previous agreements made with a public partner upon being selected for further negotiations

6.6 The Project

Provide the City a description of the Project that the Proponent wishes to fund and execute. The Proponent may select the City's approved approach or submit an alternate. For this section please provide a description of the elements included in each of the following components of the Project:

- 6.6.1 A description of the Part 1 – Marine Works
- 6.6.2 A description of the Part 2 – Port Upland Improvements including the Cathodic Protection
- 6.6.3 A description of the Part 3 – Improvements to the Current Infrastructure

6.7 Financial proposal

Depending on the Proponents desired approach, the Proposal will contain either of the documentation described below:

6.7.1 Concession Approach

Under a Concession Agreement, the City envisions a business arrangement whereby the Partner would pay annual lease payments ("Ground Rent") to the City and be responsible for collecting the City's Passenger Fee and remitting it to the City. Currently, the City collects a per-passenger fee or a per passenger tariff. The City will continue to receive these revenues as amended from time to time for all future passengers.

As a base case, the Ground Rent payment would be subject to a CPI escalator. The operator could separately set its own customer charges or fees (in addition to the City's Passenger Fee) from which it would secure its return on invested capital.

Based on the scope described above the proposal shall include:

- i. Provide a complete cash flow spreadsheet for the initial term of the Agreement. The information should be submitted in Excel format. The Excel document shall not count toward the general page limitation for this submittal.
- ii. Describe the basis for the forecast and including:
 - o Demand analysis.
 - o Assumptions regarding the cruise lines' capability to meet that demand at this facility.
 - o Challenges that may impact the forecast, including assessment of the capacity of other Alaska homeports and ports of call to berth the sailings embedded in your forecast.
- iii. Describe in detail the proposed plan of finance for the Project. For any assumed debt funding, describe in detail the mechanism for such funding and document all committed funding for the Project. Describe all sources of funds.

- iv. Describe the additional passenger fee structure that the Proponent is seeking. In a Concession Agreement, the additional passenger fee will be applied to all passengers moving through Berths I, II, III and IV.
- v. Discuss your forecast for future capital investments and your proposed plan for funding these capital investments.
- vi. Describe the financial feasibility of the investment, including the key risks and opportunities.
- vii. Proponents are to indicate the Upfront Fee that they are proposing to pay upon Financial Closing for the City's Off-site Improvement Project (Part 4). The Proposal submitted is considered an offer to pay this Upfront Fee on the target date of Financial Closing. The upfront fee must be equal to or greater than \$35,000,000 in order to be considered a responsive Proposal. Describe your funding approach and whether the Proponent wishes to fund the entire amount upon Financial Closing or in 7 equal annual installments.
- viii. Proponents are to indicate the amount of annual Lease payment to the City offered for the concession.
- ix. Provide a description on how the Proponent would impact on-going cruise operations while any construction is on-going. It is the goal of the City not to impact any future operations and for the Proponent to provide their commitment to achieve this goal.

6.7.2 Preferential Berth Approach

Under a Preferential Berthing Agreement, the City envisions a business arrangement whereby one or more Proponent(s) would pay and guarantee an additional passenger fee and remit this to the City. The City will collect the current and new per-passenger fee for the Berth or Berths that the Proponent has selected. As a base case, the tariffs would be subject to a CPI escalator. The amount of the additional passenger fee needs to be sufficient to provide the necessary funds to the City to execute the Project as described in Section 5.2.

Based on the scope described above, the proposal shall include:

- i. Provide a complete cash flow spreadsheet for the initial term of the Agreement. The information should be submitted in Excel format. The Excel document shall not count toward the general page limitation for this submittal.
- ii. Describe the basis for the forecast including:
 - o Demand analysis
- iii. Identification of berth or berths being requested; either:
 - o Berth I & II combined
 - o Berth III
 - o Berths I, II & III combined
- iv. Proponents are to indicate the Upfront Fee that they are proposing to pay upon for the Improvements to Current Infrastructure (Part 3). This upfront fee must be equal to or greater than \$15,000,000 for all three berths or \$5,000,000 per berth in order to be a compliant bid. Describe your funding approach and whether the Proponent wishes to fund the entire amount upon Commercial Closing or in 7 equal annual installments.

- v. Proponents are to indicate the Upfront Fee that they are proposing to pay upon Commercial Closing for the Off-site Improvement Project (Part 4). The Proposal submitted is considered an offer to pay this Upfront Fee on the target date of Commercial Closing. The upfront fee must be equal to or greater than \$35,000,000 for all three berths or \$11,666,667 per berth in order to be considered a responsive Proposal. Describe your funding approach and whether the Proponent wishes to fund the entire amount upon Commercial Closing or in 7 equal annual installments.

6.8 Schedule (for Concession only)

The City has set as a priority objective that the Project or an Alternate Project (if Approved) as proposed by Proponent be completed as quickly as possible, preferably by the start of the 2022 cruise season but no later than the beginning of the 2023 cruise season. Please describe your approach and / or commitment to meet this target.

6.9 Exceptions to the Agreement

The Proponents will set forth any comments, exceptions or issues on the Agreements they wish to discuss with the City if selected to negotiate. Any items of the proposed Agreement not identified by the Proponent in their Proposal Submission, will be taken by the City as accepted by the Proponent and will not be subject to further negotiation.

6.10 Proposal Form (Form of Offer)

The Proponent shall submit in a separate sealed envelope the completed filled out Form of Offer included in Appendix B. Proponent shall be responsible for using the correct Form of Offer depending on whether it is Concession or Preferential Berth Proposal. Failure to submit this filled in form will result in disqualification. The Proposal form will not count to the 50-page limit to the response.

6.11 Binding proposal

Proposals are irrevocable and open for acceptance by the City for a period of 180 days following the Submission Deadline (or such later period as mutually agreed between the City and the respective Proponent(s)).

6.12 Security

Each Proponent is required to submit a "Proposal Security" as part of its Proposal to secure the commitment of a Proponent to its Proposal until financial closing.

The Proposal Security must be either a cash deposit ("Cash Deposit") or one or more Letters of Credit with (i) a validity period of at least 180 days from and after the date of Proposal submission and up to Commercial Close in an aggregate amount equal to \$1 million (One Million US Dollars) for the period from the date of Proposal submission to Commercial Close and (ii) \$2 million (Two Million US Dollars) for the period from Commercial Close to Financial Close. The Letters of Credit must be in form and content

acceptable to the City, and issued by an issuer, reasonably acceptable to the City prior to submission of such Letter(s) of Credit, to be held by the City for the sole purpose described below. The Letter of Credit or Cash Deposit shall be submitted with the Proposal.

If at any time an issuer of the Letter of Credit ceases to be an eligible financial institution, the affected Proponent shall promptly notify the City of such cessation. No later than 20 Working Days following the Proponent becoming aware of such cessation, the Proponent is required to submit to the City a Cash Deposit, or a replacement Letter(s) of Credit issued by an eligible and acceptable financial institution that fully satisfies the requirements of this Section. Following the City's receipt of such replacement Proposal Security, the City shall promptly return the replaced portion of the Proposal Security to the Proponent.

In submitting a Proposal, each Proponent understands and agrees that the City will be entitled to draw on such Proponent's Proposal Security in its entirety if and only if, the Proponent does any one or more of the following:

- 6.12.1 Withdraws, or attempts to withdraw, any part or all of its Proposal Security during the Proposal Validity Period without the prior written consent of the City, other than pursuant to replacement where provider ceases to be an Eligible Financial Institution as per above.
- 6.12.2 Fails to comply with requirement to replace where provider ceases to be an Eligible Financial Institution as per above.
- 6.12.3 Refuses or fails to enter into the Contract in its form as of the Proposal submission deadline (subject to any changes agreed by the City and Proponent after such date).
- 6.12.4 Prior to execution of the Contract, withdraws or attempts to withdraw its Proposal, or refuses or fails to meet any commitments made therein that were to be fulfilled prior to execution of the Contract.

The City will not be entitled to draw on a Proponent's Proposal Security if:

- 6.12.5 Proponent is unable to comply with any modifications made to the RFP after the submission of such Proposal Security to the extent that such Proponent does not agree to such modifications and, as a result, withdraws its Proposal.
- 6.12.6 If the City deems a Proposal non-responsive.
- 6.12.7 The City exercises its right to not proceed with the Proposal.

Without limiting the Reserved Rights, following a draw on the Proponent's Proposal Security, the City may identify the next Proponent that provides the Best Value to the City, select it as the Preferred Proponent and proceed to execute a Contract with that Proponent.

If any of the conditions which entitle the City to draw on the Proponent's Proposal Security in its entirety set forth above are met, then the City shall be entitled to draw immediately, without notice to the Proponent, the full amount of the Letter of Credit upon presentation of a sight draft and a certificate confirming that the City has the

right to draw under the Letter of Credit in the amount of such sight draft, and the City shall be entitled to retain all of the proceeds as the sole remedy or right of the City against the Proponent.

The right of the City to draw the Proposal Security is intended to be, and shall constitute, liquidated damages to compensate the City for the cost of foregoing alternative opportunities and for other costs incurred by the City in reliance on the Proponent's Proposal to enter into the transaction contemplated hereunder.

The Parties acknowledge that the damages suffered by the City as a result of such termination would be impossible to ascertain and that the Proponent Security is a reasonable estimate thereof and is not intended as a penalty.

Upon receipt by the City of the Agreement duly executed by the Proponent and the Closing Letter of Credit and/or Cash Deposit contemplated by the Agreement, the City will promptly return the Proponent Security to the Proponent.

7 SELECTION AND AWARD PROCESS

7.1 Schedule and Approach

This RFP is part of a process that the City is following to reach a final decision on this matter. The RFP will result in selection of Preferred Proponent(s) that will be invited to negotiate a final Agreement(s) with the City. The general steps and anticipated key dates are provided for planning purposes only:

- | | |
|--|------------------------------|
| • RFP Issue Date | October 21, 2019 |
| • City Area Tour / Pre-proposal conference | Week of November 18-22, 2019 |
| • Questions Due to City | January 8, 2020 |
| • City's Answers to Questions | January 10, 2020 |
| • Submission Deadline | January 21, 2020 |
| • Execution of Agreement | To be determined |

Proposal submissions are to be received no later than the Submission Deadline. Late Proposals will not be accepted and will be returned to Proponents unopened. Proposals received on or before the due date set in the RFP will be stamped (date and time of receipt) and will be kept in the custody of the City. Such Proposals will not be opened until the above date and time.

7.2 Pre-proposal conference (mandatory)

The City will coordinate pre-Proposal Conference and site tours ("Conference") with each of the Proponents. The City will attempt to address any questions or requests for clarification during the Conference(s). Any information provided at the Conference that may be construed to be inconsistent with the express terms and conditions of this RFP is unofficial and non-binding on the City unless and until that information is issued by the City via written RFP Addenda.

Attendance at the Conference is mandatory for any Proponent that wishes to submit a Proposal. Failure to attend the Conference may result in disqualification of that Proponent(s) proposal. No employee, council member, or representative of the City has any authority to orally agree to or bind the City in any manner during this Conference and site visit.

7.3 Addenda

RFP Addenda will be issued electronically. Each Proponent shall acknowledge in its submitted Proposal that it has obtained all RFP Addenda issued. It is the sole responsibility of the Proponent to obtain all RFP Addenda. All RFP Addenda issued shall become part of this RFP. All RFP requirements shall remain unchanged except as expressly modified by an RFP Addendum. Under no circumstances is the City responsible or liable for a Proponent's not obtaining or reviewing any and all RFP

Addenda. Failure to acknowledge any and all RFP Addenda may result a nonresponsive bid determination.

7.4 Proposals and Process

- 7.4.1 Proponents are responsible for submitting Proposals (both the initial Proposal and any revisions thereto) so as to reach the City before the due date and time specified for submission of Proposals in this RFP through the City's electronic bid system, but in addition, the Proponent must submit one original and seven (7) copies of the Proposal which includes the Proposal Security. The submission is also to include one (1) electronic copy in searchable portable document format ("PDF") on compact disc.
- 7.4.2 The format and contents of the Proposal submission are identified in Section 6. Proponent shall limit its Proposal, to the maximum number of pages indicated in Section 6.
- 7.4.3 The City will evaluate the Proposals based on the evaluation criteria identified below. The City's evaluation will be based solely on the Proposals received in connection with this RFP process.
- 7.4.4 The City reserves the right to shortlist and or conduct negotiations with some or all the Proponents or to request Best and Final Offers.
- 7.4.5 The City expects to name a Committee to evaluate the Proposals.
- 7.4.6 The City expects to request revisions to Proposals. The City reserves the right to conduct meetings, discussions, and interviews and request revised Proposals at its sole discretion. Any revised Proposals shall be provided in the same format as the initial Proposals, or as otherwise directed by the City. Proponents are instructed to submit their best prices and technical solutions in revised Proposals, as the City reserves the right to further shortlist to those Proponents determined to have a reasonable chance of award based on the most recent iteration of the revised Proposals.
- 7.4.7 The City is not responsible for the Proponent's technical difficulties in submitting Proposals electronically.
- 7.4.8 Proponents shall submit Proposals in response to this RFP in English and in U.S. dollars.
- 7.4.9 Proponents may submit modifications to their Proposals at any time before the due date and time established for the submission of Proposals.
- 7.4.10 Proposals shall generally be on letter-sized (8.5" x 11") paper and use a font no smaller than size 11.
- 7.4.11 The page limit associated with the submittal document is identified herein.
- 7.4.12 All questions and requests for clarification and/or interpretation regarding this RFP shall all be submitted in writing by email to the City's Point of Contact.
- 7.4.13 Proponents shall promptly notify the City of ambiguities, inconsistencies, or errors, if any, which they may discover upon examination of the RFP. Proponents are strongly encouraged to submit any and all questions and requests for clarification and/or interpretation as soon as practicable. Questions and requests for clarification and/or interpretation must be received by the date specified above. Responses to questions will be provided by the date specified above. Questions and requests for clarification and/or interpretation received after this time and date will not be considered.

- 7.4.14 The City will issue all formal responses to all questions and requests for clarification and/or interpretation (including answers, interpretations, and clarifications) in writing via RFP Addenda to all Proponents. Only responses issued in RFP Addenda will be binding on the City. All other responses (including oral interpretations, clarifications, or submittal instructions) will be without legal effect and shall not be binding on the City. Proponents shall not seek clarification or interpretations or answers to questions verbally from any City employee, Council member or representative.
- 7.4.15 The City maintains a neutral competitive environment for all Proponents to protect the integrity of the selection process. A Proponent, or anyone on its behalf, may only contact the City through the email address of the City's Point of Contact concerning this RFP. **Any communication concerning the content of this RFP initiated by any Proponent, or anyone on its behalf, with any City elected official or employee other than through the email address may result in the rejection of that Proponent's response.**
- 7.4.16 The Proponent shall be familiar with all federal, state, and local laws, ordinances, and regulations that in any manner might affect those engaged or employed in meeting requirements in the Agreement resulting from this RFP or the materials, equipment, or procedures applicable to meeting the requirements in the Agreement resulting from this RFP, or that in any other way would affect the conduct of meeting the requirements of the Agreement resulting from this RFP.
- 7.4.17 Proponents submitting Proposals that include the Proponents (or a construction contractor) making public improvements to the City's Port are advised that Alaska Statute Title 36 sets forth certain requirements which include but are not limited to:
- i. Performance and Payment Security. The Contractor will be required to submit performance bonds and payment bonds secured from a surety company authorized to transact business within the State of Alaska and satisfactory to the City, each in the amount of one hundred percent (100%) of the contract price.
 - ii. Minimum Wage. The Contractor shall at times pay not less than the minimum wage per hour for each classification of laborers, workers, or mechanics as set forth in the general prevailing wage rate schedule applicable at the time the work is performed published by the State of Alaska, as amended from time to time, and shall comply with all other provisions of Alaska Statutes, Title 36, Chapter 5 [Wages and Hours of Labor]. The wage rate scale is available from www.labor.alaska.gov/ss/pamp/600htm.
 - iii. Employment Preference. The Contractor shall comply with the employment requirements set forth in Chapter 10 [Employment Preference] of Title 36 (AS 36.05.005, et seq.), and any amendments thereto and all regulations implementing the same. This section does not set forth a complete description of all the Alaska Statutes and regulations and other laws governing public construction or contractors performing work in the State of Alaska. By submitting a Proposal which includes making public improvements, the Proponent represents that it is familiar with all such regulations and agrees to comply with them.

7.4.18 The Proponents shall bear all costs associated with the preparation and submission of its Proposal, as well as those costs incurred during the negotiation and discussions with the City. The City shall not be responsible or liable for any of these costs under any circumstances.

7.5 Proponent's Representation

The Proponent represents that:

- 7.5.1 The Proponent has read and understands the RFP and that the Proposal is offered in accordance with the RFP requirements. The failure or omission of the Proponent to examine all forms, documents, instruments, federal, state and local statutes and regulations, or other requirements shall in no way relieve the Proponent from the RFP requirements.
- 7.5.2 The Proponent has the qualifications and is eligible to receive an award of this RFP under applicable laws and regulations.
- 7.5.3 The Proposal is based upon the requirements described or presented in the RFP and described in detail in the Scope of Work.
- 7.5.4 The Proposal submitted is unconditional in all respects except as expressly noted.
- 7.5.5 The Proponent bears full responsibility for all costs associated with the preparation, submittal, and delivery of the Proposal and any revisions thereto.
- 7.5.6 Proponent has consulted with counsel of its choice before submitting any response and is not relying in any way on any advice or representations by City attorney or any counsel retained by the City

7.6 Negotiations

- 7.6.1 Proposals shall be opened so as to avoid disclosing their contents to competing Proponents during the process of negotiation. Except for confidential information submitted as set forth in Section 7.11. Proposals, tabulations, and evaluations thereof shall be open to public inspection only after the issuance of a notice of intent to award.
- 7.6.2 The City may negotiate with those responsible Proponents whose Proposals are determined by the City to be reasonably responsive to the request for Proposals. Negotiations shall be used to clarify and assure full understanding of the requirements of the request for Proposals. The City may permit Proponents to revise their Proposals after submission and prior to award to obtain best and final offers. Proponents deemed eligible for negotiations shall be treated equally regarding any opportunity to discuss and revise Proposals. In conducting negotiations or requesting revisions, neither the manager nor any other city officer or employee shall disclose any information derived from Proposals of competing Proponents.
- 7.6.3 If an agreement can be reached with the proponent that offers the Best Value to the City, the agreement shall be entered with that Proponent.
- 7.6.4 If an agreement cannot be agreed upon with the Proponent that offers the Best Value to the City, the City shall advise the Proponent of the termination of negotiations. If the Proposals were submitted by one or more other Proponents determined to be qualified, negotiations may be conducted with such

Proponents. The contract may be awarded to the Proponent then determined to offer the Best Value to the City.

7.6.5 The City will evaluate each Proposal (as may be revised) in accordance with the evaluation criteria identified herein. The City reserves the right to conduct negotiations and/or discussions with any or all Proponents remaining in the competition.

7.6.6 Upon the conclusion of evaluations, the City may enter into negotiations for an Agreement with the Proponent determined to offer the Best Value to the City.

7.7 Agreement

Upon successful negotiation and approval by the City Council, the Proponent offering the Best Value to the City will enter into an Agreement with the City that will govern the Project.

The City intends to negotiate an Agreement(s) that includes provisions substantially in accordance with the attached general terms and conditions, which are included in this RFP. If a Proponent believes that specific changes to the City's proposed general terms and conditions are necessary, the Proponent should provide a description of any exceptions or modifications as part of a response to Submittal along with explanations for all requested changes. Proponents should additionally include any other required terms, conditions, or any other agreements that Proponents desire as an appendix to the Proposals.

7.8 Commercial Close

The Preferred Proponent must execute and deliver the Agreement to the City within the timeframe contemplated in Section 7.1 of this RFP as such schedule may be modified by the City. If the Agreement is not executed and delivered by the Preferred Proponent by this deadline, then, unless the City in its sole discretion extends or waives the deadline, the City shall have the right to terminate all discussions with the Preferred Proponent. Proponent shall have no claim or recourse against the City in any manner whatsoever as a consequence thereof.

The City shall not have any binding obligation, duties or commitments to the Preferred Proponent until and unless the Agreement has been duly executed and delivered by the City after approval by the appropriate governmental authorities. Similarly, the City shall not have any obligation to proceed to Financial Close under the Agreement unless and until all of the conditions precedent under that document been satisfied or waived in accordance with that document.

7.9 Selection Criteria

The City intends to review the responses including the Alternate Proposal and evaluate them relative to the qualification criteria provided below. Submission requirements in Section 5 will be used to evaluate responses based upon the criteria.

7.9.1 For Concession Agreement

- i. Amounts of Payments to the City, including an up-front payment
- ii. Strength of financial package
- iii. Demonstrating a commitment to the City's Objectives
- iv. Project Development Experience
- v. Project Operating Experience
- vi. Demonstrating a commitment to meeting highest environmental operational standards and outlining an operation plan the provides for responses to environmental events that may occur
- vii. Material conditions

7.9.2 For Preferential Agreement

- i. Berth(s) requested
- ii. Amounts of Payments to the City, including an up-front payment
- iii. Strength of financial package
- iv. Number of passengers guaranteed
- v. Demonstrating a commitment to meeting highest environmental operational standards of ships to use the facility.
- vi. Material conditions

All criteria are important; therefore, Proponents should provide equal attention to thoroughly responding to each criterion. In responding to the evaluation criteria, responses should be organized so that the qualifications are clearly illustrated in each of the categories, using the requirements for each criterion.

Rating	Description
Outstanding	Response indicates an exceptional approach and understanding of the requirements and contains multiple strengths which far outweigh any weaknesses. Risk of unsuccessful performance is low.
Good	Response indicates a thorough approach and understanding of the requirements and contains at least one strength, and risk of unsuccessful performance is low.
Acceptable	Response meets requirements and indicates an adequate approach and understanding of the requirements, and risk of unsuccessful performance is no worse than moderate.
Marginal	Response has not demonstrated an adequate approach and understanding of the requirements, and/or risk of unsuccessful performance is high.
Unacceptable	Response does not meet requirements and therefore contains one or more significant weaknesses or deficiencies, and/or risk of unsuccessful performance is unacceptable. Response is disqualified from further consideration.

The ratings shown in the table above will be used to measure the degree to which the response meets or does not meet the criteria above through an assessment of the strengths, weaknesses, deficiencies, and risks of a response. Note that an

“unacceptable” rating for any criterion will disqualify the entire response from consideration.

As part of the evaluation of all criteria, the City will consider the overall quality of the material presented, such as formatting and layout; spelling and grammatical accuracy; legibility of figures and chart information; quality and relevance of graphical presentations; coherent and logical flow of written responses; and accuracy of information presented.

Proposals will be reviewed by the City's Selection Committee established for this particular project. Interviews may be required at the discretion of the City. Qualification decisions will be made based on the responses that offer the best value to the City.

7.10 City's Rights

The City retains the right to cancel this RFP and reject any or all Proposals with no liability to the City and its sole discretion:

- 7.10.1 The City may reject any or all Proposals if such action is in the City's best interest.
- 7.10.2 The City may waive formalities and minor irregularities in any Proposals received.
- 7.10.3 The City reserves the right to conduct clarifications or discussions at any time with one or more of the Proponents in its sole discretion.
- 7.10.4 The City reserves the right to conduct simultaneous negotiations with one or more of the Proponents.
- 7.10.5 The City reserves the right to terminate negotiations with any Proponent, and to immediately commence negotiations with the next highest rated Proponent.
- 7.10.6 The City reserves the right to reject any Proponent that submits an incomplete or inadequate Proposal or is not responsive to the requirements of this RFP.
- 7.10.7 The City reserves the right to take any action affecting the RFP process that is determined to be in the best interest of the City.
- 7.10.8 The RFP and selection schedule is subject to change based on the discretion of the Ketchikan City Council.
- 7.10.9 Upon receipt by the City, all Proposals including any and all attachments to a Proposal will become the property of the City. The City will have the right to copy, reproduce, or otherwise dispose of each Proposal received including any idea, scheme, design, technique, suggestion, layout, or plan received during the process. The City will be free to use any information received during the process for any purpose related to the RFP process without payment of any kind or liability of any kind and shall not be liable for any use of such information in any format by anyone.

7.11 Public disclosure

All RFP submissions shall become the property of the City, except for documents or information submitted by prospective Proponents which are trade secrets, proprietary information or privileged or confidential information of the prospective Proponents.

Proposals are subject to disclosure under the Alaska Public Records Act ("the Act") (AS 40.25.100-40.25.295). If a Proponent believes that any portion of a Proposal is confidential it must clearly label it as such and submit in writing a specific detailed reason including any relevant legal authority stating why the Proponent believes such material is protected from disclosure at the time it submits its Proposal. Upon issuance of a notice of intent to award all Proposals or parts of Proposals not identified confidential as required by this section will automatically be considered public information.

The City cannot guarantee it will not be required to disclose information designated as confidential because it may not be considered confidential under the Act. In the event the City receives a request under the Act for portions of a Proposal designated as confidential as specified above it will notify the Proponent of such a request so that the Proponent may oppose the request or seek an appropriate protective order at Proponent's cost. By submitting a Proposal, Proponent agrees that it will indemnify, defend and hold the City harmless from all claims, actions and expenses including but not limited to the Proponent paying all of the City's attorneys' fees and costs in any court action filed by the Proponent or by the person or entity making the Public Records request.

If a prospective Proponent has special concerns about confidential or proprietary information that it would desire to make available to the City prior to its RFP submission, such Proponent may wish to:

- Make a written request to the City for a meeting to specify and justify proposed confidential or proprietary documents.
- Make an oral presentation to the City staff and legal counsel.
- Receive written notification from the City accepting or rejecting confidentiality requests.

7.12 Protest procedure

This solicitation is issued under the authority of Ordinance I9-I899 which is attached in the Appendix. Appeals to any decision for this solicitation will follow the procedures as outlined in the Municipal Code Chapter 3.12.042:

<https://www.codepublishing.com/AK/Ketchikan/#!/Ketchikan03/Ketchikan03I2.html#3.12.042>

APPENDIX J

SPECIMEN – CONCESSION AGREEMENT

SPECIMEN

CONCESSION AND LEASE AGREEMENT

This Concession and Lease agreement (“the Agreement”) is made and executed on this ____ day of _____, _____ by and between the CITY OF KETCHIKAN, 334 Front Street, Ketchikan, AK 99901, municipality organized and existing under the laws of the State of Alaska, (hereinafter referred to as the “City”), and [insert name and address of Operator] (hereinafter referred to as “Operator”). References to Operator are intended to mean one entity entering this Agreement.

RECITALS

- A. The City currently operates the cruise facilities within the municipal boundaries consisting of Berths I, II, III and IV and the adjacent uplands and structures (the “Port”). Berths I, II and III are owned by the city, and Berth IV is operated by the City under a lease agreement with Ketchikan Dock Company.
- B. The City wishes to assign to one Operator the responsibility of management and the provision of port services, as defined herein, for Berths I, II, III and IV and associated Uplands (the “Concession Area” or “Premises”).
- C. The City has selected an Operator to implement a comprehensive approach and plan of development to manage cruise ships and passenger to allow the City to grow the traffic while at the same time creating a first-class experience for the cruise ship passenger guests and improving the quality of life for residents that are impacted by the ships, passengers and vehicle traffic. Operator fully understands these goals and objectives of the City and agrees to operate under this Agreement in a manner consistent with attaining such goals and objectives.
- D. The Operator acknowledges that Berths I, II, and III that will be leased as part of this Agreement (the “Leased Premises”). These berths require maintenance, improvements and/or development to provide for the growth and use of the Berths and associated uplands. All such maintenance, improvements and developments

shall be fully funded and constructed by the Operator without any financial assistance or guarantees of the City, except as where noted.

- E. Operator recognizes, accepts and will preserve continuous access to the Port of Ketchikan waterfront for City residents subject to any US Coast Guard regulations.
- F. Operator understands and agrees that locally owned businesses are important to the vitality of the City and will operate and manage the Port in a manner that allows the local businesses to be an important part of the cruise ship passenger experience.
- G. The City expects the Port to be operated and managed in such a manner as to protect all aspects of the natural environment. Operator agrees to implement management and operations that minimize air emissions, insure water quality and protect the ecosystems.
- H. Ground transportation related to the cruise ships and cruise passengers significantly impacts the quality of the cruise passenger experience and, unmanaged and unplanned, adversely impacts local residents and businesses. Operator commits to manage the ground transportation of passengers to minimize impact on the City's infrastructure and residents and to seek alternative vehicle parking and off-site staging and marshalling as necessary to minimize impact to surrounding community and existing businesses.

The foregoing recitals are agreed and acknowledged by the parties to be true and correct and incorporated into this Agreement by reference,

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth herein, it is hereby agreed between City and Operator as follows:

1. CONCESSION AREA

The Operator will be responsible for Port Operations within the "Concession Area" (herein referred to as "Concession Area" or "Premises") which includes Berths I,

II, III and IV and its adjacent uplands and improvements as described below and in Attachment A. The Concession Area includes the following properties:

- a) Berth I
 - i. [insert legal description and description of existing improvements]
- b) Berth II
 - i. [insert legal description and description of existing improvements]
- c) Berth III
 - i. [insert legal description and description of existing improvements]
- d) Berth IV
 - i. [insert legal description and description of existing improvements]
- e) Tidelands [insert legal description]
- f) Within the Concession Area, the City will grant a Lease as described below in Section 2 to the Operator for Berths I, II and III (the “Leased Premises”).
- g) The City will provide the rights to operate areas of Berth IV. Operator understands that this Agreement does not transfer or assign any ownership or any other interest in the City’s lease with respect to Berth IV between the City and Ketchikan Dock Company, dated July 14, 2006, and that Operator shall operate and manage Berth IV in a manner consistent with the lease provisions in that Lease, which Lease has been provided to the Operator.
- h) The Concession Area may include certain parcels that are shown as public rights of way or easements but which will be made available to the Operator during cruise operations

2. LEASED PREMISES

Upon and subject to the terms and conditions hereafter set forth, the City leases to Operator (the “Lease”) for the purpose of conducting lawful businesses thereon, certain tidelands and improvements, situated in the City of Ketchikan, First Judicial District, State of Alaska, as follows:

- a) Berth I
[insert legal description and description of existing improvements]
- b) Berth II
[insert legal description and description of existing improvements]
- c) Berth III
[insert legal description and description of existing improvements]
- d) Tidelands [insert legal description]

The complete Leased Premises are shown on the attached Exhibit B.

All improvements to be constructed on the Leased Premises shall be the property of and be owned by the City during the term of the Lease and at the conclusion of the Lease term and any extensions or renewals.

3. PERMITTED USE OF THE CONCESSION AREA

Subject to any other limitations set forth in this Agreement, the Operator is authorized to operate the Port, as a deep water dock and vessel moorage facility capable of accommodating cruise vessels, embarkation and disembarkation of passengers, crew and freight from vessels moored at or using the facilities, and to provide ground transportation staging and loading of passengers, together with such other marine activities and uses similar thereto which are expressly allowed by law. This use expressly allowed under this Section of the Agreement are referred to as the “Permitted Uses”. The Operation responsibilities are described further in this Agreement.

Operator expressly acknowledges and agrees that the Permitted Uses shall not include or otherwise entitle the Operator or third parties to: (i) discharge any Hazardous Substance, as that term is defined in Section [insert section], from, below, on, in; and (ii) generate, handle, store, deposit, dispose of, release or otherwise, in any manner, use any Hazardous Substance on, in, or upon, except as allowed in Section [insert section] below.

The Operator’s right of use of Berths I, II, III and IV is subject to all easements or other matters of record affecting Berths I, II, III and IV and the Uplands described in

Section 1 above. Berths I, II, and III leased under this Agreement shall not be used for any other purpose other than these Permitted Uses, without the City of Ketchikan's prior written consent.

Operator shall use conduct its business on the Premises continuously and during all reasonable business hours and keep its operations fully functional to achieve maximum gross sales in and from the Premises through the term of the Agreement and any renewals or extensions.

Operator's shall operate and manage Berth IV in a manner consistent with the lease provisions between the City and Ketchikan Dock Company, dated July 14, 2006.

4. TERM OF AGREEMENT

The initial term (the "Concession Term") of this concession agreement shall be twenty years (20) years, commencing on the ___ day of _____, 2022 and ending on ___ day of _____, 2042 except as provided below for Berth IV. City may negotiate a one-time ten-year renewal of the Agreement in City's discretion. In the event the City offers a renewal pursuant to this section, Agreement terms are subject to change based on changing environmental circumstances or concerns and reevaluation of other provisions, such as insurance. The examples of possible provisions that would be subject to change in this section are by way of example and not all inclusive or limiting in any way. The Parties acknowledge and understand that the terms and conditions of a renewal of the Agreement will be subject to negotiation and approval of both parties.

The term for the Concession Area use for Berth IV as described in Sections 1 and 3 shall be the lesser of the Agreement Term as described above or the terms of the Berth IV lease between the City and Ketchikan Dock Company, dated July 14, 2006.

5. RENTAL RATE

Operator shall pay to the City annual payments in accordance with the following schedule: [insert amount].

These payments shall be prorated in twelve equal monthly payments and paid in advance on the first day of each month as more fully set out in Section 6 below.

6. MONTHLY RENTAL PAYMENTS

All rental payments are due and shall be paid and received by the first (1st) of the month without deduction or offset to City at the following address: City of Ketchikan, attn.: Finance Director, 334 Front Street, Ketchikan, Alaska 99901.

If the Operator shall fail to pay rent and rent is not received on or before the delinquency date, such unpaid rent shall bear interest at the rate equal to three percent (3%) above the prime rate from the date due to the date of actual payment. Prime rate shall be the interest rate published by the Wall Street Journal as the prime rate for commercial loans to the most credit-worthy customers. If the Wall Street Journal ceases to exist or ceases to quote a prime rate, then prime rate shall be the average of the prime rates published by the then largest, in terms of demand deposits, three (3) commercial banks headquartered in New York City, New York. In addition to such interest, Operator acknowledges that the late payment by Operator of any monthly payment of rent will cause City to incur certain costs and expenses not contemplated under this Agreement. The exact amount of City's additional costs is extremely difficult or impractical to fix. Such costs and expenses may include without limitation, administrative and collection costs, costs of borrowing funds and processing accounting expenses. Therefore, if any such payment of rent is not received by City from Operator on or before the delinquency date, that being the tenth (10th) day of the month when due, Operator shall, in addition to paying interest described above, immediately pay to City a late charge equal to four percent (4%) of the past due payment of rent. City and Operator agree that this late charge represents a reasonable estimate of such costs and expenses and is fair compensation to City for its loss suffered by such late payment by Operator. Acceptance of this late charge shall not constitute a waiver by City of Operator's default with respect to such nonpayment by Operator. This provision for late payment charge shall not

8. OBLIGATIONS OF THE OPERATOR TO OPERATE AND MANAGE THE CONCESSION AREA

At all times during the term of this Agreement, Operator shall operate the Port within the Concession Area to the highest level of service in a manner consistent and equal to or exceeding Alaska Southeast Ports and provide the necessary personnel, goods, services and facilities described as follows, but not be limited to:

- a) **Berth management, assignment and scheduling** – Operator shall make berth assignments as described in Section 9.
- b) **Accounting, billing collections and payments** – Operator shall provide all of the necessary services to support all financial functions including the collection of port fees and payments as described in Sections 10 and 11.
- c) **Marketing and customer relationships** – Operator will be responsible with the collaboration of the City to market the destination and maintain excellent customer relations as provided in Section 12.
- d) **General operations** – Operator will provide the services necessary to operate the Port as described in, but not limited to Section 13
- e) **Maintenance** - Operator will provide routine and major maintenance as described in Section 14.
- f) **Housekeeping** – The Operator will provide housekeeping and janitorial as described in Section 15.
- g) **Security** - The Operator shall be responsible for security of the Concession Area and the berths during operations and for compliance with the City’s ISPS Security Plan, all federal and state laws and regulations as related to security as described in Section 16.
- h) **Other services** - Operator may, during the term of this Agreement, negotiate with the City to provide other services not specified in this Section at the sole cost and expense of the Operator subject to the approval of the City Council, and upon approval, will constitute an Amendment to this Agreement.

- i) **Non-exclusive services** – Operator may provide other services, beyond those expressly provided herein above, on a non-exclusive basis within the Concession Area including stevedoring and ground handling, subject to the Approval of the City Council.

9. BERTHING ASSIGNMENTS

Operator shall be responsible for management of the berth use and allocations as follows:

- a) Operator shall be responsible for developing, publishing and executing a Berth Assignment policy that is open, fair and transparent to be approved by the City.
- b) The Berth Assignment policy will provide for the equitable distribution of cruise ships and passengers among Berths I, II, III and IV. This policy shall continue and remain in effect for the benefits of Berths for as long as the Berths remain viable cruise ship dock facilities. The intent of the policy is to provide each of the four Berths with a fair share of the cruise ship passengers that arrive at the Port of Ketchikan each season. For purposes of this section a “fair share” shall be construed to minimally require: 75% of cruise ship passengers be allotted to Berths, I, II and III, and approximately 25% of cruise ship passengers be allotted to Berth IV as long as Berth IV is capable of accommodating cruise ships of the sizes sufficient to generate 25% of the cruise ship passengers; and 100% of the lightered passengers allocated equally between Berths III and IV. The policy may provide for the City’s involvement in the pre-season scheduling of berthing assignments to the Port in consultation with Operator or its agent, and related cruise line companies. The parties acknowledge that circumstances familiar to the industry require a schedule that is flexible and does not require mathematical precision in allocating the number of passengers among the four berths. Operator shall work cooperatively and in conjunction with the City and the cruise ship industry to implement the intent and spirit of the policy.

- c) Operator is responsible for fulfilling the terms of this Agreement for equitable berthing in a manner consistent with the City's lease of Berth IV and Ordinance 08-1597 in the development of the berthing schedule, both of which are attached to this agreement as Exhibits D and E.
- d) Once berth requests are received, the Operator will attempt to meet the berth demands, and subsequently try to resolve any conflicts by working directly with the appropriate entities. Operator shall promptly notify the City of any unresolved scheduling conflicts and the City reserves the right to participate in decisions when there are unresolved scheduling conflicts. Conflicts will be resolved through joint meetings between the vessel operator, the vessels' agent, Operator and the City, provided, however, the City's determination shall be final and binding on the other parties.
- e) The Operator shall publish the annual berth assignments in a calendar format suitable for use by the City at least 12 months ahead of the start of the cruise season to inform its residents and businesses of the activity. This calendar will be continuously updated, published and provided to the City. This schedule shall be submitted to the City on December 1st for the following year and shall be updated as changes occur. The vessel schedule will be in a format acceptable to the City and shall be subject to approval by the City.
- f) Operator shall ensure that all cruise ship vessels using the Berths are aware of the fees and pay those fees to the Operator on behalf of the City. All fees charged by the Operator and City will be published according to the Federal Maritime Commission.
- g) No preferential berthing will be allowed for any cruise company without the written approval of the City.

10. FINANCIAL RESPONSIBILITIES

The Operator will be responsible for all financial services for the Operations including the billing and collection of Port Fees, and remittances to the City of their

appropriate funds. All cruise ship vessels using the Berths shall be subject to the provisions of the City Passenger Wharfage, Dockage and other City Fees imposed under the current City Code and any amendments to that Code that may increase these fees.

Operator shall collect all City Passenger Wharfage, Dockage and any Other Fees that may be imposed during the term of this Agreement and remit all payment of fees to the City within thirty (30) days of collection from each cruise ship company and/or passengers. The procedure and mechanism for collecting and remitting these fees as between the Operator and all cruise ship companies who use the Berths shall be the sole responsibility of the Operator.

The City shall have the right to audit Operator's collection and administration process yearly in the sole discretion of the City or at any time the City has a reasonable concern that the Operator has not fully remitted the Passenger Fee or any other fees to the City. Operator shall make all passenger manifests from all cruise ships who use the Berths available to the City within ten (10) days of a written request of the City for copies of the passenger manifests.

11. OPERATOR FEES, FUTURE INCREASES AND OPERATOR INDEMNIFICATION FOR USE OF FEES

Operator may charge and collect fees as initially agreed [insert pricing from Proposal] for the services provided by Operator to the users of the Port, which fees shall be agreed upon by the City and Operator and adopted by ordinance of the City. The fees agreed upon are in addition to the City's passenger fee and other docking, wharfage and other fees for the use of the Port of Ketchikan, currently in City code or as may be amended. The fees agreed to as part of this Agreement shall be retained by the Operator after remitting to the City all the City fees required to be collected and remitted by the Operator in this Agreement.

The Operator is entitled to provide for annual rate increases as follows:

[Insert provision]. Future increases, other than as expressly approved herein will be subject to the approval of City Council. The City reserves the right to increase its

current fees “pari passu” or in the same proportion to the increases approved for the Operator, if any, in the future.

Should the Operator and City come to a future agreement for significant capital expenditures, those fees that may be charged by the Operator in order to finance the improvements may not entitle the City to the application of proportional increases in its fees.

Operator shall defend and indemnify the City from and against any action or action of any kind and any nature, including actions for equitable relief and/or injunctive relief, which claim or action alleges in any way that the use of the fees collected by the Operator and retained by the Operator violates federal or state constitutional law or violates any federal or state statute or regulation. This defend and indemnification provision includes but is not limited to costs and attorneys’ fees from the first notice of such a claim or action is made to the Operator or the City. The breach of this provision constitutes a material breach and default of the Agreement.

12. MARKETING AND CUSTOMER RELATIONS

Operator shall market the use of the Berths in the Port of Ketchikan. The City shall be consulted and participate in Operator’s marketing strategy on at least a yearly basis. Operator shall promote use of the Berths and shall cooperate with the City in such promotion.

Operator agrees to solicit new business for the Port of Ketchikan including, but not limited to, the making of formal business proposals to cruise ship passenger companies and related companies, supporting the marketing programs of cruise ship passenger lines which use the Berths, and maintaining a high level of customer service at the Port. The City and Operator agree to meet as required or as requested by either party to jointly define targeted new users and secondary users and develop a sales and promotion plan.

The City and the Operator agree to meet within ninety (90) days after the execution and acceptance of this Agreement for the purpose of developing collaborative

marketing programs that will attract more, new and diverse cruise business. These marketing programs and performance standards will be considered material provisions of the Agreement and may be invoked by the City if Operator fails to meet agreed to performance standards.

13. GENERAL OPERATIONS

The Operator will be responsible for the operations within the Concession Area during cruise operations including but not limited to:

- a) Preparation and staging of material and equipment prior to ship arrival
- b) Storage and movement of equipment after ship departures
- c) Provision and setting of gangways and maintenance of gangway operations during the calls
- d) Line handling
- e) Traffic control within the Concession Area
- f) Coordination with bus and other transportation providers to manage the Ground Transportation area as well as coordinate with any off-site facilities.
- g) Coordination of traffic with the City at the intersections
- h) Passenger routing and directional guidance to provide for safe operations
- i) Wayfinding
- j) Guest services
- k) Provide and manage any office and maintenance areas required for the operations
- l) Performance standards - It is agreed that providing excellent service to the cruise lines calling at the Port of Ketchikan, their guests, passengers, and crewmembers, is a critical goal of the Operator under the terms of this Agreement. To achieve this goal, the Operator will propose performance standards and metrics that will set the service goals for the Operator. The Performance Standards will compare the Port of Ketchikan with other

competing ports and develop metrics to assure that the Port will be ranked as the “best in class”

- m) Prior to the start of the cruise season, the Operator and the City will convene a meeting to discuss and agree on the operations of the Facility, issues ahead, coordination with the City and other relevant parties and Agencies, Tourism Agencies and other parties as established by the City. The goal of the meeting is to develop and publish the annual operating plans that can be shared with all stakeholders.
- n) Other facilities and services customary to Ports of Call proposed by the Operator and approved by the City

14. MAINTENANCE

Operator shall maintain and repair, at its sole cost and expense to commercial maintenance standards and in good, safe and substantial condition, all buildings, structures, floats, ramps, utilities, sidewalks, passenger shelters and restrooms, asphalt and concrete paving; road and parking striping; piling, breasting, moorage dolphins, anoid/zinc system and railings; lamp posts; benches and planters; restrooms; cargo crane and all alterations and additions with respect to Berths I, II, III and IV.

For Berth IV, any major maintenance as provided for in the Lease between the City and the Ketchikan Dock Company will be the responsibility of the City.

Prior to February 1st of each year the Operator and City shall agree upon a seasonal landscaping plan including maintenance for the Port planters and appurtenances. Operator shall be responsible for keeping all refuse in covered containers and shall regularly remove such refuse to a municipal landfill, or such other legal disposal site, at Operator’s expense. Operator shall keep the mechanical and electrical systems and drains clean and in a good state of repair and shall protect all pipes, drains and storm drains so that they do not freeze or become blocked or clogged. In the event Operator fails to perform the maintenance and repair obligations as required by this section, the City may proceed to perform such maintenance or repairs as the City may deem

necessary to preserve the structural integrity, safety and appearance of the Concession Area. The cost incurred by the City to perform Operator's obligations under this section shall be paid by Operator within ten (10) business days after receipt by Operator of documentation evidencing the cost incurred by the City. Operator's failure to perform the obligations under this section shall constitute a material default by the Operator entitling the City the right to remedies for breach of this Agreement.

On or before December 31 of each year, Operator shall submit a written report to the City identifying and explaining maintenance and repairs undertaken during the preceding calendar year and a written report identifying and explaining the planned maintenance and repairs for the upcoming year.

City and Operator shall agree in writing upon a winter maintenance plan.

15. HOUSEKEEPING

Operator shall be responsible for all housekeeping and janitorial of the Concession Area including:

- a) Operator shall keep Berths I, II, III and IV and all improvements and appurtenant therein, in an attractive, clean and safe condition throughout the Agreement Term and any extension or renewal term.
- b) Clean and sweep the Concession area, the dock, ramps, shelters, restrooms, and pedestrian walkways, of all debris, trash and garbage, and keep those areas in an attractive, safe and clean condition.
- c) Clear and clean the Concession Area after each day of ship operations.
- d) Wintertime responsibilities – to be mutually determined.

16. SECURITY

Commencing on the execution of this Agreement, Operator shall be fully responsible for security of the Concession Area and shall properly protect each Berth to avoid any unauthorized use of any Berth and/or trespass by third parties. The Port Facilities Security Plan will be co-developed by the City and Operator. Operator shall

supply sufficient security personnel to comply with the Marine Transportation Security Act of 2002, and with all local, state and federal applicable laws and regulations related to security.

The security of the Berths may be assigned by Operator to a third party, acceptable to and approved by the City in writing. Should Operator elect to assign the dock security responsibilities to a qualified third person, such assignment shall not affect a release of Operator's obligations to the City as provided herein. Security responsibility will be limited to the Concession Area.

The Operator will also provide, in coordination with the City general site security to protect the Concession Area.

17. PROJECT DEVELOPMENT AND PROJECT COSTS

This Agreement requires Operator to construct certain improvements related to Berths I, II and III (the "Project") within the Leased Premises as described in Section 2. The following are the agreed elements to be constructed by the Operator:

- a) Part 1: Marine Works to expand berth capacity.** The Marine Works shall be as follows:
 - i. Berth I: [to be filled in]**
 - ii. Berth II: [to be filled in]**
 - iii. Berth III: [to be filled in]**
- b) Part 2: Construction of or modification to Berth Uplands [to be filled in]**
- c) Part 3: Cathodic Protection-** The Operator will construct a cathodic protection system for the existing Berths I and II. Operator shall submit all design and engineering plans and specifications to the City for review within one hundred and twenty (120) days of signing of this Agreement and will be responsible for all project costs. The City currently estimates these improvements to cost \$15,000,000.

Operator shall complete all of the Project Construction for Parts 1, 2 and 3 above on such dates to be mutually agreed upon by the City and Operator and all costs for the

Project shall be borne solely by the Operator, including any cost overruns, except as to the cathodic protection system specified in Part 3 above.

All design, engineering, construction and permitting costs for Parts 1, 2 and 3 shall be solely the responsibility of the Operator. This Section obligates the Operator to all costs to complete the Project even if those costs are not specifically set out in this Agreement including, but not limited to, the application of State of Alaska Davis-Bacon prevailing wage rates. In the event of any potential environmental mitigation costs as provided in the permits to be issued for any of the construction works above, all such costs shall be borne solely by the Operator.

18. FUTURE CONSTRUCTION

The City requires that the Operator during the Term make necessary improvements to be able to meet future demand. If at any point in the future, the Operator identifies the need for additional improvements, those improvements will be subject to negotiations and approval by the City.

19. TERMINATION OF RIGHTS OF THE CITY FOR FAILURE TO COMPLETE CONSTRUCTION

If, for any reason, the Project Development specified in Section 7 above, as to Berths I, II and III, Berth Uplands and the cathodic protection system have not been completed by [enter date], substantially in accordance with the agreed upon Plans then: (a) The City shall have the right to terminate this Agreement upon giving thirty (30) days prior written notice to Operator, which notice shall be given after [enter date for completion], or alternatively, (b) The City may elect to intervene and complete any unfinished portion of the Project Development and add all reimbursement costs, including but not limited to administrative costs, engineering and design costs, permitting costs, consultant and legal fees, and any other related costs, to the monthly Rent on a pro rata basis for the immediate following five (5) years of the Agreement and the Agreement

shall be so amended. The parties agree that the [enter date for completion of construction] date may be extended by mutual written agreement of the City and Operator.

20. CONSTRUCTION OBLIGATIONS

Operator shall, during the course of the development of the Final Plans direct Operator's design engineer to provide the City with copies of all preliminary design plans provided to Operator as part of the plan review and approval process at the same time as the design engineer provides the plans to the Operator. The City Manager or his designee will review all plans within 8 weeks of receipt. The City shall give written notice to Operator of any objection or concern the City has to the design of any aspect of Project. The City's concerns and objections to the preliminary design plans shall be considered and changes made to the design plan. Operator shall not commence construction of the Project, or the applicable portion of the Project without first obtaining the City's written consent to the Final Plans, herein referred to as the "Final Plans". The City's consent shall be delivered to Operator in not less than sixty (60) days from the date the Final Plans are received by the City. If the City withholds its consent or consents with conditions, City shall timely submit to Operator a detailed written explanation that supports its objection to the Final Plans. In the absence of objection, or receipt of a timely objection, Operator may proceed with construction of the Project and improvements. In the event the City files a timely objection to the Final Plans the parties shall meet and attempt to informally mediate the City's objections within forty-eight (48) hours from Operator's receipt of the objection. If the parties are unable to resolve the City's objections by informal mediation, the Operator shall proceed with the construction and/or improvements implementing the Plans in accordance with the City's objections. If implementation of the Plans with the City's objections will materially increase the costs of the construction or improvements, the parties agree to resolve any dispute related to costs at a later time in order not to impede the progress of the Project. If the processing of any application for a construction, environmental or required permit results in material

changes to the Plans as related to the Project, Operator shall give immediate notice to the City if changes to the plans become necessary. In such event Operator shall confer with the City prior to making a change to the Final Plans. Once the Final Plans are approved and work is commenced, the construction of the Project and any aspect of the Project shall be performed diligently to completion in a good and workmanlike manner in accordance with the Final Plans. As provided herein, once the Final Plans are approved by the City, the Final Plans shall be made a part of this Agreement as an addendum to **Exhibit C** thereafter referred to as the “**Exhibit C- Final Plans.**”

Operator shall repair any damage resulting from defects in design or construction or improvements to Berths I, II, and III for five years from the date of the Substantial Completion, in addition to the Operator’s repair obligations listed above.

21. INSPECTION OF CONSTRUCTION

The City, or its designated representative, shall at all times, have the right to come upon the Concession Area for purposes of inspecting the construction of the Project. When exercising its rights under this section, the City agrees to not interfere with and/or disrupt construction work and shall comply with Operator’s and/or its contractor’s security and safety policy and procedures. The City shall give written notice to Operator if there is a material objection to a condition, circumstance or manner in which Improvements are being constructed that becomes known to the City and is contrary to the Final Plans approved by the City prior to the Substantial Completion Date, as soon as reasonably practicable, and in no event less than ten (10) working days from the date the condition or circumstance becomes known to the City. The City acknowledges that timely notification of a material objection is essential to enabling Operator to correct the perceived problem in a timely and cost-effective manner.

22. SUBMISSION OF AS-BUILT DRAWINGS

Within not less than ninety (90) days after the Substantial Completion Date of the Improvements, Operator shall deliver to the City complete and fully detailed As-Built

drawings of the completed improvements prepared by a qualified person. The As-Built drawings shall be provided by Operator to the City in both hard copy and electronic format.

23. WASTE REMOVAL AND DEMOLITION

Except as provided elsewhere in this Agreement, Operator shall not cause or permit any waste or damage, disfigurement or injury to the Concession Area, and shall not remove or demolish, in whole or in part, any part of the Concession Area without the prior written approval of the City, which approval may be subject to the City's sole discretion.

24. SIGNS

Operator shall not erect, install, nor permit upon Berths I, II, III or IV any sign or other advertising device without first having obtained the City's written consent or as approved by the City as part of the proposal submission. Operator shall remove all signs and sign hardware upon expiration or earlier termination of this Agreement and restore the sign location to the state existing prior to its installation, unless the City elects to accept the sign location in an altered state or to retain all or any portion of the signage. The restrictions set forth in this Section shall not apply to signs the Operator is required by building or fire codes, ISPS or other federal or state port security laws or regulations to display, and this provision shall not apply or otherwise relate to signage determined necessary by the Operator to managed vehicular and pedestrian flow and control.

25. USE BY THE CITY

The City shall be entitled to full use of the Concession Area to schedule, manage, market and operate activities at those Berths during the period of October 15 to March 31 each year during the term of the Agreement and any renewals and extensions, unless cruise ship operations are scheduled during that period.

The operational obligations of the Operator shall be suspended during any time of actual use by the City, which time the City shall provide notice of in writing to the Operator at least ten (10) days in advance of such use.

26. REPORTING

Commencing on the 15th day of the month following the month in which the first cruise vessels begin use of Berths I, II, III and IV pursuant to the terms of this Agreement, and on the 15th day of each month thereafter during the term of the Agreement and the month following the termination of the Agreement, Operator shall submit a written report to the City in a form reasonably satisfactory to City, summarizing for the preceding month (i) all vessel movements at the Berths, (ii) all passengers, stores and cargo loaded, discharged, handled, received, delivered, or held at the Berths, and (iii) all bunkering by vessels using the Berths.

27. BOOKS AND RECORDS

Operator/Operator shall keep accurate books and records according to generally accepted accounting principles with respect to the items subject to reporting under this Agreement. For purposes herein “books and records” shall mean all bookkeeping or accounting documents Operator utilizes in managing its business operations relating to this Agreement including, but not limited to, logs of all vessel, calls and invoices, and records related to the collection of City fees and the remission of City fees to the City. Operator shall not co-mingle personal funds with business funds.

28. AUDIT

Operator/Operator, upon reasonable notice, shall make its books and records relating to this Agreement available to the City Port, or to any City auditor, or to any auditor or representative designated by the City for the purpose of examining Operator’s books and records to determine the accuracy of Operator’s reporting. Operator’s books and records shall be maintained and/or made available in Ketchikan, Alaska to the City’s

representative for the purpose of auditing or re-auditing these accounts and the books and records shall be retained and made available until any errors or omissions identified by the City are resolved.

29. ENVIRONMENTAL INSPECTION

Operator and the City will jointly conduct an annual environmental inspection of the Leased Premises on a date and at a time mutually convenient to the parties. The environmental inspection will be done in conjunction with the maintenance inspection to inspect the Berth I, II and III Improvements, and Operator's operations on and use of Berths I, II and III. The purpose of the environmental inspection is for the parties to determine whether there is a potential or existing release of a Hazardous Substance on, in or upon the Leased Premises. If a release of a Hazardous Substance, for which Operator is responsible under Section 2 is found during an annual inspection, Operator will contact a qualified engineer with instructions to take immediate action to contain, prevent and remove the Hazardous Substance to the level at which the appropriate agency will issue a "no further action" letter. Prior to or contemporaneous with the termination of the Agreement, the parties shall have a final environmental assessment of Berths I, II and III done by a qualified environmental engineer to establish a baseline determination of compliance with applicable federal and state environmental laws as of that date. The environmental assessment done at the termination of the Agreement is herein referred to as the "Final Baseline Report," and will be appended to and made a part of Exhibit F as the "Final Baseline Addendum."

30. ENVIRONMENTAL REMEDIATION

In the event of a violation of applicable Environmental Laws after the Substantial Completion Date by the Operator, or a Hazardous Substance release caused by Operator's use or occupancy or management of Berths I, II, III and IV for which Operator is responsible under this Agreement or otherwise responsible under applicable Federal or State Laws, Operator shall promptly undertake and diligently pursue all acts

necessary or appropriate to correct the violation or investigate, contain, and stop the Hazardous Substance Release and if, required by Environmental Laws or this Agreement, remove the Hazardous Substance at Operator's sole expense. The payment of Rent, or any payment due under this Agreement, shall not be reduced or otherwise abated, during any such remediation period, and Operator hereby waives any rent abatement rights to which it might otherwise be entitled pursuant to this Agreement, applicable statutory or common law. In the event the violation of applicable Environmental Laws occurs prior to the Substantial Completion Date, Operator shall promptly take all action necessary to correct the violation, contain, and stop the Hazardous Substance Release, and, if required by Environmental Laws, or this Agreement, remove the Hazardous Substance, at Operator's sole expense.

31. NOTICE OF VIOLATION

Operator shall promptly notify the City upon: (a) receipt of oral or written notice from a regulatory agency of an alleged or actual violation of any applicable Environmental Laws related to the Leased Premises or to Operator's occupation or use or management of Berths I, II, III and IV; and (b) discovery of any material release of a Hazardous Substance that has taken place or has come to be located at the soil or groundwater on or beneath the Leased Premises excepting spills or petroleum products entirely contained within or on impervious asphalt or concrete surfaces that consist of quantities that do not require reporting to a regulatory agency under Environmental Laws.

32. USE OF PREMISES NOT TO JEOPARDIZE INSURANCE COVERAGE

Operator shall not use, or permit the Premises, or any part thereof to be used, in any way which will cause a cancellation of any insurance policy owned by the City or Operator on the subject Premises or adjoining properties. Operator shall, at its sole cost, comply with all requirements pertaining to the Premises, of any insurance organization or company, necessary for the maintenance of insurance, as herein provided, covering any

building and appurtenances and improvements at any time located on the Leased Premises.

33. COMPLIANCE WITH LAWS AFFECTING PREMISES

During the term of this Agreement, Operator at Operator's sole expense shall comply with all applicable local, State and Federal Laws, regulations and requirements, all applicable Federal Maritime and Security Laws, Regulations, and Environmental Laws that may relate to the Operator's use, possession and exercise of the Premises under the terms of this Agreement, or which affect the Premises ("Laws"). Operator shall likewise observe and comply with the requirements of all policies of public liability, fire and other policies of insurance at any time in force with respect to the premises. Operator shall not commit, or allow to be committed, any waste, destruction or nuisance on or to the Premises. Operator shall promptly provide the City with copies of all notices and communications from any government entity, agency or regulatory authority or body which relate to Operator's noncompliance or alleged noncompliance with any Laws relating to its operations and use of any portion of the Premises.

34. VACATION OR ABANDONMENT OF PROPERTY

Operator shall not vacate or abandon the Premises at any time during the Agreement term. If Operator shall vacate, abandon or surrender the Premises, or be dispossessed by process of law, or otherwise, any personal property and/or fixtures belonging to Operator and left on the Premises after thirty (30) days written notice to Operator to remove such personal property and/or fixtures shall be deemed to be abandoned and at the option of City may become the property of City. City shall not be responsible for nor be required to pay for or purchase the property or fixtures deemed abandoned and Operator specifically waives any right or claim to any remuneration, reimbursement or payment of any property and/or fixtures deemed abandoned.

35. INSPECTION OF PREMISES BY CITY

Operator shall permit City and the agent, representative or employee of City to enter into and upon the Premises at all reasonable times during usual business hours for the purpose of inspecting the same, or for the purpose of posting notices of non-responsibility for alterations, additions, or repairs, without any rebate of rent and without any liability to Operator for any loss of occupation or quiet enjoyment of the Premises occasioned by the inspection.

36. ENCUMBERING OF LEASEHOLD INTEREST BY OPERATOR

- a) Operator shall not encumber by mortgage, deed of trust, or other property instrument, its leasehold interest and estate in the Premises, together with all buildings and improvements placed by Operator thereon, as security for any indebtedness of Operator, except with City's written consent and approval by the City Council.
- b) Operator shall not encumber its leasehold interest and estate in the Premises unless the mortgage, deed of trust, or other instrument creating such encumbrance provides that no foreclosure shall be taken and no conveyance or assignment shall be taken in lieu of foreclosure of Operator's leasehold interest unless and until City has been given not less than thirty (30) days' written notice to be substituted for Operator on the instrument creating such encumbrance upon paying any and all delinquent payments and agreeing to promptly cure any other defaults of Operator.

32. RECORDING OF LEASE PROHIBITED

OPERATOR SHALL NOT RECORD A COPY OF THIS LEASE WITH ANY DISTRICT RECORDER'S OFFICE. Operator is allowed to record a memorandum of Lease which summarizes certain terms and provisions of this Lease in accordance with AS 40.17.120. The form of the memorandum of lease may be developed mutually by the

parties.

33. PAYMENT OF TAXES, ASSESSMENTS, LIENS

Operator shall pay and discharge as they become due, promptly and before delinquency, all taxes, assessments and municipal liens which may be levied, assessed, charged or imposed or which may become a lien or charge on or against the Premises referred to in Section 1 and 2 and any building or buildings or any other improvements now or hereafter thereon, or on or against Operator's estate hereby created which may be a subject of taxation, during the entire term hereof.

34. PAYMENT OF CITY PROPERTY TAXES TO CITY

If the Operator enters into any subleases, with written approval of the City and the City Council, Operator is required to collect such taxes from the sub-Operator and pay them directly to the City no less than ten (10) days prior to the due date established by the City for payment of assessed property taxes (September 30), including the real property taxes assessed upon any subleased part of the Premises.

35. OPERATOR'S CHALLENGE OF AMOUNT OF TAXES

If Operator shall in good faith desire to contest the validity or amount of any tax, assessment, levy, or other governmental charge herein agreed to be paid by Operator, Operator shall be permitted to do so, and to defer payment of such tax or charge, the validity or amount of which Operator are so contesting, until final determination of the contest, on giving to City written notice thereof prior to the commencement of any such contest, which shall be at least 120 days prior to delinquency, and on protecting City on demand by a good and sufficient surety bond against any such tax, levy, assessment, rate or governmental charge, and from any cost, liability, or damage out of any such contest.

All rebates on account of any such taxes, rates, levies, charges, or assessments required to be paid and paid by Operator under the provisions hereof shall belong to Operator, and City will, on the request of Operator, execute any receipts, assignments, or

other acquittances that may be necessary in the Premises in order to secure the recovery of any such rebates, and will pay over to Operator any such rebates that may be received by City.

36. REMOVAL OF DANGEROUS CONDITIONS

Operator shall, throughout the Agreement term, at Operator's sole expense, do all things necessary to remove any dangerous condition from time to time existing on the leased property without the necessity of demand or direction from the City, and also at the demand of the City, in City's sole discretion.

37. BUILDINGS AND IMPROVEMENTS TO BE PROPERTY OF CITY AT END OF LEASE

Any building or improvement constructed by Operator on the Premises, or existing on the Premises as of the effective date of this Agreement, and all alterations, improvements, changes, or additions made in or to such Premises, shall become the property of the City at the termination of the Agreement term. Operator shall not be entitled to any reimbursement, remuneration or payment for such improvements, alterations, changes or additions from the City.

38. MAINTENANCE AND REPAIR RESPONSIBILITIES OF OPERATOR

Operator shall, throughout the term of this Agreement, at its own cost and expense, and without any expense to City, keep and maintain the Leased Premises, including all buildings and improvements of every kind which may be a part thereof, and all appurtenances thereto, including sidewalks or walkways adjacent thereto, overhangs, signs, canopies, fixtures, and other improvements in good, sanitary, and neat order, condition and repair, and except as specifically provided herein, restore and rehabilitate any improvements of any kind which may be destroyed or damaged by fire, casualty, or any other cause whatsoever. City shall not be obligated to make any repairs, replacements or renewals of any kind, nature, or description whatsoever to the Premises

or any buildings, walkways or improvements thereon, except as covered by insurance. Operator shall also comply with and abide by all Federal, State, local statutes, ordinances, laws, and regulations affecting the Premises, the improvements thereon or any activity on or in such Premises. The failure of the Operator to comply with all the obligations and responsibilities in this Section shall constitute a material breach of the Agreement.

Should Operator fail to perform any maintenance or repair for which it is responsible within thirty (30) days after written notice from the City, the City shall have the option to perform such maintenance or repair.

The City, in its sole discretion, may determine that such maintenance or repair must be completed immediately to correct any condition which is hazardous or which materially and adversely affects the operation of the Berths or the Port, in which event the City may conduct such maintenance and repair without giving notice to Operator. Operator shall immediately reimburse the City for the entire cost of maintenance or repair conducted by the City, including reasonable administrative costs of the City. Such maintenance or repair by the City shall in no event be construed as a waiver of any duty of the Operator under this Agreement and shall be in addition to any other right or remedy of the City.

39. DAMAGE OR DESTRUCTION TO BUILDINGS AND OTHER IMPROVEMENTS

Operator shall be responsible for any and all damage, other than normal wear and tear, incurred during the term hereof which arises out of or in connection with Operator's or its subcontractor's, its agents', employees', contractors' and invitees' use of the Berths or the Port. If Operator damages the Berths or the Port, Operator shall take immediate steps to mitigate the damage to prevent injury or further damage. Operator shall notify the City of such damage and Operator shall inform the City of the mitigating action it will take or has taken. Operator shall repair, or cause to be repaired, such damage after (i) receiving the City's approval of the design, plans and specifications, if any, through the building permit process, (ii) receiving approval from the City of the contractor, (iii)

obtaining all necessary permits, and (iv) complying with any other reasonable requirements of the City. The City may, in its discretion, repair any such damage at the sole cost and expense of the Operator and Operator shall pay such costs within thirty (30) days after notice.

The damage, destruction, or partial destruction of any building or other improvement which is a part of the Premises shall not release Operator from any obligation hereunder, except as hereinafter expressly provided, and in case of damage to or destruction of any such building or improvement, Operator shall, to the extent covered by insurance proceeds, promptly repair and restore the same to a condition as good or better than that which existed prior to such damage or destruction. Without limiting such obligations of Operator, it is agreed that the proceeds of any insurance covering such damage or destruction shall be made available to Operator for such repair or replacement.

40. UTILITIES

Operator shall fully and promptly pay or cause to be paid all charges for water, gas, heat, light, power, telephone service, and other public utilities of every kind used, rendered, supplied, or furnished to, on or in the Premises throughout the term hereof, and all other costs and expenses of every kind whatsoever of or in connection with the use, operation, and maintenance of the Premises and all activities conducted thereon, and City shall have no responsibility of any kind for any thereof, including interruption thereof. Any charges or expenses in connection with any alterations, additions, installations, or changes required or desired in connection with the supplying or using of such utilities or services or substitutes throughout the lease term shall be paid by Operator. Operator agrees to and hereby does agree to indemnify and defend City and saves City harmless against any liability or damages of any kind and any nature related to or resulting from the use of any utilities.

41. PREMISES TO BE FREE OF LIENS

Operator shall keep all of the Premises and every part thereof and all building and other improvements at any time located thereon free and clear of any and all mechanic's, materialmen's and other liens for or arising out of or in connection with the work or labor done, services performed, or materials or appliances used or furnished for or in connection with any operations of Operator. Any alterations, improvements, repairs or additions which Operator may make, permit or cause to be made, or any work or construction, by, for, or permitted by Operator on or about the Premises, or any obligations of any kind incurred by Operator, Operator shall at all times promptly and fully pay and discharge any and all claims on which any such lien may or could be based, and shall defend and indemnify City and protect all of the Premises and all buildings and improvements thereon against all such liens and claims of liens and suits or other proceedings pertaining thereto.

42. ADVANCE NOTICE BY OPERATOR OF CONSTRUCTION ACTIVITIES REQUIRED

Operator shall give City written notice no less than thirty (30) days in advance of the commencement of any construction, alterations, addition, improvement, or repair estimated to cost in excess of Ten Thousand Dollars (\$10,000.00) in order that City may post notices of City's non-responsibility.

43. OPERATOR/OPERATOR SHALL DEFEND AND INDEMNIFY CITY

City shall not be liable for any loss, injury, death, or damage to persons or property which at any time may be suffered or sustained by Operator/Operator or any person whatsoever may at any time be using or occupying or visiting the Premises or Berth IV or be in, on, or about the Leased Premises or Berth IV, whether such loss, injury, death, or damage, whether to person or property, shall be caused by or in any way result from or arise out of any act, omission, or negligence of Operator or of any occupant, subOperator, visitor, or user of any portion of the Leased Premises or Berth IV or shall result or be caused by any other matter or thing whether or not the same kind as

or of a different kind than the matters or things above set forth. Operator shall defend and indemnify City against all claims, actions, liability, loss, or damage of any kind and any nature, to person or property, including death, arising out or related in any way to this Agreement or arising out of or related in any way to any act or omission of the Operator, including actions or claims for equitable relief or injunctive relief, and including federal or state administrative proceeding, and including attorneys' fees and costs to defend the action or claim and any attorneys' fees and costs incurred by the City upon first notice to the City and until the Operator begins the defense of the City. Operator hereby waives all claims against City for damages to the building and improvements that are now on or hereafter placed or built on the Premises and to the property of Operator in, on, or about the Premises and for injuries to persons or property in or about the Premises from any cause or action of any kind and any nature arising at any time.

This obligation of the Operator to defend and indemnify the City extends and incorporates any and all claims of any kind and any nature, including death, arising out of or related in any way to Operator's or its subcontractors or agents' performance of its obligations under the Project Development described in Section 17.

This obligation to defend and indemnify shall be enforceable regardless of the negligence of the City or allegations of negligence of the City, and regardless of whether liability without fault is imposed or sought to be imposed on the City. This obligation to defend and indemnify includes all loss, damage, injury, liability or claims, including death, and including without limitation, loss predicated or alleged in whole or in part, upon active or passive negligence of the City or its agents.

Operator specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this defend and indemnification provision, even if the allegations are or may be groundless, false or fraudulent. Operator's obligation to defend shall arise at the time such claim is tendered to the Operator or its insurer by the City and shall continue at all times thereafter.

Operator shall ensure that any general contractor contract, subcontract, sublease, license, permit, subtenant, or any other user agreement with Operator contains the identical defend and indemnification provision in favor of the City.

The failure of Operator to comply with this any part of this provision shall constitute a material breach and default on the Agreement.

44. SURRENDER OF PROPERTY AT EXPIRATION OF LEASE

Operator shall pay the rent and all other sums required to be paid by Operator hereunder in the amounts, at the times, and in the manner herein provided, and shall keep and perform all the terms and conditions hereof on its part to be kept and performed, and, at the expiration or sooner termination of this agreement, peaceably and quietly quit and surrender to City the Premises in good order and condition subject to the other provisions of this agreement. In the event of the nonperformance by Operator of any of the covenants of the agreement undertaken herein, this agreement may be terminated as herein provided.

45. INSURANCE REQUIREMENTS

- a) Operator shall, at all times during the term of this agreement and at Operator's sole expense, but for the mutual benefit of City and Operator, keep all improvements which are now or hereafter a part of the Leased Premises, insured against loss or damage by Special Form perils subject to full insurable replacement cost of such improvements, with loss payable to Operator and Operator's lender as its interests may appear. Any loss adjustment shall require the written consent of City, Operator, and Operator's lender.
- b) Operator shall, at Operator's expense, but for the mutual benefit of City and Operator, maintain in effect throughout the terms of this agreement commercial general liability insurance or marine general liability covering the Premises and its appurtenances and the walkways fronting any building

or improvement thereon in the amount of \$10,000,000.00 each occurrence/\$10,000,000.00 aggregate bodily injury and property damage. If a commercial general liability form is used, it shall have no marine exclusions. In addition, either form shall have coverage extensions for: wharfinger's liability, terminal operations, stevedore's liability, marina keeper's liability and sudden and accidental pollution liability. These coverages extensions shall be in addition to blanket contractual liability, products and completed operations. Operator shall also maintain in effect throughout the terms of the lease \$10,000,000.00 each occurrence/\$20,000,000.00 aggregate umbrella liability insurance. Such insurance shall specifically insure Operator against all liability assumed by it hereunder, as well as liability imposed by law, and shall show City as an additional co-insured on all such policies.

- c) Upon the execution of this lease and annually thereafter on or before at least sixty (60) days before the anniversary date, Operator shall deliver to City a certificate of the general liability and umbrella insurance showing City as an additional co-insured along with the Endorsement to the policies by which such has been made effective.
- d) In the event the Operator seeks to enter any subleases for any part of the Premises, Operator shall provide certificates of insurance from each sub-operator within thirty (30) days of the City Council's approval of the sublease, which certificates shall show that the sub-operator has procured the same insurance as required in (a)-(c) above and that the City is named as an additional co-insured on the sub-operators policies.
- e) In the event that automobiles or other passenger vehicles are used in connection with Operator's operations and maintenance in the premises Operator shall maintain an automobile liability policy or policies insuring against liability for bodily injury, death, or damage to property, including loss of use thereof, and occurring in any way related to the use, loading or

unloading of any of Operator's automobiles or passenger vehicles (including owned, hired and no-owned vehicles) on and around Berths I, II, III and IV and associated areas. Coverage shall in an amount of not less than Five Million Dollars (\$5,000,000.00) for each accident.

- f) In accordance with Alaska law and the Longshore and Harbor Workers' Compensation Act, if applicable to the Operator's employees assigned to work at Berths I, II, III and IV, Operator shall maintain in force Workers' Compensation Insurance for all of Operator's employees, including coverage for US Longshore & Harbor Workers Act claims, if applicable. Operator shall also maintain employer's liability coverage, if required by Alaska or Federal Law (U.S. Department of Labor) in an amount of not less than One Million Dollars (\$1,000,000.00) per accident and One Million Dollars (\$1,000,000.00) per employee for disease. This obligation of the Operator extends to the Operator's sub-operators, tenants, subsidiaries, affiliates, joint venturers, and partner companies or entities and Operator shall be solely responsible to insure all such entities are in compliance with this provision.
- g) Operator shall maintain pollution liability insurance covering liability for bodily injury, property damage, including first-party clean-up cost, resulting from sudden and accidental release of pollutants on Berths I, II, III and IV and the Uplands or on water. The amount of such insurance shall be not less than Five Million Dollars (\$5,000,000.00) per occurrence or per claim. If coverage available is under a claims-made policy, the effective date shall be as of the execution of this agreement, and shall be maintained continuously in effect for two years after the termination date of the agreement. If coverage or insurer is replaced, continuity of coverage shall be maintained through extended endorsements and prior acts coverage on the replacement policy(s).
- h) In the event that Operator operates any watercraft, Operator shall maintain, or require to be maintained, protection and indemnity insurance (watercraft liability), including collision liability, with limits not less than Ten Million

And No/100 Dollars (\$10,000,000) each occurrence, or such lesser limits and deductible as are readily available in the insurance market at a commercially reasonable cost, which limits and deductible are subject to City approval, and including Jones Act, wreck removal, damages in “Rem” (the vessel), and U.S. Longshoremen’s & Harbor Workers’ coverages.

- i) Operator shall carry Errors & Omissions insurance in connection with the professional services to be provided under this Agreement with limits of not less than \$5,000,000 per occurrence, subject to an annual aggregate of \$5,000,000 in each account year.
- j) Operator shall obtain and maintain such other insurance as required by Law and by administrative agencies with jurisdiction over marine operations. In addition, Operator shall obtain such other insurance as is reasonably requested by City’s Risk Manager and is customary for other comparable Port tenants and uses permitted under this Agreement.
- k) Operator waives any right of action that they or their insurance carriers might have against the City for any loss, cost, damage, or expense (for purposes of this paragraph, collectively “Loss”) covered by any property insurance policy or policies maintained or required to be maintained pursuant to this agreement. Operator waives any right of action they and/or their insurance carrier(s) might have against the City for any Loss under this agreement, whether or not such loss is insured. Operator acknowledges, represents and warrants that Operator has reviewed the provisions of this agreement with their insurance company(s) and those companies have consented and approved the Waiver of Subrogation provisions of this Section. If requested by the City, Operator shall provide written acknowledgment from each insurer approving the waiver of subrogation provision stated herein.
- l) Any breach of the requirements of this Section constitutes a material breach of the agreement and City may, in its sole discretion, terminate the

agreement upon thirty (30) days' notice, and such breach cannot be cured except in the sole discretion of the City.

- m) The City shall be named an additional insured on all insurance policies except the Workers' Compensation policy, and Operator shall provide the City with Certificates from each insurer showing the City as an additional insured within thirty (30) days of the execution of this agreement. This Section and all the provisions in this section shall apply to all sub-operators, subtenants and licensees of the Operator.
- n) If any of the insurance required in this Section is provided under a claims-made form of policy, Operator shall maintain such coverage continuously throughout the Agreement Term and without lapse for a period of three years beyond the termination of this Agreement, to the effect that should occurrences during the Term give rise to claims made after termination of this agreement, such claims shall be covered by such claims-made policies.

46. GENERAL INSURANCE MATTERS

- a) All liability insurance policies required to be maintained by Operator shall contain a cross-liability clause, shall name as additional insureds "THE CITY OF KETCHIKAN AND ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS," and shall be primary to any other insurance available to the additional insureds with respect to claims arising under this Agreement, or related to any performance by Operator and shall provide that such insurance applies separately to each insured against whom complaint is made or suit is brought except with respect to the limits of the company's liability.
- b) All insurance policies required to be maintained by Operator shall be issued by an insurance company or companies reasonably acceptable to the City. Operator's compliance with this Section shall in no way relieve or decrease Operator's liability under this Agreement.

- c) All insurance policies required to be maintained by Operator shall provide for thirty (30) days prior written notice of cancellation or intended non-renewal or reduction in coverage to Operator and the City and shall be given in accordance with the notice provisions of Section 85 of this Agreement.
- d) Operator shall deliver to the City certificates of insurance in a form satisfactory to the City evidencing the coverages required in this Agreement, together with evidence of payment of premiums, on or before the Commencement Date of the Agreement and upon renewal of each policy not less than thirty (30) days before expiration of the term of the policy. Operator shall, upon the City's request, promptly furnish the City with a complete copy of any insurance policy required. Not more often than every year and upon not less than sixty (60) days prior written notice, the City may require Operator to increase the insurance limits set forth in Section 40 above if the City finds in its reasonable judgment that it is the general commercial practice in ports with similar numbers of cruise ship vessels and passengers per cruise ship season to carry insurance in amounts greater than those amounts carried by Operator with respect to risks comparable to those associated with the use of the Berths and the Port.

The failure of Operator to comply with any of the provisions related to insurance coverage shall constitute a material breach of this Agreement.

47. VOLUNTARY OR INVOLUNTARY ASSIGNMENT, TRANSFER OR SALE OF AGREEMENT INTEREST NOT ALLOWED

Neither this Agreement nor the leasehold estate of Operator nor any interest of Operator hereunder in the Premises or in a building or improvements thereon shall be subject to a voluntary or involuntary assignment, transfer, or sale, or to assignment, transfer, or sale by operation of law in any manner whatsoever (including through statutory merger or consolidation) and any such attempt to effect a voluntary or involuntary assignment, transfer, or sale shall be null and void and of no effect, unless

Operator obtains City's written consent. The term "statutory merger or consolidation" means a transfer of fifty-one percent (51%) or more of Operator's issued and outstanding stock to any person, partnership, or corporation.

48. PROHIBITION AGAINST TRANSFER

This Agreement is personal to Operator. No part of Berths I, II or III, or the Uplands, inclusive of the Leased Premises, or any interest in the Lease, or the Operator/Concession obligations as related to all four Berths, may be sold, assigned, pledged, transferred, mortgaged, or subleased by Operator, nor may a right of use of any portion of Berths I, II III and IV and the Uplands, be conveyed or conferred on any third party by Operator without the prior approval of the City Council, which consent may be withheld in the City's sole discretion.

49. CITY'S REMEDIES FOR OPERATOR'S DEFAULT

The failure to observe or perform any of the Operator's covenants, agreements or obligations in this Agreement, other than for the payment of rent or any other sum, shall constitute a default, if the failure is not cured within 60 days after City gives Operator written notice of the breach or failure, provided that if Operator is not able to cure the default due to acts of God, fire, or national emergency, then the cure period shall extend so long as Operator has commenced to cure such default within the initial 60 day period and Operator is diligently continuing to cure the default.

Notices given under this subsection shall specify the alleged breach or failure to perform and the applicable lease provisions and demand that Operator perform according to those provisions. No notice of a failure to perform shall be deemed a forfeiture or termination of this Agreement unless City so elects in the notice. In the event of any default of this Agreement by Operator, City, in addition to the other rights or remedies it may have, shall have the immediate right of reentry and may remove all persons and property from the Premises; such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of Operator. Should City elect

to reenter, as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, City may either terminate this Agreement or it may from time to time, without terminating this Agreement, relet the Premises or any part thereof for such term and terms (which may be for a term extending beyond the term of this Agreement) and at such rental or rentals and on such other terms and conditions as City, in the sole discretion of City, may deem advisable with the right to make alterations and repairs to the Premises. Notwithstanding any such reletting without termination, City may at any time thereafter elect to terminate the Agreement for such previous breach. Should City at any time terminate this Agreement for any breach by Operator, in addition to any other remedy it may have, City may recover from Operator all monetary damages incurred by reason of such breach, including the cost of recovering the Premises, and including the amount of rent and charges equivalent to rent reserved in this Agreement for the remainder of the stated term.

50. RECOVERY OF COSTS AND ATTORNEY FEES

If any actions at law or in equity shall be brought to enforce those provisions of this Agreement for the payment of any rent or for the remission of fees to the City pursuant to the City code as to passenger wharfage, dockage and other fees, under this Agreement or for the recovery of the possession of the Leased Premises, the prevailing party shall be entitled to recover from the other party, as part of the prevailing party's costs, reasonable actual attorney's fees, the amount of which shall be fixed by the court and shall be made a part of any judgment or decree rendered.

In any other action on account of any breach of, or to enforce or to interpret any of the covenants, terms, or conditions of this Agreement, Alaska Rule of Civil Procedure 82 shall govern the recovery of costs and attorneys' fees to the prevailing party.

51. VOLUNTARY SURRENDER OF AGREEMENT

The voluntary or other surrender of this Agreement by Operator or a mutual cancellation thereof, shall not work a merger, and shall, at the option of City, terminate

all or any existing subleases or subtenancies, or may, at the option of City, terminate all or any existing subleases or subtenancies.

52. IMPROVEMENTS AT LEASE END PROPERTY OF CITY

On termination of this lease for any cause, City shall become the owner of any building or improvements of any kind and any nature and regardless of when the improvements were constructed or placed on the Premises.

53. WAIVER OF CITY

The waiver of City or the failure of City to take action with respect to any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition, or subsequent breach of the same, or any other term, covenant, or condition therein contained. The subsequent acceptance of rent hereunder by City shall not be deemed to be a waiver of any preceding breach by Operator of any term, covenant or condition of this Agreement, other than the failure of Operator to pay the particular rental so accepted, regardless of City's knowledge of such preceding breach at the time of acceptance of such rent.

54. EMINENT DOMAIN

- a) ***Interest of Parties in Condemnation.*** In the event the leased land or any part thereof shall be taken for public purposes by condemnation as a result of any action or proceedings in eminent domain, or shall be transferred in lieu of condemnation to any authority entitled to exercise the power of eminent domain, the interests of City and Operator in the award or consideration for such transfer and the effect of the taking or transfer upon the lease shall be as provided in this section. Any taking by City of the leasehold interest of Operator in the tidelands under any improvements shall be deemed to be a taking of the improvements located on the portion of the tidelands.
- b) ***Total Taking.***

- (1) *Effect on Continuation of Lease.* In the event the entire leased land is taken and so transferred, this Lease and all the right, title, and interest thereunder of Operator shall cease on the date title to such land, so taken or transferred, vests in the commending authority.
- (2) *Allocation of Compensation.* Any compensation received or payable as a result of eminent domain proceedings or a transfer in lieu thereof constituting a total taking shall be divided as follows:
 - (i) City shall receive compensation for the land and improvements taken and any damages arising therefrom;
 - (ii) Operator shall receive compensation for the damages to its leasehold interest.

In the event the parties are unable to agree upon an equitable division of the award, such dispute shall be submitted to mediation as provided in Section 74.

- (3) *Restoration of Premises.* If there is a total taking, neither party has any obligation nor responsibility of restoring the leased land.

c) ***Partial Taking - Termination.***

- (1) *Effect on Continuation of Lease.* In the event the taking or transfer of part of the leased land leaves the remainder of the leased land in such location, or in such form, shape or reduced size, or so inaccessible as to be not effectively and practicably usable in the opinion of Operator or City for the purpose of operation thereon of Operator's business or that of its subOperator, then in such event, this Lease and all right, title, and interest thereunder shall cease on the date title to the land or the portion thereof so taken or transferred vest in the condemning authority, and the condemning authority enters into possession.
- (2) *Allocation of Award.* Any compensation received or receivable as a result of eminent domain proceedings or a transfer in lieu thereof

constituting a partial taking where this lease is terminated shall be divided in accordance with the provisions of paragraph b(2) hereof.

(3) *Restoration.* If there is a partial taking and the lease is terminated under paragraph c(1) hereof, neither party shall have any obligation nor responsibility of restoring the leased land.

d) ***Partial Taking - Continuation of Lease.***

(1) *Effect on Continuation of Lease.* In the event the taking or transfer of a part of the leased land leaves the remainder of the leased land in such location and in such form, shape, or size, or so accessible as to be effectively and practicably unusable in the opinion of the Operator and the City for the purpose of operation thereon of Operator's business or that of its subOperator, this Lease shall terminate and end as to the portion of the leased land so taken or transferred as of the date title to such portion vests in the condemning authority and the condemning authority enters into possession, but shall continue in full force and effect as to the portion of the leased land not so taken or transferred.

(2) *Allocation of Award.* Any compensation received or receivable as a result of eminent domain proceedings or a transfer in lieu thereof constituting a partial taking where this lease is not terminated shall be divided in accordance with the provisions of paragraph b(2)(a) and (b) hereinabove.

e) ***Restoration.*** If there is a partial taking and this Lease is not terminated, then any proceeds allocable to the Operator shall be appropriately utilized to reconstruct and restore the remainder of the leased land and all buildings or improvements to as complete an architectural unit and character as possible.

f) ***Voluntary Conveyance.*** A voluntary conveyance by City to a public utility, agency, or authority under threat of a taking under the power of eminent domain in lieu of formal proceedings shall be deemed a taking within the meaning of this Section.

55. HOLDOVER TENANCY

Any holding over after the expiration of the term of this Lease, with or without out the express, written consent of City, shall be construed to be a tenancy from month to month, at a monthly rental rate of One Hundred Fifty percent (150%) of that monthly rental required to be paid by Operator for the monthly period immediately prior to the expiration of the term hereof, and shall otherwise be on the terms and conditions herein specified, unless otherwise agreed to in writing by the City.

56. AGREEMENT BINDING ON PARTIES

The covenants and conditions herein contained shall, subject to the specific provisions as to assignment, transfer, and subletting, apply to and bind the successors, administrators, and assigns of all of the parties.

57. NONDISCRIMINATION

Use of the Premises will be nondiscriminatory to the end that no person shall, on the ground of race, color, religion, sex, age, disability, or national origin, be excluded from using the Premises.

58. SIGNS, AWNINGS AND CANOPIES

All signs, awnings, and canopies shall comply with City of Ketchikan ordinances, rules and regulations.

59. QUIET ENJOYMENT

City agrees that Operator, upon paying the rent and other charges herein provided for and performing all the covenants and conditions of this Agreement, shall lawfully and quietly occupy the leased property during the lease term without hindrance by City or any persons claiming under City, except as specifically provided for in this Lease.

60. COVENANT AGAINST WASTE

Operator covenants not to do or suffer any waste or damage, disfigurement or injury to the Premises.

61. HAZARDOUS WASTE RESPONSIBILITY

Operator represents and warrants that the Premises shall never be used for the generation, manufacture, storage, treatment, disposal, release, or threatened release of any hazardous waste or substance. The term “Hazardous Waste or Substance” means hazardous or toxic substances, materials or wastes, including but not limited to any substance, material or waste which is (i) petroleum; (ii) asbestos; (iii) polychlorinated biphenyls (PCBs); (iv) toxic or hazardous substances as defined in Alaska Statute 18.60.105 or 46.03.826, and associated regulations; (v) designated as a “Hazardous Substance” pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. ' 9601, et. seq.; (vi) designated as a “Hazardous Waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. ' 6901, et. seq.; (vii) designated as a “Hazardous Substance” under the Clean Water Act, 33 U.S.C. ' 1321, or listed pursuant to 33 U.S.C. § 11317; (viii) listed by the U.S. Department of Transportation at 49 C.F.R. Part 302; and (ix) any other substance, waste or material which is regulated as hazardous or dangerous by any Federal, State or local agency.

Operator agrees to hold City harmless and to indemnify and defend City and its council members, mayor, employees, volunteers, representatives, officers, consultants, attorneys and insurers against any and all claims and losses of any kind and any nature resulting from or relating to Operator’s breach of this Section, including, but not limited to, any loss, damage, liability, cost, or expense, including reasonable actual attorneys’ and consultants’ fees and expert fees, and including without limitation (i) any claims of third parties for personal injury, death, property damage, or other harm, and (ii) any response costs, costs of remedial, restoration or clean-up actions, fines imposed against or incurred by City arising out of or related to the presence of Hazardous Materials in, on, or under the Premises, or out of any such use of the Premises, or due to the incorporation of

such materials. This obligation to indemnify, defend and hold City harmless shall survive the term of this Agreement and include any claim, cause of action or administrative regulatory enforcement action in which Operator or City are determined or alleged to be a potentially responsible party. Operator for purposes of this Section includes any and all sub-Operators, subtenants, invitees, licensees and grantees of the Operator.

This obligation of the Operator to defend and indemnify the City extends and incorporates any and all claims of any kind and any nature, including death, arising out of or related in any way to Operator's or its subcontractors or agents' performance of its obligations under the Project Development described in Section 17.

Operator/Operator shall insure that any general contractor contract, subcontract, sublease, license, permit, subtenant, or any other user agreement with Operator contains the identical defend and indemnification provision in favor of the City.

The failure of Operator to comply with this any part of this provision shall constitute a material breach and default on this Agreement.

62. HAZARDOUS MATERIALS HANDLING

- a) *Requirements for Handling.* Neither Operator nor its Agents or Invitees, shall Handle in, on or about the Berths and the Port, any Hazardous Material without the prior written consent of the City. Handling of such Hazardous Material must be shown to be material to the Operator's business and will be handled in a manner which strictly complies with all Environmental Laws and will not materially increase the or other casualty to the Berths and Port. Notwithstanding the foregoing risk of fire, Operator may handle on the Berths janitorial or office supplies or materials in such limited amounts as are customarily used for general office purposes so long as such handling is at all times in full compliance with all Environmental Laws.
- b) *Operator Responsibility.* Operator shall not be compelled by the City to handle any Hazardous Materials of any kind. However, should Hazardous

Materials be introduced on the Berths for handling by the Operator, Operator shall handle all Hazardous Materials, including cargo, introduced on the Berths during the term of this Agreement in compliance with all applicable laws and regulations at its sole cost and expense. Operator shall protect its employees, passengers and the general public in accordance with all applicable laws on Hazardous Materials. The City may from time to time request and Operator shall be obligated to provide adequate information for the City to determine that the Hazardous Materials are handled in a manner that complies with all applicable laws. The City shall have the right to inspect the Berths for Hazardous Materials at reasonable times. In the event the City does inspect any handling of Hazardous Materials on the Berths, such inspection in no way relieves the Operator of its obligations and indemnifications under this Agreement.

- c) *Requirement to Remove.* Prior to termination of this Agreement, Operator, at its sole cost and expense, shall remove any and all Hazardous Materials introduced on the Berths or the Port by Operator, its agents, employees, contractors, licensees or invitees.

Prior to the termination of this Agreement, the City shall have the right, but not the obligation, to conduct at Operator's cost, an inspection and audit of the Berths for the purpose of identifying Hazardous Materials existing on the Berths at the time of termination and required to be removed by Operator. The City's failure to conduct an audit or to detect conditions if an audit is conducted shall not be deemed to be a release of any liability for environmental conditions subsequently determined to be Operator's responsibility under this Agreement. If Operator fails to comply with this provision, the City may perform the removal or remedial action at Operator's expense and Operator shall immediately reimburse the City.

- d) *Notification of Any Release of Discharge.* Operator shall immediately notify the City in writing of any release of discharge of any Hazardous Materials,

whether or not the release is quantities that would be required under the law requiring the reporting of such releases to a governmental or regulatory agency.

e) *Notification of Any Notice, Investigation or Claim.* Operator shall also notify the City in writing of, and shall contemporaneously provide the City with a copy of:

- (1) Any written notice of release of Hazardous Materials in or on the Berths or in the Port that is provided by Operator to a governmental or regulatory agency;
- (2) Any notice of a violation, or a potential or alleged violation, of any Environmental Law that is received by Operator from any governmental or regulatory agency;
- (3) Any inquiry, investigation, enforcement, cleanup, removal, or other action that is instituted or threatened by a governmental or regulatory agency against Operator and that relates to the release or discharge of Hazardous Materials on or from the Port;
- (4) Any claim that is instituted or threatened by any third party against Operator and that relates to any release or discharge of Hazardous Materials on or from the Port; and,
- (5) Any notice of the loss of any environmental operating permit by Operator.

f) *Failure to Comply.* Failure to comply with the provisions set forth in this Section shall constitute a material default under this Agreement. In the event of such default, the City shall have all rights available under this Agreement and at law or equity including, without limitation, the right to either:

- (1) Terminate the Agreement and collect damages the City incurs as a result of such default, including, without limitation, cleanup costs incurred by the City resulting from the cleanup of any Hazardous Materials released into the Port, soil, or groundwater; or

- (2) Require the cleanup of such Hazardous Materials at the Operator's expense while still enforcing the remaining terms and obligations of the Agreement.
- g) *Survival.* The obligations within this Section shall survive the expiration of or termination of this Agreement.

63. INDEMNIFICATION OF CITY BY OPERATOR

Operator agrees to indemnify, defend and save City and its council members, mayor, employees, volunteers, representatives, officers, consultants, attorneys and insurers harmless against and from any and all claims of any kind and any nature by or on behalf of any person, firm or corporation, arising from the conduct or management of or from any work or thing whatsoever done in or about the Leased Premises regardless of when such claims may have occurred, arose or accrued, which in any way relate to the Leased Premises, including, without limitation, in connection with Hazardous Materials. Operator also agrees to indemnify, defend and save City and its council members, mayor, employees, volunteers, representatives, officers, consultants, attorneys and insurers harmless against and from any and all claims of any kind and any nature arising during the Lease term from any condition of the Leased Premises. Operator also agrees to indemnify, defend and save harmless City from any and all claims of any kind and any nature arising from or related to any breach or default on the part of Operator in the performance of any covenant or agreement on the part of Operator to be performed, pursuant to the terms of this lease, or arising from or related to Operator's failure to comply with any law, ordinance or regulation of any governmental body, or arising from or related to any negligent act or omission of Operator or any of its agents, contractors, servants, employees, licensees, guests and subOperators and any agents, contractors, servants, employees, licenses and guess of its subOperators. Operator's obligation to defend, indemnify and save City harmless shall include Operator's payments of reasonable actual legal fees, litigation costs and expert fees, and costs incurred by City in

relation to any claim, including any administrative claim or proceeding, filed against it which is tendered to Operator to defend and indemnify City.

This obligation of the Operator to defend and indemnify the City extends and incorporates any and all claims of any kind and any nature, including death, arising out of or related in any way to Operator's or its subcontractors or agents' performance of its obligations under the Project Development described in Section 17. This obligation to defend and indemnify shall be enforceable regardless of the negligence of the City or allegations of negligence of the City, and regardless of whether liability without fault is imposed or sought to be imposed on the City. This obligation to defend and indemnify includes all loss, damage, injury, liability or claims, including death, and including without limitation, loss predicated or alleged in whole or in part, upon active or passive negligence of the City or its Agents.

Operator specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this defend and indemnification provision, even if the allegations are or may be groundless, false or fraudulent. Operator obligation to defend shall arise at the time such claim is tendered to the Operator or its insurer by the City and shall continue at all times thereafter.

The foregoing defend and indemnity obligation of Operator shall include without limitation, defense and indemnification from all loss and liability, including attorney's fees, court costs and all other litigation expenses. This defend and indemnification by Operator shall begin from the date Operator shall receive the first notice that any claim or demand is or may be made. The provisions of this Section shall survive the termination of this Agreement with respect to any damage, destruction, injury or death occurring prior to such termination.

64. BANKRUPTCY

If Operator enters into or is placed into any proceeding relating to bankruptcy, it shall give written notice via certified mail to the City within five days of initiation of the

proceedings. The notification shall include the date on which the proceeding was filed, the identity and location of the court, and any identification numbers related to the case and the attorney name and address representing the Operator.

65. NO REPRESENTATIONS BY CITY

Operator acknowledges that, except as expressly set forth in this Agreement, City has not made any warranty or representation regarding the truth, accuracy or completeness of any documents related to the Leased Premises, including but not limited to any federal or state documents, or any engineering, soil or other documents related to the Leased Premises. City expressly disclaims any and all liability for representations or warranties, express or implied, statements of fact and other matters contained in such information, or for omissions from any documents related to the Leased Premises, or in any other written or oral communications transmitted or made available to Operator. Operator shall rely solely upon its own investigation with respect to the Leased Premises, including, without limitation, the Premises' physical, environmental or economic condition, compliance or lack of compliance with any ordinance, order, permit or regulation or any other attribute or matter relating thereto. City has not undertaken any independent investigation as to the truth, accuracy or completeness of any documents related to the Leased Premises and to the extent any documents have been provided to the Operator, such documents have been provided solely as an accommodation to the Operator.

City expressly makes no representations or warranties of any kind as to whether the tidelands or Port contains any contamination or any environmental condition that may or could be the subject of investigation or remediation. Operator is solely responsible for completing any testing or inspections Operator deems necessary before entering this Agreement.

66. OPERATOR'S AGREEMENT TO DEFEND AND INDEMNIFY CITY REGARDING TESTS AND INSPECTIONS

Operator agrees to defend, indemnify and hold harmless the City, its council members, mayor, employees, consultants, attorneys, representatives and insurers, from and against any and all liens, claims, causes of action, damages, liabilities and expenses (including reasonable attorneys' fees) arising out of Operator's inspections or test of the Port conducted or performed at any time for any reason.

67. ENVIRONMENTAL STUDIES, APPRAISALS AND ENGINEERING REPORTS

Operator shall have a continuing obligation throughout the term of the Agreement, including any extensions, to provide to City copies of any and all appraisal reports, engineering reports, and all reports, tests or studies involving contamination of or other environmental concerns relating to the Premises, within thirty (30) days of the receipt of such reports, tests or studies. The breach of this provision by the Operator constitutes a material breach of the Agreement and City may immediately terminate the Agreement upon such breach in its sole discretion.

68. ACTIONS AGAINST OPERATOR

There shall exist no pending actions, suits, arbitrations, claims, attachments, proceedings, assignments for the benefit of creditors, insolvency, bankruptcy, reorganization or other proceedings, actually filed against the Operator that would (i) prevent Operator from performing its obligations under this Agreement or (ii) materially and adversely affect the operation or value of the Premises. This provision is applicable throughout the term of the Agreement and any extensions. Operator has a continuing obligation to advise the City in writing of any actions or proceedings as described in this Section that exist at any time during the term of this Agreement and any extensions. In the event of any such action or proceeding, City may terminate this Agreement in its sole discretion.

69. OPERATOR'S REPRESENTATIONS AND WARRANTIES

Operator represents and warrants that:

- a) Operator has been duly organized and is validly existing as a corporation in good standing in the State of [state] and is qualified to do business in the State of Alaska. Operator has the full right and authority and has obtained any and all consents required to enter into this Agreement and to consummate or cause to be consummated the transactions contemplated by this Agreement. This Agreement has been, and all of the documents to be delivered by Operator at the signing of the Agreement will be, authorized and properly executed and constitute, or will constitute, the valid and binding obligation of Operator, enforceable in accordance with their terms.
- b) At all times during the Agreement Term, and all extensions thereof, Operator shall (i) remain in good standing with the State of Alaska, (ii) timely pay all fees required by a company authorized to do business in Alaska, (iii) timely file all Biennial Reports, and (iv) fully disclose the name, address, percentage of ownership and management responsibilities of all persons that are admitted or withdraw as members or managers of Operator. In addition, Operator shall provide information specific to (i), (ii), and (iii) above, to the City within thirty (30) days after receipt of a written request.
- c) There is no agreement to which Operator is a party or to the Operator's knowledge binding on Operator or any of its subsidiaries, affiliates, or associated companies or entities, or parent company, which is in conflict with this Agreement. There is no action or proceeding pending or, to Operator's knowledge, threatened against Operator, or any of its subsidiaries, affiliates, or associated companies or entities, or parent company, which challenges or impairs Operator's ability to execute or perform its obligations under this Agreement.

- d) Under no circumstances will Operator attempt to hold any council member, mayor, employee, consultant, or representative of the City personally liable on account of any breach of any provision of this Agreement by the City.

70. DISCLAIMERS OF CITY

Except as expressly set forth in this Agreement, it is understood and agreed that City has not at any time made and is not now making, and specifically disclaims, any warranties or representations of any kind or character, express or implied, with respect to the Leased Premises, including, but not limited to, warranties or representations as to (i) matters of title, (ii) environmental matters relating to the Leased Premises or any portion thereof, including, without limitation, the presence of Hazardous Materials in, on, under or in the vicinity of the Leased Premises, (iii) geological conditions, including, without limitation, subsidence, subsurface conditions, water table, underground water reservoirs, limitations regarding the withdrawal of water, and geologic faults and the resulting damage of past and/or future faulting, (iv) whether, and to the extent to which the Leased Premises or any portion thereof is affected by any stream (surface or underground), body of water, wetlands, flood prone area, flood plain, floodway or special flood hazard, (v) drainage, (vi) soil conditions, including the existence of instability, past soil repairs, soil additions or conditions of soil fill, or susceptibility to landslides, or the sufficiency of any undershoring, (vii) the presence of endangered species or any environmentally sensitive or protected areas, (viii) zoning or building entitlements to which the Leased Premises or any portion thereof may be subject, (ix) the availability of any utilities to the Leased Premises or any portion thereof including, without limitation, water, sewage, gas and electric, (x) usages adjoining the Leased Premises, (xi) access to the Leased Premises or any portion thereof, (xii) the value, compliance with the plans and specifications, size, location, age, use, design, quality, description, suitability, structural integrity, operation, title to, or physical or financial condition of the Leased Premises or any portion thereof, or any income, expenses, charges, liens, encumbrances, rights or claims on or affecting or pertaining to the Leased Premises or any part thereof, (xiii) the condition or use of the

Leased Premises or compliance of the Leased Premises with any or all past, present or future federal, state or local ordinances, rules, regulations or laws, building, fire or zoning ordinances, codes or other similar laws, (xiv) the existence or non-existence of underground storage tanks, surface impoundments, or landfills, (xv) the merchantability of the Leased Premises or fitness of the Leased Premises for any particular purpose; (xvi) tax consequences, or (xviii) any other matter or thing with respect to the Leased Premises.

Operator has not relied and will not rely on, and City has not made and is not liable for or bound by any express or implied warranties, guarantees, statements, representations or information pertaining to the Leased Premises or relating thereto made or furnished by City or any council member, mayor, employee, consultant, representative or attorney of City, to whomever made or given, directly or indirectly, orally or in writing. Operator represents that it is a knowledgeable, experienced and sophisticated Operator of real estate and a knowledgeable, experienced and sophisticated business entity that is relying solely on its own expertise and that of Operator's consultants in entering this Agreement and shall make an independent verification of the accuracy of any documents and information provided by City. Operator acknowledges that it has not received any tax advice from City or City's employees, agents or consultants, assembly members, mayor or attorneys and City acknowledges that it is relying solely on its own employees, agents, and consultants for any tax advice or as to any tax consequences possibly associated with this Agreement. Operator will conduct such inspections and investigations of the Leased Premises as Operator deems necessary, including, but not limited to, the physical and environmental conditions thereof, and shall rely upon its own inspections and investigations in entering this Agreement. Upon signing of the Agreement, Operator shall assume the risk that adverse matters, including, but not limited to, adverse physical defects or adverse environmental, health or safety conditions, may not have been revealed by Operator's inspections and investigations.

71. RELEASE OF LIABILITY FOR CITY

Operator further hereby WAIVES any and all objections to or complaints regarding (including, but not limited to, federal, state and common law based actions), or any private right of action under, state and federal law to which the Leased Premises is or may be subject to, including, but not limited to, CERCLA, Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), as amended (“RCRA”), physical characteristics and existing conditions, including, without limitation, structural and geologic conditions, subsurface soil and water conditions and solid and hazardous waste and Hazardous Materials on, under, adjacent to or otherwise affecting the Leased Premises. Operator further hereby assumes the risk of changes in applicable laws and regulations relating to past, present and future environmental conditions on the Leased Premises and the risk that adverse physical characteristics and conditions, including, without limitation, the presence of Hazardous Materials or other contaminants, may not have been revealed by Operator’s investigation.

72. HAZARDOUS MATERIALS DEFINED

For purposes hereof, “Hazardous Materials” means “Hazardous Substance,” “Pollutant or Contaminant,” and “Petroleum” and “Natural Gas Liquids,” as those terms are defined or used in Section 101 of CERCLA, or any other substance regulated because of their effect or potential effect on public health and the environment, including, without limitation, PCBs, lead paint, asbestos, urea formaldehyde, radioactive materials, putrescible, and infection materials.

73. DISCLAIMERS, RELEASES, AND INDEMNIFICATIONS ARE MATERIAL TO THE AGREEMENT AND SURVIVE THROUGHOUT TERM OF THE AGREEMENT AND EXTENSIONS

Operator acknowledges and agrees that the disclaimers, releases, indemnifications and other agreements set forth herein are an integral and material part of this Agreement

and that City would not have agreed to Agreement the Premises to Operator without the disclaimers, releases, indemnifications and other agreements set forth above.

74. DISPUTE RESOLUTION – MEDIATION

The Parties agree to attempt in good faith to resolve all disputes arising out of this Agreement by discussion and negotiation before mediation. Any Party desiring mediation may begin the process by giving the other Party a written Request to Mediate, describing the issues involved and inviting the other Party to join with the calling Party to name a mutually agreeable mediator and a time frame for the mediation. The mediation shall be held in Ketchikan, Alaska. The contents of all discussions during the mediation shall be confidential and non-discoverable in subsequent litigation, if any, unless otherwise ordered by a court. If the Parties can agree upon a mutually acceptable resolution agreement, it shall be reduced to writing, signed by the Parties, and the dispute shall be at an end. If the result of the mediation is a recognition that the dispute cannot be successfully mediated, or if either Party refuses in writing to mediate or if within thirty (30) days of receipt of a written Request to Mediate the Parties have not named a mutually acceptable mediator and set a time frame for the mediation to occur, then any Party may initiate litigation exclusively in the Superior Court for the First Judicial District, State of Alaska, at Ketchikan, Alaska.

75. JURISDICTION AND VENUE

The Superior Court for the State of Alaska, First Judicial District at Ketchikan, Alaska, shall be the exclusive jurisdiction and venue for any action of any kind or any nature arising out of or related in any way to this Agreement or any use of the Leased Premises. This provision is binding upon any Lender of Operator and Operator shall obtain written prior approval of any Lender to this provision and such written approval shall be attached to this Agreement and any subsequent Lenders will be required to provide written approval within 30 days of assuming any rights or obligations with respect to the Operator or this Agreement.

76. NO MODIFICATIONS

This contract is a final complete expression of all terms and conditions of the Agreement between the parties and no modifications or amendments to this Agreement shall be enforceable unless made in writing and duly signed by the City and Operator. Operator specifically understands and agrees that no employee, representative, council member, the Mayor, consultant, representative, attorney or volunteer, has any actual or apparent authority to verbally modify any of the terms and conditions of this Agreement, or otherwise make any verbal promises or provide any verbal assurances of any kind to the Operator at any time.

77. INDEPENDENT CONTRACTOR

Operator agrees that it shall perform the services under this Agreement as an independent contractor to the City, and not as an officer, employee or agent of the City, and to utilize its professional skill and best efforts during the term of this Agreement for the performance of the work required and contemplated by this Agreement. Operator agrees to be solely responsible for all matters relating to payment of its employees, including compliance with Social Security, withholding and all other regulations governing such matters. Operator agrees to be responsible for its own acts and those of its affiliates, subsidiaries, parent companies, subordinates, representatives, consultants, employees and subcontractors, subtenants, and licensees during the term of this Agreement and any extensions and renewals.

78. HEADINGS

Section headings used in this Agreement are for convenience of reference only and shall not affect the construction of this Agreement.

79. REMEDIES CUMULATIVE

No remedy herein or otherwise conferred upon or reserved to City shall be considered exclusive of any other remedy, but the same shall be cumulative and shall be

in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute; and every power and remedy given by this Agreement to City may be exercised from time to time and as often as occasion may arise or as may be deemed expedient by City. No delay or omission of City to exercise any right or power arising from any default shall impair any such right or power, nor shall it be construed to be a waiver of any such default or an acquiescence therein.

80. WAIVER OF REMEDIES NOT TO BE INFERRED

No waiver of any breach of any of the covenants or conditions of this Agreement shall be construed to be a waiver of any other breach or to be a waiver of, acquiescence in, or consent to any further or succeeding breach of the same or similar covenant or condition.

81. ALASKA LAW

This Agreement shall be construed, interpreted and enforced in accordance with the laws of the State of Alaska.

82. TIME OF ESSENCE

Time is of the essence of this Agreement.

83. ENTIRETY AND AMENDMENTS

This Agreement embodies the entire agreement between the City and Operator. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought and only with approval of the City Council.

84. NO THIRD PARTY BENEFICIARIES

The provisions of this Agreement are and will be for the benefit of City and Operator only and are not for the benefit of any third party, and accordingly, no third party shall have the right to enforce the provisions of this Agreement.

85. MANNER OF MAILING NOTICES

In every case where under any of the provisions of this Agreement or in the opinion of either City or Operator, or otherwise, it shall or may become necessary or desirable to make or give any declaration or notice of any kind or deliver any document, it shall be sufficient if a copy of any such declaration, notice or document is personally delivered, or sent by courier service, or sent by registered or certified mail, postage prepaid, return receipt requested, properly addressed to City or Operator (as the case may be) at the following address or to such other addresses as the one party may have theretofore furnished to the other party in writing for the purpose of receiving notices:

To City: City of Ketchikan
 334 Front St.
 Ketchikan, AK 99901

To Operator:

Where service is by courier service (two (2) day service or better requested) it shall be deemed to have been effected at the expiration of a period of four (4) working days from the time the notice was delivered to the courier service. Facsimiles shall be deemed to have been received on the next following business day after the date of successful transmission, as shown by a sending party. E-mail communication shall not be considered sufficient or proper notice for any notice required by this Agreement.

86. NO CONSTRUCTION OF AGREEMENT FOR OR AGAINST A PARTY

This Agreement and associated documents have been the subject of discussion and negotiation between the parties with City and Operator having retained their own attorneys and consultants, such that neither this document nor any associated document shall, for the purpose of interpretation thereof, be construed in favor of or against any party, except that all provisions related to disclaimers, releases and defense and indemnification for City shall be construed in favor of the City.

87. COUNTERPARTS/ELECTRONIC COPIES

This Agreement may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all Parties to the counterparts had signed the same instrument. Delivery by electronic means of a copy of an original of this Agreement that was signed by a Party hereto shall constitute the delivery of that original Agreement as signed by that party.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the day and year first above written. The officers of the City of Ketchikan have executed this Agreement under authorization contained in City of Ketchikan Resolution [Number to be filled in] adopted by the City of Ketchikan on the ____ day of _____ 2020.

DATED this ____ day of _____, 2020.

CITY:
City of Ketchikan

By: _____
City Manager

And By: _____
City Clerk

OPERATOR:

By: _____
President

And By: _____
Chief Executive Officer

STATE OF ALASKA)

) ss.

FIRST JUDICIAL DISTRICT)

THIS CERTIFIES that on this _____ day of _____, 2020 before me, a Notary Public in and for the State of Alaska, personally appeared _____ and _____ to me known and known to me to be the persons whose names are subscribed to the foregoing instrument, and after being first duly sworn according to law they stated to me under oath that they are the City Manager and City Clerk, respectively, of the CITY OF KETCHIKAN, that they have been authorized by the City to execute the foregoing instrument on its behalf and they executed the same freely and voluntarily as the free act and deed of the City. WITNESS my hand and official seal the say and year in this certificate first above written.

Notary Public for Alaska _____

My commission expires: _____

STATE OF _____)

) ss.

COUNTY OF _____)

THIS CERTIFIES that on this ____ day of _____, 2020 before me, a Notary Public in and for the State of _____, personally appeared _____ and _____ to me known and known to me to be the persons whose names are subscribed to the foregoing instrument, and after being first duly sworn according to law they stated to me under oath that they are the President and Chief Executive Officer, of the _____, that they have been authorized by said company to execute the foregoing instrument on its behalf and they executed the same freely and voluntarily as the free act and deed of said company. WITNESS my hand and official seal the say and year in this certificate first above written.

Notary Public for _____

My commission expires: _____

SPECIMEN

APPENDIX K

SPECIMEN - PREFERENTIAL BERTHING AGREEMENT

SPECIMEN

-PORT OF KETCHIKAN PREFERENTIAL BERTHING AGREEMENT

This Port of Ketchikan Preferential Berthing Agreement is made and executed on this ____ day of _____, _____ by and between the CITY OF KETCHIKAN, 334 Front Street, Ketchikan, AK 99901, municipality organized and existing under the laws of the State of Alaska, (hereinafter referred to as “City”), and [insert name and address of ____] (hereinafter referred to by name or “Company”).

RECITALS

- A. The City intends to implement a comprehensive approach and plan of development and operation to manage cruise ship and cruise passenger growth to create an enjoyable experience for the cruise ship passenger guests while at the same time improving the experience and quality of life for residents that are impacted by the ships, passengers and vehicle traffic.
- B. The City currently operates the cruise facilities within the municipal boundaries consisting of Berths I, II, III and IV and the adjacent uplands and structures (the “Port”). Berths I, II and III are owned by the city, and Berth IV are operated by the City under a lease agreement with Ketchikan Dock Company.
- C. Company is desirous of obtaining preferential berthing rights for the use of certain City-owned berths (herein referred to as “Berths”) and in return it is willing to guarantee and pay the City for these rights.
- D. Company understands the City expects to make improvements and other construction as related to Berths I, II and III and possibly other Upland areas and that this Agreement is intended to provide the City with sufficient guaranteed funding to allow the City to make those improvements and finance the improvements through issuing a Port revenue bond, which will be guaranteed by

the remission to the City of the fees per the City code from Company under this Agreement.

The foregoing recitals are agreed and acknowledged by the parties to be true and correct and incorporated into this Agreement by reference,

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth herein, it is hereby agreed between City and Company as follows:

1. TERM OF AGREEMENT

The initial term of this Agreement shall be twenty years (20) years, commencing on the ___ day of _____, 2022 and ending on ___ day of _____, 2042. City may negotiate a one-time ten-year renewal of the Agreement in City’s discretion. In the event the City offers a renewal pursuant to this section, Agreement terms are subject to change based on changing environmental circumstances or concerns and reevaluation of other provisions, such as insurance. The examples of possible provisions that would be subject to change in this section are by way of example and not all inclusive or limiting in any way.

2. PROJECT DEVELOPMENT

The City intends to construct certain improvements as related to Berths I, II and III herein after referred to as the “Project”. The Project is divided into four parts defined as follows:

Part 1: Include certain marine works to improve Berths I, II and III. .

Part 2: Include the construction of or modification to Berth Uplands associated with increased efficiency and/or expanded berth capacity;

Part 3: The construction of a cathodic protection system for the existing Berths I and II.

The City will complete all of the components for Project Construction for Parts 1, 2 and 3 and on what dates as mutually agreed upon by the City and Company and all costs for the Project shall be borne solely by the City. All design, engineering, construction and permitting costs for Parts 1, 2 and 3 shall be solely the responsibility of the City through consultation with Company as necessary and appropriate.

Part 4: City's improvement projects outside of the Berths. The City is planning specific projects within and outside of the Agreement Premises that when implemented will mitigate impacts from the project and will improve passenger and resident experience. The City has established a minimum budget of \$35,000,000.

3. FINANCIAL GUARANTEES TO THE CITY

In return for the Preferential Berthing Rights identified in this Agreement, the Company shall guarantee the number of passengers and the equivalent Minimum Annual Financial Guarantees (MAG) as specified in Exhibit A. These Guarantees will extend for the duration of the Term.

Company shall remit to the City the guaranteed amount within thirty days of each vessel docking at the Berths.

4. FUTURE RATE INCREASES

In addition to the tariffs agreed and shown in Exhibit A, commencing in calendar year [insert year], the City may increase from time to time the Port rates, including the Wharfage Rate and/or the Dockage Rate, provided that no such increase shall be in excess of three percent (3%) per annum (on average over the Term of the Agreement) from the then-existing rate chargeable to the Company. Further, rates may not be increased more than one time in each twelve-month period. The City shall provide the Company no less twelve months prior written notice of any such increase. Pursuant to this provision, the City may implement rate increases less frequently than annually, in which case at the time it seeks to increase such rate(s) it will be entitled to an annual

increase equivalent to the cumulative amount of the increases that would have been permitted for the period of time between increases. As a way of example, if the City does not initiate an increase in the rates for 3 years, it shall be permitted an increase over the then-existing rate equal to 3% compounded annually for the 3 year period.

5. OTHER FEES

Other than the fees, tariffs, taxes or charges contemplated by this Agreement, or otherwise provided for in [to be filled in] in the amounts set forth therein (other than the rates as is being modified herein), the City shall impose any new fees, tariffs, taxes or charges on the Company during the Term of this Agreement for the use of the Berths by its vessels. It being understood that this provision shall not prevent the City from imposing (i) industry-wide security or other charges upon cruise lines calling at the Port in accordance with decisions taken by State or Federal Agencies with jurisdiction over the Port.

6. INDEMNIFICATION AND DEFEND THE CITY

Company shall defend and indemnify the City, its mayor, council members, employees, consultants, and attorneys in an action or claim of any kind, in court or with any administrative agency, in which action or claim alleges a violation of any federal or state constitutional provision, or any federal or state statute or regulation, as to the use of the monies paid to the City under Section 3 of this Agreement, including but not limited to the use of the monies for the Project outlined in Section 2 of this Agreement. This defend and indemnification provision is a material provision in this Agreement and the failure of the Company to fully comply with this provision constitutes a material breach and default of the Agreement and the City may terminate the Agreement immediately in its sole discretion.

7. FAILURE TO MAKE TIMELY PAYMENTS

All payments are due and shall be paid and received by the first (1st) of the month following thirty (30) days after the date each cruise ship docks at the at the following

address: City of Ketchikan, attn.: Finance Director, 334 Front Street, Ketchikan, Alaska 99901.

If the Company shall fail to make the payment or it is not received on or before the delinquency date, such unpaid payment shall bear interest at the rate equal to three percent (3%) above the prime rate from the date due to the date of actual payment. Prime rate shall be the interest rate published by the Wall Street Journal as the prime rate for commercial loans to its most credit-worthy customers. If the Wall Street Journal ceases to exist or ceases to quote a prime rate, then prime rate shall be the average of the prime rates published by the then largest, in terms of demand deposits, three (3) commercial banks headquartered in New York City, New York. In addition to such interest, Company acknowledges that the late payment by Company of any monthly payment of rent will cause City to incur certain costs and expenses not contemplated under this Agreement. The exact amount of City's additional costs is extremely difficult or impractical to fix. Such costs and expenses may include without limitation, administrative and collection costs, costs of borrowing funds and processing accounting expenses. Therefore, if any such payment of rent is not received by City from Company on or before the delinquency date, that being the tenth (10th) day of the month when due, Company shall, in addition to paying interest described above, immediately pay to City a late charge equal to four percent (4%) of the past due payment. City and Company agree that this late charge represents a reasonable estimate of such costs and expenses and is fair compensation to City for its loss suffered by such late payment by Company. Acceptance of this late charge shall not constitute a waiver by City of Company's default with respect to such nonpayment by Company. This provision for late payment charge shall not prevent City from exercising all other rights and remedies available to City under this Agreement.

The failure to make payment when due by Company, if the failure to pay shall not be cured within 30 days after the due date, shall be a material default and breach of the Agreement. City may, in its sole discretion, exercise any rights and remedies available to City.

8. PREFERENTIAL BERTHING

Beginning [insert date] and throughout the Term of this Agreement, City agrees to provide Preferential Berthing Rights to Company [to be filled in, herein referred to as “Berths”]an the Port of Ketchikan as negotiated and mutually agreed to by the City and the Company. These rights shall be provided as follow:

[to be filled in]

9. PREFERENTIAL BERTH ALLOCATION PROCEDURES

On or before [insert date], Company will submit to the City its annual berth requirements twenty-fourth months in advance of the cruise ship season for which Preferential Berthing will apply, [insert dates] and thereafter, on or before [insert dates] during the Term of the Agreement (its “Cruise Schedule”). All preferential berth requests submitted by [insert date] in the manner provided herein shall be granted in accordance with Company’s Preferential Berthing Rights conferred by this Agreement and will not be changed unless so desired by Company or as agreed upon by the parties.

Following two (2) weeks after the City confirms the berth allocations, the Company relinquishes any preferential rights provided by this Agreement for any of the Port facilities for the entire cruise season, and the City will be free to allocate berths to any other user.

10. EXCLUSIVITY

During the Term of this Agreement, the Company shall not be permitted to dock any of its vessels at or use any other port in the City of Ketchikan, Borough of Ketchikan or within a radius of **30.0** miles of the City, except (i) by mutual agreement between the City and the Company or (ii) if the City cannot provide available berths at its Port.

11. REPORTING

Commencing on the 15th day of the month following the month in which the first cruise vessels begin use the Berths pursuant to the terms of this Agreement, and on the

15th day of each month thereafter during the term of the Agreement and the month following the termination of the Agreement, Company shall submit the passenger manifests for all cruise ship vessels using the Port of Ketchikan in accordance with the preferential berthing rights in this Agreement.

12. ENVIRONMENTAL REMEDIATION

In the event of a violation of applicable Environmental Laws by the Company, or a Hazardous Substance release caused by Company's use or occupancy of the Berths for which Company is responsible under this Agreement or otherwise responsible under applicable federal or state laws, Company shall promptly undertake and diligently pursue all acts necessary or appropriate to correct the violation or investigate, contain, and stop the Hazardous Substance release and if, required by Environmental Laws or this Agreement, remove the Hazardous Substance at Company's sole expense. The payment of the financial guarantees due under this Agreement, shall not be reduced or otherwise abated, during any such remediation period, and Company hereby waives any abatement rights to which it might otherwise be entitled pursuant to this Agreement, applicable statutory or common law.

13. NOTICE OF VIOLATION

Company shall promptly notify the City upon: (a) receipt of oral or written notice from a regulatory agency of an alleged or actual violation of any applicable Environmental Laws related to the Berths or to Company's use of Berths I, II, and III; and (b) discovery of any material release of a Hazardous Substance that has taken place or has come to be located at the soil or groundwater on or beneath the Berths excepting spills or petroleum products entirely contained within or on impervious asphalt or concrete surfaces that consist of quantities that do not require reporting to a regulatory agency under Environmental Laws.

14. COMPLIANCE WITH LAWS AFFECTING USE OF THE BERTHS

During the term of this Agreement, Company at Company's sole expense shall comply with all applicable local, State and Federal Laws, regulations and requirements, all applicable federal maritime and security laws, regulations, and environmental laws that may relate to the Company's use, possession and exercise of the Berths under the terms of this Agreement, or which affect the Berths and tidelands ("Laws"). Company shall likewise observe and comply with the requirements of all policies of public liability, fire and other policies of insurance at any time in force with respect to the Berths and tidelands. Company shall not commit, or allow to be committed, any waste, destruction or nuisance on or to the Berths or tidelands. Company shall promptly provide the City with copies of all notices and communications from any government entity, agency or regulatory authority or body which relate to Company's noncompliance or alleged noncompliance with any Laws relating to its operations and use of any portion of the Berths or tidelands.

15. COMPANY SHALL DEFEND AND INDEMNIFY CITY

City shall not be liable for any loss, injury, death, or damage to persons or property which at any time may be suffered or sustained by any person whosoever may at any time be using or occupying or visiting the Berths as part of or associated with any exercise of the Preferential Berthing rights provided Company in this Agreement, whether such loss, injury, death, or damage, whether to person or property, shall be caused by or in any way result from or arise out of any act, omission, or negligence of Company or of any occupant, visitor, guest or user of any portion of the Berths or shall result or be caused by any other matter or thing whether or not the same kind as or of a different kind than the matters or things above set forth. Company shall defend and indemnify City against all claims, actions, liability, loss, or damage of any kind and any nature, to person or property, including death, arising out or related in any way to this Agreement or arising out of or related in any way to any act or omission of the Company, including actions or claims for equitable relief, and including federal or state administrative proceeding, and including attorneys' fees and costs to defend the action or

claim and any attorneys' fees and costs incurred by the City upon first notice to the City and until the Company begins the defense of the City. Company hereby waives all claims against City for injuries to persons or property in or about the Berths from any cause or action of any kind and any nature arising at any time.

This obligation to defend and indemnify shall be enforceable regardless of allegations of negligence of the City, and regardless of whether liability without fault is imposed or sought to be imposed on the City. This obligation to defend and indemnify includes all loss, damage, injury, liability or claims, including death, and including without limitation, loss predicated or alleged in whole or in part, upon active or passive negligence of the City or its agents.

Company specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this defend and indemnification provision, even if the allegations are or may be groundless, false or fraudulent. Company obligation to defend shall arise at the time such claim is tendered to the Company or its insurer by the City and shall continue at all times thereafter.

The failure of Company to comply with this any part of this provision shall constitute a material breach and default on the Agreement.

16. VOLUNTARY OR INVOLUNTARY ASSIGNMENT, TRANSFER OR SALE OF THIS AGREEMENT IS NOT ALLOWED

This Agreement nor any rights under this Agreement shall be subject to a voluntary or involuntary assignment, transfer, or sale, or to assignment, transfer, or sale by operation of law in any manner whatsoever (including through statutory merger or consolidation) and any such attempt to effect a voluntary or involuntary assignment, transfer, or sale shall be null and void and of no effect, unless Company obtains City's written consent. The term "statutory merger or consolidation" means a transfer of fifty-one percent (51%) or more of Company's issued and outstanding stock to any person, partnership, or corporation.

17. PROHIBITION AGAINST TRANSFER

This Agreement is personal to Company. This Agreement or any interest in this Agreement shall not be sold, assigned, pledged, transferred, mortgaged by Company without the prior approval of the City Council, which consent may be withheld in the City's sole discretion.

18. FORCE MAJEURE

Company may be excused from performing any of its respective duties, obligations or undertakings under this Agreement (including but not limited to monetary or otherwise) in the event and so long as the performance of such duty, obligation or undertaking regarding cruise operations in the City is unreasonably prevented or delayed by an Act of God, epidemic, fire, tornado, earthquake, flood, explosion, action of civil commotion or terrorism, sabotage, condemnations, governmental restriction, order of civil or military or naval authorities, embargo, disputes, or impossibility of obtaining materials critical and non-substitutable to the Project .

In the event of an occurrence as described above, Company will be entitled to an extension of this Agreement equal to the amount of time of the delay or prevented duties , and will give written notice to the City as soon as may be possible after the occurrence causing such delay of cruise operations in the City, asserting its claim of right to such extension and the reasons therefore.

19. CITY'S REMEDIES FOR COMPANY'S DEFAULT

The failure to observe or perform any of the Company's covenants, agreements or obligations in this Agreement shall constitute a default, if the failure is not cured within 60 days after City gives Company written notice of the breach or failure, provided that if Company is not able to cure the default due to acts of God, fire, or national emergency, then the cure period shall extend so long as Company has commenced to cure such

default within the initial 60 day period and Company is diligently continuing to cure the default.

Notices given under this subsection shall specify the alleged breach or failure to perform and the applicable Agreement provisions and demand that Company perform according to those provisions. No notice of a failure to perform shall be deemed a forfeiture or termination of this Agreement unless City so elects in the notice. Should City elect to reenter, as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, City may either terminate this Agreement or it may from time to time, without terminating this Agreement, enter a new agreement for preferential berthing at the Berths for such term and conditions as City, in the sole discretion of City. City may at any time thereafter elect to terminate the Agreement for such previous breach. Should City at any time terminate this Agreement for any breach by Company, in addition to any other remedy it may have, City may recover from Company all monetary damages incurred by reason of such breach, including the cost of recovering the Berths, and including the amount of financial guarantees and charges equivalent to the financial guaranties reserved in this Agreement for the remainder of the stated term.

20. RECOVERY OF COSTS AND ATTORNEYS' FEES

If any actions at law or in equity shall be brought to enforce those provisions of this Agreement for the payment of any financial guarantees under this Agreement or for the recovery of the possession of the Agreement Premises, the prevailing party shall be entitled to recover from the other party, as part of the prevailing party's costs, reasonable actual attorney's fees, the amount of which shall be fixed by the court and shall be made a part of any judgment or decree rendered.

In any other action on account of any breach of, or to enforce or to interpret any of the covenants, terms, or conditions of this Agreement, Alaska Rule of Civil Procedure 82 shall govern the recovery of costs and attorneys' fees to the prevailing party.

21. WAIVER OF CITY

The waiver of the City or the failure of the City to take action with respect to any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition, or subsequent breach of the same, or any other term, covenant, or condition therein contained. The subsequent acceptance of payment of the financial guarantees hereunder by the City shall not be deemed to be a waiver of any preceding breach by Company of any term, covenant or condition of this Agreement.

22. COVENANT AGAINST WASTE

Company covenants not to do or suffer any waste or damage, disfigurement or injury to the Berths or the Port.

23. HAZARDOUS WASTE RESPONSIBILITY

Company represents and warrants that the Berths shall never be used for the generation, manufacture, storage, treatment, disposal, release or threatened release of any hazardous waste or substance. The term “Hazardous Waste or Substance” means hazardous or toxic substances, materials or wastes, including but not limited to any substance, material or waste which is (i) petroleum; (ii) asbestos; (iii) polychlorinated biphenyls (PCBs); (iv) toxic or hazardous substances as defined in Alaska Statute 18.60.105 or 46.03.826, and associated regulations; (v) designated as a “Hazardous Substance” pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. ' 9601, et. seq.; (vi) designated as a “Hazardous Waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. ' 6901, et. seq.; (vii) designated as a “Hazardous Substance” under the Clean Water Act, 33 U.S.C. ' 1321, or listed pursuant to 33 U.S.C. § 11317; (viii) listed by the U.S. Department of Transportation at 49 C.F.R. Part 302; and (ix) any other substance, waste or material which is regulated as hazardous or dangerous by any Federal, State or local agency.

Company agrees to hold City harmless and to indemnify and defend City and its council members, mayor, employees, volunteers, representatives, officers, consultants, attorneys and insurers against any and all claims and losses of any kind and any nature resulting from or relating to Company's breach of this Section, including, but not limited to, any loss, damage, liability, cost, or expense, including reasonable actual attorneys' and consultants' fees and expert fees, and including without limitation (i) any claims of third parties for personal injury, death, property damage, or other harm, and (ii) any response costs, costs of remedial, restoration or clean-up actions, fines imposed against or incurred by City arising out of or related to the presence of Hazardous Materials in, on, or under the Berths, or out of any such use of the Berths, or due to the incorporation of such materials. This obligation to indemnify, defend and hold City harmless shall survive the term of this Agreement and include any claim, cause of action or administrative regulatory enforcement action in which Company or City are determined or alleged to be a potentially responsible party. Company for purposes of this Section includes any and all subtenants, invitees, guests, licensees and grantees of the Company.

24. HAZARDOUS MATERIALS HANDLING

- a) *Notification of Any Release of Discharge.* Company shall immediately notify the City in writing of any release of discharge of any Hazardous Materials, whether or not the release is quantities that would be required under the law requiring the reporting of such release to a governmental or regulatory agency.
- b) *Notification of Any Notice, Investigation or Claim.* Company shall also notify the City in writing of, and shall contemporaneously provide the City with a copy of:
 - (1) Any written notice of release of Hazardous Materials in or on the Berths or in the Port that is provided by Company to a governmental or regulatory agency;

- (2) Any notice of a violation, or a potential or alleged violation, of any Environmental Law that is received by Company from any governmental or regulatory agency;
 - (3) Any inquiry, investigation, enforcement, cleanup, removal, or other action that is instituted or threatened by a governmental or regulatory agency against Company and that relates to the release or discharge of Hazardous Materials on or from the Port;
 - (4) Any claim that is instituted or threatened by any third party against Company and that relates to any release or discharge of Hazardous Materials on or from the Port; and,
 - (5) Any notice of the loss of any environmental operating permit by Company.
- f) *Failure to Comply.* Failure to comply with the provisions set forth in this Section shall constitute a material default under this Agreement. In the event of such default, the City shall have all rights available under this Agreement and at law or equity including, without limitation, the right to either:
- (1) Terminate the Agreement and collect damages the City incurs as a result of such default, including, without limitation, cleanup costs incurred by the City resulting from the cleanup of any Hazardous Materials released into the Port, soil, or groundwater; or
 - (2) Require the cleanup of such Hazardous Materials at the Company's expense while still enforcing the remaining terms and obligations of the Agreement.
- g) *Survival.* The obligations within this Section shall survive the expiration of or termination of this Agreement.

25. INDEMNIFICATION OF CITY BY COMPANY: HAZARDOUS MATERIALS

Company agrees to indemnify, defend and save City and its council members, mayor, employees, volunteers, representatives, officers, consultants, attorneys and insurers harmless against and from any and all claims of any kind and any nature by or on behalf of any person, firm or corporation, arising from the use of the Berths by Company during a Preferential Berthing use, regardless of when such claims may have occurred, arose or accrued, which in any way relate to the Company's use of the Berths including, without limitation, in connection with Hazardous Materials. Company also agrees to indemnify, defend and save harmless City from any and all claims of any kind and any nature arising from or related to any breach or default on the part of Company in the performance of any covenant or agreement on the part of Company to be performed, pursuant to the terms of this Agreement, or arising from or related to Company's failure to comply with any law, ordinance or regulation of any governmental body, or arising from or related to any negligent act or omission of Company or any of its agents, contractors, servants, employees, licensees, guests and any agents, contractors, servants, employees, licenses and guests. Company's obligation to defend, indemnify and save City harmless shall include Company's payments of reasonable actual legal fees, litigation costs and expert fees, and costs incurred by City in relation to any claim, including any administrative claim or proceeding, filed against it which is tendered to Company to defend and indemnify City.

This obligation to defend and indemnify shall be enforceable regardless of allegations of negligence of the City, and regardless of whether liability without fault is imposed or sought to be imposed on the City. This obligation to defend and indemnify includes all loss, damage, injury, liability or claims, including death, and including without limitation, loss predicated or alleged in whole or in part, upon active or passive negligence of the City or its Agents.

Company specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim which actually or potentially falls within this defend and indemnification provision, even if the allegations are or may be groundless, false or fraudulent. Company obligation to defend shall arise at the time

such claim is tendered to the Company or its insurer by the City and shall continue at all times thereafter.

The foregoing defend and indemnity obligation of Company shall include without limitation, defense and indemnification from all loss and liability, including attorney's fees, court costs and all other litigation expenses. This defend and indemnification by Company shall begin from the date Company shall receive the first notice that any claim or demand is or may be made. The provisions of this Section shall survive the termination of this Agreement with respect to any damage, destruction, injury or death occurring prior to such termination.

26. BANKRUPTCY

If Company enters into or is placed into any proceeding relating to bankruptcy, it shall give written notice via certified mail to the City within five days of initiation of the proceedings. The notification shall include the date on which the proceeding was filed, the identity and location of the court, and any identification numbers related to the case and the attorney name and address representing the Company.

27. NO REPRESENTATIONS BY CITY

Company acknowledges that, except as expressly set forth in this Agreement, City has not made any warranty or representation regarding the truth, accuracy or completeness of any documents related to the Berths, including but not limited to any federal or state documents, or any engineering, soil or other documents related to the Berths. City expressly disclaims any and all liability for representations or warranties, express or implied, statements of fact and other matters contained in such information, or for omissions from any documents related to the Agreement Premises, or in any other written or oral communications transmitted or made available to Company. Company shall rely solely upon its own investigation with respect to the Berths, including, without limitation, the Berths' physical, environmental or economic condition, compliance or lack of compliance with any ordinance, order, permit or regulation or any other attribute

or matter relating thereto. City has not undertaken any independent investigation as to the truth, accuracy or completeness of any documents related to the Berths and to the extent any documents have been provided to the Company, such documents have been provided solely as an accommodation to the Company.

City expressly makes no representations or warranties of any kind as to whether the tidelands or Port contains any contamination or any environmental condition that may or could be the subject of investigation or remediation. Company is solely responsible for completing any testing or inspections Company deems necessary before entering this Agreement.

28. ACTIONS AGAINST COMPANY

There shall exist no pending actions, suits, arbitrations, claims, attachments, proceedings, assignments for the benefit of creditors, insolvency, bankruptcy, reorganization or other proceedings, actually filed against the Company that would (i) prevent Company from performing its obligations under this Agreement or (ii) materially and adversely affect the operation or value of the Agreement Premises. This provision is applicable throughout the term of the Agreement and any extensions. Company has a continuing obligation to advise the City in writing of any actions or proceedings as described in this Section that exist at any time during the term of this Agreement and any extensions. In the event of any such action or proceeding, City may terminate this Agreement in its sole discretion.

29. TERMINATION BY COMPANY

- a. **Termination for Casualty.** The Company may terminate this Agreement if the Berths (or any significant portion thereof) are made inaccessible, damaged or destroyed due to fire, act(s) of terrorism or other casualty, and the City does not promptly repair or remedy the damage or provide reasonably suitable temporary alternative accommodations within a reasonable period of time to be mutually agreed by the Parties. During the

time that the Port is not available for use, and prior to any termination by the Company as permitted above, the Company will not be responsible for complying with the provisions of this Agreement. Notwithstanding anything to the contrary contained in the foregoing sentence, the Company agrees that if the City provides reasonably suitable alternative accommodations in a timely manner, the Company cannot terminate the Agreement and will remain responsible for complying with the foregoing sections of this Agreement, subject to the Parties' good faith negotiation of reasonable discounts necessitated by such alternative accommodations. If either the Berths are not available for more than six (6) months, in lieu of the Company's termination right set forth above, the Parties may mutually agree that the Term of this Agreement may be extended by a period of time equal to the period of time that the Berths remains unavailable for use.

- b. **Termination For Failure to Construct** – If the City is unable to obtain required permits, approvals, or licenses for the construction of Part 1 of the Project, or the City is unable to secure funds for the construction of Part 1 of the Project, then the Company may terminate this Agreement after giving the City sixty (60) days written notice and opportunity to cure, terminate this Agreement. If the City shall cure any such failure within such sixty (60) day period then the Company's notice of termination shall be rendered ineffective, and this Agreement shall continue in full force and effect.

30. COMPANY'S REPRESENTATIONS AND WARRANTIES

Company represents and warrants that:

- a) Company has been duly organized and is validly existing as a corporation in good standing in the State of [state] and is qualified to do business in the State of Alaska. Company has the full right and authority and has obtained any and all consents required to enter into this Agreement and to

consummate or cause to be consummated the transactions contemplated by this Agreement. This Agreement has been, and all of the documents to be delivered by Company at the signing of the Agreement will be, authorized and properly executed and constitute, or will constitute, the valid and binding obligation of Company, enforceable in accordance with their terms.

- b) At all times during the Agreement Term, and all extensions thereof, Company shall (i) remain in good standing with the State of Alaska, (ii) timely pay all fees required by a company authorized to do business in Alaska, (iii) timely file all Biennial Reports, and (iv) fully disclose the name, address, percentage of ownership and management responsibilities of all persons that are admitted or withdraw as members or managers of Company. In addition, Company shall provide information specific to (i), (ii), and (iii) above, to the City within thirty (30) days after receipt of a written request.
- c) There is no agreement to which Company is a party or to the Company's knowledge binding on Company or any of its subsidiaries, affiliates, or associated companies or entities, or parent company, which is in conflict with this Agreement. There is no action or proceeding pending or, to Company's knowledge, threatened against Company, or any of its subsidiaries, affiliates, or associated companies or entities, or parent company, which challenges or impairs Company's ability to execute or perform its obligations under this Agreement.
- d) Under no circumstances will Company attempt to hold any council member, mayor, employee, consultant, or representative of the City personally liable on account of any breach of any provision of this Agreement by the City.

31. DISCLAIMERS OF CITY

Except as expressly set forth in this Agreement, it is understood and agreed that City has not at any time made and is not now making, and specifically disclaims, any warranties or representations of any kind or character, express or implied, with respect to

the Berths, including, but not limited to, warranties or representations as to (i) matters of title, (ii) environmental matters relating to the Berths or any portion thereof, including, without limitation, the presence of Hazardous Materials in, on, under or in the vicinity of the Berths (iii) geological conditions, including, without limitation, subsidence, subsurface conditions, water table, underground water reservoirs, limitations regarding the withdrawal of water, and geologic faults and the resulting damage of past and/or future faulting, (iv) whether, and to the extent to which the Berths or any portion thereof is affected by any stream (surface or underground), body of water, wetlands, flood prone area, flood plain, floodway or special flood hazard, (v) drainage, (vi) soil conditions, including the existence of instability, past soil repairs, soil additions or conditions of soil fill, or susceptibility to landslides, or the sufficiency of any undershoring, (vii) the presence of endangered species or any environmentally sensitive or protected areas, (viii) zoning or building entitlements to which the Berths or any portion thereof may be subject, (ix) the availability of any utilities to the Berths or any portion thereof including, without limitation, water, sewage, gas and electric, (x) usages adjoining the Berths, (xi) access to the Berths or any portion thereof, (xii) the value, compliance with the plans and specifications, size, location, age, use, design, quality, description, suitability, structural integrity, operation, title to, or physical or financial condition of the Berths or any portion thereof, or any income, expenses, charges, liens, encumbrances, rights or claims on or affecting or pertaining to the Berths or any part thereof, (xiii) the condition or use of the Berths or Port or compliance of the Berths or Port with any or all past, present or future federal, state or local ordinances, rules, regulations or laws, building, fire or zoning ordinances, codes or other similar laws, (xiv) the existence or non-existence of underground storage tanks, surface impoundments, or landfills, (xv) the merchantability of the Berths or fitness of the Berths for any particular purpose; (xvi) tax consequences, or (xviii) any other matter or thing with respect to the Berths.

Company has not relied and will not rely on, and City has not made and is not liable for or bound by any express or implied warranties, guarantees, statements, representations or information pertaining to the Berths or relating thereto made or

furnished by City or any council member, mayor, employee, consultant, representative or attorney of City, to whomever made or given, directly or indirectly, orally or in writing. Company represents that it is a knowledgeable, experienced and sophisticated Company of real estate and a knowledgeable, experienced and sophisticated business entity that is relying solely on its own expertise and that of Company's consultants in entering this Agreement and shall make an independent verification of the accuracy of any documents and information provided by City. Company acknowledges that it has not received any tax advice from City or City's employees, agents or consultants, assembly members, mayor or attorneys and City acknowledges that it is relying solely on its own employees, agents, and consultants for any tax advice or as to any tax consequences possibly associated with this Agreement. Company will conduct such inspections and investigations of the Berths as Company deems necessary, including, but not limited to, the physical and environmental conditions thereof, and shall rely upon its own inspections and investigations in entering this Agreement. Upon signing of the Agreement, Company shall assume the risk that adverse matters, including, but not limited to, adverse physical defects or adverse environmental, health or safety conditions, may not have been revealed by Company's inspections and investigations.

32. RELEASE OF LIABILITY FOR CITY

Company further hereby WAIVES any and all objections to or complaints regarding (including, but not limited to, federal, state and common law based actions), or any private right of action under, state and federal law to which the Berths or Port are or may be subject to, including, but not limited to, CERCLA, Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), as amended ("RCRA"), physical characteristics and existing conditions, including, without limitation, structural and geologic conditions, subsurface soil and water conditions and solid and hazardous waste and Hazardous Materials on, under, adjacent to or otherwise affecting the Berths or the Port. Company further hereby assumes the risk of changes in applicable laws and regulations relating to past, present and future environmental conditions on the Berths and the risk that adverse

physical characteristics and conditions, including, without limitation, the presence of Hazardous Materials or other contaminants, may not have been revealed by Company's investigation.

33. DISCLAIMERS, RELEASES, AND INDEMNIFICATIONS ARE MATERIAL TO THE AGREEMENT AND SURVIVE THROUGHOUT TERM OF THE AGREEMENT AND EXTENSIONS

Company acknowledges and agrees that the disclaimers, releases, indemnifications and other agreements set forth herein are an integral and material part of this Agreement and that City would not have agreed to this Agreement without the disclaimers, releases, indemnifications and other agreements set forth above.

34. DISPUTE RESOLUTION – MEDIATION

The Parties agree to attempt in good faith to resolve all disputes arising out of this Agreement by discussion and negotiation before mediation. Any Party desiring mediation may begin the process by giving the other Party a written Request to Mediate, describing the issues involved and inviting the other Party to join with the calling Party to name a mutually agreeable mediator and a time frame for the mediation. The mediation shall be held in Ketchikan, Alaska. The contents of all discussions during the mediation shall be confidential and non-discoverable in subsequent litigation, if any, unless otherwise ordered by a court. If the Parties can agree upon a mutually acceptable resolution agreement, it shall be reduced to writing, signed by the Parties, and the dispute shall be at an end. If the result of the mediation is a recognition that the dispute cannot be successfully mediated, or if either Party refuses in writing to mediate or if within thirty (30) days of receipt of a written Request to Mediate the Parties have not named a mutually acceptable mediator and set a time frame for the mediation to occur, then any Party may initiate litigation exclusively in the Superior Court for the First Judicial District, State of Alaska, at Ketchikan, Alaska.

35. JURISDICTION AND VENUE

The Superior Court for the State of Alaska, First Judicial District at Ketchikan, Alaska, shall be the exclusive jurisdiction and venue for any action of any kind or any nature arising out of or related in any way to this Agreement or any use of the Berths or the Port. This provision is binding upon any Lender of Company and Company shall obtain written prior approval of any Lender to this provision and such written approval shall be attached to this Agreement and any subsequent Lenders will be required to provide written approval within 30 days of assuming any rights or obligations with respect to the Company or this Agreement.

36. NO MODIFICATIONS

This contract is a final complete expression of all terms and conditions of the Agreement between the parties and no modifications or amendments to this Agreement shall be enforceable unless made in writing and duly signed by the City and Company. Company specifically understands and agrees that no employee, representative, council member, the Mayor, consultant, representative, attorney or volunteer, has any actual or apparent authority to verbally modify any of the terms and conditions of this Agreement, or otherwise make any verbal promises or provide any verbal assurances of any kind to the Company at any time.

37. HEADINGS

Section headings used in this Agreement are for convenience of reference only and shall not affect the construction of this Agreement.

38. REMEDIES CUMULATIVE

No remedy herein or otherwise conferred upon or reserved to City shall be considered exclusive of any other remedy, but the same shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute; and every power and remedy given by this Agreement to City may

be exercised from time to time and as often as occasion may arise or as may be deemed expedient by City. No delay or omission of City to exercise any right or power arising from any default shall impair any such right or power, nor shall it be construed to be a waiver of any such default or an acquiescence therein.

39. WAIVER OF REMEDIES NOT TO BE INFERRED

No waiver of any breach of any of the covenants or conditions of this Agreement shall be construed to be a waiver of any other breach or to be a waiver of, acquiescence in, or consent to any further or succeeding breach of the same or similar covenant or condition.

40. ALASKA LAW

This Agreement shall be construed, interpreted and enforced in accordance with the laws of the State of Alaska.

41. TIME OF ESSENCE

Time is of the essence of this Agreement.

42. ENTIRETY AND AMENDMENTS

This Agreement embodies the entire agreement between the City and Company. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought and only with approval of the City Council.

43. NO THIRD PARTY BENEFICIARIES

The provisions of this Agreement are and will be for the benefit of City and Company only and are not for the benefit of any third party, and accordingly, no third party shall have the right to enforce the provisions of this Agreement.

44. MANNER OF MAILING NOTICES

In every case where under any of the provisions of this Agreement or in the opinion of either City or Company, or otherwise, it shall or may become necessary or desirable to make or give any declaration or notice of any kind or deliver any document, it shall be sufficient if a copy of any such declaration, notice or document is personally delivered, or sent by courier service, or sent by registered or certified mail, postage prepaid, return receipt requested, properly addressed to City or Company (as the case may be) at the following address or to such other addresses as the one party may have theretofore furnished to the other party in writing for the purpose of receiving notices:

To City: City of Ketchikan
 334 Front St.
 Ketchikan, AK 99901

To Company:

Where service is by courier service (two (2) day service or better requested) it shall be deemed to have been effected at the expiration of a period of four (4) working days from the time the notice was delivered to the courier service. Facsimiles shall be deemed to have been received on the next following business day after the date of successful transmission, as shown by a sending party. E-mail communication shall not be considered sufficient or proper notice for any notice required by this Agreement.

45. NO CONSTRUCTION OF AGREEMENT FOR OR AGAINST A PARTY

This Agreement and associated documents have been the subject of discussion and negotiation between the parties with City and Company having retained their own attorneys and consultants, such that neither this document nor any associated document shall, for the purpose of interpretation thereof, be construed in favor of or against any party, except that all provisions related to disclaimers, release and defense and indemnification for City shall be construed in favor of the City.

46. COUNTERPARTS/ELECTRONIC COPIES

This Agreement may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all Parties to the counterparts had signed the same instrument. Delivery by electronic means of a copy of an original of this Agreement that was signed by a Party hereto shall constitute the delivery of that original Agreement as signed by that party.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers as of the day and year first above written. The officers of the City of Ketchikan have executed this Agreement under authorization contained in City of Ketchikan Resolution [Number to be filled in] adopted by the City of Ketchikan on the ____ day of _____ 2020.

DATED this ____ day of _____, 2020.

City of Ketchikan

By: _____
City Manager

And By: _____
City Clerk

COMPANY:

By: _____
President

And By: _____
Chief Executive Officer

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

THIS CERTIFIES that on this _____ day of _____, 2020 before me, a Notary Public in and for the State of Alaska, personally appeared _____ and _____ to me known and known to me to be the persons whose names are subscribed to the foregoing instrument, and after being first duly sworn according to law they stated to me under oath that they are the City Manager and City Clerk, respectively, of the CITY OF KETCHIKAN, that they have been authorized by the City to execute the foregoing instrument on its behalf and they executed the same freely and voluntarily as the free act and deed of the City. WITNESS my hand and official seal the say and year in this certificate first above written.

Notary Public for Alaska _____
My commission expires: _____

STATE OF _____)

) ss.

COUNTY OF _____)

THIS CERTIFIES that on this _____ day of _____, 2020 before me, a Notary Public in and for the State of _____, personally appeared _____ and _____ to me known and known to me to be the persons whose names are subscribed to the foregoing instrument, and after being first duly sworn according to law they stated to me under oath that they are the President and Chief Executive Officer, of the _____, that they have been authorized by said company to execute the foregoing instrument on its behalf and they executed the same freely and voluntarily as the free act and deed of said company. WITNESS my hand and official seal the say and year in this certificate first above written.

Notary Public for _____

My commission expires: _____

APPENDIX L

CITY ORDINANCE 08-1597

THE CITY OF KETCHIKAN, ALASKA

ORDINANCE NO. 08-1597

AN ORDINANCE OF THE COUNCIL OF THE CITY OF KETCHIKAN, ALASKA; ESTABLISHING CRITERIA FOR THE ASSIGNMENT OF CRUISE SHIP BERTHS; AND ESTABLISHING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF KETCHIKAN, ALASKA, AS FOLLOWS:

Section (1): New Section. A new section, to be numbered 13.08.045, entitled "Assignment of cruise ship berths," is added to Title 13, Chapter 8, of the Ketchikan Municipal Code, to read as follows:

"13.08.045 Assignment of cruise ship berths. (a) The City will endeavor to assign cruise ships to berths in such a way that satisfies the Policy of Equitable Distribution, herein "Policy", stated in Section 13.10.19 of the Berth IV Lease, which requires, in part, that 75% of cruise ship passengers be allotted to Berths I, II, or III, and approximately 25% to Berth IV; with 100% of the lightered passengers allocated equally between Berths III and IV.

(b) Subject to the overall objectives stated in subsection (a), the decision as to where each individual ship will be berthed or lightered to at any given time will be determined by any one or more of the following criteria:

- (1) Ship characteristics such as size, length, location of gangway access points, location of mooring lines, and services received by the ship while berthed;
- (2) Ship scheduled times of arrival, departure, and direction of travel;
- (3) Dock characteristics such as height, type (fixed or floating), location and type of mooring bollards, available services and gangways, condition, and safety;
- (4) Existing and predicted weather and tides;
- (5) Facility and vessel security requirements, existing Maritime Security (MARSEC) Level, and availability of security personnel;
- (6) Ongoing or anticipated construction or repair work on the dock, adjacent uplands, or adjacent roadways;
- (7) Ship's Captain or cruise line special requests;
- (8) Special circumstances such as emergencies, festivals, exercises, events, et cetera;
- (9) Convenience of passengers;
- (10) Sufficiency of ground transportation, pedestrian ways, and the impact of motor vehicle traffic;

(11) Safe and efficient use of city port facilities and resources.

The port and harbors director shall determine the weight, if any, to be given to each of the above considerations and shall be the final authority for berth assignments.

(c) The city manager or his designee shall be permitted to participate in berth scheduling conferences between cruise line agencies and participating cruise lines when such participation is requested by the city manager. A cruise ship schedule for each season, which includes anticipated berth assignments, will be prepared by cruise line agencies and forwarded to the City of Ketchikan at least three (3) months prior to the arrival of the first cruise ship of the season. The city manager or his designee will provide written consent of the berth assignments along with any required or recommended changes.

(d) The city manager may establish additional regulations as he determines to be useful in determining where cruise ships are berthed, provided, however, that those regulations do not conflict with this policy and do not conflict with Section 13.10.19 of the Berth IV Lease with Ketchikan Dock Company dated July 14, 2006.”

Section 2: Effective Date. This ordinance is effective one (1) month after its final passage and publication.


PASSED ON FIRST READING February 7, 2008

FINAL PASSAGE February 21, 2008



Bob Weinstein, Mayor

ATTEST:



Katherine M. Suiter
City Clerk

EFFECTIVE		DATE: 3-27-2008		
ROLL CALL	YEA	NAY	ABSENT	
BERGERON	X			
COOSE	X			
FREEMAN	X			
J. HARRIS	X			
K. HARRIS	X			
NORTON				X
WEST	X			
MAYOR				