

CITY AND COUNTY OF SAN FRANCISCO
BOARD OF SUPERVISORS
BUDGET AND LEGISLATIVE ANALYST

1390 Market Street, Suite 1150, San Francisco, CA 94102 (415) 552-9292
FAX (415) 252-0461

September 21, 2012


TO: Budget and Finance Committee
FROM: Budget and Legislative Analyst 
SUBJECT: September 26, 2012 Budget and Finance Committee Meeting

TABLE OF CONTENTS

| Item | File | Page |
|-------------|--|-------------|
| 1 | 12-0908 Contract – New Flyer of America Inc. – Low Floor Diesel-Hybrid Buses – Not to Exceed \$36,889,364 | 1 – 1 |
| 3 | 12-0903 Approving Updated Security Provisions for America's Cup Lease Disposition Agreement | 3 - 1 |

| | |
|--|---|
| Item 1 File 12-0908 | Department: San Francisco Municipal Transportation Agency (SFMTA) |
| EXECUTIVE SUMMARY | |
| <p style="text-align: center;">Legislative Objectives</p> <ul style="list-style-type: none"> The proposed resolution (File 12-0908) would authorize the SFMTA to execute a contract with New Flyer for the purchase of 45 40-foot low-floor diesel hybrid buses, as well as related tools, training, manuals, and spare parts, through the Minnesota Cooperative Purchasing Venture (CPV), for \$36,889,364, and for a term not to exceed six years. <p style="text-align: center;">Key Points</p> <ul style="list-style-type: none"> Currently, the SFMTA has 45 heavy-duty buses that are 13 years old, exceeding the minimum retirement age of 12 years, established by the Federal Transportation Agency (FTA). Based on a 2007 survey by the FTA, the average retirement age for these heavy-duty buses nationwide is 15.1 years. Under the proposed contract, New Flyer would develop a prototype for the new buses within 180 days (or 6 months) of the notice to proceed, and deliver the 45 new buses within 180 days (or 6 months) of SFMTA's approval of the prototype. The six-year contract term covers the warranty periods for the new buses. The total budget for the proposed contract with New Flyer is \$36,889,364, which includes: (1) the cost of 45 new heavy-duty (Class 700) low-floor diesel-hybrid coaches; (2) tools and diagnostics to maintain the new vehicles; (3) training for staff to drive the new; (4) insurance and storage costs; and (5) an allowance for spare. <p style="text-align: center;">Fiscal Impacts</p> <ul style="list-style-type: none"> The SFMTA's FY 2012-13 capital budget for this project, approved by the SFMTA Board of Directors, is \$36,000,000, resulting in an \$889,364 budget shortfall for the contract. The \$36,000,000 approved budget is comprised of \$29,880,000 in federal grants and \$6,120,000 in funds from the Proposition K Sales Tax. The SFTMA will reduce the proposed contract's not-to-exceed amount for spare parts by \$2,000,000, from \$3,000,000 to \$1,000,000 and reduce the training budget by \$599,046, from \$1,299,046 to \$700,000, therefore reducing the contract total by \$2,599,046 (\$2,000,000 plus \$599,046), from \$36,889,364 to \$34,290,318. We recommend reducing the amount of the proposed contract between SFMTA and New Flyer by \$2,599,046, from \$36,889,364 to \$34,290,318, consistent with the SFMTA's proposed contract expenditure reductions, noted above. <p style="text-align: center;">Recommendation</p> <ul style="list-style-type: none"> Amend the proposed resolution to reduce the proposed contract amount by \$2,599,046, from \$36,889,364 to \$34,290,318. Approve the proposed resolution as amended. | |

MANDATE STATEMENT/BACKGROUND

Mandate Statement

In accordance with Charter Section 9.118, any agreement (a) for more than \$10,000,000, (b) that extends for longer than ten years, or (c) with an amendment of more than \$500,000, is subject to Board of Supervisors approval.

Additionally, pursuant to San Francisco Administrative Code Section 21.16(b), the purchaser may utilize the competitive procurement process of any other public agency to make purchases of commodities for the use of the City under the terms established in that agency's competitive procurement process and as agreed upon by the City and the procuring agency, upon making a determination that (i) the other agency's procurement process was competitive or the result of a sole source award and (ii) the use of the other agency's procurement would be in the City's best interests.

Background

In 1985, the Federal Transit Administration (FTA) established minimum life requirements for transit buses and vans to ensure that taxpayers received the best return on public investments. The minimum life requirement for a heavy-duty, large bus, defined as a bus with a length of 35 to 48 feet and with 27 to 40 seats, was set at 12 years. According to a 2007 study performed by the FTA, the average national retirement age for these heavy-duty, large buses is 15.1 years. Currently, the San Francisco Municipal Transportation Agency (SFMTA) has 45 heavy-duty, large buses that are 13 years old. Therefore, the SFMTA is expecting to replace these 45 buses. According to the September 2012 report to the SFMTA Board of Directors, the SFMTA has been exploring procurement opportunities for city buses, and the procurement process through the Minnesota Competitive Purchasing Venture (CPV) proved to be the most efficient, both in time and cost.

The SFMTA Board of Directors report explains that in 2011, the State of Minnesota issued a request for proposal for 2012-13 Model Year transit buses, including low-floor diesel hybrid buses, on behalf of the members of the Minnesota Competitive Purchasing Venture (CPV). New Flyer Industries (New Flyer) was one of the companies that submitted a proposal in response to the Minnesota's Materials Management Division, and the New Flyer proposal was accepted by Minnesota's Materials Management Division. It was determined that SFMTA met the Minnesota State requirements to become a member of the Minnesota CPV and was authorized to do so by the SFMTA Board in March 2012. The SFMTA commenced negotiations on an agreement with New Flyer Industries to purchase 45 low-floor diesel hybrid buses through the Minnesota CPV.

DETAILS OF PROPOSED LEGISLATION

The proposed resolution (File 12-0908) would authorize the SFMTA to execute a contract with New Flyer for the purchase of 45 40-foot low-floor diesel hybrid buses, as well as related tools, training, manuals, and spare parts, through the Minnesota Cooperative Purchasing Venture

(CPV), for a total amount of \$36,889,364, and for a term not to exceed six years. The contract total includes a not-to-exceed \$3,000,000 for spare parts.

Under the proposed contract, the contractor will deliver a prototype of the bus within 180 days of the notice to proceed. Once SFMTA has approved the prototype, the contractor has 180 days to deliver the 45 new buses. The term of the contract is for six years to cover the vehicle warranty periods.

FISCAL IMPACTS

The total budget for the proposed contract with New Flyer is \$36,889,364. As noted in Table 1 below, this amount includes: (1) the cost of 45 new heavy-duty (Class 700) low-floor diesel-hybrid coaches; (2) tools and diagnostics to maintain the new vehicles; (3) training for staff to drive the new; (4) insurance and storage costs; and (5) an allowance for spare parts.

Table 1: Itemized Costs of New Flyer Contract

| Item | Per Item Cost | Number | Total Cost |
|--------------------------------------|---------------|--------|---------------------|
| XDE40 (ISL/EV50) Hybrid Bus | \$741,069 | 23 | \$ 17,044,584 |
| XDE40 (ISB/BAE) Hybrid Bus | 691,941 | 22 | 15,222,697 |
| Subtotal for All Vehicles | | 45 | \$32,267,281 |
| Tools and Diagnostics | NA | NA | 278,037 |
| Training | NA | NA | 1,299,046 |
| Fee for Insurance/Storage of Engines | 1,000 | 45 | 45,000 |
| Allowance for Spare Parts | NA | NA | 3,000,000 |
| Subtotal for Other Contract Costs | | | 4,622,083 |
| Contract Total | | | \$36,889,364 |

The SFMTA's FY 2012-13 capital budget for this project, approved by the SFMTA Board of Directors, is \$36,000,000, resulting in an \$889,364 budget shortfall for the contract. The source of funds for the \$36,000,000 budget is comprised of \$29,880,000 in Federal grants and \$6,120,000 in funds from the Proposition K Sales Tax.¹ According to Mr. Elson Hao, Principal Engineer, SFMTA, the SFTMA will reduce the not-to-exceed amount for spare parts by \$2,000,000 from \$3,000,000 to \$1,000,000 and reduce the training budget by \$599,046 from \$1,299,046 to \$700,000, reducing the contract total by \$2,599,046², from \$36,889,364 to \$34,290,318.

The amount of the proposed contract between SFMTA and New Flyer should be reduced by \$2,599,046, from \$36,889,364 to \$34,290,318, as noted above.

¹ Proposition K was passed by San Francisco voters in November 2003, allowing the half-cent transportation sales tax to be allocated to the Prop K Expenditure Plan. The Expenditure Plan does not provide guidance as to the allocation of those revenues over the 30-year period, but instead only stipulates eligible programs.

² \$2,000,000 plus \$599,046 equals \$2,599,046.

RECOMMENDATION

Amend the proposed resolution to reduce the proposed contract amount by \$2,599,046, from \$36,889,364 to \$34,290,318.

Approve the proposed resolution as amended.

| | |
|---|--|
| Item 3 Files 12-0903 | Departments: Economic and Workforce Development; Office of Risk Management; Port |
| EXECUTIVE SUMMARY | |
| <p style="text-align: center;">Legislative Objectives</p> <p>The proposed resolution would (a) approve revisions to the Lease Disposition Agreement (LDA) between the City and the America's Cup Event Authority ("Authority") with respect to the financial security for certain obligations to the City; (b) authorize and direct the procurement of insurance coverage for the City's satisfaction of certain such obligations; (c) reaffirm the direction for ongoing staff progress reports as to the implementation of the America's Cup events; and (d) authorize related actions.</p> <p style="text-align: center;">Key Points</p> <ul style="list-style-type: none"> On March 27, 2012, the Board of Supervisors approved the LDA between the City and the Authority, modifying provisions of the Host and Venue Agreement. Under the LDA, the City is responsible for completing infrastructure improvements to Piers 27, 29, and 30-32, and delivering these piers to the Authority by specified dates to be used as venues for the 34th America's Cup. On August 14, 2012, the Executive Director of the Port executed a revised LDA, subject to subsequent Board of Supervisors approval of certain provisions, as described in this report. Previously, the America's Cup Organizing Committee (ACOC) was required to obtain a \$32 million surety bond or other form of financial security to secure the performance of the City and the ACOC of their respective obligations under the Host and Venue Agreement. Because the ACOC had not been able to obtain the surety bond or other form of financial security by the date of the Board of Supervisors approval of the LDA on March 27, 2012, and because responsibility for infrastructure improvements to Port property was transferred from the Authority under the Host and Venue Agreement, to the Port under the LDA, the ACOC and City continued to negotiate on the form of financial security to be provided. Under the proposed resolution, the financial security would consist of (1) \$2,400,000 to be deposited by the City into a cash collateral account; (2) performance bonds to be secured by the construction contractor, Turner Construction Company, for Piers 27, 29, and 30-32; (3) liquidated damages of up to \$5,000,000 to be paid by the City for failure to deliver Piers 27 and 30-32 to the Authority by the specified date; and (4) the City's existing event and property insurance policies. The \$2,400,000 deposit as cash collateral and insurance premium of \$1,015,000, totaling \$3,415,000, are to be made from General Fund monies previously appropriated by the Board of Supervisors for the America's Cup in the Office of Economic and Workforce Development's FY 2012-13 budget. All expenditures incurred by the City, including the cash collateral deposit, the insurance premium payment, and liquidated damages are subject to reimbursement to the City by the ACOC. In addition, the proposed resolution approves changes to the force majeure provisions of the LDA, removing severe weather, labor disputes, and fire as causes of project delays not subject to liquidated damages. Therefore, under the revised language, the City would be liable to pay liquidated damages due to any delays in delivery of Piers 27 and 30-32 to the Authority by the specified dates, if such delays are caused by severe weather, fire, labor disputes, or other reasons not covered by force majeure. In order to insure the City against the costs of liquidated damages, | |

the ACOC will obtain an insurance policy that covers the City for delays due to severe weather, fire, and other causes. However, an insurance policy covering the City for delays due to labor disputes is not available for purchase.

- Under the Host and Venue Agreement between the City and the Authority, the ACOC is responsible to reimburse the City's actual costs for hosting the America's Cup in 2012 and 2013. To date, the ACOC has reimbursed the City \$6,115,979 for the City's costs incurred as of June 2012.

Fiscal Impacts

- The premium on the insurance policy is \$1,015,000, and the deductible is \$2,400,000. Therefore, in the event of a claim against the insurance policy, the total cost to the City would be no more than \$3,415,000. OEWD's FY 2012-13 General Fund appropriation, as previously approved by the Board of Supervisors, includes \$10 million for America's Cup-related costs, which would be the source of funding for the insurance policy. The ACOC is responsible to reimburse the City for the \$1,015,000 costs of the insurance policy premium, and the \$2,400,000 deductible (if necessary).
- The City is also required to deposit \$2,400,000 in a cash collateral account. These funds would be paid from the OEWD's FY 2012-13 budget, as noted above, and are subject to reimbursement to the City by the ACOC if the funds are drawn down.

Policy Consideration

- The Sponsor will be submitting an Amendment of the Whole at the Budget and Finance Committee's September 26, 2012 meeting. This report is based on the proposed Amendment of the Whole.
- The proposed resolution would require the City to expend \$1,015,000 to procure the insurance policy. In addition, the proposed resolution also requires the City to deposit \$2,400,000 in cash collateral, and would impose liabilities on the City, including (a) any additional deposits to the cash collateral to replenish draw-downs of the initial \$2,400,000 deposit, and (b) liquidated damages up to \$5 million not covered by the insurance policy.
- While the ACOC is responsible to reimburse the City for the \$1,015,000 insurance premium payment, and other costs if incurred, the availability of funds due to ACOC fundraising is not certain. The ACOC was to provide \$32 million in fundraising toward the City's operating and other costs for the America's Cup. To date, \$10.8 million has been collected and another \$2.2 million has been pledged, totaling \$13 million. Of this amount the ACOC has paid the City \$6.1 million for costs previously incurred for the America's Cup.
- Because the City could incur costs under the proposed resolution which may not be reimbursed to the City by the ACOC, we consider approval of the proposed resolution to be a policy matter for the Board of Supervisors. As previously recommended by the Budget and Legislative Analyst, the proposed resolution requires the America's Cup Project Director and Executive Director of the Port to report quarterly on (a) ACOC's fundraising efforts and the City's expenditures, and (b) any cost-savings measures taken by the City to offset any shortfall of America's Cup-related tax and fundraising revenues.

Recommendation

- Approval of the proposed resolution is a policy matter for the Board of Supervisors.

MANDATE STATEMENT/ BACKGROUND

Mandate Statement

Under Article 3.15 of the America's Cup Lease Disposition Agreement (LDA), previously approved by the Board of Supervisors on March 27, 2012, Board of Supervisors approval is required for revisions to certain LDA terms related to the City's construction and venue delivery obligations because these changes materially increase the obligations or liabilities for the City.

Background

The 34th America's Cup is a series of international sailing races between the Golden Gate Yacht Club, the defender of the America's Cup, and three to four challengers, being hosted by the City in 2012 and 2013. On March 27, 2012, the Board of Supervisors approved the Lease Disposition Agreement (LDA) between the City and the America's Cup Event Authority (the "Authority") (File 12-0127), defining the Port properties to be used as venues for the America's Cup and the respective responsibilities of the City, Authority, and America's Cup Organizing Committee (ACOC) to prepare for and host the 34th America's Cup. The LDA replaced the previously proposed Development and Disposition Agreement and revised the Host and Venue Agreement previously approved by the Board of Supervisors on December 14, 2010 (File 10-1259). The LDA removed the Authority's long-term lease and development rights from the Host and Venue Agreement, including Authority investments in Port infrastructure. Instead, the Port would be responsible for completing necessary improvements at piers that would be used for the America's Cup, and the Authority would only make temporary use of the piers, returning them to the Port after the America's Cup event. The LDA defined the terms and conditions for which the Port would (a) provide venues to the Authority for the America's Cup, including the respective licenses or leases for these venues; and (b) make improvements to these venues in preparation of the America's Cup, at the Port's expense.

Piers 27, 29, and 30-32

Piers 27, 29, and 30-32, which are affected by the subject resolution, will be major venues for the America's Cup. In accordance with the Host and Venue Agreement and the LDA, Piers 27, 29, and 30-32 will be among those properties provided to the Authority rent-free for use for the America's Cup.

- **Piers 27 and 29** will be used by the Authority for race-viewing and team hospitality berths. In accordance with the LDA, the Port is scheduled to complete Phase I of the Pier 27 Cruise Terminal, which includes construction of the Cruise Terminal's core and shell, on or before March 1, 2013. The Authority will have use of Pier 27 and the adjacent Pier 29 for the America's Cup. Pier 29, which was damaged by fire in June 2012, is being repaired by Turner Construction Company ("Turner") under a Construction Management/General Contractor agreement between Turner and the Port. Delivery of Pier 29 from the Port to the Authority is also scheduled to take place on or before March 1, 2013, under the LDA.
- **Piers 30-32** will be used for the America's Cup team bases, including team offices for up to five teams, a crane to lift the 72-foot catamarans from the water onto Pier 32, and work space to accommodate up to five 72-foot catamarans. In accordance with the LDA, the Port is scheduled to complete improvements to Piers 30-32 by January 14, 2013.

The Executive Director of the Port executed the LDA on August 14, 2012, which revised some provisions of the LDA previously approved by the Board of Supervisors on March 27, 2102. Revisions that are now subject to Board of Supervisors approval are discussed below.

DETAILS OF PROPOSED LEGISLATION

The proposed resolution would (a) approve revisions to the Lease Disposition Agreement (LDA), as previously approved by the Board of Supervisors, between the City and the America's Cup Event Authority ("Authority") with respect to the financial security for certain obligations to the City; (b) authorize and direct the procurement of insurance coverage for the City's satisfaction of certain such obligations; (c) reaffirm the direction for ongoing staff progress reports as to the implementation of the America's Cup events; and (d) authorize related actions.

Changes to the Financial Security Instrument Requirement

The Host and Venue Agreement, as previously approved by the Board of Supervisors, required the ACOC to obtain a \$32 million surety bond, or other form of financial security.¹ As the Budget and Legislative Analyst noted in a report to the Board of Supervisors dated March 22, 2012, "This \$32 million surety bond or financial security instrument constitutes the only asset to secure the performance of the City and the ACOC of their respective obligations under the Host and Venue Agreement. The Host and Venue Agreement limited each party's financial liability, due to a default of the Host and Venue Agreement, to the \$32 million surety bond or financial instrument." The ACOC had been unable to obtain any such form of financial security prior to the Board of Supervisors' approval of the LDA on March 27, 2012.

As shown on page 1 of Attachment I to this report, in the version of the LDA that was approved by the Board of Supervisors on March 27, 2012, Article 4 was left blank and as shown on page 5 of Attachment I, Section 7.11(c) Financial Liability Limitations, was left incomplete and concluded "Subject to further negotiation." Mr. Michael Martin, America's Cup Project Director, reported to the Budget and Legislative Analyst in March 2012 that the then-ongoing negotiations reflected the then-recent changes in the LDA in which the Port, rather than the Authority, was funding Port infrastructure improvements. According to the Budget and Legislative Analyst's March 22, 2012 report to the Board of Supervisors, "The ACOC, City staff, and the City's risk manager are continuing to try to identify a means by which the ACOC can obtain a financial security instrument in the amount of \$32 million that complies with the terms of the Host and Venue Agreement." Ultimately, however, the Office of Risk Management determined that such a financial security agreement did not exist in the form described in the Host and Venue Agreement, and therefore could not be obtained.

In lieu of the previously agreed upon financial security agreement, the LDA approved by the Executive Director of the Port on August 14, 2012, included a completely new financial security arrangement. Attachment I to this report provides the text of the entirely new LDA Article 4: Security for Parties' Secured Obligations, and the revised Section 7.11 Limitations of Liabilities

¹ Forms of financial security may include letter of credit or letter of guaranty.

of the Parties, to show the changes that occurred. According to Deputy City Attorney Joanne Sakai, the changes to LDA Article 4 are subject to Board of Supervisors approval, and the subject resolution has been revised to reflect this requirement.

The August 14, 2012 LDA removes ACOC's obligation to obtain the \$32 million security instrument, replacing it with the City's posting of the security, as described below. This change effectively shifts responsibility from the ACOC to the City to secure its obligations under the LDA, although, as noted below, the ACOC is responsible to reimburse the City for its actual costs out of available funds from its fundraising program. The August 14, 2012 LDA substitutes the following four requirements for the ACOC's \$32 million surety bond:

- \$2.4 million in deposits to fund a cash collateral deposit held under a cash collateral account² by January 15, 2013, and if used, to be replenished in full no later than July 15, 2013;
- Performance bonds to be provided by the construction contractor, Turner Construction Company (Turner) for Piers 30-32 infrastructure improvements, the Pier 27 Cruise Terminal Project, and the Pier 29 restoration work;
- Liquidated damages to be paid by the City (see below); and
- Proceeds of the City's existing event and property insurance policies.

These four requirements would assure the Authority that the City completes construction of infrastructure improvements to Piers 27, 29, and 30-32 by the dates required by the LDA (discussed further below). The (a) \$2.4 million to fund and, if necessary, replenish the cash collateral and (b) premium and the deductible for the City's insurance policy (described below) would be paid from the Office of Economic and Workforce Development's existing FY 2012-13 General Fund appropriation. The ACOC would be liable for reimbursing the City for any expenditures from the cash collateral and insurance policy, per the Memorandum of Understanding (MOU) between the City and the ACOC.

Assurances for On-Schedule Delivery of Piers 27, 29, and 30-32

The City would be liable for up to \$5 million in liquidated damages if the City fails to complete construction of infrastructure improvements to Piers 27 and 30-32 by the dates required by the LDA. Sections 1.2(b) and (c) of the LDA specify the schedule of liquidated damages that the Authority may demand from the City for delays in delivering Piers 27 or 30-32, for each day of delay beginning on March 1, 2013:

March 1- March 31, 2013: \$29,200 per day;
April 1 -April 30, 2013: \$60,350 per day; and
May 1- May 31, 2013: \$73,687 per day.

According to the America's Cup Project Manager, project and risk management staff propose that damages would be paid from available recoveries under the insurance policy³ that is one of

² Allowable uses of the cash collateral include (a) accelerating completion of Piers 27, 30-32, and Pier 80; (b) Authority relocation costs in the event Piers 27, 29, or 30-32 are unavailable by the agreed-upon dates; (c) the Authority's direct losses, subject to limitations under the Host and Venue Agreement; (d) meeting other LDA obligations; and (e) the City's Event-related costs, once all other cash collateral obligations have been satisfied.

the subjects of the proposed resolution. The insurance policy is described under “Force Majeure Changes,” below.

Under the August 14, 2012 LDA, if the Port is unable to deliver the **Pier 27** venue to the Authority by March 1, 2013, the Authority may terminate the LDA on 10 days’ notice to the Port. As an alternative to terminating the LDA, Section 7.4(a)(ii) of the LDA authorizes the Authority to pursue one or more of the following:

- Accept delivery of the Pier 27 venue before the Port has completed Phase I of the Cruise Terminal Project, if the Authority’s proposed use can be safely accommodated, as determined by the Chief Harbor Engineer, comparable to the provision in the March 27, 2012 LDA;
- Require the City to provide \$2.4 million in cash collateral toward the \$2.4 million insurance deductible, described below and not previously required by the March 27, 2012 LDA, from which the City must draw to accelerate construction or secure functionally-equivalent space acceptable to the Authority; and
- Demand payment of liquidated damages if the Cruise Terminal Project is delivered after March 1, 2013, which was not previously required by the March 27, 2012 LDA.

On-time delivery of **Pier 29** from the Port to the Authority on or before March 1, 2013 is addressed under Section 1.2(d) of the LDA. The Port included requirements in the contract with Turner that Turner (a) pay liquidated damages of \$5,000 per day to the Port beginning on March 1, 2013, and continuing every day until the Pier 29 restoration work is complete, with the exception of punch list items;⁴ (b) agrees to complete the punch list items and any other work required to complete the Pier 29 restoration contract after the Port has delivered Pier 29 to the Authority but no later than April 30, 2013, subject to the Authority’s agreement, and during which time the Authority may share occupancy; and (c) provide a surety bond in the full amount of the Pier 29 restoration contract, guaranteeing payment and performance of the Pier 29 restoration work under which the authority will have the unilateral right to require the Port to call on the bond if the Pier 29 restoration work is not completed by March 1, 2013, subject to punch list items and specified long-lead items, if Turner’s failure is caused by a payment default or other circumstances authorizing a call upon the bond.

The Board of Supervisors authorized the Port to enter into a contract with Turner for construction of infrastructure improvements to **Piers 30-32** in April 2012 (File 12-0282). The Port’s contract with Turner for Piers 30-32 infrastructure improvements provides for liquidated damages of at least \$5,000 per day if the improvements are not completed by February 14, 2013.

The August 14, 2012 LDA does not provide a termination clause with regard to delivery of Piers 30-32. However, if the Port is unable to deliver **Piers 30-32** to the Authority by March 1, 2013, Section 7.4(d) of the LDA authorizes the Authority to pursue one or more of the following:

³ As is noted elsewhere in the report, delays arising from labor disputes would not be covered under the insurance policy.

⁴ The LDA defines “Punch List Items” as “items of construction that are unfinished when a work of improvement is substantially complete, customarily handled by a punch list.”

- Require the City to draw upon the cash collateral to accelerate construction or secure functionally-equivalent space acceptable to the Authority;
- Demand payment of liquidated damages if Piers 30-32 is delivered after March 1, 2013; and
- Demand that the Port call upon the Piers 30-32 performance bond and enforce the liquidated damages provision in the Turner Construction Management/General Contractor agreement, if applicable.

According to Port Special Project Manager Mr. Brad Benson, the Port's construction work on Piers 27 and 29 are on-schedule to be completed on or before March 1, 2013. Piers 30-32 infrastructure improvements are being completed in two phases: Phase I was completed prior to the August 2012 America's Cup preliminary races; and Phase II will commence following the completion of the October 2012 America's Cup preliminary races. According to Port project manager Mr. Uday Prasad, Phase II of Piers 30-32 was scoped to be completed within the four month period of October 14, 2012 to February 14, 2013.

Force Majeure Changes and Insurance Policy Provisions

The August 14, 2012 LDA revises Section 3.15(a), changing conditions included in the force majeure provisions,⁵ subject to Board of Supervisors approval. These changes remove fire, unusually severe weather, and labor disputes from the force majeure, and would therefore leave the City liable for liquidated damages, as prescribed in the LDA, for delays in completing work on Piers 27 and 30-32 due to fire, unusually severe weather, and labor disputes. Such liquidated damages are capped at \$5 million under the LDA, and per the City's agreement with the ACOC, such liquidated damages would be reimbursable to the City from the ACOC.

Because the ACOC is intended to reimburse the City for liquidated damages arising from delay in delivering Piers 27 or 30-32 to the Authority by March 1, 2013 due to any reason not already covered by the force majeure, the ACOC worked with the City's Director of Risk Management to identify an insurance policy to cover up to \$5 million in the event that liquidated damages are assessed. The insurance policy currently under consideration (a) has a premium of \$1,015,000; (b) has a self-insured retention (i.e. deductible) of \$2,400,000; and (c) provides coverage in the event that delivery of Piers 27 and 30-32 occurs after March 1, 2013 due to fire or unusually severe weather. The costs of the \$1,015,000 premium and, if necessary, the \$2,400,000 deductible, would be paid from the Office of Economic and Workforce Development's FY 2012-13 operating budget, which includes a \$10 million General Fund allocation for America's Cup costs. Both the \$1,015,000 premium and, if necessary, the \$2,400,000 deductible would be refunded to the City by the ACOC through the ACOC's fundraising efforts.

The proposed resolution would authorize the Office of Risk Management to proceed with the procurement of the insurance policy.

⁵ *West's Encyclopedia of American Law, 2nd Edition*: force majeure "relates to the law of insurance and is frequently used in construction contracts to protect the parties in the event that a segment of the contract cannot be performed due to causes that are outside the control of the parties, such as natural disasters, that could not be evaded through the exercise of due care."

The City was unable to obtain insurance coverage for labor disputes that may delay the on-time delivery of Piers 27 or 30-32. According to Mr. Martin, the City has determined that the risk of labor dispute delaying Piers 27 and 30-32 is small, and that this is a risk over which the City has a reasonable amount of control.

In addition, the proposed resolution reaffirms the schedule of progress reports to be submitted to the Board of Supervisors as to the implementation of the America's Cup events. This progress report schedule was recommended by the Budget and Legislative Analyst's Office in its March 22, 2012 report to the Board of Supervisors.

FISCAL IMPACTS

The proposed resolution would authorize the Director of Risk Management to procure an insurance policy to cover up to \$5 million in liquidated damages resulting from delay in the City transferring Piers 27 or 30-32 to the America's Cup Event Authority (the "Authority") due to fire or unusually severe weather. The premium on the insurance policy is \$1,015,000, and the insurance policy has a deductible of \$2,400,000. Therefore, in the event of a claim against the insurance policy, the total cost to the City would be no more than \$3,415,000. The Office of Economic and Workforce Development's (OEWD) existing FY 2012-13 General Fund appropriation, which includes \$10 million for America's Cup-related costs, would be the source of funding for the insurance policy. The costs of the insurance policy, including both the \$1,015,000 premium and the \$2,400,000 deductible (if necessary) would be reimbursed to the City by the ACOC. The \$2,400,000 deductible amount would be payable from the cash collateral described below.

The proposed resolution, as amended, would authorize the City to (a) deposit \$2.4 million to the cash collateral required under the August 14, 2012 Lease Disposition Agreement (LDA); and (b) replenish the \$2.4 million cash collateral, in full, as prescribed under the August 14, 2012 LDA. The \$2.4 million initial deposit and any necessary replenishment deposits would be paid from the OEWD's existing FY 2012-13 and FY 2013-14 General Fund budgets. All deposits would be subject to reimbursement to the City by the ACOC.

ACOC Deposits and Fundraising, To-Date

The ACOC was to provide \$32 million in fundraising toward the City's operating and other costs for the America's Cup, not including funds for their own operations. According to Ms. Kyri McClellan, Chief Executive Officer for the ACOC, the ACOC has raised approximately \$13 million. The amount of \$13 million already raised includes (a) \$6.1 million paid to the City to reimburse the City's FY 2011-12 America's Cup costs, (b) \$2.4 million allocated to Host and Venue Agreement obligations, (c) \$1.1 million allocated to 18 months of ACOC operations, (d) \$2.2 million in pledges through January 2014, and (e) \$1.2 million in the ACOC's cash-on-hand.

POLICY CONSIDERATIONS

The Sponsor will Submit an Amendment to the September 26, 2012 Budget and Finance Committee Meeting

The Sponsor will submit an Amendment to the Budget and Finance Committee at its September 26, 2012 meeting, amending two clauses as follows (with changes underlined):

RESOLVED, That the changes to the definition of force majeure as specified in Section 3.15 of the LDA and the provisions relating to the LDA Security in Section 4.2 of the LDA are hereby approved; and, be it [...]

FURTHER RESOLVED, That this Board reaffirms its direction under Resolution No. 109-12 to the America's Cup Project Director and the Executive Director of the Port, as applicable, to provide the following progress reports: (i) to the City Controller and the Budget & Finance Committee of the Board of Supervisors on a quarterly basis, a report on (A) ACOC fundraising and transfers of such revenues to the City, (B) Port infrastructure expenditures in preparation for the Event and (C) City operating expenditures for the Event, including any draws upon the Cash Collateral; and (ii) if ACOC fundraising does not appear to be on track to enable ACOC to contribute to the City amounts sufficient to pay for City operating expenditures and other amounts to be reimbursed by ACOC fundraising, a proposal for cost saving measures to offset any shortfall from Event-related tax and fundraising revenues.

This report has been written, based on the Amendment of the Whole.

Delay or Inaction on the Proposed Resolution by October 17, 2012 Would Entitle the Authority to Terminate the LDA

Section 3.15 would remove fire, unusually severe weather, and labor disputes from the LDA force majeure clause. Under the LDA, Board of Supervisors approval of this force majeure change is required by October 17, 2012. Under Section 3.15(c), if the Board does not approve Section 3.15(a) by October 17, 2012, Section 3.15(c) states:

“the Authority will be entitled to terminate this Agreement in its entirety as its sole remedy, and upon termination, neither Party will have any recourse to the other Party, except for obligations of either Party that survive in accordance with Section 6.1(c) (Termination Rights: Survival); provided that the Authority must exercise its termination remedy under Section 3.15(b) (Conditions Subsequent Regarding Certain Force Majeure Events: Remedy), if at all, by providing notice in accordance with Article 8 (Notices) to the City no later than 5 p.m. (San Francisco time) on November 16, 2012. The Authority's failure to provide timely notice of termination under Section 3.15(b) (Conditions Subsequent Regarding Certain Force Majeure Events: Remedy) will constitute the Authority's irrevocable waiver of this termination right.”

The Budget and Legislative Analyst notes that the Authority has the right, but not the requirement to terminate the Agreement.

While the Host and Venue Agreement states that the ACOC will endeavor to raise up to \$32 million to reimburse the City for costs of hosting the America's Cup, the full availability of the \$32 million to be raised by ACOC is not certain

Under the Host and Venue Agreement, the ACOC is intended to reimburse the City's actual costs for hosting the America's Cup in 2012 and 2013. The ACOC has reimbursed the City \$6,115,979 for the City's costs incurred as of June 2012.

The proposed resolution, which revises certain provisions of the LDA previously approved by the Board of Supervisors, would require the City to expend \$1,015,000 to procure the aforementioned insurance, which would be reimbursed by the ACOC. In addition, the proposed resolution requires the City to deposit \$2,400,000 in a cash collateral account, and would impose a liability on the City, including (a) any additional deposits to the cash collateral to replenish draw-downs of the initial \$2,400,000 deposit, and (b) liquidated damages up to \$5 million not covered by the insurance policy. The ACOC is responsible to reimburse the City for any draw-down on the cash collateral account or payment of liquidated damages not covered by the insurance policy, in the event that such costs should occur.

While the ACOC intends to reimburse the City for the \$1,015,000 insurance premium and other actual costs incurred by the City under the LDA, the availability of funds due to ACOC fundraising is not certain. Therefore, because the City could incur costs which may not be reimbursed, we consider approval of the proposed resolution to be a policy matter for the Board of Supervisors.

As previously recommended by the Budget and Legislative Analyst in the March 22, 2012 report to the Board of Supervisors, under the proposed resolution, the America's Cup Project Director and Executive Director of the Port is to report quarterly to the Board of Supervisors on (a) ACOC fundraising and transfer of funds to the City; (b) Port expenditures for infrastructure improvements; and (c) the City's operating expenditures. If the ACOC does not contribute the total amount of \$32 million to be raised by the ACOC, as provided by the Host and Venue Agreement, the America's Cup Project Director is to report to the Board of Supervisors on cost-savings measures to be taken by the City to offset any shortfall of America's Cup-related tax and fundraising revenues.

RECOMMENDATION

Approval of the proposed resolution is a policy matter for the Board of Supervisors.

**Attachment I: Changes to Lease Disposition Agreement (LDA)
Article 4: Security for Parties' Secured Obligations
Section 7.11: Limitations of Liabilities of the Parties**

| | |
|--|--|
| <p>LDA, as approved by Board of Supervisors, March 27, 2012</p> | <p>LDA, as amended by Mayor, August 14, 2012</p> |
| <p>Article 4: Left Blank by Agreement of the Parties</p> | <p>Article 4: Security for Parties' Secured Obligations</p> <p>4.1. Authority Secured Obligations.</p> <p>(a) Scope. The Authority has provided the City and Port with security in an amount and scope commensurate with the LDA Security as described below to secure the performance of or satisfy the following (all, collectively, the "Authority Secured Obligations"):</p> <ul style="list-style-type: none"> (i) performance of the Authority Mitigation Measure regarding Recreation and Park Department property in and around Marina Green as provided in Section 3.2.4 (Park Resources) of Exhibit A; (ii) Restoration of the Venues before they are surrendered to the Port in accordance with Section 6.2 (Restoration After Termination) of this Agreement and Article 23 (Surrender) of the Venue Leases and Article 22 (Surrender) of the Venue Licenses; and (iii) security measures required to secure environmental obligations under Article 12 (Hazardous Materials) of the Venue Leases and Venue Licenses. <p>(b) Guaranty. The Authority must provide to the City a payment and performance guaranty with a maximum payment obligation of \$6 million (the "Guaranty") to secure the Authority Secured Obligations described in Section 4.1(a) (Authority Secured Obligations: Scope), which must be delivered to the City by the later of October 18, 2012 if the Board Approves Section 3.15 (Conditions Subsequent Regarding Certain Force Majeure Events) or, if the Board does not Approve Section 3.15 (Conditions Subsequent Regarding Certain Force Majeure Events), but the Authority does not elect to terminate this Agreement, then concurrently with the City's deposit of the Cash Collateral on January 15, 2013. The Guaranty must be made and delivered by a Third-Party guarantor ("Guarantor") and contain Guarantor's express representation that it has a Net Worth of \$12 million or more, which Guarantor must maintain until all of the Authority Security Obligations have been satisfied or waived. The Guaranty must be in form and substance Approved by the Port, in consultation with the City Attorney and the City's Risk Manager. Upon receipt of the Guaranty or earlier termination of this Agreement, the Port will cancel or return the \$250,000 guaranty that the Authority previously delivered to the Port in connection with an access license.</p> <p>(c) Environmental Oversight Deposit. As partial security for the Authority Secured Obligations described in Section 4.1(a)(iii) (Authority Secured</p> |

Obligations: Scope) for all of the Venues in the aggregate, the Authority has provided a \$10,000 cash deposit (the "Environmental Oversight Deposit") to the Port. The Port is authorized to draw funds from the Environmental Oversight Deposit for the purposes specified in the Venue Leases and Venue Licenses, and the Authority must replenish the Environmental Oversight Deposit to \$10,000 following any draw.

(d) Independent Instruments. The Parties acknowledge that:

(i) Each form of Authority security is independent of the others and will operate independently to secure the distinct Authority Secured Obligations specified above.

(ii) The Port may draw on the Environmental Oversight Deposit according to the terms of the Venue Leases and Venue Licenses.

(e) Release of Security. The Port may make a demand on the Guaranty or draw upon the Environmental Oversight Deposit, as applicable, up to 60 days after the Term ends. If no Port Claim is outstanding on the 61 day after the Term ends; the Port will cancel and return the Guaranty and any remaining portion of the Environmental Oversight Deposit.

4.2. City Secured Obligations.

(a) Scope. The City has provided the LDA Security as security for the performance of the City's, including the Port's, and the ACOC's obligations under this Agreement (the "**City Secured Obligations**"). The Parties acknowledge that any Port obligation to pay the Authority for any Reimbursable Costs under this Agreement is an independent obligation of the Port that is not secured by the LDA Security or subject to the limitations on liability under **Section 7.11(c)** (Limitations on Liability of Parties; Financial Liability Limitations). The Authority has agreed to accept the following in full satisfaction of the ACOC's obligation to provide security under HVA § 9.3.

(b) Liquidated Damages: The City has agreed to pay the Authority liquidated damages under the following circumstances, without affecting the City's replenishment obligation under **Section 4.2(c)** (City Secured Obligations: Cash Collateral).

(i) The City will pay the Authority liquidated damages should the Delivery of Piers 30-32 or the Pier 29 Venue be delayed beyond March 1, 2013, subject to a cap of \$5 million, as described in **Section 1.2(b)** (Port Infrastructure Work: Piers 30-32 Work), **Section 1.2(c)(iii)** (Port Infrastructure Work: Cruise Terminal Work), and, if applicable, **Section 3.15(b)** (Conditions Subsequent Regarding Certain Force Majeure Events: Revised Definition of Force Majeure).

(ii) The City will pay the Authority liquidated damages should the Delivery of the Pier 29 Venue be delayed beyond March 1, 2013, as described in **Section 1.2(d)** (Port Infrastructure Work: Pier 29 Restoration Work).

| | |
|---|--|
| <p>(c) Cash Collateral.</p> <p>(i) No later than January 15, 2013, the City will establish a cash escrow account in the amount of \$2.4 million at a San Francisco branch of a bona fide financial institution selected by the Authority and Approved by the City, held in the names of the City and the Authority subject to a control agreement or other instrument perfecting the Authority's security interest to its satisfaction (the "Cash Collateral"). The City is obligated to make this deposit even if ACOC has not raised and tendered to the City the full amount required to make the deposit; in such a circumstance any amount advanced by the City will be subject to reimbursement by the ACOC.</p> <p>(ii) Disputes as to whether a claim is payable from Cash Collateral under this Agreement will be submitted for dispute resolution under Section 7.6 (Dispute Resolution).</p> <p>(iii) Should a draw be made on the Cash Collateral at any time before July 1, 2013, the City is obligated to replenish the account no later than July 15, 2013, to a balance of \$2.4 million. The City is obligated to make this deposit even if ACOC has not raised and tendered to the City the full amount required to make the deposit; in such a circumstance any amount advanced by the City will be subject to reimbursement by the ACOC.</p> <p>(iv) The Cash Collateral will secure, in addition to the City's other sources, payment of the following costs, to the extent other sources of funds are not immediately available:</p> <p>(A) to accelerate and Complete the Cruise Terminal Project (which as defined does not include the Pier 29 Restoration Work) or to secure and prepare Functionally-Equivalent Space;</p> <p>(B) to accelerate and Complete the remaining Piers 30-32 Work or the 2013 Pier 80 Work;</p> <p>(C) to pay the Authority's Relocation Costs to the extent specified in Section 1.2(e) (Port Infrastructure Work: Authority Expenditures);</p> <p>(D) expressly subject to the limitations of HVA § 17.2 and Section 7.11(e) (Limitations on Liability of the Parties: Limitations on Damages), to compensate the Authority for direct Losses caused by any breach by the City or the ACOC under the HVA, for any Event of Default by the City under this Agreement, for any default by the Port under any Venue Lease or Venue License, and for any failure of performance by the City under the Implementation Plans;</p> <p>(E) to pay the City, Port, or contractors retained by the City or the Port to provide the needed services on its behalf to meet any City, the Port, and ACOC obligations that are to be secured by the LDA Security under the HVA or this Agreement that are not</p> | |
|---|--|

| | |
|--|--|
| | <p>addressed specifically in Section 4.2(c)(iv) (City Secured Obligations: Cash Collateral), including meeting the City's obligations under the Implementation Plans; and</p> <p>(F) to the extent any funds remain after all of the above obligations have been satisfied, to the City for the City's Event-related costs.</p> <p>(v) The Parties will agree on a form of a demand notice to be submitted to the Claims Administrator for any draw on the Cash Collateral, under which the Parties will state their agreed use of funds to be drawn from the Cash Collateral.</p> <p>(vi) The City's and the ACOC's obligations to perform other Event related activities will not be diminished by the exhaustion of the Cash Collateral.</p> <p>(vii) The Parties intend for the Cash Collateral to be used only for the purposes specified in this Agreement Further, consistent with HVA § 17.2 and Section 7.11(e) (Limitations on Liability of the Parties: Limitations on Damages), the Parties agree that under no circumstances may Cash Collateral be used to pay consequential losses or damage, loss of profit, loss of business opportunity, or damage to goodwill.</p> <p>(viii) If the Parties reasonably anticipate that the Cash Collateral will be insufficient to satisfy all foreseeable demands to be made by the Parties, then, to the extent necessary to satisfy the demands having priority:</p> <p>(A) until June 30, 2013, demands made by the City, including any demand in accordance with Section 4.2(c)(iii) (City Secured Obligations: Cash Collateral), will have priority over demands made by the Authority; and</p> <p>(B) beginning on July 1, 2013, demands made by the Authority will have priority over demands made by the City.</p> <p>(d) Independent Instruments. The Parties acknowledge that:</p> <p>(i) Each element of the LDA Security is independent of the other and will operate independently to secure the distinct City Secured Obligations specified above.</p> <p>(ii) The Authority may require a draw on the Cash Collateral in accordance with the control agreement.</p> <p>(e) Release of LDA Security. The Authority may make a demand on or draw upon (or require the ACOC or the City to make demand for or draw upon, as appropriate) the LDA Security until the dates below:</p> <p>(i) Liquidated damages: for delayed Delivery of Piers 30-32, the Pier 27 Venue, and the Pier 29 Venue for the period beginning on March 1, 2013, and ending on June 10, 2013; and</p> <p>(ii) Cash Collateral: 60 days after the later of the end of the Term or the conclusion of any dispute resolution proceedings regarding claims against Cash Collateral under Section 7.6 (Dispute Resolution).</p> |
|--|--|

| | |
|---|---|
| <p>If no Authority Claim is outstanding after all of the dates described above in Section 4.2(c) (City Secured Obligations: Release of LDA Security) have elapsed, the control agreement will provide for the Cash Collateral to be released to the City without further action by the Authority.</p> | <p>Section 7.11: Limitations of Liabilities of the Parties</p> <p>(a) Sources of Repayment. Except as otherwise provided in this Agreement, the Authority agrees that any and all obligations of the Port or the City arising out of or related to this Agreement are special and limited obligations of the Port and the City, as applicable, and the Port's and City's obligations to make any payments under this Agreement to implement this Agreement are restricted entirely to funding sources available to the Port and the City, each in its sole discretion, and from no other source.</p> <p>(i) All obligations of the Port or the City arising out of or related to this Agreement are special and limited obligations of the Port and the City, as applicable, and the Port's and City's obligations to make any payments under this Agreement to implement this Agreement are restricted entirely to funding sources available to the Port and the City, each in its sole discretion, and from no other source.</p> <p>(ii) More specifically, in no event may the Authority compel the City or the Port to use funds in or obligate the City General Fund or the Port Harbor Fund to reimburse the Authority for Reimbursable Costs or to satisfy any Authority Claim of damages for a breach by the Port under this Agreement.</p> |
| <p>(b) Indemnities. An Indemnified Party's recovery for any Loss under this Agreement will be limited to the amount of any available insurance (including surety bond) proceeds.</p> | <p>(b) Indemnities. An Indemnified Party's recovery on an Indemnified Claim for any Loss under Section 2.7 (General Indemnities) of this Agreement will be limited to the amount of proceeds available under insurance policies and bonds described in this Agreement, subject to any deductibles and self-insured retentions.</p> |

| | |
|--|--|
| <p>(c) Financial Liability Limitations. Under the HVA, each Party's financial liability following a default under this Agreement was to be subject to a \$32 million cap established under HVA § 17.4 and HVA § 17.5, not including Indemnification obligations or proceeds of insurance. Consistent with the spirit of the HVA, however, the Parties agree that their respective liabilities for Claims of Breach under the HVA, default under this Agreement (excluding any Port obligation to pay for Reimbursable Costs), and any other Claim for a Loss arising in relation to the HVA, this Agreement or a Venue Lease or Venue License will be limited to the sources of recovery set forth in this Subsection. [Subject to further negotiation] <i>(Note: bracketed text in original)</i></p> | <p>(c) Financial Liability Limitations. Party's financial liability following a default under this Agreement was to be subject to a \$32 million cap established under HVA § 17.4 and HVA § 17.5, not including Indemnification obligations or proceeds of insurance. Consistent with the spirit of the HVA, however, the Parties agree that the Parties' respective monetary remedies for Hazardous Material Claims, Indemnified Claims, and Claims arising from any alleged Breach under the HVA, Event of Default under this Agreement, and any other Loss arising in relation to the HVA, this Agreement, or a Venue Lease or Venue License will be limited as set forth below.</p> <p>(i) The City's, including the Port's, and the Authority's remedies for any failure by the City to meet its obligations will be paid from the following sources:</p> <p>(A) the Cash Collateral; (B) the Piers 30-32 Performance Bond and performance bonds for the Cruise Terminal Project and the Pier 29 Restoration Work; (C) liquidated damages as provided in this Agreement; and (D) proceeds of the City's insurance policy described in Section 2.8(a) (City Insurance: Event Insurance).</p> <p>(ii) The City's, including the Port's, remedies for any failure by the Authority to meet its obligations will be paid from the following sources:</p> <p>(A) the Guaranty; (B) the Environmental Oversight Deposit; and (C) the proceeds of the Authority's insurance policy described in Section 2.8(b)(i) (Authority Insurance: Event Insurance).</p> |
| <p>(d) No Individual or Agent Liability. No member of the Board, the Port Commission, or Port or City Agent will incur any liability under this Agreement to the Authority or any successor in their individual capacities by reason of their actions under this Agreement or execution of this Agreement. Except as otherwise specifically provided by any security instrument, no Agent of the Authority will be personally liable to the Port or the City for any amount that may become due or on any obligations under this Agreement.</p> | <p>(d) No Individual or Agent Liability. No member of the Board, the Port Commission, or Port or City Agent will incur any liability under this Agreement to the Authority or any successor in their individual capacities by reason of their actions under this Agreement or execution of this Agreement. Except as otherwise specifically provided by any security instrument, no Agent of the Authority will be personally liable to the Port or the City for any amount that may become due or on any obligations under this Agreement.</p> |

| | |
|--|---|
| <p>(e) Limitations on Damages. In any action, including any dispute resolution proceeding under Section 11.6 (Dispute Resolution) between the Parties for damages, the damages may not include any indirect or consequential loss or damage, loss of profit, loss of business opportunity, or damage to goodwill.</p> | <p>(e) Limitations on Damages. The Parties agree, consistent with HVA §17.2, under no circumstances including any dispute resolution proceeding under Section 7.6 (Dispute Resolution) or other proceeding between the Parties for damages arising from alleged breaches under the HVA, this Agreement, or the Venue Leases and Venue Licenses, may the damages include any indirect or consequential loss or damage, loss of profit, loss of business opportunity, or damage to goodwill, except for the City's limited waiver solely for the purpose of allowing for payment of liquidated damages to the Authority for delayed Delivery of Piers 30-32 (or Pier 80 in the alternative), the Pier 27 Venue, or the Pier 29 Venue under Section 1.2(d) (Port Infrastructure Work).</p> |
| <p><i>The LDA approved by the Board on March 27, 2012 did not include a Section 7.11(f)</i></p> | <p>(f) Release. As consideration for the covenants and obligations under this Agreement, the Authority and the City, including Port, each on behalf of itself and its successors and assigns, agrees to waive any right to recover from, and forever releases the other Party and its Agents of and from any Losses, whether direct or indirect, known or unknown, foreseen or unforeseen, that the Party may now have or that may arise on account of or in any way be connected with this Agreement, the HVA, or the Venue Leases and Venue Licenses, to the extent not recoverable from the sources described in this Section.</p> <p>In connection with this release, the City (acting by and through the Port) and the Authority each acknowledges that it is familiar with California Civil Code section 1542, which provides as follows:</p> <p style="text-align: center;">A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR EXPECT TO EXIST IN HIS OR HER FAVOR WHEN OF EXECUTING THE RELEASE, WHICH IF KNOWN TO HIM OR HER MUST HAVE MATERIALLY AFFECTED THE SETTLEMENT WITH THE DEBTOR.</p> <p style="text-align: center;">_____ Authority (<i>Monique Moyer signature</i>) City (by the Port)</p> <p>Each of the Authority and the City agrees that the release given in this Section covers unknown Claims to the extent Losses from such Claims are not recoverable from the applicable sources described in this Section. Accordingly, by entering into this Agreement, the Authority and the City each waives the benefits of Civil Code section 1542, or under any other statute or common law principle of similar effect. This release and waiver will survive termination of this Agreement.</p> |

**Attachment II: Changes to Lease Disposition Agreement (LDA),
Section 3.14. Force Majeure and Other Delays
Section 3.15. Conditions Subsequent Regarding Certain Force Majeure Events.**

| | |
|---|--|
| LDA, as approved by Board of Supervisors, March 27, 2012 | LDA, as amended by Mayor, August 14, 2012 and Requiring Further Board of Supervisors Approval, Subject to Proposed Resolution |
| <p>3.14 Force Majeure and Other Delays.</p> <p>(a) Extension. All dates and times by which any Party or Third Party must perform an obligation, satisfy a condition to the other Party's performance, or respond to a notice, request, or demand under this Agreement will be extended by Force Majeure, subject to the limits of Subsection (d) (Outside Delivery Date).</p> | <p>3.14. Force Majeure and Other Delays.</p> <p>(a) Extension. All dates and times by which any Party or Third Party must perform an obligation, satisfy a condition to the other Party's performance, or respond to a notice, request, or demand under this Agreement will be extended by Force Majeure.</p> |
| <p>(b) Notice. To obtain the benefit of an extension of time due to Force Majeure (in each instance, a "Force Majeure Delay"), the Party whose act is delayed (the "Delayed Party") must give notice within 30 days after the earlier of the event or discovery of the event causing the delay occur to the other Party of:</p> <ul style="list-style-type: none"> (i) the cause of delay; (ii) if the Delayed Party does not discover the event until after more than 2 days after it occurred, the time elapsed between the event and discovery of the event and the reason for delay in discovering the event; and (iii) the Delayed Party's reasonable estimate of the length of the Force Majeure Delay. | <p>(b) Notice. To obtain the benefit of an extension of time due to Force Majeure (in each instance, a "Force Majeure Delay"), the Party whose act is delayed (the "Delayed Party") must give notice within 30 days after the earlier of the event or discovery of the event causing the delay to occur to the other Party of:</p> <ul style="list-style-type: none"> (i) the cause of delay; (ii) if the Delayed Party does not discover the event until after more than 2 days after it occurred, the time elapsed between the event and discovery of the event and the reason for delay in discovering the event; and (iii) the Delayed Party's reasonable estimate of the length of the Force Majeure Delay. |
| <p>(c) Effect of Notice or Failure to Provide Notice. Unless the Party receiving notice objects to the Delayed Party's estimate of the period of Force Majeure Delay within 5 days after timely receipt of a Force Majeure notice, the Force Majeure Delay will be the period specified in the notice, subject to Subsection (d) (Outside Delivery Date). A Delayed Party that does not provide timely notice will be deemed to have waived the benefit of its right to a Force Majeure Delay.</p> | <p>(c) Effect of Notice or Failure to Provide Notice. Unless the Party receiving notice objects to the Delayed Party's estimate of the period of Force Majeure Delay within 5 days after timely receipt of a Force Majeure notice, the Force Majeure Delay will be the period specified in the notice. A Delayed Party that does not provide timely notice will be deemed to have waived the benefit of its right to a Force Majeure Delay.</p> |
| <p>(d) Outside Delivery Date. Under no circumstances may a Force Majeure Delay extend beyond the Outside Delivery Date for a Venue except by the Parties' written agreement.</p> | <p><i>Note: The LDA approved by the Mayor on August 14, 2012 did not include an "Outside Delivery Date" section.</i></p> |

| | |
|---|--|
| <p>(e) Definitions. The following definitions will apply in the application of this Section:</p> <p>(i) “Force Majeure” means events beyond the Delayed Party’s reasonable control that prevent the action that is being delayed, including: acts of nature or of the public enemy; acts of the government (not including issuance of Regulatory Approvals by Regulatory Agencies); fires; floods; tidal waves; epidemics; quarantine restrictions; freight embargoes; earthquakes; unusually severe weather; and strikes or other substantial interruption of work because of labor disputes. The following are excluded from the definition of Force Majeure:</p> <p>(A) the Authority’s failure to secure anticipated financing for the Project unless caused by Force Majeure;</p> <p>(B) the effect of Laws relating to sea level rise;</p> <p>(C) any obligation under this Agreement that may be satisfied in full by the payment of a liquidated sum of money; and</p> <p>(D) an event that does not cause an actual delay in a Party’s ability to complete the action by the required date.</p> <p>(ii) “Litigation Force Majeure” means any action or proceeding before any judicial, adjudicative, or legislative decision-making body, including any administrative appeal, that prevent the action that is being delayed, brought by a Third Party that challenges:</p> <p>(A) the validity of any action taken by any City body, including the Planning Commission and the Port Commission, in connection with environmental review of the Project under CEQA or NEPA, Approvals relating to the Project, or any findings on which any action is predicated;</p> <p>(B) the validity of any action taken by any other Regulatory Agency, including environmental review of the Project; or</p> <p>(C) the failure of any Regulatory Agency to impose a Regulatory Condition of Approval.</p> <p>Any proceeding brought by an Authority Affiliate or Agent, any Persons Controlled by or under the Common Control of the Authority or an Authority Affiliate, or any other Third Party assisted directly or indirectly in the proceeding by the Authority is excluded from the definition of Litigation Force Majeure.</p> <p>(iii) “Outside Delivery Date” means, for each Venue, the date that is 24 months after the Delivery Date specified in Schedule 1, which will be amended as necessary to reflect changes in the Event Plan.</p> | <p>(d) Section: Definitions. The following definitions will apply in the application of this Section</p> <p>(i) Subject to Section 3.15 (Conditions Subsequent Regarding Certain Force Majeure Events: Labor Disputes), “Force Majeure” means any of the following events beyond the Delayed Party’s control, but only to the extent that the event delays or prevents a Party’s performance: acts of nature (excluding unusually severe weather) or of the public enemy; acts of the government (not including issuance of Regulatory Approvals by Regulatory Agencies); fires; floods; tidal waves; epidemics; quarantine restrictions; freight embargoes; earthquakes; unusually severe weather; and substantial interruption of work caused by labor disputes or strikes directed at Event-related activities, including Improvements and Alterations at Venues.</p> <p>(ii) “Litigation Force Majeure” means any action or proceeding before any judicial, adjudicative, or legislative decision-making body, including any administrative appeal, that prevent the action that is being delayed, brought by a Third Party that challenges:</p> <p>(A) the validity of any action taken by any City body, including the Planning Commission and the Port Commission, in connection with environmental review of the Project under CEQA or NEPA, Approvals relating to the Project, or any findings on which any action is predicated;</p> <p>(B) the validity of any action taken by any other Regulatory Agency, including environmental review of the Project; or</p> <p>(C) the failure of any Regulatory Agency to impose a Regulatory Condition of Approval.</p> <p>Any proceeding brought by an Authority Affiliate or Agent, any Persons Controlled by or under the Common Control of the Authority or an Authority Affiliate, or any other Third Party assisted directly or indirectly in the proceeding by the Authority is excluded from the definition of Litigation Force Majeure.</p> |
|---|--|

| | |
|---|--|
| <p>(e) Event Postponement. The Port acknowledges that, independent of Force Majeure, the Authority has the right under the HVA § 12.1 to postpone any World Series regatta or Regatta for up to 12 months from the dates specified in the Venue Schedule, as revised from time to time in accordance with HVA §§ 3.3-3.4. This Agreement does not provide an independent basis for postponement of any regatta. The following will apply if the Authority elects to exercise this right under the HVA:</p> <ul style="list-style-type: none"> (i) The Authority will provide the Port with a notice of the election, including the proposed dates for the anticipated postponement, concurrently with its notice to the City. (ii) The Authority will consult with the City to implement revisions to the Venue Schedule to accommodate the proposed postponement. The City will have the right to change the designated Venues for the Event, subject to applicable Regulatory Agency Approval, as long as the Event can be accommodated at those Venues to the Authority's satisfaction. (iii) The Port's economic good standing relies upon its continuing operation of the waterfront, including its ongoing leasing activities at non-Venue locations and its maritime operations. The Port's continuing operations will rely on its ability to use or lease portions of its facilities not in use as Event Venues, and the Port's Public Trust mission requires it to make Port property available for other Public Trust uses such as access for navigation, fishing, and commerce, when Venues are not being used for the Event. The Authority acknowledges that the Port may consider these factors when reviewing any proposed changes to the Venue Schedule. (iv) A postponement by the Authority will effect an automatic extension of dates for performance of the Parties under this Agreement, including the Delivery Dates for any Venue planned for use for the postponed regatta consistent with the revised Venue Schedule will be revised in accordance with HVA §§ 3.3-3.4. (v) This Subsection does not change any of the other rights or obligations under HVA § 12.1. | <p>(f) Event Postponement. The Port acknowledges that, independent of Force Majeure, the Authority has the right under the HVA § 12.1 to postpone any World Series regatta or Regatta for up to 12 months from the dates specified in the Event Plan, as revised from time to time in accordance with HVA §§ 3.3-3.4. This Agreement does not provide an independent basis for postponement of any regatta. The following will apply if the Authority elects to exercise this right under the HVA:</p> <ul style="list-style-type: none"> (i) The Authority will provide the Port with a notice of the election, including the proposed dates for the anticipated postponement, concurrently with its notice to the City. (ii) The Authority will consult with the City, including the Port, to implement revisions to the Event Plan to accommodate the proposed postponement. The City will have the right to change the designated Venues for the Event, subject to applicable Regulatory Agency Approval, as long as the Event can be accommodated at those Venues to the Authority's satisfaction. (iii) A postponement by the Authority will effect an automatic extension of dates for performance of the Parties under this Agreement, including the Delivery Dates for any Venue planned for use for the postponed regatta consistent with the revised schedule, and the Event Plan will be revised in accordance with HVA §§ 3.3-3.4. (iv) This Subsection does not change any of the other rights or obligations under HVA § 12.1. |
| <p>3.15. Conditions Subsequent Regarding Certain Force Majeure Events. The City has agreed to make the following good faith efforts with respect to certain Force Majeure events that might affect the Port's Delivery of the Pier 27 Venue or Piers 30-32. .</p> <p>(a) Labor Disputes, Fire, and Unusually Severe Weather.</p> <p>The City commits to seeking Approval to amend the LDA to provide for payment to the Authority of liquidated damages for Losses that may arise from delays caused by labor disputes or strikes directed at the City's construction or other Event-related site preparation activities at the Pier 27 Venue or Piers 30-32, fire, and unusually severe weather, subject to Approval by the Port Commission and the Board no later than October 17, 2012, in each such body's</p> | <p><i>The LDA approved by the Board on March 27, 2012 did not include a Section 3.15</i></p> |

sole discretion. Should the City receive both required Approvals, delays caused by labor disputes or strikes directed at the City's construction or other Event related site preparation activities at the Pier 27 Venue or Piers 30-32, fire, or unusually severe weather, will not be Force Majeure events excusing the City's obligation to pay the Authority liquidated damages should the Delivery of Piers 30-32 or the Pier 27 Venue be delayed beyond March 1, 2013, as described in Section 1.1(b) (Port Infrastructure Work: Piers 30-32 Work) and Section 1.2(iii) (Port Infrastructure Work: Cruise Terminal Work), subject to the \$5 million cap. If the Authority directs the Port to secure and deliver Functionally-Equivalent Space for the Unavailable Venue, the Authority's Losses will include Relocation Costs. The City's costs of providing replacement space will not be counted towards the \$5 million cap, but will be paid or reimbursed from the Cash Collateral, subject to all conditions of Section 4.2(c) (City Secured Obligations: Cash Collateral).

(b) Revised Definition of Force Majeure. Effective when the City has obtained the Approvals necessary to implement Section 3.15(a) (Conditions Subsequent Regarding Certain Force Majeure Events: Labor Disputes, Fire, and Unusually Severe Weather), the definition of "Force Majeure" will be revised automatically to mean any of the following events beyond the Delayed Party's control, but only to the extent that the event delays or prevents the City's timely Delivery of the Pier 27 Venue or Piers 30-32: performance: acts of nature (excluding unusually severe weather) or. of the public enemy; acts of the government (not including issuance of Regulatory Approvals by Regulatory Agencies); floods, tidal waves; epidemics; quarantine restrictions; freight embargoes; and earthquakes.

(c) Remedy. Should the City be unable to obtain required Approvals under *Section Error! Reference source not found.* (Conditions Subsequent Regarding Certain Force Majeure Events: Labor Disputes, Fire, and Unusually Severe Weather), the Authority will be entitled to terminate this Agreement in its entirety as its sole remedy, and upon termination, neither Party will have any recourse to the other Party, except for obligations of either Party that survive in accordance with Section 6.1(c) (Termination Rights: Survival); provided that the Authority must exercise its termination remedy under Section 3.15(b) (Conditions Subsequent Regarding Certain Force Majeure Events: Remedy), if at all, by providing notice in accordance with Article 8 (Notices) to the City no later than 5 p.m. (San Francisco time) on November 16, 2012. The Authority's failure to provide timely notice of termination under Section 3.15(b) (Conditions Subsequent Regarding Certain Force Majeure Events: Remedy) will constitute the Authority's irrevocable waiver of this termination right. (*note: emphasis added*)