

**City of Kodiak Special Council Meeting Agenda for January 20, 2015,  
5:30 p.m. at Kodiak Island Borough Conference Room in Borough Building (Room 121)**

---

**I. Call to Order**

Roll Call

**II. Public Comments on Agenda Items Only**

**III. Executive Session**

a. Discussion About Potential Contractor Claims Related to the Reconstruction of Pier III

b. Discussion About Horizon Lines of Alaska, LLC Contract Amendments .....1

**IV. Adjournment**

(This page left intentionally blank.)

---

**MEMORANDUM TO COUNCIL**

---

**To:** Mayor Branson and City Councilmembers

**From:** Aimée Kniaziowski, City Manager 

**Date:** January 20, 2015

**Agenda Item: III. a. Discussion About Potential Contractor Claims Related to the Reconstruction of Pier III**

---

**SUMMARY:** The City Council will enter into executive session to discuss potential contractor claims related to the reconstruction of Pier III.

**MOTION:**

Move to enter into executive session pursuant to AS 44.62.310(c)(1) to discuss matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the City, specifically, potential contractor claims related to the reconstruction of Pier III.

(This page left intentionally blank.)

---

**MEMORANDUM TO COUNCIL**

---

**To:** Mayor Branson and City Councilmembers

**From:** Debra Marlar, City Clerk *DM*

**Date:** January 20, 2015

**Agenda Item:** III. b. Discussion About Horizon Lines of Alaska, LLC Contract Amendments

---

**SUMMARY:** The City Council will enter into executive session to discuss amendments to the Horizon Lines of Alaska, LLC contracts.

**ATTACHMENTS:**

Attachment A: Amended Contracts

**MOTION:**

Move to enter into executive session pursuant to AS 44.62.310(c)(1) to discuss matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the City, specifically an amendment to a contract with Horizon Lines of Alaska, LLC.

**PORT OF KODIAK  
PREFERENTIAL USE AGREEMENT  
(Pier III)  
City of Kodiak and Horizon Lines of Alaska, LLC  
City Contract 217720**

This Preferential Use Agreement (“Agreement”) is made and entered into as of \_\_\_\_\_1, ~~2015~~~~2014~~, between the City of Kodiak, an Alaska municipal corporation (“City”), and Horizon Lines of Alaska, LLC (“Horizon Lines”), a limited liability company organized under the laws of the state of Delaware.

WHEREAS, Horizon Lines and the City have entered into a Terminal Operation Contract and a Warehouse Lease Agreement, both dated \_\_\_\_\_ 1, ~~2015~~~~2014~~, which together with this Agreement provide for Operator’s use and occupancy of facilities at Port of Kodiak Piers II and III.

WHEREAS, Horizon Lines has agreed herein to install a 100 foot gauge crane for use on Pier III and to make a minimum number of container vessel calls at Pier III annually, and leases all storage areas, marshalling yard and buildings at the Pier III Terminal, and it is therefore appropriate that the City grant Horizon Lines the preferential use of the Pier III Terminal as provided herein.

NOW, THEREFORE, in consideration of the premises, and the terms, covenants, conditions, and agreements contained herein and further stated in the Terminal Operation Contract and the Warehouse Lease Agreement, Horizon Lines and the City hereby agree as follows:

**I. DESCRIPTION OF PREMISES**

The premises that are the subject of this Agreement consist of the terminal and adjacent property at Pier III as further described below (“Premises”).

- A. At the commencement of this Agreement, the Premises consists of 4.46 acres for freight operations; a container terminal pier, 490 feet by 64 feet with an overall length of 880 feet, bollard to bollard; and a 30-ton Paceco container crane (“Old Crane”); as depicted in Exhibit A to this Agreement.
- B. The City presently is preparing to construct a new Pier III dock structure, consisting of a new 330-ft. long, 110-ft wide dock structure extending eastward from the existing Pier III, plus associated backland terminal area, which should be substantially complete on or about June 30, 2015, as depicted in Exhibit A to this Agreement. Upon its substantial completion, the new Pier III will become part of the Premises. As further described below, Horizon Lines will provide, at its own expense, a 100-foot gauge container crane (“New Crane”) on the new Pier III to replace the Old Crane on the existing Pier III. Horizon Lines will own the New Crane, and the New Crane will not be part of the Premises.

**II. USE OF PREMISES; PREFERENTIAL BERTHING**

- A. The City hereby grants Horizon Lines the right to use and occupy the Premises in connection with its transportation business and related activities during the term of this Agreement.

**B.** Horizon Lines vessels calling to load and discharge containerized cargo on a scheduled basis shall be entitled to preferential berthing rights at Pier III in accordance with the terms and conditions set forth in this Agreement.

1. Preferential Berthing and Old Crane Use Rights.

- a. Horizon Lines shall have the preferential right to use the Pier III dock, berth and Old Crane for purposes of mooring, docking, and loading or discharging cargo on or from Horizon Lines' vessels, including ships, barges, or other watercraft which are owned, operated, or chartered by or for Horizon Lines or any affiliated or related company, or which are used in connection with any of Horizon Lines' freight operations, or a vessel owned or operated by an entity with which Horizon Lines has a connecting carrier, consortium, or rationalization agreement, if, and to the extent that, said vessel is carrying cargo on Horizon Lines' behalf. Horizon Lines' preferential right to use the Old Crane terminates upon the earlier to occur of (i) one year after the date on which the New Crane becomes operational, and (ii) the date when removal of the Old Crane has been completed.
- b. The preferential right of use provided by this paragraph is defined to mean that Horizon Lines shall be accorded the right, after furnishing a vessel schedule, to berth a vessel and utilize the Old Crane in preference to any other user immediately upon the vessel's arrival in Kodiak harbor, provided that (a) the vessel arrives during a period of twelve (12) hours before or after the arrival time designated in a vessel schedule on file with the City Harbormaster (which schedule may be changed from time-to-time upon ten (10) days' written notice), or (b) the vessel arrives at an arrival time designated at least eight (8) hours in advance by radio or other message from Horizon Lines to the City Harbormaster.
- c. The preferential right provided herein shall apply whether or not the Pier III dock, berth and Old Crane are being used by any other vessel, and any such other vessel, barge or craft occupying the berth at the time of arrival of Horizon Lines' vessel during a preferential berthing period shall be removed immediately from the berth at no cost to Horizon Lines.
- d. Horizon Lines shall make a reasonable effort to vacate the berth within six (6) hours after working cargo; provided however, should weather conditions prevent the vessel from leaving safely, an extension may be granted by the City Harbormaster.
- e. Horizon Lines agrees that during the term of this Agreement its Kodiak representative, upon request, will furnish the City Harbormaster with information as to the position, estimated time of arrival in Kodiak, and estimated port time of any vessel due to arrive in Kodiak which will claim preferential berthing rights under this Agreement.

2. Preferential Use of Storage, Marshaling Areas, and Facilities Other than the Dock, Berth and Old Crane. Horizon Lines shall have a continuing preferential right to

use and occupy the storage, marshaling areas, parking areas, and all improvements included in the Pier III Terminal other than the dock, berth and Old Crane for its freight operations, including without limitation the operations of loading, unloading, working, parking, and storage of cargo, vans, chassis, trucks, and other equipment; provided that the City reserves from this grant of preferential right the use of access ways shown on Exhibit A for the transit of cargo from non-Horizon Lines vessels between Pier III and public rights-of-way. "Preferential right" as used in this paragraph is defined to mean that Horizon Lines' use and occupancy of the Premises shall have first priority over any use and occupancy of the Premises by others which interferes with Horizon Lines' operation, at no cost to Horizon Lines other than as elsewhere set forth in this Agreement.

3. Reservation of Secondary Rights. The City specifically reserves to itself and for non-Horizon Lines vessels secondary rights to use and occupy the Pier III Terminal, or portions thereof, subject to the priorities of use accorded to Horizon Lines under this Agreement. The City agrees that it will issue tariffs governing the rates, charges, and conditions for the secondary use of the Pier III Terminal by others, and shall assess reasonable rates and charges to secondary users of the facility.
4. Berthing of Horizon Lines Barges. In addition to preferential berthing for loading and unloading cargo as provided above, barges owned, chartered, or operated by Horizon Lines shall be allowed to berth at Pier III while not engaged in cargo operations, unless the City Harbormaster requests their removal to allow the use of Pier III by other vessels. In such event, the City Harbormaster will notify the tug captain as early as possible of the time the barge must clear the pier.

### **III. OPERATION AND MAINTENANCE OF CRANES.**

#### **A. Operation, Maintenance and Removal of Old Crane.**

1. Horizon Lines shall provide competent and qualified operators for the Old Crane who shall be available on a 24-hour basis during the time that it is operational, to provide crane services to vessels utilizing the Pier III Terminal. Horizon Lines shall be responsible for all costs of operating and maintaining the Old Crane.
2. Third parties requiring use of the Old Crane shall request such services through Horizon Lines. Third parties shall be charged for the use of the Old Crane at the rate of \$1,000.00 per hour, with a minimum of one hour for equipment warm-up plus a minimum of one hour for equipment usage. Horizon Lines shall retain \$850.00 per hour of this amount and shall remit the balance of \$150.00 per hour to the City.
3. Within one year after the New Crane becomes operational, Horizon Lines shall be responsible for all costs of decommissioning, removing and disposing of the Old Crane. At time that demolition of the Old Crane is to commence, the City shall transfer title to the Old Crane to Horizon Lines or to a third party designated by Horizon Lines for this purpose, and Horizon Lines may retain any proceeds from the salvage, scrapping or sale of the Old Crane.



**B. Installation, Operation and Maintenance of New Crane.**

1. Commencing upon the later to occur of (i) determination by the City or its representative that the new Pier III is substantially complete under the terms of the contract for its construction (“Substantial Completion”), and (ii) Kodiak Electric Association completion of the power line extension to Pier III and the flywheels needed for the operation of the New Crane, and continuing thereafter for the duration of this Agreement, the City grants Horizon Lines an easement to install, operate and maintain the New Crane on the crane rails located on the new Pier III. The City may not grant any other entities the right to use the crane rails without Horizon Lines’ consent, but the City may grant to other entities the right to cross the easement or to install equipment or fixtures or other improvements in the easement that do not interfere with Horizon Lines’ use of the easement. The City shall install on Pier III in time for the commencement of operation of the New Crane a 12.47kva isolation transformer for the protection of the New Crane. Upon the installation of the transformer, Horizon Lines shall reimburse the City’s actual cost of acquiring and installing the transformer, which is estimated to be approximately \$60,000.
2. Horizon Lines shall maintain sole authority for and control of the New Crane. Horizon Lines shall provide competent and qualified operators for the New Crane who shall be available on a 24-hour basis commencing upon the New Crane becoming operational and continuing thereafter for the duration of this Agreement, to provide crane services to all vessels utilizing the Pier III Terminal, and may allow its use for other purposes at its discretion. Horizon Lines shall be responsible for all costs of installing, operating and maintaining the New Crane.
3. Horizon Lines shall charge third parties an hourly rate for the use of the New Crane based on comparable rates in the marketplace, with a minimum time requirement not greater than two hours. Horizon Lines shall retain the entire amount of such charges.

**IV. PAYMENTS**

**A.** Horizon Lines shall pay to the City wharfage fees at the rates shown in the following table. Transhipped/transloaded cargo shall be subject to a single-move, one-time wharfage charge at the same rate.

<u>Year</u>	<u>Rate per Ton</u>	<u>Year</u>	<u>Rate per Ton</u>
2014	\$3.45	2019	\$4.60
2015	3.45	2020	4.72
2016	3.45	2021	4.83
2017	3.80	2022	4.96
2018	4.17	2023	5.08

**B.** All Horizon Lines vessels (as described in Section II.B.1.a) shall pay dockage fees at the rates shown in the following table.

<u>Year</u>	<u>Rate per Foot</u>	<u>Year</u>	<u>Rate per Foot</u>
2014	\$1.62	2019	\$2.27
2015	1.62	2020	2.50
2016	1.70	2021	2.75
2017	1.87	2022	3.05
2018	2.06	2023	3.64

**C.** Horizon Lines shall submit to the City within ten days of the end of each month a statement detailing the vessel dockage and cargo tonnage handled during the previous month.

**D.** Horizon Lines shall pay the City for use of the facilities depicted on Exhibit “A,” including the Old Crane until its replacement, and in addition to wharfage, dockage, and other fees or charges elsewhere specified in this Agreement, the monthly payments due on the first day of each month as shown in the table below.

<u>Year</u>	<u>Monthly Payment</u>	<u>Year</u>	<u>Monthly Payment</u>
2014	\$23,352.92	2019	\$26,906.25
2015	23,352.92	2020	27,578.91
2016	23,352.92	2021	28,268.38
2017	24,750.00	2022	28,975.09
2018	26,250.00	2023	29,699.47

**E.** Amounts payable by Horizon Lines for facilities or services under this Agreement supersede any charges for the same facilities or services under the Tariff for the Port of Kodiak Cargo Terminal. Nothing in this Agreement reduces or modifies the liability of Horizon Lines for fees or charges for other facilities or services set out in the Tariff for the Port of Kodiak Cargo Terminal.

**F.** All amounts due under this Agreement that are not paid within thirty days of the date of invoice thereafter shall bear interest at the rate of 12% per annum for as long as the delinquency continues.

**V. TERM OF AGREEMENT**

**A.** Initial Term. The term of his Agreement shall commence on \_\_\_\_\_ 1, ~~2015~~2014, and shall continue in full force and effect until midnight \_\_\_\_\_, ~~2025~~2024, unless earlier terminated pursuant to this section.

**B.** Renewal Terms. This Agreement may be renewed for two consecutive additional five-year periods (each a “Renewal Term”), by mutual agreement of the parties. At least ninety (90) days’ prior to the expiration of the term then in effect, Horizon Lines shall provide written notice to the City of its desire to renew or not renew this Agreement for the next succeeding Renewal Term. The City will then reply to Horizon Lines within fifteen (15) days whether it wishes to renew this Agreement. If both parties agree to renew this Agreement, they shall then enter good faith negotiations to address any modifications to this Agreement requested by either party. The failure of the parties to agree upon a renewal of this Agreement shall cause this Agreement to terminate at the end of the current term.

**C.** The City may declare a default hereunder and terminate this Agreement, in addition to exercising any other available remedy, upon the occurrence of any of the following:

1. The failure of Horizon Lines to pay any sum of money due under this Agreement within ten (10) days after the due date.
2. The failure of Horizon Lines to perform or observe any covenant or condition of this Agreement, other than a default in the payment of money described in Section V.C.1, which is not cured within thirty (30) days after notice thereof from the City to Horizon Lines, unless the default is of a kind that may be cured, but not within such thirty (30)-day period, in which case no default shall be declared so long as Horizon Lines shall commence the curing of the default within such thirty (30) day period and thereafter shall diligently and continuously prosecute the curing of same.
3. The commencement of a case under any chapter of the federal Bankruptcy Code by or against Horizon Lines, or the filing of a voluntary or involuntary petition proposing the adjudication of Horizon Lines as bankrupt or insolvent, or the reorganization of Horizon Lines, or an arrangement by Horizon Lines with its creditors, unless the petition is filed or case commenced by a party other than Horizon Lines and is withdrawn or dismissed within ninety (90) days after the date of its filing.
4. The admission in writing by Horizon Lines of its inability to pay its debts when due; the appointment of a receiver or trustee for the business or property of Horizon Lines, unless such appointment shall be vacated within ten (10) days after its entry; Horizon Lines making an assignment for the benefit of creditors; or the voluntary or involuntary dissolution of Horizon Lines.
5. If Horizon Lines is in default under either the Warehouse Lease Agreement or the Terminal Operation Contract.

- D. The City may terminate this Agreement on one hundred eighty (180) days' notice to Horizon Lines if Horizon Lines makes (i) fewer than forty-five (45) container vessel calls at the City in any period of twelve (12) consecutive months, or (ii) no Horizon Lines vessel calls at Pier III for a period of ninety (90) or more consecutive days.

## **VI. USE OF PREMISES**

- A. Horizon Lines shall not use the Premises or any facilities for any unlawful purposes.
- B. Horizon Lines shall use the Pier III Terminal area solely for freight transportation purposes.
- C. Horizon Lines is entitled to quiet enjoyment of the Premises provided that Horizon Lines does not breach the terms of this Agreement.

## **VII. MAINTENANCE AND REPAIR OF PREMISES**

- A. The City shall maintain and repair, at its own expense, the utilities (water, sewer or septic system, storm drainage, and electrical except items stated in Paragraph VII.B), common roadbeds and pier structures (less mooring capstans). In no event shall the City be obligated to repair or otherwise mitigate or respond to damages resulting from Horizon Lines' use of the pier and pavement pursuant to this Agreement; except that the City shall be obligated to repair or otherwise attempt to mitigate or respond to damages resulting from an act or omission by the City or a third party. The City shall insure that other users of Pier III, if any, keep it clean and orderly.
- B. Horizon Lines shall, at its own expense, provide all routine preventive maintenance, repairs, and replacements to the structures, including: marine department building, maintenance facility building, container cranes, crane medium voltage 12.47KVA electrical system and associated equipment, crane rails, cable trench, heat trace system, overhead lights, electric pedestals, van back stack area, and electric capstan mooring units.
- C. Asphalt: Horizon Lines will maintain and repair all asphalt pavement in good condition. Horizon Lines will provide all snow removal and de-icing of the Pier III Terminal. Horizon Lines shall keep the Premises clean, orderly, and free of rubbish. If Horizon Lines fails to adequately remove snow, ice, or debris, the City may furnish the necessary equipment and manpower to provide this service in which event Horizon Lines shall promptly pay the City's billings for such services.
- D. Horizon Lines shall provide the City Harbormaster a semi-annual maintenance and repair report on any single incident of damage or repair over ten thousand dollars (\$10,000).
- E. Within thirty (30) days after each anniversary of the date of this Agreement, Horizon Lines and the City agree to inspect the Premises and prepare a report describing the condition of the Premises and specifying any items in need of repair. The party responsible for those repairs shall start those repairs within thirty (30) days after the report is prepared and shall promptly complete them.
- F. If, at any time during the term of this Agreement, the Premises are damaged or destroyed by fire or other casualty, due to any cause other than an act or omission solely of Horizon Lines, the City may elect to either (i) at its expense, repair, rebuild, replace and restore the Premises to a condition comparable to that which existed immediately prior to the fire

or other casualty, or (ii) terminate this Agreement. In the event the City elects to repair, rebuild, replace or restore the Premises, payments under this Agreement shall be abated in proportion to the extent that the Premises are not usable by Horizon Lines during the time the unusable areas remain unrepaired or unrestored.

- G. The City shall maintain a depth of approximately minus 38 feet MLLW in the berthing area.
- H. Horizon Lines shall make no alterations, additions, or improvements to the Pier III Terminal without the prior written approval of the City. At the expiration of this Agreement, or any renewal thereof, any such improvements shall become the property of the City.
- I. Horizon Lines acknowledges having inspected or having been given a full opportunity to inspect the Premises and hereby accepts them in their present condition, and shall at the termination of this Agreement surrender said Premises in as good a condition and repair to the City, reasonable wear and tear excepted.
- J. Notwithstanding any other provision of this Agreement:
  - 1. Commencing upon the earlier to occur of (i) one (1) year after the date on which the New Crane becomes operational, and (ii) the date when removal of the Old Crane has been completed, neither party shall have any obligation to maintain, repair or restore the old Pier III.
  - 2. On and after the date of Substantial Completion of the new Pier III, Horizon Lines may continue to use the old Pier III at its own risk, subject to load limits that the City may impose from time to time, and subject to J.3 of this paragraph.
  - 3. At any time after the earlier to occur of (i) one (1) year after the date on which the New Crane becomes operational, and (ii) the date when removal of the Old Crane has been completed, the City may determine in its sole discretion to:
    - a. Discontinue permission to use the old Pier III, or
    - b. Decommission, demolish and remove the old Pier III.

### VIII. ADDITIONAL TERMS REGARDING THE NEW CRANE.

- A. Covenant against Liens. Horizon Lines may not permit any lien other than a lien securing the general corporate obligations of Horizon Lines, including without limitation ~~a lien to secure financing or~~ a mechanic's or materialman's lien, to be filed or recorded against the New Crane. The Operator shall indemnify and save the City harmless from all liability for damages occasioned by any such lien, together with all costs and expenses (including attorneys' fees) incurred by the City in negotiating, settling, defending, or otherwise protecting against such lien and shall, in the event of a judgment of foreclosure of the lien, cause the lien to be discharged and removed prior to any attempt at execution of such judgment. If any lien other than a lien securing the general corporate obligations of Horizon Lines is filed or recorded against the New Crane, Horizon Lines shall cause the lien to be removed; provided that Horizon Lines may in good faith and at Horizon Lines' own expense contest the validity of any mechanic's or materialman's lien without subjecting the New Crane to foreclosure, if Horizon Lines has furnished the bond

required in AS 34.35.072 (or any comparable statute hereafter enacted providing for a bond freeing the New Crane from the effect of such a lien claim).

**B. Option to Purchase.**

1. Upon occurrence of any of the following events, the City shall have the option to purchase the New Crane as provided below: (i) the City terminates this Contract upon a default by Horizon Lines as provided in Section V; or (ii) Horizon Lines ceases to operate at Pier III under the terms of this Agreement.
2. The City shall exercise the option to purchase by giving Horizon Lines written notice not less than ninety 90 days before the purchase date. The City shall, at its own expense, retain an independent appraiser, who shall determine the fair market value of the New Crane at its location on Pier III. The City shall complete such appraisal and deliver a copy of the appraisal report to Horizon Lines with its notice exercising the option to purchase.
3. The appraiser's determination of the fair market value of the New Crane under (2) of this paragraph shall constitute a final binding determination of the fair market value and the option purchase price for the New Crane, unless Horizon Lines gives written notice to the City of its objection to the appraiser's determination within thirty (30) days after receiving the appraiser's report, and Horizon Lines shall then engage a second independent appraiser at Horizon Lines' expense to make a second appraisal of the fair market value in accordance with (2) of this paragraph.
4. If the second appraisal determines a fair market value that varies from that determined by the first appraisal by no more than twenty percent (20%), then the option purchase price shall be the average of the fair market values determined by the appraisals. If the second appraisal determines a fair market value that varies from the first appraisal by more than twenty percent (20%), then, unless the City and Horizon Lines agree on an option purchase price themselves, the option purchase price shall be determined by arbitration by a single arbitrator under the rules of the American Arbitration Association.
5. Upon the final determination of the option purchase price, the City shall pay the purchase price for the New Crane to Horizon Lines in exchange for a bill of sale or other appropriate document conveying title to the New Crane to the City free of all liens.

**C. Right of First Refusal.** The City is hereby given a right of first refusal to purchase the New Crane on the following terms and conditions:

1. Horizon Lines may accept an offer to purchase the New Crane only if it is made subject to the City's right of first refusal herein. Upon acceptance of an offer to purchase the New Crane from a third party (the "Purchase Offer"), Horizon Lines will present a copy of the offer and acceptance to the City by written notice at the address set forth in Section XIX. The City will then have ninety (90) days to either agree to purchase the New Crane on the same terms and conditions set forth in the Purchase Offer or decline to exercise its right of first refusal. The City shall give written notice of its decision to exercise or decline to exercise its right of first

refusal to Horizon Lines at the address set forth in Section XIX no later than ninety (90) days after being presented with a copy of the Purchase Offer.

2. If the City does not exercise its right of first refusal, Horizon Lines may then sell the New Crane to the third party, or any assignee/nominee of said third party, on the same terms and conditions set forth in the Purchase Offer. If the New Crane sells to the third party, or any assignee/nominee of said third party, on the same terms and conditions set forth in the Purchase Offer, then any interest of the City in and to the New Crane shall cease and be of no further force and effect.
3. If the New Crane is not sold to the third party, or the third party's assignee/nominee, on the terms and conditions in the Purchase Offer, then the City will continue to have the right of first refusal to purchase the New Crane under the procedures outlined above in this paragraph.

## **IX. INDEMNITY**

- A. Horizon Lines shall indemnify and hold harmless the City and its elected and appointed officials, employees, agents, and servants from any and all losses, expenses, damages, demands, and claims by any person in connection with or rising out of any injury (including death) to persons or in connection with damage to property or the natural environment, sustained in whole or in part as a result of Horizon Lines' use and operation of the Old Crane or New Crane, its occupancy and maintenance of the Premises, and/or exercise of its rights under this Agreement or Horizon Lines' breach of this Agreement. Horizon Lines shall defend all suits and actions brought against the City and any of its elected or appointed officials, employees, agents or servants from any such injury or damage and shall pay all damages, costs, and expenses, including attorney's fees incurred in connection with the suits or actions. The only exception to this indemnity provision shall be for claims resulting from the negligence, gross negligence, or willful misconduct of the City or its employees, agents, or servants, and for claims resulting from an act or omission of a third party, with respect to which Horizon Lines' obligations under this paragraph shall be limited to that portion of any such claim not attributable to the City and not attributable to a third party.
- B. This indemnity provision specifically includes all environmental damage that may result from Horizon Lines' operations under this Agreement and any penalties or fines which may be assessed in connection therewith.
- C. Claims arising in whole or in part out of any incident or event occurring during the term of this Agreement or any extension or renewal of it shall be covered by the provisions of this section IX even though they may not have been asserted or discovered until after the expiration of said term.

## **X. UTILITIES**

- A. During the term of this Agreement, except as provided in paragraph B of this section, Horizon Lines shall pay the providers directly for all utility bills and accounts for utility services used or consumed by Horizon Lines on or in connection with the Premises, including all operating costs for the Old Crane.
- B. The City shall provide water and septic tank pump-out service, or sewer service if available, to the Premises at no charge to Horizon Lines.

- C. Horizon Lines shall be responsible for obtaining its own janitorial services for the facilities associated with the Pier III Terminal.

## **XI. INSURANCE**

- A. Horizon Lines shall procure and maintain at its sole expense, and shall keep in full force and effect throughout the term of this Agreement, the following policies of insurance:

1. Commercial General Liability Insurance, \$5,000,000 combined single limit per occurrence for bodily injury and property damage claims arising from all operations related to this Lease. The general aggregate limit shall be \$5,000,000.
2. Commercial Automobile Liability Insurance, \$5,000,000 combined single limit per accident for bodily injury and property damage.
3. Worker's Compensation and Employers Liability. Worker's Compensation shall be statutory as required by the State of Alaska. Employers Liability shall be endorsed to the following minimum limits and contain USL&H coverage endorsement, if applicable: (i) bodily injury by accident--\$1,000,000 each accident; and (ii) bodily injury by disease--\$1,000,000 each employee, \$1,000,000 policy limit.

- B. Other Insurance Provisions. The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability
  - a. City, its officers, officials, employees and volunteers are to be covered as additional insureds. The coverage shall contain no special limitation on the scope of protection afforded to City, its officers, officials, employees and volunteers.
  - b. Horizon Lines' insurance coverage shall be primary insurance as respects City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by City, its officers, officials, employees and volunteers shall be excess of Horizon Lines' insurance and shall not contribute to it.
  - c. Horizon Lines' insurer shall agree to waive all rights of subrogation against City, its officers, officials, employees and volunteers for losses arising from work performed by Horizon Lines for City.
2. Worker's Compensation and Employer's Liability. Horizon Lines' insurer shall agree to waive all rights of subrogation against City, its officers, officials, employees and volunteers for losses arising from work performed by Horizon Lines for City.
3. All Insurance. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice has been given by the Insurer to City by certified mail, return receipt requested.



- C. Acceptability of Insurers. Insurance is to be placed with insurers qualified to do business in Alaska having a Best's rating of no less than A-: VII.
- D. Verification of Coverage. Horizon Lines shall furnish City with approved certificates of insurance and with certified copies of all endorsements effecting coverage required by this Section. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates are to be on forms which meet industry standard. City reserves the right to require complete, certified copies of all required insurance policies at any time.

## **XII. RIGHT OF INSPECTION**

- A. The City shall have the right to inspect the Premises without prior notice to ensure compliance with the terms of this Agreement.
- B. The City shall have the right to audit Horizon Lines' records and to require Horizon Lines to prepare summaries or reports from its records to determine compliance with the payment terms of this Agreement.

## **XIII. TAXES**

- A. In addition to the fees and charges provided in this Agreement, Horizon Lines shall pay when due all taxes and other charges which are levied at any time during the term of this Agreement upon the leasehold interest and any improvements on the Premises. If the City receives a notice of assessment from any taxing jurisdiction claiming that the City or Horizon Lines is liable for any tax or charge for which Horizon Lines has agreed to make payment under this paragraph, the City shall notify Horizon Lines in writing no later than thirty (30) days after receipt of the claim. If the City fails to provide Horizon Lines such notice, Horizon Lines shall have no obligation to pay the tax or charge.
- B. If Horizon Lines has a reasonable basis to contest, protest, or appeal (the "Appeal") the imposition or amount of any tax or charge, Horizon Lines, at its own expense, may prosecute the Appeal, in which case the City shall cooperate fully with Horizon Lines including, but not limited to, providing documentation and other information as required for Horizon Lines to settle or sustain the Appeal. If Horizon Lines prosecutes the Appeal, and if, but only if, such proceedings suspend enforcement and collection of the tax or charge, and no part of the Premises or any interest therein is or will be in danger of being sold or forfeited, Horizon Lines shall have no obligation to pay the tax or charge until the taxing jurisdiction's decision that the City or Horizon Lines is liable for the tax or charge becomes final. If any of the Premises is subjected to a lien which is not discharged within thirty (30) days after Horizon Lines receives notice of such lien, Horizon Lines shall deposit with the City cash, a sufficient corporate surety bond or other security satisfactory to the City in an amount adequate to provide for the discharge of the lien plus any interest, costs, attorneys' fees or other charges that could accrue as a result of such contest.

## **XIV. ASSIGNMENT**

The parties stipulate and agree that the services rendered under this Agreement are of such a nature that the rights and duties of Horizon Lines hereunder shall not be assignable without the prior written consent of the City, which consent shall not be unreasonably withheld, except to an entity that is owned solely by or that is an affiliate of Horizon

Lines, after thirty (30) days' prior notice to the City. Horizon Lines shall include in such notice a statement of any legal requirement for confidentiality regarding the notice or the related transaction, with which the City shall comply. Should the City consent to an assignment Horizon Lines shall nevertheless remain liable for the performance of all of its obligations under this Agreement and the acceptance by the City directly from an assignee of any payments or other performance due under this Agreement shall not be construed as a waiver of Horizon Lines' continuing liability. A change of control of Horizon Lines other than from the parent entity of Horizon Lines to an affiliate shall constitute an assignment for purposes of this provision. Notwithstanding the foregoing, no consent by the City shall be required in connection with the merger pursuant to that certain Agreement and Plan of Merger dated as of November 11, 2014 by and among Horizon Lines, Inc., Matson Navigation Company, Inc. and Hogan Acquisition Inc.

#### **XV. COMPLIANCE WITH FEDERAL, STATE, AND LOCAL LAWS**

At all times during the term of this Agreement, Horizon Lines shall conduct operations in accordance with all applicable federal, state, and local laws and ordinances.

#### **XVI. SEVERABILITY**

If any part, term or provision of this Agreement is declared null or unenforceable by a court or other tribunal of competent jurisdiction, the validity and enforceability of the rest of this Agreement shall not be affected.

#### **XVII. WAIVERS**

No waiver by Horizon Lines or the City of any covenant or condition of this Agreement shall be construed as a waiver of any other covenant or condition, nor shall the waiver of one breach be considered as a waiver of any other breach.

#### **XVIII. SURRENDER**

- A.** Horizon Lines agrees not to encumber the Premises at any time during the term of this Agreement. Horizon Lines agrees that the Premises shall not be subject to any liens, charges or encumbrances and agrees that at the expiration of the term of this Agreement it will deliver to the City or its designee, the Premises in good condition (ordinary wear and tear excepted) and without liens, charges, or encumbrances.
- B.** Unless required for the performance by Horizon Lines of its obligations hereunder, Horizon Lines shall have the right at any time during the Term to remove from the Premises all its equipment, removable fixtures and other personal property, and all property of third persons for which Horizon Lines is responsible, and on or before the expiration or earlier termination of this Agreement it shall remove all of the same from the Premises, repairing all damage caused by any removal; provided, however, that, except with respect to the New Crane, if Horizon Lines shall fail to remove all such property within forty-five (45) days after the expiration or earlier termination of this Agreement, the City may remove such property to a public warehouse for deposit or may retain the same in its own possession and in either event may sell the same at public auction; provided, further, that the City shall have given Horizon Lines ten (10) days' notice of the City's intent to sell such property at public auction, the proceeds of which shall be applied: first to the expenses of removal, including repair required thereby, and of storage and sale; second, to any sums owed by Horizon Lines to the City, with any

balance remaining to be paid to Horizon Lines; if the expenses of such removal, repair, storage, and sale shall exceed the proceeds of sale, Horizon Lines shall pay such excess to the City upon demand. Without limiting any other term or provisions of this Agreement, Horizon Lines shall indemnify and hold harmless the City, its officers, agents, employees, and contractors from all claims of third persons arising out of the City's removal and disposition of property pursuant to this Section, including claims for conversion, claims for loss of or damage to property, claims for injury to persons (including death), and claims for any other damages, consequential or otherwise, excluding only claims based on the City's sole negligence.

**XIX. MODIFICATIONS AND NOTICES**

- A. No modification of this Agreement shall be effective unless agreed to by Horizon Lines and the City in writing. No modification of one provision of this Agreement shall be considered a waiver, breach or cancellation of any other provision.
- B. All notices required to be given under this Agreement shall be in writing, and shall be effective on the date of receipt and shall be mailed to the parties at the following addresses:

Horizon Lines of Alaska, LLC 1717 Tidewater Road Anchorage, Alaska 99501 Attn: _____	City Manager City of Kodiak 710 Mill Bay Road Kodiak, Alaska 99615
---	---

Any notice or document delivered by facsimile transmission to a facsimile machine at which the recipient routinely receives such transmissions shall be effective upon the date of receipt of the complete and fully legible document (so long as the original is also mailed in accordance with this paragraph) unless the transmission occurred outside of the usual business hours of the recipient, in which event the document shall be deemed to have been received on the next business day.

**XX. ANTI-DISCRIMINATION**

During the performance of this Agreement, Horizon Lines agrees:

- A. In connection with its performance under this Agreement including construction, maintenance, and operation of or on the Premises, Horizon Lines will not discriminate against any employee or applicant for employment because of age, race, color, ancestry, religion, sex, or national origin.
- B. Horizon Lines and its employees shall not discriminate, by segregation or otherwise, against any person on the basis of race, color, ancestry, religion, sex, or nationality by curtailing or refusing to furnish accommodations, facilities, services, or use privileges offered to the public generally.
- C. Horizon Lines shall include and require compliance with the above nondiscrimination provisions in any subletting or subcontract made with respect to construction or maintenance operations under this Agreement.

**XXI. ALASKA LAW**

The parties agree that this Agreement was entered into in the State of Alaska, that Alaska law will govern its interpretation and application, and that venue of any suit or other action arising out of this Agreement shall be in Alaska.

**XXII. BINDING ON SUCCESSORS AND ASSIGNS**

All provisions of this Agreement shall inure to the benefit of and be binding on the parties, their successors, and permitted assigns.

**XXIII. COMPLETE AGREEMENT**

This Agreement, including Exhibit A hereto, and the Terminal Operation Contract and Warehouse Lease Agreement, both dated \_\_\_\_\_, ~~2015~~2014, between Horizon Lines and the City, constitute the final agreement between the parties. They are the complete and exclusive expression of the parties' agreement on the matters contained in this Agreement. All prior and contemporaneous oral and written negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by the aforementioned agreements.

IN WITNESS WHEREOF, the parties have signed this Agreement on the date or dates indicated beneath the signature of their respective officers or agents.

City of Kodiak

Horizon Lines of Alaska, LLC

\_\_\_\_\_  
Lon White                      Date  
Harbormaster/Acting City Manager

\_\_\_\_\_  
Kenneth Gill                      Date  
Director of Operations

ATTEST:

ATTEST:

\_\_\_\_\_  
Debra L. Marlar                      Date  
City Clerk

\_\_\_\_\_  
Richard Kniazowski                      Date  
Terminal Manager

**PORT OF KODIAK  
TERMINAL OPERATION CONTRACT  
(Piers II and III)  
City of Kodiak and Horizon Lines of Alaska, LLC  
City Contract 217719**

This Terminal Operation Contract made and entered into as of \_\_\_\_\_ 1, ~~2015~~~~2014~~, by and between the City of Kodiak, Alaska, an Alaska municipal corporation (“City”), and Horizon Lines of Alaska, LLC, a limited liability company organized under the laws of state of Delaware (“Operator”).

**W I T N E S S E T H**

WHEREAS, the parties desire to enter into a Terminal Operation Contract and Operator is willing and able to perform the services; and

WHEREAS, the Operator and the City have entered into a Preferential Use Agreement and a Warehouse Lease Agreement, both dated \_\_\_\_\_ 1, ~~2015~~~~2014~~, which together with this Contract provide for Operator’s use and occupancy of facilities at Port of Kodiak Piers II and III, and the City agrees that it is in the best interest of the public for the Operator to provide services for the Port of Kodiak at Piers II and III; and

WHEREAS, Operator has agreed in the Preferential Use Agreement to install a 100 foot gauge crane for use on Pier III and to make a minimum number of container vessel calls at Pier III annually, and leases all storage areas, marshalling yard and buildings at Pier III, and it is therefore appropriate that Operator be the exclusive provider of stevedoring and terminal services at Pier III.

NOW, THEREFORE, in consideration of premises, and the terms, covenants, conditions, and agreements herein contained and further stated in the Warehouse Lease Agreement and Preferential Use Agreement, the Operator and the City hereby agree as follows:

**1. Term.**

A. Pier III. With regard to Operator’s services at Pier III, this Contract shall continue in effect for the term of the Preferential Use Agreement.

B. Pier II. With regard to Operator’s services at Pier II:

1. Initial Term. The term of this Contract shall commence on \_\_\_\_\_ 1, ~~2015~~~~2014~~, and shall continue in full force and effect until midnight \_\_\_\_\_, ~~2025~~~~2024~~, unless earlier terminated pursuant to the terms of Paragraph 13 below.

2. Renewal Terms. This Contract may be renewed for two consecutive additional five-year terms (each a “Renewal Term”) by mutual agreement of the parties. At least ninety (90) days prior to the expiration of the term then in effect, the Operator shall provide written notice to the City of its desire to renew or not renew this Contract for the next succeeding Renewal Term. The City will then reply to the Operator within fifteen (15) days whether it wishes to renew this Contract. If both parties agree to renew this Contract, they shall then enter good faith negotiations to address any modifications to this Contract requested by either party. The failure of the parties to agree upon a renewal of this Contract shall cause this Contract to terminate at the end of the current Term.

**2. Facilities.** The City will make available to the Operator those certain terminals and adjacent properties at Piers II and III, as depicted in Exhibit A to this Contract (the “Facilities”). The City shall have the right to make additions, alterations, or improvements to the Facilities which do not impede Operator's access to or use of the Facilities.

**3. Terminal Operator Services.** Subject to the foregoing and to any future modifications or revisions of the Preferential Use Agreement, the Operator agrees to perform Stevedoring and Cargo Terminal Services at the Facilities in a prompt, efficient, prudent, and economical manner including the provision of all clerical personnel, laborers, and supervision necessary to perform such Stevedoring and Cargo Terminal Services.

A. Exclusive and Non-Exclusive Rights

(1) **Horizon Lines Vessels.** The Operator shall have the exclusive right to perform Stevedoring of vessels and Cargo Terminal Services twenty-four (24) hours per day, seven (7) days per week on Horizon Lines vessels and associated cargo at the Facilities. Horizon Lines vessels include ships, barges, or other watercraft which are owned, operated, or chartered by or for Horizon Lines or any affiliated or related company, or which are used in connection with any of Horizon Lines’ freight operations, or a vessel owned or operated by an entity with which Horizon Lines has a connecting carrier, consortium, or rationalization agreement, if, and to the extent that, said vessel is carrying cargo on Horizon Lines’ behalf.

(2) **Non-Horizon Lines Vessels at Pier II**

(a) The City shall have the planning and management responsibility in accommodating any non-Horizon Lines vessels at Pier II, including the planning and assignment of berthing and cargo staging/storage space and the rearrangement or relocation of other customers’ berthing and cargo staging/storage space at Pier II.

(b) The Operator shall have a non-exclusive right to perform Stevedoring of vessels and Cargo Terminal Services twenty-four (24) hours per day, seven (7) days per week on all non-Horizon Lines vessels at Pier II.

(3) **Non-Horizon Lines Vessels at Pier III**

(a) Subject to (3)(b) below, the Operator shall have the exclusive right to perform Stevedoring and Cargo Terminal Services for non-Horizon Lines vessels at Pier III.

(b) The Operator and City agree to cooperate and collaborate in good faith in accommodating any non-Horizon Lines vessels at Pier III under the City’s secondary berthing rights in the Preferential Use Agreement, including the planning and assignment of berthing and cargo staging/storage space and the rearrangement of Horizon Lines’ cargo staging/storage space at Pier III, provided Operator’s Stevedoring and Cargo Terminal Services for Horizon Lines vessels are not unreasonably altered or disrupted.

(4) **Exemptions.** Unless services are requested, the following vessels are exempt from using the services of the Operator: vessels of the Alaska Marine Highway System, vessels in port at the invitation of the City for special occasions where the ship will be open to the public, U.S. flagged government vessels, including university research

vessels, and vessels seeking fuel or other services from Harbor Enterprises dba Petro Marine Services and North Pacific Fuel aka Petro Star. Commercial fishing vessels, catcher-processors and fish processors, and cargo vessels under 300' are also exempt, unless loading or unloading commercial freight or hazardous materials. For this purpose, commercial freight means cargo transported on a vessel under a bill of lading.

(5) Use of Vessels' Gear. It is recognized that some vessels carry on-board cranes or other vessel's gear for the discharging or loading of cargo. In the interests of safety and expeditious handling of cargo, it is agreed that vessel's cranes or vessel's gear may be used for the discharge or loading of cargo at Pier II unless, in the City's opinion the vessel's cranes are not suitable for the handling of such cargo.

B. Stevedoring. For the purpose of this Contract, the term "Stevedoring" is defined to include the following vessel loading and discharging functions:

(1) Perform the stowage of cargo on board vessels in accordance with instructions received from their masters or their designated representatives.

(2) Discharge cargo or containers from vessels and transport the cargo or containers to a place of rest in the Facilities.

(3) Transport cargo or containers from a place of rest in the Facilities and load and stow cargo or containers onto the vessels.

(4) Lash and unlash cargo on vessels.

(5) Open and close hatches and cells.

(6) Plug and unplug shipboard electrical reefer receptacles if necessary to the extent not performed by the vessels.

(7) Check and tally containers and container seals and cargo.

(8) Spot vessels and handle lines as may be required.

(9) Bill, receive, or attempt to collect and, where applicable, remit to the City, all charges incurred under the applicable Port of Kodiak Tariff by persons, vessels, or cargo utilizing Port facilities or services subject to this Contract.

C. Cargo Terminal Services. For the purpose of this Contract, the term ("Cargo Terminal Services" is defined to include the following functions:

(1) Transport empty and loaded containers within the Facilities.

(2) Receive and deliver empty or loaded containers or chassis.

(3) Perform all necessary housekeeping services.

(4) Furnish all security at Pier III, for commercial cargo vessels, in accordance with a U.S. Coast Guard approved facility security plan, except for cruise ship operations.

(5) Visually inspect the condition of containers and cargo discharged from vessels at the Facilities, reporting to the vessels' masters or agents any damage or defects noted.

(6) Prepare daily reports reflecting the movement of containers or cargo.

(7) Provide expeditious movement of containers and cargo.

(8) Perform such other duties as are reasonable in such operations and as negotiated between the parties involved.

**4. Definition of Vessel.** For the purpose of this Contract, the term “vessel” shall mean and include every type of self propelled or non-self propelled vessel, including without limitation barges, container vessels, break-bulk vessels, and combinations of break-bulk and container vessels, and all other types of cargo or passenger vessels.

**5. Operator’s Equipment.** The Operator will provide all equipment necessary to perform the services required by this Contract.

**6. Public Berth.** It is agreed that the berths and facilities as above mentioned are public berths and subject to the provisions of the Preferential Use Agreement regarding Pier III shall be made available to and are available to all types of vessels that may wish to load or unload without discrimination in favor of or against any vessel, shipper, or consignee; provided, however, that the City at its option may determine that a given vessel is unsuitable for servicing at the berth and may prohibit the berthing of such vessel or alternatively may require the owner of such vessel to post such bond as the City may deem appropriate in the circumstances. Nothing contained herein is to be deemed to allow the berthing or transit of cargo which is prohibited by any applicable law including without limitation explosives or other dangerous commodities.

**7. Services by Other Persons at Pier II.** A person other than Operator may provide Stevedoring or Cargo Terminal Services at Pier II only under the following conditions.

A. Such other person may provide Stevedoring or Cargo Terminal Services only in accordance with the terms of a written contract between the City and such other person. The City will provide a copy of such contract to the Operator.

B. If any term of such contract between the City and such other person to provide Stevedoring or Cargo Terminal Services at Pier II is more favorable to such other person than the terms of this Contract are to the Operator, the Operator may elect to adopt any or all of such more favorable terms under this Contract, commencing as of the date on which the contract with such other person becomes effective.

C. A contract between the City and any other person to provide Stevedoring or Cargo Terminal Services at Pier II shall require that if there exists a labor organization which represents a majority of the individuals living in or around Kodiak, Alaska who earn their livelihood as stevedores or longshoremen, such other person shall make reasonable good-faith efforts to negotiate a collective bargaining agreement with said labor organization for the provision of the Stevedoring and Cargo Terminal labor under the contract.

**8. Compensation to City.** As and for compensation to the City, the City shall be entitled to all income derived from wharfage, dockage, and sale of water. All such sums shall be a charge against the vessel or cargo, as the case may be, and shall be collected by the Operator and remitted by the Operator to the City. Such remittances shall be accompanied by appropriate itemized documentation. Charges shall be paid by the Operator to the City within ninety (90) days after the first billing to the vessel or cargo, as the case may be or within ten (10) working days of receipt of payment by the Operator, whichever is less, provided that credit terms shall be those chosen by the Operator. All such billings to the vessels and cargo will be itemized for services rendered by the Operator and shall be made promptly after performance of those services.



**9. Compensation to Operator.** The Operator shall be entitled to keep all other charges (including charges for electrical energy, storage, and the movement of cargo) authorized and fixed in accordance with the applicable Port of Kodiak Tariff. The Operator shall be bound by any future modification or amendments of the Port of Kodiak Tariff; provided, however, the City shall not alter the credit terms of the tariff during the term of this Contract. When charges involve stevedoring or other labor services based upon an hourly wage rate, then the Operator may add to the total applicable labor charge an administrative fee not exceeding thirty percent (30%) and shall collect such fee from the person or vessel requiring the services in question. In no event, however, shall the Operator charge or collect an administrative fee with respect to any portion of its labor costs which are based upon or derived from wage rates exceeding those applicable to similar work under contracts or agreements subject to the Davis-Bacon Act. If, on the date of execution of this Contract, there exists a labor organization which represents a majority of the individuals living in or around Kodiak, Alaska who earn their livelihood as stevedores or longshoremen, then the Operator shall make reasonable good-faith efforts to negotiate a collective bargaining agreement with said labor organization for the provision of stevedoring labor services under this Contract.

**10. Indemnification.**

A. The Operator shall indemnify and hold harmless the City and its elected and appointed officials, employees, agents, and servants from any and all losses, expenses, damages, demands, and claims by any person in connection with or rising out of any injury (including death) to persons or in connection with damage to property or the natural environment, sustained in whole or in part as a result of the Operator's occupancy and maintenance of the Facilities, and/or exercise of its rights under this Contract or the Operator's breach of this Contract. The Operator shall defend all suits and actions brought against the City and any of its elected or appointed officials, employees, agents or servants from any such injury or damage and shall pay all damages, costs, and expenses, including attorney's fees incurred in connection with the suits or actions. The only exception to this indemnity provision shall be for claims resulting from the negligence, gross negligence, or willful misconduct of the City or its employees, agents, or servants, and for claims resulting from an act or omission of a third party, with respect to which the Operator's obligations under this paragraph shall be limited to that portion of any such claim not attributable to the City and not attributable to a third party.

B. This indemnity provision specifically includes all environmental damage that may result from the Operator's operations under this Contract and any penalties or fines which may be assessed in connection therewith.

C. Notwithstanding any provision of this Contract, Operator shall not be liable for, and shall not be liable to indemnify, defend or hold the City harmless from, any condition at the Facilities, whether known or unknown, which was in existence before July 1, 2004.

**11. Insurance.**

A. Operator shall procure and maintain at its sole expense, and shall keep in full force and effect throughout the term of this Lease, the following policies of insurance:

- (1) Commercial General Liability Insurance, \$5,000,000 combined single limit per occurrence for bodily injury and property damage claims arising from all operations related to this Contract. The general aggregate limit shall be \$5,000,000.

(2) Commercial Automobile Liability Insurance, \$5,000,000 combined single limit per accident for bodily injury and property damage.

(3) Worker's Compensation and Employers Liability. Worker's Compensation shall be statutory as required by the State of Alaska. Employers Liability shall be endorsed to the following minimum limits and contain USL&H coverage endorsement, if applicable: (i) bodily injury by accident--\$1,000,000 each accident; and (ii) bodily injury by disease--\$1,000,000 each employee, \$1,000,000 policy limit.

B. Other Insurance Provisions. The policies are to contain, or be endorsed to contain, the following provisions:

(1) Commercial General Liability and Automobile Liability

(i) City, its officers, officials, employees and volunteers are to be covered as additional insureds. The coverage shall contain no special limitation on the scope of protection afforded to City, its officers, officials, employees and volunteers.

(ii) Operator's insurance coverage shall be primary insurance as respects City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by City, its officers, officials, employees and volunteers shall be excess of Operator's insurance and shall not contribute to it.

(iii) Operator's insurer shall agree to waive all rights of subrogation against City, its officers, officials, employees and volunteers for losses arising from work performed by Operator for City.

(2) Worker's Compensation and Employer's Liability. Operator's insurer shall agree to waive all rights of subrogation against City, its officers, officials, employees and volunteers for losses arising from work performed by Operator for City.

(3) All Insurance. Each insurance policy required by this Contract shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after 30 days' prior written notice has been given by the Insurer to City by certified mail, return receipt requested.

C. Acceptability of Insurers. Insurance is to be placed with insurers qualified to do business in Alaska having a Best's rating of no less than A-: VII.

D. Verification of Coverage. Operator shall furnish City with approved certificates of insurance and with certified copies of all endorsements effecting coverage required by this Section. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates are to be on forms which meet industry standard. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

**12. Damage to the Facilities.** The Operator shall pay for all damage to City-owned property caused by the Operator, its agents, employees, or invitees. A person does not become an invitee of the Operator under this section solely because of the person's use of the Operator's stevedoring or cargo terminal services.

**13. Default and Termination.** The City may declare a default hereunder and terminate this Contract, in addition to exercising any other available remedy, upon the occurrence of any of the following:

A. The failure of the Operator to pay any sum of money due under this Contract within ten (10) days after the due date.

B. The failure of the Operator to perform or observe any covenant or condition of this Contract, other than a default in the payment of money described in Paragraph 13(A), which is not cured within thirty (30) days after notice thereof from the City to the Operator, unless the default is of a kind that may be cured, but not within such thirty (30)-day period, in which case no default shall be declared so long as the Operator shall commence the curing of the default within such thirty (30) day period and thereafter shall diligently and continuously prosecute the curing of same.

C. The commencement of a case under any chapter of the federal Bankruptcy Code by or against the Operator, or the filing of a voluntary or involuntary petition proposing the adjudication of the Operator as bankrupt or insolvent, or the reorganization of the Operator, or an arrangement by the Operator with its creditors, unless the petition is filed or case commenced by a party other than the Operator and is withdrawn or dismissed within ninety (90) days after the date of its filing.

D. The admission in writing by the Operator of its inability to pay its debts when due; the appointment of a receiver or trustee for the business or property of the Operator, unless such appointment shall be vacated within ten (10) days after its entry; the Operator making an assignment for the benefit of creditors; or the voluntary or involuntary dissolution of the Operator.

E. If the Operator is in default under either the Preferential Use Agreement or the Warehouse Lease Agreement.

**14. Inspection of Books.** The City reserves the right at any reasonable time after seven days written notice to Operator to inspect and make copies of the books and records of the Operator related to operations conducted pursuant to this Contract. The Operator agrees that cargo manifests shall not be released by Operator to a third party except in accordance with the laws of the United States.

**15. Assignment.** The parties stipulate and agree that the services rendered under this Agreement are of such a nature that the rights and duties of the Operator hereunder shall not be assignable without the prior written consent of the City, which consent shall not be unreasonably withheld, except to an entity that is owned solely by or that is an affiliate of the Operator, after thirty (30) days' prior notice to the City. The Operator shall include in such notice a statement of any legal requirement for confidentiality regarding the notice or the related transaction, with which the City shall comply. Should the City consent to an assignment the Operator shall nevertheless remain liable for the performance of all of its obligations under this Agreement and the acceptance by the City directly from an assignee of any payments or other performance due under this Agreement shall not be construed as a waiver of the Operator's continuing liability. A change of control of the Operator other than from the parent entity of the Operator to an affiliate shall constitute an assignment for purposes of this provision. Notwithstanding the foregoing, no consent by the City shall be required in connection with the merger pursuant to that certain Agreement and Plan of Merger dated as of November 11, 2014 by and among Horizon Lines, Inc., Matson Navigation Company, Inc. and Hogan Acquisition Inc.

**16. Compliance with Federal, State, and Local Laws.** At all times during the term of this Contract, the Operator shall conduct operations in accordance with all applicable federal, state, and local laws and ordinances. Without limiting the generality of the foregoing, the Operator shall obtain coverage under the Multi-Sector General Permit for all industrial storm water discharges from the Pier III Terminal.

**17. Severability.** If any part, term or provision of this Contract is declared null or unenforceable by a court or other tribunal of competent jurisdiction, the validity and enforceability of the rest of this Contract shall not be affected.

**18. Waivers.** No waiver by the Operator or the City of any covenant or condition of this Contract shall be construed as a waiver of any other covenant or condition, nor shall the waiver of one breach be considered as a waiver of any other breach.

**19. Modifications and Notices.**

A. No modification of this Agreement shall be effective unless agreed to by the Operator and the City in writing. No modification of one provision of this Agreement shall be considered a waiver, breach or cancellation of any other provision.

B. All notices required to be given under this Agreement shall be in writing, and shall be effective on the date of receipt and shall be mailed to the parties at the following addresses:

Horizon Lines of Alaska, LLC	City Manager
1717 Tidewater Road	City of Kodiak
Anchorage, Alaska 99501	710 Mill Bay Road
Attn: _____	Kodiak, Alaska 99615

Any notice or document delivered by facsimile transmission to a facsimile machine at which the recipient routinely receives such transmissions shall be effective upon the date of receipt of the complete and fully legible document (so long as the original is also mailed in accordance with this paragraph) unless the transmission occurred outside of the usual business hours of the recipient, in which event the document shall be deemed to have been received on the next business day.

**20. Alaska Law.** The parties agree that this Contract was entered into in the State of Alaska, that Alaska law will govern its interpretation and application, and that venue of any suit or other action arising out of this Contract shall be in Alaska.

**21. Binding on Successors and Assigns.** All provisions of this Contract shall inure to the benefit of and be binding on the parties, their successors, and permitted assigns.

**22. Complete Agreement.** This Contract, including Exhibit A, hereto, and the Preferential Use Agreement and Warehouse Lease Agreement, both dated \_\_\_\_\_ 1, ~~2015~~2014, between the Operator and the City, constitute the final agreement between the parties. They are the complete and exclusive expression of the parties' agreement on the matters contained in this Contract. All prior and contemporaneous oral and written negotiations and agreements between the parties on the matters contained in this Contract are expressly merged into and superseded by the aforementioned agreements.

IN WITNESS WHEREOF, these parties have signed this Contract on the date or dates indicated beneath the signature of their respective officers or agents.

City of Kodiak

Horizon Lines of Alaska, LLC

---

Lon White                      Date  
Harbormaster/Acting City Manager

---

Kenneth Gill                      Date  
Director of Operations

ATTEST:

ATTEST:

---

Debra L. Marlar                      Date  
City Clerk

---

Richard Kniaziowski                      Date  
Terminal Manager

**PORT OF KODIAK  
PIER II WAREHOUSE LEASE AGREEMENT  
City of Kodiak and Horizon Lines of Alaska, LLC  
City Contract 217718**

THIS LEASE AGREEMENT (“Agreement”) made and entered into as of \_\_\_\_\_ 1, ~~2015~~~~2014~~, by and between the City of Kodiak, Alaska, an Alaska municipal corporation (“City”), and Horizon Lines of Alaska, LLC, a limited liability company organized under the laws of state of Delaware (“Lessee”).

**W I T N E S S E T H**

WHEREAS, the City owns property situated in U.S. Survey 2537B in the City of Kodiak, Alaska, commonly known as Pier II or Fishermen’s Terminal, on which is situated a building (the “Warehouse”), which includes warehouse and office space, and adjacent parking space.

WHEREAS, the City has entered into a Preferential Use Agreement and a Terminal Operation Contract with the Lessee, both dated \_\_\_\_\_ 1, ~~2015~~~~2014~~, which together with this Agreement provide for the Lessee’s use and occupancy of facilities at Port of Kodiak Piers II and III.

NOW, THEREFORE, in consideration of the premises and the terms, covenants, conditions, and agreements contained herein, and further stated in the Preferential Use Agreement and the Terminal Operation Contract, the parties agree as follows.

**1. Premises.** The City leases to the Lessee, and the Lessee takes and hires from the City, the Warehouse including offices, a site for a vehicle off-loading ramp, van rows 8 and 9, and parking adjacent to the Warehouse, but excluding the following: (i) all other city-owned property in the vicinity of Pier II, (ii) 162 sq. ft. of office space on the second floor, (iii) a 320 sq. ft. area in the warm room, (iv) two 60-ft parking areas on the north and south sides of the Warehouse , (v) one 120-ft parking area on the east end of the Warehouse , and (vi) a 60 ft. by 120 ft. (7,200 sq. ft.) section of the Warehouse for use as a port maintenance shop and other purposes as deemed appropriate by the City (the “Premises”), for storage, loading, and unloading of freight shipped or to be shipped across the City port facilities. The Premises is more particularly described in attached Exhibits A and B.

**2. Term.** (a) Initial Term. This Agreement shall continue in effect for a period of five (5) years commencing on \_\_\_\_\_ 1, ~~2015~~~~2014~~, and shall continue in full force and effect until midnight \_\_\_\_\_, ~~2020~~~~2019~~, unless earlier terminated pursuant to the terms of Paragraph 12.

(b) This Agreement may be renewed for an additional term of five (5) years, by mutual agreement of the parties. At least ninety (90) days prior to the expiration of the term then in effect, the Lessee shall provide written notice to the City of its desire to renew or not renew this Agreement. The City will then reply within fifteen (15) days whether it wishes to renew the Agreement with the Lessee. If both parties agree, they shall then enter good faith negotiations to address any modifications to this Agreement requested by either party.

**3. Rental.** (a) Lessee agrees to pay rent for the Premises in monthly installments due on the first day of each month as shown in the table below.

<u>Year</u>	<u>Monthly Rent</u>
2014	\$8,966.70
2015	\$8,966.67
2016	\$9,235.67
2017	\$9,512.74
2018	\$9,798.12
2019	\$10,092.06

(b) Insurance Cost Escalation Clause. The monthly rent may be adjusted no more than once annually so as to require the Lessee to reimburse the City for the full amount by which the cost to the City of maintaining casualty insurance coverage for the Premises has increased over the cost of such insurance as of July 1, 2013, but only if such insurance premium costs incurred by the City have increased by five (5%) percent or more over the FY2013 cost.

**4. Use.** The Lessee shall use the Premises for the storage, loading, and unloading of freight shipped or to be shipped across the City port facilities. If on the date of execution of this Agreement there exists a labor organization which represents the majority of the individuals living in or around Kodiak, Alaska, who earn their livelihood as warehousemen, then the Lessee shall make reasonable good faith efforts to negotiate a collective bargaining agreement with said labor organization for the provision of warehousing labor services with respect to the Premises.

**5. Office Space and Mutual Access.** The City agrees that reasonable access to and from the Premises over the contiguous property shall be made available to the Lessee, except during cruise ship operations when access to the dock and east side of the Warehouse may be restricted to comply with marine transportation security requirements. Lessee agrees that the City shall have unrestricted access to the second-floor office, the warm room, the NOAA warehouse area, and the City's port maintenance shop, all located within the Warehouse .

**6. Repairs and Maintenance.** (a) All routine preventive maintenance and repairs costing fifteen thousand dollars (\$15,000) or less in connection with any single incident of damage, decay, or breakdown shall be accomplished at the sole cost and expense of the Lessee, including but not limited to repairs to the overhead door, exterior doors and windows, boiler and electrical systems, and excepting only repairs to the roof, exterior walls, foundation, water and sewer systems and fire suppression system, all of which shall be maintained by the City.

(b) Except for the foregoing items to be maintained by the City and items covered by insurance and force majeure, the cost of any repairs totaling more than fifteen thousand dollars (\$15,000) in connection with any single incident of damage, decay, or breakdown, shall be shared by the City and the Lessee, with the Lessee bearing the first fifteen thousand dollars (\$15,000) of such cost and the City bearing the remainder; provided, however, that in no event shall the Lessee be liable for more than fifty thousand dollars (\$50,000) in total out-of-pocket costs associated with routine preventive maintenance and repair during any one calendar year.

(c) The Lessee shall keep the Premises in a neat and broom-clean condition and contract with a janitorial service for the offices. The City retains the right to inspect the Premises during regular business hours and, should such inspection reveal a failure by the Lessee to adequately

maintain the Premises, the Lessee shall make such corrections as may be required within a reasonable time specified by the City.

(d) Snow removal on the Pier II dock shall be the responsibility of the City.

**7. Utilities.** The City shall pay all water and sewer charges. All electric, heating oil, garbage, telephone, and janitorial charges shall be borne by the Lessee.

**8. Insurance.**

(a) Lessee shall procure and maintain at its sole expense, and shall keep in full force and effect throughout the term of this Lease, the following policies of insurance:

(1) Commercial General Liability Insurance, \$5,000,000 combined single limit per occurrence for bodily injury and property damage claims arising from all operations related to this Lease. The general aggregate limit shall be \$5,000,000.

(2) Commercial Automobile Liability Insurance, \$5,000,000 combined single limit per accident for bodily injury and property damage.

(3) Worker's Compensation and Employers Liability. Worker's Compensation shall be statutory as required by the State of Alaska. Employers Liability shall be endorsed to the following minimum limits and contain USL&H coverage endorsement, if applicable: (i) bodily injury by accident--\$1,000,000 each accident; and (ii) bodily injury by disease--\$1,000,000 each employee, \$1,000,000 policy limit.

(4) Insurance in an amount of not less than \$50,000 for loss due to property lost or stolen while in the Lessee's custody or control.

(b) Other Insurance Provisions. The policies are to contain, or be endorsed to contain, the following provisions:

(1) Commercial General Liability and Automobile Liability

(i) City, its officers, officials, employees and volunteers are to be covered as additional insureds. The coverage shall contain no special limitation on the scope of protection afforded to City, its officers, officials, employees and volunteers.

(ii) Lessee's insurance coverage shall be primary insurance as respects City, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by City, its officers, officials, employees and volunteers shall be excess of Lessee's insurance and shall not contribute to it.

(iii) Lessee's insurer shall agree to waive all rights of subrogation against City, its officers, officials, employees and volunteers for losses arising from work performed by Lessee or any sublessee for City.

(2) Worker's Compensation and Employer's Liability. Lessee's insurer shall agree to waive all rights of subrogation against City, its officers, officials, employees and volunteers for losses arising from work performed by Lessee or any sublessee for City.

(3) All Insurance. Each insurance policy required by this Lease shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after 30 days' prior written notice has been given by the Insurer to City by certified mail, return receipt requested.



(c) Acceptability of Insurers. Insurance is to be placed with insurers qualified to do business in Alaska having a Best's rating of no less than A-: VII.

(d) Verification of Coverage. Lessee shall furnish City with approved certificates of insurance and with certified copies of all endorsements effecting coverage required by this Section. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates are to be on forms which meet industry standard. City reserves the right to require complete, certified copies of all required insurance policies, at any time.

(e) The City shall provide fire insurance coverage for the Warehouse and Pier II structures.

**9. Alterations.** The Lessee shall make no alterations, additions, or improvements to the Premises without the prior written approval of the City. At the expiration of this Agreement or any renewal thereof, any such improvements shall become the property of the City.

**10. Fire or Other Casualty Loss.** In the event the Warehouse is damaged to such an extent as to render the same untenable in whole or in substantial part, or is destroyed, the City has the option to repair, rebuild, or not to rebuild. During such repair or reconstruction, the Lessee's rental shall be abated in the proportion that the damaged space bears to the whole of the leased space. Should the City elect not to rebuild, this Agreement shall be deemed terminated and any advanced but unaccrued rentals shall be repaid to the Lessee. In either event, the City shall furnish notice of its intent to the Lessee within thirty (30) days after the loss occurrence.

**11. Assignment.** The Lessee may not assign or sublease any rights or interests under this Agreement without the prior written consent of the City, which consent shall not be unreasonably withheld, except to an entity that is owned solely by or that is an affiliate of the Lessee, after thirty (30) days prior notice to the City. The Lessee shall include in such notice a statement of any legal requirement for confidentiality regarding the notice or the related transaction, with which the City shall comply. Should the City consent to an assignment the Lessee shall nevertheless remain liable for the performance of all of its obligations under this Agreement and the acceptance by the City directly from an assignee of any payments or other performance due under this Agreement shall not be construed as a waiver of The lessee's continuing liability. A change of control of the Lessee other than from the parent entity of the Lessee to an affiliate shall constitute an assignment for purposes of this provision. Notwithstanding the foregoing, no consent by the City shall be required in connection with the merger pursuant to that certain Agreement and Plan of Merger dated as of November 11, 2014 by and among Horizon Lines, Inc., Matson Navigation Company, Inc. and Hogan Acquisition Inc.

**12. Default and Termination.** The City may declare a default hereunder and terminate this Agreement upon the occurrence of any of the following:

A. The failure of the Lessee to pay rent or any other sum of money due under this Agreement within 10 days after the due date.

B. The failure of the Lessee to perform or observe any covenant or condition of this Agreement, other than a default in the payment of money described in Section 12(A), which is not cured within 30 days after notice thereof from the City to Lessee, unless the default is of a kind that may be cured, but not within such 30-day period, in which case no event of default shall be declared so long as Lessee shall commence the curing of the default within such 30 day

period and thereafter shall diligently and continuously prosecute the curing of same.

C. The commencement of a case under any chapter of the federal Bankruptcy Code by or against the Lessee, or the filing of a voluntary or involuntary petition proposing the adjudication of the Lessee as bankrupt or insolvent, or the reorganization of the Lessee, or an arrangement by the Lessee with its creditors, unless the petition is filed or case commenced by a party other than the Lessee and is withdrawn or dismissed within ninety (90) days after the date of its filing.

D. The admission in writing by the Lessee of its inability to pay its debts when due; the appointment of a receiver or trustee for the business or property of the Lessee, unless such appointment shall be vacated within 10 days after its entry; the Lessee making an assignment for the benefit of creditors; or the voluntary or involuntary dissolution of the Lessee.

E. If the Lessee is in default under either the Preferential Use Agreement or the Terminal Operation Contract.

### **13. Indemnification.**

(a) The Lessee shall indemnify and hold harmless the City and its elected and appointed officials, employees, agents, and servants from any and all losses, expenses, damages, demands, and claims by any person in connection with or rising out of any injury (including death) to persons or in connection with damage to property or the natural environment, sustained in whole or in part as a result of the Lessee's occupancy and maintenance of the Premises, and/or exercise of its rights under this Agreement or the Lessee's breach of this Agreement. The Lessee shall defend all suits and actions brought against the City and any of its elected or appointed officials, employees, agents or servants from any such injury or damage and shall pay all damages, costs, and expenses, including attorney's fees incurred in connection with the suits or actions. The only exception to this indemnity provision shall be for claims resulting from the negligence, gross negligence, or willful misconduct of the City or its employees, agents, or servants, and for claims resulting from an act or omission of a third party, with respect to which the Lessee's obligations under this paragraph shall be limited to that portion of any such claim not attributable to the City and not attributable to a third party.

(b) This indemnity provision specifically includes all environmental damage that may result from the Lessee's operations under this Agreement and any penalties or fines which may be assessed in connection therewith.

(c) Notwithstanding any provision of this Agreement, Lessee shall not be liable for, and shall not be liable to indemnify, defend or hold the City harmless from, any condition on the Premises, whether known or unknown, which was in existence before July 1, 2004.

**14. Compliance with Federal, State, and Local Laws.** At all times during the lease term the Lessee shall conduct operations in accordance with all applicable federal, state, and local laws and ordinances.

**15. Severability.** If any part, term or provision of this Agreement is declared null or unenforceable by a court or other tribunal of competent jurisdiction, the validity and enforceability of the rest of this Agreement shall not be affected.

**16. Waivers.** No waiver by Lessee or the City of any covenant or condition of this Agreement shall be construed as a waiver of any other covenant or condition, nor shall the waiver of one breach be considered a waiver of any other breach.

**17. Modifications and Notices.** (a) No modification of this Agreement shall be effective unless agreed to by Lessee and the City in writing. No modification of one provision of this Agreement shall be considered a waiver, breach or cancellation of any other provision.

(b) All notices required to be given under this Agreement shall be effective on the date of receipt and shall be mailed to the parties at the following addresses:

Horizon Lines of Alaska, LLC	City Manager
1717 Tidewater Road	City of Kodiak
Anchorage, Alaska 99501	710 Mill Bay Road
Attn: _____	Kodiak, Alaska 99615

Any notice or document delivered by facsimile transmission to a facsimile machine at which the recipient routinely receives such transmissions shall be effective upon the date of receipt of the complete and fully legible document (so long as the original is also mailed in accordance with this paragraph) unless the transmission occurred outside of the usual business hours of the recipient, in which event the document shall be deemed to have been received on the next business day.

**18. Alaska Law.** The parties agree that this Agreement was entered into in the State of Alaska, that Alaska law will govern its interpretation and application, and that venue of any suit or other action arising out of this Agreement shall be in Alaska.

**19. Binding on Successors and Assigns.** All provisions of this Agreement shall inure to the benefit of and be binding on the parties, their successors, and permitted assigns.

**20. Complete Agreement.** This Agreement, including Exhibits A and B hereto, and the Preferential Use Agreement and Terminal Operation Contract, both dated \_\_\_\_\_ 1, ~~2015~~2014, between the Lessee and the City, constitute the final agreement between the parties. They are the complete and exclusive expression of the parties’ agreement on the matters contained in this Agreement. All prior and contemporaneous oral and written negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by the aforementioned agreements.

IN WITNESS WHEREOF, the parties have signed this Agreement on the date or dates indicated beneath the signature of their respective officers or agents.

City of Kodiak

Horizon Lines of Alaska, LLC

\_\_\_\_\_  
Lon White    Date  
Harbormaster/Acting City Manager

\_\_\_\_\_  
Kenneth Gill    Date  
Director of Operations

ATTEST:

ATTEST:

\_\_\_\_\_  
Debra L. Marlar    Date  
City Clerk

\_\_\_\_\_  
Richard Kniaziowski    Date  
Terminal Manager