

Order 277-13/14

Passage: 9-0 on 6/16/2014

MICHAEL F. BRENNAN (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (2)
EDWARD J. SUSLOVIC (3)
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**CITY OF PORTLAND
IN THE CITY COUNCIL**

Effective 6/26/2014

JOHN R. COYNE (5)
JILL C. DUSON (A/L)
JON HINCK (A/L)
NICHOLAS M. MAVODONES, JR (A/L)

**ORDER APPROVING LEASE WITH PORTLAND TUGBOAT, LLC
RE: BERTHING, STORAGE SPACE,
AND PARKING AT PORTLAND OCEAN TERMINAL**

ORDERED, that the attached lease with Portland Tugboat, LLC for berthing, storage space and parking at the Portland Ocean Terminal is hereby approved, substantially in the form attached; and

BE IT FURTHER ORDERED, that the City Council hereby authorizes the City Manager to execute said document and any other related documents necessary or convenient to carry out the intent of said document.

LEASE AGREEMENT
BETWEEN CITY OF PORTLAND
AND PORTLAND TUGBOAT, LLC
FOR BERTHING, STORAGE, AND PARKING SPACE
AT THE PORTLAND OCEAN TERMINAL

This lease, made as of the 1st day of July, 2014, by and between the **CITY OF PORTLAND**, a Maine municipal corporation having its principal place of business at 389 Congress Street, Portland, Maine (hereinafter sometimes referred to as “**CITY**”) and **PORTLAND TUGBOAT, LLC**, a Maine corporation having its principal office at P.O. Box 480, Belfast, Maine (hereinafter referred to as “**PORTLAND TUG**”).

WHEREAS, **CITY** has available berthing, storage at the Portland Ocean Terminal (POT) located at 40 Commercial Street in Portland, and parking space at or near POT; and

WHEREAS, **PORTLAND TUG** wishes to lease berthing, storage and parking spaces to operate its tugboat business from the POT; and

WHEREAS, **CITY** agrees to lease berthing, storage and parking space to **PORTLAND TUG**, pursuant to the terms and conditions set forth in this Agreement; and

WHEREAS, **CITY** has sufficient right, title and interest in and to the real property, together with the facilities, easements, rights, licenses, and privileges hereinafter granted, and has full power and authority to enter into this Agreement in respect thereof;

NOW, THEREFORE, in consideration of the mutual covenants and considerations herein contained,

WITNESSETH:

1. Premises:

CITY does hereby lease, demise and let unto **PORTLAND TUG** the two Pier Spaces at Pier One described below for berthing alongside the POT, as well as twelve hundred (1,200) square feet of storage or warehouse space for its exclusive use and located in the POT Building, (hereinafter the “Premises”) as shown on Exhibit A attached hereto, together with the right of ingress and egress thereto. Also, the **CITY** reserves the right to relocate, temporarily and from time to time, the berthing areas at POT, as further delineated below.

The Berthing portion of the Premises shall mean two (2) continuous “Pier Spaces” of approximately 150 lineal feet each totaling approximately three hundred (300) lineal feet of non-exclusive use berthing space at the POT on the easterly side of the Maine State Pier’s Pier One, together with the right of access and egress and the right to use in common with other tenants and the public all rights of way, easements, and appurtenances, rights, privileges, and immunities thereunto belonging or pertaining, and

any improvements constructed or located thereon by **PORTLAND TUG**. The Premises include both the berthing area leased to **PORTLAND TUG** and the common use areas. A delineation of the Premises is attached hereto as Exhibit A. The Premises are leased in 'as is' condition, and **PORTLAND TUG** acknowledges being adequately familiar with the condition of the Premises

2. **Term.**

Subject to Section 14 below for termination for cause or convenience, the term of this Agreement shall be for a period of five (5) years, commencing on July 1, 2014, and ending on June 30, 2019.

In the event **PORTLAND TUG** continues to occupy the Premises beyond the term, such holding over shall not constitute a renewal or extension of this Agreement, but shall create a tenancy at sufferance which may be terminated at any time by **CITY** or **PORTLAND TUG** by giving Thirty (30) days' prior written notice to the other party of such termination. Any such tenancy at sufferance shall be on all terms and conditions of this Agreement, except as provided herein for a month to month tenancy.

3. **Permitted Uses.**

a. Permitted Uses of Berthing.

(1) **PORTLAND TUG** shall use and occupy the Berthing portion of the Premises for only berthing and servicing of its Fleet and operation of a tugboat business from the Premises as provided herein. "Fleet" shall mean the **PORTLAND TUG's** permanent, wholly-owned fleet of tugboats, workboats, barges, other vessels, and marine equipment, including, but not limited to, these five tugboats and one seaworthy working barge:

- 1) *Andrew McAllister*
- 2) *Iona McAllister*
- 3) *Rowan McAllister*
- 4) *Roderick McAllister*
- 5) *Fournier Girls*
- 6) *Office Barge*

(2) **PORTLAND TUG** shall berth no more than three Fleet vessels, including tugboats, barges, and marine equipment, at any single pier berth, such that no more than one primary Fleet vessel, barge or piece of equipment may be berthed in a berthing slot adjacent to Pier One at any given time and with no more than two additional Fleet vessels, barges or pieces of equipment rafted alongside the primary berth occupant.

"Pier Space" shall mean a portion of the pier consisting of one hundred and fifty (150) continuous linear feet of a pier docks, but not including any pier apron,

driveway, or land areas. A Pier Space includes priority access to use of all pier mounted devices (bollards & cleats) for the securing of Fleet vessels.

“Pier One” shall mean the pier that is the westernmost pier comprising the eastern side of the Maine State Pier. Pier One is nine hundred feet (900) in length and consists of six (6) Pier Spaces. These Pier Spaces, beginning at the head of the Pier are designated Pier Spaces 1A, 1B, 1C, 1D, 1E and 1F.

(3) In no event shall **PORTLAND TUG** berth more than six (6) total Fleet vessels, barges or pieces of equipment at the two Pier Spaces that constitute the **PREMISES**, such that no more than two vessels may be consecutively rafted alongside a vessel which is berthed along the pier. **PORTLAND TUG** may make special arrangements with **CITY** on a case by case basis to berth additional Fleet vessels, barges or pieces of equipment. **CITY** shall, at its convenience, provide such additional Fleet berthing depending on availability and safety of such berthing, but **CITY** shall be under no obligation to provide such additional berthing. If such additional berthing is provided, **CITY** shall charge **PORTLAND TUG** additional berthing fees for such additional Fleet berthing.

(4) This lease explicitly does NOT give **PORTLAND TUG** the right to berth vessels owned or operated by third parties at the premises, or at any portion of the POT or any other pier or wharf owned or operated by the **CITY**. When prior approval has been obtained from **CITY** for such a third party to berth at a pier owned or operated by the **CITY**, **PORTLAND TUG** may participate in or effectuate such berthing. If **PORTLAND TUG** causes a third party vessel to berth at a pier owned or operated by the **CITY** without such prior approval, **PORTLAND TUG** shall bear the berthing fees due to the **CITY** as a result of such berthing, and **PORTLAND TUG** shall be responsible for any resulting damage to **CITY** facilities, and hereby agrees to indemnify and hold the **CITY** harmless from any claims against the **CITY** resulting from such berthing.

(5) **PORTLAND TUG** specifically understands and agrees that other tenants and users will be using the easterly side of Pier One of the Maine State Pier as well as other parts of the adjacent property for various uses including, but not limited to, marine industrial work. **PORTLAND TUG** also specifically understands and agrees that the **CITY** will be using the easterly side of Pier One of the Maine State Pier for the berthing of cruise ships and other vessels. Such other operations may, at the **CITY**'s sole discretion, take priority over **PORTLAND TUG**'s operations and **PORTLAND TUG** will use its best efforts to coordinate its berthing and other operations to accommodate the **CITY**'s other uses at POT. Except in the case of an emergency, **CITY** will provide reasonable advance notice of the need to have **PORTLAND TUG** temporarily relocate its vessels from its Premises to accommodate **CITY**'s other facility uses and **CITY** will make its best effort to provide for alternate temporary berthing of **PORTLAND TUG**'s vessels based on alternate berthing availability and any security requirements. If **CITY** requires **PORTLAND TUG** to relocate and

PORTLAND TUG is not able to occupy its Premises for more than thirty-six (36) hours, **PORTLAND TUG's** monthly rent shall be prorated to reflect such loss of use of its Premises. No reduction or pro-ration of Rent or other credit shall be due **PORTLAND TUG** if such required relocation is for a period of less than thirty-six (36) hours.

(6) Fleet repairs. No Hot Work or other major repair or construction work on or around **PORTLAND TUG's** vessels will be permitted without the prior written consent of the **CITY** which may be withheld at **CITY's** sole discretion. All contractors and agents performing permitted work on the Premises or **PORTLAND TUG's** vessels must supply **CITY** with written evidence of adequate insurance prior to commencing any such approved work. In this Section, "Hot Work" shall mean the use of welding equipment or cutting torches on metal for the purposes of repair, construction, salvage or any other evolution that creates a source of ignition.

b. Permitted Uses of Pier Space.

(1) **PORTLAND TUG** Uses: **PORTLAND TUG** may use the Pier portion of the storage, warehousing, and similar operations which are related to its commercial transportation business. **PORTLAND TUG** shall not engage in the sale of food, drinks or goods in or from the Premises.

(2) **CITY** uses: **CITY** reserves the right to permit other parties to use the Common Use Space and the remainder of the POT (other than the Premises) during the term of this Agreement and thereafter, so long as such use does not unreasonably interfere with the use of the Premises and the Common Use Space by **PORTLAND TUG** as permitted or required by this Lease Agreement.

(3) **PORTLAND TUG** agrees to work with the **CITY** to coordinate **PORTLAND TUG's** use of the Premises and the Common Use Space with other tenants and users of the POT. **PORTLAND TUG** acknowledges that the primary intended use of the POT is as a deepwater marine facility and agrees that it will make all reasonable accommodations necessary to permit that use of the POT.

(4) All uses hereunder shall be limited to those uses permitted under **CITY** zoning laws.

(5) **PORTLAND TUG** shall not be permitted to fuel its vehicles or any other vehicles on the POT property.

(6) Nothing herein is intended to create, nor shall it be deemed to be, a joint venture between the parties and **PORTLAND TUG** and its officers and employees shall at all times be an independent contractor to **CITY**.

4. Parking.

CITY shall provide up to ten (10) reserved parking spaces in a location at the POT designated by the **CITY**, such spaces to be used by **PORTLAND TUG** as employee parking. Notwithstanding the foregoing, the **CITY** reserves the right to relocate the reserved parking areas on the Terminal property upon no less than Twenty-Four (24) hours notice to **PORTLAND TUG**; and in particular, whenever the ferry operated by Nova Star Cruises is in port (and actively operating with passengers), currently approximately 7:00 p.m. to 9 p.m. daily, **PORTLAND TUG** will park in the nearby gravel Thames Street City Lot, and the **CITY** will provide **PORTLAND TUG** the necessary ‘tags’ for such parking in said Lot

5. Rent.

Rent for the Premises, that is, the Berthing, use of twelve hundred square feet of space in the POT Building and the ten (10) reserved parking spaces hereunder shall be payable in advance on the first day of each month of the term of this Lease Agreement. Said rent per month shall be as follows:

(a) Base Rent.

Berthing: A Base Rent of Two Thousand Thirty-Four Dollars (\$2,034.00) per Pier Space per month for a total of Four Thousand Sixty-Eight Dollars (\$4,068.00) per month for the period beginning July 1, 2014 through and including June 30, 2015.

Annual Rent Increases: The Base Rent for Berthing shall be increased each July 1st of each year during the Term of this Lease and any holding over periods by three percent (3%) per annum, such that the following schedule will be in effect:

| <i>Lease period</i> | <i>Monthly Base Rent per Pier Space</i> |
|------------------------------|---|
| July 1, 2015 – June 30, 2016 | \$2,095.00 per month |
| July 1, 2016 – June 30, 2017 | \$2,158.00 per month |
| July 1, 2017 – June 30, 2018 | \$2,223.00 per month |
| July 1, 2018 – June 30, 2019 | \$2,289.00 per month |

POT Space

And Parking: A Base Rent of Two Thousand Seven Hundred Fifty Dollars (\$2,750) per month for the period beginning July 1, 2014 through and including June 30, 2015.

Annual Rent Increases: The Base Rent for POT Space and Parking shall be increased each July 1st of each year during the Term of this Lease and any holding over periods by three percent (3%) per annum such that the following schedule will be in effect:

| <i>Lease period</i> | <i>Monthly Base Rent POT and Parking</i> |
|------------------------------|--|
| July 1, 2015 – June 30, 2016 | \$2,833.00 per month |
| July 1, 2016 – June 30, 2017 | \$2918.00 per month |
| July 1, 2017 – June 30, 2018 | \$3,005.00 per month |
| July 1, 2018 – June 30, 2019 | \$3,096.00 per month |

(b) Security Fee. In addition to the Base Rent, **PORTLAND TUG** agrees to pay the **CITY** a Security Fee of Three Hundred Fifty Dollars (\$350.00) per month. ***Such Security Fee may be adjusted from time to time to reflect the actual costs of providing adequate security to the Premises.*** **PORTLAND TUG** acknowledges that such security requirements and associated costs may increase significantly during times of emergency, crisis, threat, war, or as the result of new or revised local, state or federal laws, rules or regulations.

(c) Payment. **PORTLAND TUG** shall pay the Base Rent and any other fees in advance on the first (1st) day of each month.

(d) Late Charge. A late charge of two percent (2.0%) per month shall be charged and applied to any charge not paid within ten (10) days of when it is due hereunder. Collection costs, legal fees, and administrative costs associated with collection of late payments shall also be charged to **PORTLAND TUG**, who shall pay such costs within ten (10) days of receipt of a bill for such costs as additional rent.

(e) Security deposit. **PORTLAND TUG** shall provide in advance a Security Deposit in the amount of Five Thousand Dollars (\$5,000.00) in U. S. funds in cash or a letter of credit in a form acceptable to **CITY**, which deposit the **CITY** may hold for ninety (90) days after the expiration or termination of this agreement and which the **CITY** may apply during or after the term of the Agreement to cover any damages to the Premises or any other expenses that may be incurred by the **CITY** directly relating to this Agreement, including but not limited to, any vessel recovery, vessel removal, or legal costs. All or portions of the Security Deposit may also be retained by the **CITY** as liquidated damages in the event of a default by **PORTLAND TUG**. The retention of the Security Deposit shall not limit or replace any other remedy available to **CITY** for breach of this Agreement. If at the outset of the term of this Lease **CITY** is holding any Security Deposit from a prior lease with **PORTLAND TUG**, such existing Security Deposit shall be used to fund, in whole or in part, the funding requirement in this subsection.

6. Obligations of CITY.

The **CITY** shall provide the following services:

- a. Connections to these utilities, but the use thereof to be at **PORTLAND TUG**'s expense: i) water (only for ordinary drinking and cleaning, and for ballast and other shipside uses for **PORTLAND TUG**'S vessels only; ii) electricity

necessary for **PORTLAND TUG**'s normal business operations at the POT; and
iii) sewer from facilities used by **PORTLAND TUG** within the buildings on the Premises. There shall be no 'pumping out' from vessels into the sewer connections so provided.

- b. Maintenance and repair of the roof, exterior walls and structure of the building of which the Premises are a part in the same condition as they are at the commencement of the term or as it may be put in during the term of this Agreement, reasonable wear and tear, damage by fire and other casualty only excepted, unless such maintenance or repair is made necessary by fault or neglect of **PORTLAND TUG** or the employees, contractors, agents or invitees of **PORTLAND TUG**, in which case such maintenance or repair shall be at the expense of the **PORTLAND TUG** and **PORTLAND TUG** shall pay all costs therefor;
- c. Maintenance of the Common Use Space, the exterior grounds of the POT, all portions of the POT (other than the Premises) which **PORTLAND TUG** is entitled to use pursuant to the terms of this Agreement, and more specifically, **CITY** shall plow and remove snow on the Maine State Pier sufficient to allow **PORTLAND TUG** to conduct its operations.
- d. Notify **PORTLAND TUG** of any repairs, construction or other activities at the POT that will materially interfere with **PORTLAND TUG**'s use of any portion of the POT as permitted or required by this Agreement. Except in the case of an emergency as determined by the **CITY**, such notice shall be provided at least ten (10) days in advance of the commencement of such repairs, construction or other activities to the extent that the **CITY** has knowledge of the same in time to provide such notice.

7. Obligations of PORTLAND TUG.

PORTLAND TUG, at **PORTLAND TUG**'s expense shall:

- a. Be responsible for the payment of any and all periodic charges for utilities it may require and consume and which are separately metered, including the cost of installation of any such utilities and separate metering, if required. Any utilities used by **PORTLAND TUG** which are not separately metered will be charged as a flat monthly fee which shall be based upon best estimated costs, plus labor and administration costs, to be mutually agreed upon by the parties by separate agreement. **PORTLAND TUG** shall pay all expenses relating to its use of telephone, cable television, computer and internet services, including but not limited to installation and periodic charges.
- b. Maintain the entire Premises in the same condition and repair as it has on the commencement of this Agreement, except only for reasonable wear and tear and

damage caused by fire or other unavoidable casualty. **PORTLAND TUG** shall be responsible for furnishing and cleaning the Premises.

- c. **PORTLAND TUG** will be responsible for proper handling, removal and disposal of trash and waste resulting from its use of the Premises at its own cost and expense. **PORTLAND TUG** is solely responsible for the collection, removal and disposal from the POT of any solid and liquid waste generated by **PORTLAND TUG** or any of its Fleet, said collection, removal and disposal to be in compliance with all applicable federal, state and local laws and regulations.
- d. It shall be **PORTLAND TUG**'s sole responsibility to contract and pay for adequate rodent and pest control at the Premises, and shall provide for routine rodent and pest control services to the extent required as a result of its operations on or from the Premises.
- e. Maintain in full force and effect the insurance coverage required below, and such fire and extended coverage or business interruption insurance for its own property or benefit as it may deem to be appropriate.
- f. Notify the **CITY** in advance of any proposed alterations to the Premises. All such alterations are subject to the prior written approval of the **CITY**'s Director of Recreation and Public Facilities (the "Director").
- g. In addition to other payments required herein, **PORTLAND TUG** shall pay and discharge punctually all generally applicable taxes and governmental assessments on any of **PORTLAND TUG**'s activities or property on the Premises or the Common Use Space. The parties understand and agree that there are no real property taxes to be assessed against the Premises leased hereunder and chargeable to **PORTLAND TUG**. **PORTLAND TUG** reserves the right to contest the imposition or amount of any such taxes or assessments by any means provided by law.
- h. **PORTLAND TUG** shall be solely responsible for docking, undocking and securing of its Fleet and the safekeeping of its Fleet and all equipment at all times during the term of this agreement and while the Fleet may be at any **CITY** facility. **PORTLAND TUG** shall be solely responsible for the movement of the Fleet during the term of this Agreement and timely removal of the Fleet upon the termination or expiration of this Agreement.
- i. **PORTLAND TUG** acknowledges that as of the date this Lease is executed, the pilings and camel-type fenders at the Premises are in satisfactory and reasonably good condition. **PORTLAND TUG** shall be solely responsible for repair or replacement of these **CITY** items, unless necessitated by ordinary use and wear and tear and age or damage caused by others.

- j. Emergency/first aid plan. **PORTLAND TUG** shall provide to the Director and the Chief of the Fire Department a written emergency plan that will cover appropriate preparedness procedures and contacts in the event of an emergency or need for first aid or other medical assistance.
- k. **PORTLAND TUG** shall provide **CITY** a list of all employees who need regular access to the POT and Premises. Such list shall include the full legal name of each person and each person's home address and contact information.
- l. **PORTLAND TUG** acknowledges and agrees that portions of the Facility are open to general public access and that **PORTLAND TUG's** Premises are particularly open and vulnerable to potential uninvited access or acts of vandalism. **CITY** makes no implied or actual representation as to the security of **PORTLAND TUG's** Premises and property. **PORTLAND TUG** shall be fully responsible for providing its own security aboard its vessels at its own cost and expense, and shall hold the **CITY** harmless from any breaches of security or acts of vandalism, damage or destruction. **PORTLAND TUG's** use of the Premises is solely at its own risk.

8. Compliance with Laws.

- a. General: **PORTLAND TUG** shall, at its own cost and expense, promptly observe and comply with all applicable laws, ordinances, requirements, orders, directives, rules and regulations of the federal, state, and county and city governments, and of all other governmental authorities, including but not limited to those concerning environmental issues, noise and lighting, affecting the Premises or appurtenances thereto, while such laws or regulations are in force, regardless of when enacted. **PORTLAND TUG** shall pay all costs, expenses, liabilities, losses, damages, fines, penalties, claims, and demands, including reasonable counsel fees, which may arise directly out of **PORTLAND TUG's** failure to comply with the covenants of this Section, and such failure shall be deemed a default under this Agreement. **PORTLAND TUG** shall be responsible for obtaining all necessary permits and licenses required for its use and occupancy of the POT at its own cost and expense. **PORTLAND TUG** shall not play, nor permit to be played, any amplified music or broadcasts of any kind which result in any complaints from the public or from co-tenants at the POT in its operations hereunder, either at the POT or on water.
- b. Security Rules: **PORTLAND TUG** shall, in its own expense, comply with all safety and security requirements in its operations hereunder. **PORTLAND TUG** further agrees that its officers, employees and agents shall abide by the provisions of the **CITY's** Federal Facility Security Plan, and with any other security directives or policies that may be promulgated from time to time by the **CITY**, the State of Maine or by agencies of the Federal Government during the term of this Agreement, and the **CITY** agrees to provide **PORTLAND TUG** with copies of the same upon request to permit **PORTLAND TUG** to comply with their

terms. All **PORTLAND TUG** employees working at the POT shall obtain a Transit Worker Identification Credential (TWIC) and shall display such TWIC cards at all times when at the POT, whether within the Premises or on the Common Use Space. If required by the U.S. Coast Guard or other agency(ies) with appropriate jurisdiction, **PORTLAND TUG** shall create its own Facility Security Plan. **PORTLAND TUG** shall promptly pay all costs, expenses, liabilities, losses, damages, fines, penalties, claims, and demands, including reasonable counsel fees, which may arise directly out of **PORTLAND TUG's** (including its officers, volunteers and employees) failure to comply with the covenants of this paragraph, and such failure shall be deemed a default under this Agreement.

9. Signage.

PORTLAND TUG shall have the right to have signage in the Premises, which signage shall be approved by the Director and shall be at **PORTLAND TUG's** sole cost. Installation of such signage shall be done by the **CITY** or by a contractor acceptable to the **CITY**, at **PORTLAND TUG's** cost. General signage for the Common Use Space, and the parking lot at the POT, shall be provided and installed by the **CITY**, at **CITY's** cost. All signage shall be installed and maintained in accordance with all applicable local and state governmental codes.

10. Indemnification.

- a. General. To the fullest extent permitted by law, **PORTLAND TUG** shall at its own expense defend, indemnify, and hold harmless the **CITY**, its officers, agents, and employees from and against any and all liability, claims, damages, penalties, losses, expenses, or judgments, just or unjust, arising from injury or death to any person, or damage to property sustained by anyone (including but not limited to **CITY** employees or property) resulting from or arising out of any act or omission of **PORTLAND TUG**, its officers, agents, servants, employees, or invitees, or anyone for whom **PORTLAND TUG** may be legally liable, including but not limited to claims based upon violation of any environmental law or regulation.

PORTLAND TUG shall, at its own cost and expense, defend any and all suits or actions, just or unjust, which may be brought against **CITY** or in which **CITY** may be impleaded with others upon any such above-mentioned matter, claim or claims, including claims of contractors, employees, laborers, materialmen, and suppliers. In cases in which **CITY** is a party, **CITY** shall have the right to participate at its own discretion and expense and no such suit or action shall be settled without prior written consent of **CITY**. Such obligation of indemnity and defense shall not be construed to negate nor abridge any other right of indemnification or contribution running to **CITY** which would otherwise exist.

- b. In addition to the foregoing, to the fullest extent permitted by law, **PORTLAND TUG** hereby agrees to assume all risk of injury, harm or damage to any person or

property (including but not limited to all risk of injury, harm or damage to **PORTLAND TUG's** officers, agents, employees, contractors, customers or invitees or to their property) arising out of, during, or in connection with the rental or use of the POT property or any portion thereof and the activities hereunder which injury, harm or damage is alleged to be related to the presence of mold at or in the Premises, and to defend, indemnify and hold the CITY harmless from any such liability, claims, damages, losses or expenses.

- c. It shall be **PORTLAND TUG's** responsibility, at its own cost and expense, to be in compliance with all existing and future security requirements of the federal, state or local government, and **PORTLAND TUG** shall hold the **CITY** harmless and shall pay any fines, penalties, cost or expenses incurred by **CITY** or by **PORTLAND TUG** and arising out of any breach of said security requirements by **PORTLAND TUG**, its officers, agents, employees, customers, invitees, subtenants, contractors, subcontractors or anyone for whose act **PORTLAND TUG** may be liable.
- d. Covenant against liens: **PORTLAND TUG** shall not cause or permit any lien against the **CITY's** property or any improvements thereto to arise out of or accrue from any action or use thereof by **PORTLAND TUG** and shall hold the **CITY** harmless therefrom; provided, however, that **PORTLAND TUG** may in good faith contest the validity of any alleged lien. Upon request of the **CITY**, **PORTLAND TUG** shall post a bond warranting payment of any such lien in the event **PORTLAND TUG** contests such lien.
- e. Survival. The Terms of this Section shall expressly survive the expiration or termination of this Agreement.

11. Insurance.

- a. Amounts. Without expense to the **CITY**, and with no lapse in coverage, **PORTLAND TUG** shall procure and maintain, at its own cost, and show evidence to the **CITY** of the following insurance to protect the **CITY** from claims and damages which may arise from **PORTLAND TUG's** operations under this Agreement, whether such operations shall be performed by the **PORTLAND TUG** or by anyone directly or indirectly employed by it, in the types and minimum amounts set forth below:

| <u>Description</u> | <u>Coverage</u> | <u>Each Occurrence</u> |
|---|-----------------|---|
| (i) Commercial General Liability, including Broad Form Property Damage | B.I./P.D. | \$2,000,000 |
| (ii) Protection & Indemnity insurance | | \$2,000,000 |
| (iii) Worker's Compensation, LHWCA and/or Jones Act or other marine employee insurance, such that all employees are covered | | At least Maine or other statutory requirements and limits |

- b. City Protected. The **CITY** shall be named as an additional insured under items (i) and (ii) above. **PORTLAND TUG** shall provide evidence of Workers Compensation coverage in the statutory amounts.
- c. Notice to **CITY**. All policies of insurance required herein shall be in a form and issued by a company or companies satisfactory to the **CITY**, and approved to do insurance business in the State of Maine. Each such policy shall provide that such policy may not be changed, altered or canceled by the insurer during its term without first giving thirty (30) days' notice in writing to the **CITY**. Each liability policy required to be obtained hereunder shall be on an occurrence basis. In the event that policies are not available on an occurrence basis, **PORTLAND TUG** shall purchase a "tail" which provides coverage hereunder for a minimum of six (6) years after termination of this Agreement.

All policies required hereunder shall be primary to any insurance or self-insurance which **CITY** may maintain for its own benefit. Liability insurance coverage shall also extend to damage, destruction, and injury to **CITY**-owned or **CITY**-leased property and **CITY** personnel, to the extent caused by, or resulting from negligent acts, operations, or omissions of **PORTLAND TUG**, its officers, agents, employees, invitees, and/or contractors.

- d. Certificates. Certificates or other evidence of insurance coverages required of **PORTLAND TUG** in this Section, in amounts no less than those stipulated herein or as may be in effect from time-to-time, shall be delivered to the **CITY** prior to use of the Premises. Such certificate or certificates shall at all times while this Agreement is in effect provide **CITY** with at least thirty (30) days prior written notice of any change or modification in insurance coverage or insurance carrier. With respect to the Liability Insurance, the **CONTRACTOR** will provide the **CITY** a certificate of insurance evidencing such coverage, in this way: certificate must say either: A) "the policy has been endorsed to name the City of Portland as an Additional Insured" and a copy of the endorsement must come to the City of Portland with the certificate, or B) "the policy already includes an endorsement, such as the General Liability Expansion Endorsement, by which the

City of Portland is, in fact, automatically made an additional insured." A Certificate which merely has a box checked under "Addl Insr," or the like, or which merely states the City of Portland is named as an Additional Insured, will not be acceptable.

- e. Property Insurance. **PORTLAND TUG** shall procure and maintain, at its option and election, such all risks fire and casualty insurance covering its property on the Premises as it deems necessary.

12. Assignment/Subletting.

PORTLAND TUG shall not sublease, transfer or assign this Agreement or the rights granted hereunder at any time during the original or any extended term of this Agreement without the prior written approval of **CITY**, which may be granted or withheld in **CITY**'s discretion. No such assignment or subletting shall relieve **PORTLAND TUG** of any obligations hereunder and any person accepting such assignment shall take the Agreement subject to all prior breaches and shall be liable therefore in the same manner as **PORTLAND TUG**.

13. Casualty Damage.

- a. If the Premises or any part thereof shall be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use, then, and in such case, the Rent hereinabove stated or a just and proportional part thereof, according to the nature and extent of injuries sustained, shall be suspended or abated, until the Premises shall have been put in proper condition for use by **PORTLAND TUG**. Provided, however, in the event of such destruction or damage, either **CITY** or **PORTLAND TUG** shall have the right to terminate this Lease by giving the other party written notice of such termination within thirty (30) days after such damage or destruction, and upon the giving of such notice, the term of this Agreement shall cease and come to an end as of the date of such damage or destruction and any unearned rent shall be returned to **PORTLAND TUG**.
- b. Anything in this Agreement to the contrary notwithstanding, **CITY** and **PORTLAND TUG** each hereby release the other and the other's officers, directors, shareholders, agents and employees from any and all liability or responsibility (to the other or anyone claiming through or under them by way of subrogation or otherwise) for any loss or damage to the releasor's property caused by fire or other peril of the type generally covered by extended coverage endorsements, whether or not the releasor actually carries such insurance coverage and even if such fire or other peril shall have been caused by the fault or negligence of the other party, or anyone for whom such party may be responsible.

14. Termination for Convenience or Cause.

- a. Either party may, in its discretion and for its convenience, terminate this Agreement upon no less than thirty (30) days prior written notice to the non-terminating party, which notice shall not be required to coincide with a rental period. In the event of termination during a rental period, **CITY** will reimburse to **PORTLAND TUG** the pro-rated amount paid in rent for any time period after the effective date of the termination; provided, however, that **PORTLAND TUG** shall remain liable to pay any Rent accrued and owed for the time period prior to the effective date of termination.
- b. Either party may terminate this Agreement upon no less than thirty (30) calendar days' prior written notice for failure of the non-terminating party to comply with the terms and conditions of this Agreement. In such event, the non-terminating party shall have the right to cure such default within the thirty (30) day period, or in the case of default in any payment due hereunder, within ten (10) calendar days of receipt of notice of such default. Such notice of default shall not be required to coincide with a rental period.
- c. Upon any termination of this Lease, **PORTLAND TUG** shall quit and surrender to **CITY** the Premises in accordance with the provisions of Section 15 hereof. If this lease is terminated, **PORTLAND TUG** shall remain liable to **CITY** for all Rent accrued and unpaid up to the date of such termination. In no event shall either party be liable to the other for incidental, special, or consequential damages of any nature claimed as a result of the breach of any term of this Agreement or termination of this Agreement.

15. Return of Premises.

PORTLAND TUG at the expiration or termination of this Agreement shall peaceably yield up to **CITY** the Premises in safe, secure, broom clean condition, good repair in all respects, reasonable use and wear and damage by fire and all other unavoidable casualties excepted. **PORTLAND TUG** shall remove all trade fixtures, equipment and other personal property installed or placed by it at its expense in, on or about the Premises; provided, however, all damage caused by or as a result of such removal shall be repaired by **PORTLAND TUG** at its expense. Should **PORTLAND TUG** fail to remove its fixtures, equipment or property within Thirty (30) days of a notice to do so from **CITY**, ownership of such fixtures, equipment and property shall automatically be vested in **CITY** and **CITY** have the right dispose of such fixtures, equipment and property in any manner it sees fit, and retain all proceeds therefrom. Notwithstanding the foregoing, **PORTLAND TUG** shall continue to be liable to **CITY** for the costs of any such removal and disposal in excess of any such proceeds. All obligations of **PORTLAND TUG** in this section shall survive termination or expiration of this Agreement.

16. Covenants.

CITY covenants that it is the owner in fee of the Premises and can and will provide quiet enjoyment of the Premises during the term of this Agreement. Each party covenants that the Agreement is signed by a duly authorized individual. Except as herein otherwise expressly provided, the covenants, conditions, and agreements contained in this Agreement shall bind and inure to the benefit of **CITY** and **PORTLAND TUG** and their respective successors, and assigns.

17. Notices.

Any notice required to be given under this Lease shall be in writing and shall be hand-delivered or sent by U.S. certified mail, return receipt requested, postage prepaid, addressed to the parties as stated below or such other address as either party may designate in writing to which its future notices shall be sent.

To **PORTLAND TUG**:

PORTLAND TUGBOAT, LLC
P.O. Box 480
Belfast, Maine 04915
Attn: Brian Fournier
Copy to: Buckley McAllister

To **CITY**: Mark H. Rees
City Manager
389 Congress Street
Portland, Maine 04101
cc: Director of Facilities Management
[same address]

18. Amendment.

Both parties hereto acknowledge and agree that they have not relied upon any statements, representations, agreements or warranties except such as are expressed herein. The terms of this Lease may be modified or amended by the mutual assent of the parties hereto; provided, however, that no such modification or amendment to this Lease shall be binding until in writing and signed by both parties.

19. Governing Law.

This Agreement shall be governed by and construed in accordance with the laws of the State of Maine

20. **Force Majeure.**

Neither **PORTLAND TUG** nor **CITY** shall be deemed in violation of this Lease if it is prevented from performing any of its obligations hereunder by reason of strikes, boycotts, labor disputes, acts of God, war, acts of superior governmental authority or other reason over which it has no control; provided, however, that the suspension of performance shall be no longer than that required by the force majeure and the party prevented from performance has given written notice thereof to the other party.

21. **Non-Waiver.**

Failure of **CITY** or **PORTLAND TUG** to complain of any act or omission on the part of the other party no matter how long the same may continue, shall not be deemed to be a waiver by said party of its rights hereunder. No waiver by **CITY** or **PORTLAND TUG** at any time, express or implied, of any breach of any provision of this Agreement shall be deemed a waiver or a breach of any other provision of this Agreement or a consent to any subsequent breach of the same or any other provision.

22. **Right to Enter and Inspect.**

CITY, by its authorized officers, employees, or agents, shall have the right, at such times as may be reasonable under the circumstances and with as little interruption of **PORTLAND TUG**'s operations as is reasonably practicable, to enter upon and in the Premises and Fleet without charge to inspect the same to determine compliance with City ordinances and the terms of this **AGREEMENT**.

23. **Partial Invalidity.**

If any term, covenant, condition, or provision of this **Agreement**, or the application thereof to any person or circumstance shall, at any time or to any extent, be invalid or unenforceable, the remainder of this **Agreement**, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term, covenant, condition, and provision of this **Agreement** shall be valid and be enforced to the fullest extent permitted by law.

24. **Entire Agreement.**

In entering into this **Agreement**, both the **CITY** and **PORTLAND TUG** each warrant that it has not acted in reliance on any statement of representation made by any employee, officer, director or counsel of the other, which statement or representation is not stated herein. This **Agreement** expresses the entire understanding and all agreements of the **CITY** and **PORTLAND TUG** with each other in regard to use and lease of the POT. This **Agreement** may be modified only by a written amendment signed by both parties.

25. Brokers.

CITY and **PORTLAND TUG** each represent and warrant to the other that it has not dealt with any agents, brokers or finders in connection with this Agreement. Each party agrees to hold and indemnify the other harmless from and against any losses, damages, costs or expenses (including attorneys' fees) that either party may suffer as a result of claims made or suits brought by any broker in connection with this transaction, the obligated party hereunder to be the party whose conduct gives rise to such claim.

IN WITNESS WHEREOF, the said **CITY OF PORTLAND** has caused this Lease Agreement to be signed and sealed by Mark H. Rees, its City Manager, thereunto duly authorized, and **PORTLAND TUGBOAT, LLC** has caused this Lease Agreement to be signed and sealed by Brian J. Fournier, its President, thereunto duly authorized, the day and date first above written.

WITNESS:

CITY OF PORTLAND

By: _____
Mark H. Rees
Its City Manager

WITNESS:

PORTLAND TUG, LLC

By: _____
Brian J. Fournier
Its President

Approved as to form:

Approved as to funds:

Corporation Counsel's Office

Finance Department

