

CITY AND COUNTY OF SAN FRANCISCO

EDWIN LEE, MAYOR

MEMORANDUM OF UNDERSTANDING

MOU 15689

BY AND BETWEEN

**SAN FRANCISCO CONTROLLER,
ACTING THROUGH THE DIRECTOR OF PUBLIC FINANCE**

AND

THE SAN FRANCISCO PORT COMMISSION

NADIA SESAY, DIRECTOR OF PUBLIC FINANCE

MONIQUE MOYER, PORT EXECUTIVE DIRECTOR

SAN FRANCISCO PORT COMMISSION

DOREEN WOO HO, PRESIDENT

KIMBERLY BRANDON, VICE PRESIDENT

WILLIE ADAMS

LESLIE KATZ

MEL MURPHY

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MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (this “MOU”), dated for reference purposes only as of _____, 2013, is entered into by and among the San Francisco Port Commission (the “Port”), a commission duly constituted under the Charter of the City and County of San Francisco (the “City”), and the San Francisco Controller (the “Controller”), acting through the City’s Director of Public Finance or her designee (the “Director”).

RECITALS

A. The Port is constructing and installing certain improvements to Piers 19, 23, 27, 29, 30-32, and 70 and other Port property to prepare for their use as venues for the 34th America’s Cup events. The Port has funds budgeted to pay for a portion of these improvements, and the Director will issue debt as provided in this MOU for a portion of the improvements (the City-financed portion only, the “Project”) as authorized by the San Francisco Board of Supervisors (the “Board”) Resolution No. 84-12, File No. 120379.

B. The Director and the Port wish to document their mutual understanding with respect to the execution of a Property Lease and a Project Lease (together, the “lease/lease-back”) by and between the City and a corporate trustee and the execution and delivery of certificates of participation (“COPs”) in connection therewith, all for the purpose of financing the Project (including any refinancing, the “Financing”).

C. The COPs will evidence the obligation of the City under the Project Lease to make certain lease payments (the “Base Rental”) from its General Fund. The City will also be obligated under the Project Lease to pay “Additional Rental” (together, Base Rental and Additional Rental constitute “Rental Payments” under the Project Lease). The Director and the Port agree that the Financing described above will be the most efficient way to finance the Project.

D. The Port acknowledges and agrees that the City would not agree to execute the lease/lease-back transaction documents or to cause execution and delivery of the COPs without the undertaking by the Port to budget such amounts as necessary to offset the costs of the COPs on the City’s General Fund, as further described in this MOU. The City acknowledges and agrees that the Port would not enter into this MOU without the City’s agreement to authorize the Port’s budgeted expenditures to meet its obligations under this MOU.

E. Section B7.320 of the City’s Charter authorizes the Mayor to submit to the Board for approval a memorandum of understanding between the Port and another department of the City, approved by a Port Commission resolution, that requires the department to expend funds or requires the Port to transfer funds to the department and, upon approval by Board resolution, requires the City to appropriate funds sufficient to fund the expenditure until the memorandum of understanding expires or is terminated by the Port Commission and the other City department.

F. Because the Project is a Port undertaking, the Director and the Port now wish to enter into this MOU to establish their mutual expectation that the Port will undertake to budget

for each fiscal year such amounts as are necessary to pay the costs of the Financing over the life of the Project Lease and the COPs, including amounts to offset Rental Payments under the Project Lease, and any other costs of financing or refinancing the Project, and that the City will approve and authorize the Port's budgeted fiscal year expenditures to meet its obligations under this MOU.

NOW, THEREFORE, IN CONSIDERATION of the foregoing, the Port and the Director hereby agree as follows:

AGREEMENT

1. **Recitals.** The foregoing recitals are true and correct and are incorporated herein by this reference.

2. **Payment of Rental Payments.**

a. **Binding Port Budget Obligation.** The Port agrees to submit a budget for each fiscal year for approval by the Board and Mayor of the City that includes amounts for direct payments by the Port or reimbursement by the Port of the City for "Rental Payments," which term is defined to include all obligations incurred by the City under the Project Lease, including the Rental Payments and all other expenses incurred by the City in connection with the Financing.

b. **Harbor Fund Not Pledged.** The Director acknowledges that the Port is not pledging any revenues as security for its obligations under this MOU, and any payments by the Port under this MOU shall be made from any source of legally available funds of the Port in any fiscal year after it has satisfied its obligations to pay debt service on any Port revenue bonds in that fiscal year, whether the revenue bonds are outstanding as of the date of this MOU or issued after the date of this MOU. The Director and the Port acknowledge and agree that the Port's obligations under this MOU are and will be expressly subordinate to any Port revenue bonds currently or hereafter outstanding. The Director agrees to confirm in writing the subordinate status of the Port's obligations under this MOU in relation to any Port revenue bonds within a reasonable time after the Port's request.

c. **Binding City Obligation to Appropriate Funds.** The Director acknowledges that, following a Board resolution approving this MOU, the City will be required to appropriate funds sufficient to fund the Port's budgeted expenditures to meet its obligations under this MOU.

3. **Term.** The term of this MOU will begin on the date the resolution of the Board approving it becomes effective and end on the upon the payment of all costs related to the Financing, including all Rental Payments and the costs of retiring the COPs or any obligations incurred by the City to refinance the COPs.

4. **COP Expectations.**

a. **Port Asset Transfer for COP Purposes.** The Port agrees to request an interjurisdictional transfer of Pier 27 to the City's General Services Agency, Real Estate Division, to provide collateral for the COPs, subject to the following: (i) the transfer will be made subject to the trust created by the Burton Act (stats. 1968, ch. 1333) and the common law public trust for commerce, navigation, and fisheries; (ii) the transfer will be subject to a condition subsequent that Pier 27 will be transferred back to the Port after the COPs have been fully paid.

b. **Amount of COPs.** The parties agree that the City will execute and deliver the lease/lease-back documents and cause execution and delivery of the COPs in an amount sufficient to pay not only the costs of constructing the Project but, as applicable, other costs relating to the Financing, including capitalized interest, costs of issuance, reimbursement of eligible pre-issuance costs, and other contingencies. The initial principal amount of the COPs will be the greater of: (i) \$50,000,000; and (ii) any greater amount agreed upon by the Director and the Port, if approved by the Port Commission and the Board. The initial principal amount of any obligations incurred by the City to refinance the COPs will be the greater of: (i) the amount required to defease the outstanding COPs (or any obligations issued to refinance the COPs), fund a debt service reserve for the obligations and pay the costs of issuing the obligations; and (ii) such greater amount agreed upon by the Director and the Port, if approved by the Port Commission and the Board.

5. **Obligations with Respect to Project.** The Port shall be responsible for all operations, maintenance, insurance and other issues relating to the ongoing use of Pier 27 and the new cruise terminal building at Pier 27, subject to any obligations of the City under the Project Lease.

6. **Obligations with Respect to the Financing.** The Director, as the designee of the Controller, shall collaborate with the Port with respect to the ongoing management of the Project Lease and the COPs, in terms of approvals, refunding opportunities, or other aspects of the transaction that could result in a change in the nature or the amount of the Rental Payments. Because the Financing relies on Rental Payments to be made by the City from its General Fund, subject to the Port's reimbursement obligation under this MOU, the Controller has final authority with respect to managing the Financing. The authority of the Controller to manage the Financing shall also extend to all refinancings of the COPs that are payable from or secured by the City's General Fund or any City assets not under Port jurisdiction.

7. **Port Obligations Relating to Leased Property.**

a. **Port Management Obligations.** The Port shall provide Port assets to serve as "Leased Property" under the Project Lease, and the Controller will provide additional City assets to serve as Leased Property during the construction of the new cruise terminal building at Pier 27. The Port hereby authorizes the City to include the new cruise terminal building at Pier 27 as "Leased Property" for the lease/lease-back, subject to the following: (i) the lease/lease-back documents will attach only to the new Pier 27 cruise terminal building, including the air parcel of the planned building envelope before the building is completed, but not the underlying pier and substructure; (ii) the City assets subject to the lease/lease-back will be the primary

security for the COPs until the cruise terminal building is complete and operational for its intended use; and (iii) after construction of the new Pier 27 cruise terminal building is complete, the cruise terminal building will be the sole security for the COPs, and the City assets will be released from the lease/lease-back.

b. Damage or Destruction. For as long as any interest in Pier 27 constitutes “Leased Property” under the Property Lease, the Port will use the proceeds of any insurance proceeds related to the damage or destruction of Pier 27 to rebuild or replace Pier 27 or, if the cruise terminal building was not complete, complete its construction, as soon as it commercially reasonable to do so.

8. Notice. Any notice given under this MOU shall be effective only if in writing and given by delivering the notice in person or by sending it first-class mail or certified mail with a return receipt requested or by overnight courier return receipt requested, with postage prepaid, at the following addresses, or at such other addresses as either the Port or the Director may designate by notice as its new address:

Address for Port: Port of San Francisco
Pier One
San Francisco, CA 94111
Attn: Monique Moyer, Executive Director
Email: monique.moyer@sfport.com
Telephone No.: (415) 274-0401
Fax No.: (415) 274-0578

Address for Controller: Office of the Controller, Director of Public
Finance
City Hall Room 336
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
Attn: Nadia Sesay, Director
Email: nadia.sesay@sfgov.org
Telephone No.: (415) 554-7500
Fax No.: (415) 554-4864

For convenience of the parties, courtesy notices may also be given by email, facsimile, or telephone to the address or numbers set forth above or such other address or number as may be provided from time to time; however, neither the Port nor the Director may give official or binding notice by email, telephone, or facsimile.

9. Miscellaneous Provisions.

a. California Law. This MOU shall be construed and interpreted in accordance with the laws of the State of California and the City’s Charter.

b. Entire Agreement. Subject to any subsequent agreements authorized pursuant to this MOU, this MOU contains all of the representations and the entire agreement between the

parties with respect to the subject matter of the MOU. Any prior correspondence, memoranda, agreements, warranties, or written or oral representations relating to such subject matter are superseded in total by this MOU. No prior drafts of this MOU or changes from those drafts to the executed version of the MOU shall be introduced as evidence in any litigation or other dispute resolution proceeding by any party or other person, and no court or other body should consider those drafts as in interpreting this MOU.

c. Amendments. No amendment of this MOU in whole or any part shall be valid unless it is in writing and signed by both the Port and the Director.

d. Severability. Except as is otherwise specifically provided for in this MOU, invalidation of any provision of this MOU, or of its application to any person, by judgment or court order, shall not affect any other provision of this MOU or its application to any other person or circumstance, and the remaining portions of this MOU shall continue in full force and effect, unless enforcement of this MOU as partially invalidated would be unreasonable or grossly inequitable under all of the circumstances or would frustrate the purpose of this MOU.

e. No Party Drafter; Captions. The provisions of this MOU shall be construed as a whole according to their common meaning and not strictly for or against any party to achieve the objectives and purposes of the parties. Any caption preceding the text of any section, paragraph, or subsection is included only for convenience of reference and shall be disregarded in the construction and interpretation of the MOU.

f. Singular, Plural, Gender. Whenever required by the context, the singular includes the plural and vice versa, and the masculine gender includes the feminine gender, and vice versa.

g. Successors. The terms, covenants, agreements and conditions set forth in the MOU shall bind and inure to the benefit of the Port and the Controller and, except as otherwise provided herein, their contractors, agents, personal representatives, successors, and assigns.

h. Waiver. No failure by either party to insist upon the strict performance of any obligation of the other party under this MOU or to exercise any right, power or remedy arising out of a breach thereof, irrespective of the length of time for which such failure continues, and no acceptance of full or partial MOU consideration during the continuance of any such breach shall constitute a waiver of such breach or of the right to demand strict compliance with such term, covenant, or condition. A party's consent to or approval of any act by the other party requiring consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent act. Any waiver of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of the MOU.

i. Further Assurances. The parties hereto agree to execute and acknowledge such other and further documents as may be necessary or reasonably required to carry out the mutual intent of the parties as expressed in this MOU.

j. Application. The parties intend for this MOU to establish their shared understanding as to the budgeting of certain costs and as such this document shall not confer any rights on any other person to mandate or enjoin any action by the parties hereto.

10. **Approval Contingency.** This MOU shall not be effective without authorization from the Port Commission and the Board, each in its sole and absolute discretion.

IN WITNESS WHEREOF, the parties have caused this MOU to be executed as of the date first written above.

AGREED TO AS WRITTEN
ABOVE:

CITY AND COUNTY OF SAN
FRANCISCO, a municipal
corporation operating by and
through SAN FRANCISCO PORT
COMMISSION

By: _____
MONIQUE MOYER
Port Executive Director

Date: _____
Port Resolution No. 12-37

REVIEWED:

DENNIS J. HERRERA
City Attorney

By: _____
Joanne Sakai
Deputy City Attorney

AGREED TO AS WRITTEN
ABOVE:

SAN FRANCISCO CONTROLLER,
acting through the City's Director of
Public Finance

By: _____
NADIA SESAY
Director of Public Finance

Date: _____
Board Resolution No. _____

REVIEWED:

DENNIS J. HERRERA
City Attorney

By: _____
Deputy City Attorney