

The Law Offices of John S. Unpingco & Associates, LLC

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Suite 12B

Sinajana, Guam 96910

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www.ualawguam.com

TRANSMITTAL LETTER

January 22, 2008

Office of the Public Auditor
238 Archbishop Flores Street
Hagatna, Guam 96910

RE: Procurement Appeal 

Gentlemen:

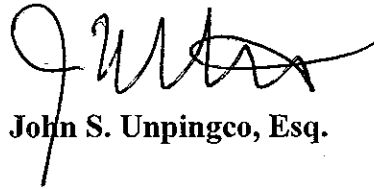
Enclosed is our appeal for the unsolicited proposal submitted by Matson Navigation Company, Inc. and Horizon Lines, Inc. to purchase, refurbish, transport, erect and operate three used gantry cranes at the Jose D. Leon Guerrero Commercial Port.

Please note that we do request a hearing.

Please do not hesitate to call me if you should have any questions.

Sincerely,

THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC



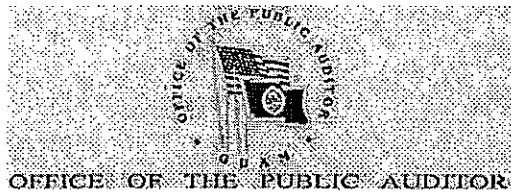
John S. Unpingco, Esq.

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

JAN 22 2008

TIME: 5:00 PM
BY: Anne Camacho
FILE No. OPA-PA 08-002

COPY



**Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL**

PART I- To be completed by OPA

In the Appeal of)
) **NOTICE OF APPEAL**
)
FAR EAST EQUIPMENT CO., LLC)
APPELLANT) Docket No. OPA-PA _____
)
)

PART II- Appellant Information

Name: FAR EAST EQUIPMENT COMPANY, LLC
Mailing Address: PO BOX 10838
TAMUNING, GUAM 96931
Business Address: _____
Daytime Contact No: 473-4375; 888-6270

PART III- Appeal Information

- A) Purchasing Agency: Port Authority of Guam
- B) Identification/Number of Procurement, Solicitation, or Contract: unsolicited proposal
- C) Decision being appealed was made on 1-8-08 (date) by:
 Chief Procurement Officer Director of Public Works Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:
(Please select one and attach a copy of the Decision to this form)
- Decision on Protest of Method, Solicitation or Award
 Decision on Debarment or Suspension
 Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
 Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

N/A	

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

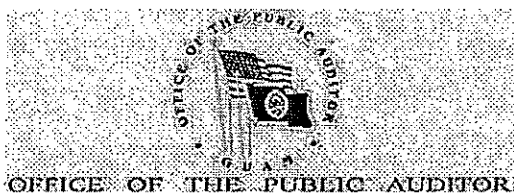
Submitted this 22 day of Jan, 2008.

By: _____
APPELLANT

or

By:  _____
Appellant's Duly Authorized Representative

(Address) THE LAW OFFICES OF JOHN S. UNPINGCO & ASSOCIATES, LLC
(Phone No.) 777 ROUTE 4, SUITE 12B SINAJANA, GUAM 96910
Tel: 475-8545; Fax: 475-8550



**Appendix B: Declaration Form
PROCUREMENT APPEAL**

In the Appeal of)
)
)
 FAR EAST EQUIPMENT CO., LLC)
 APPELLANT) Docket No. OPA-PA _____
)
 _____)

DECLARATION RE COURT ACTION
(To be signed by the Government Purchasing Agency.)

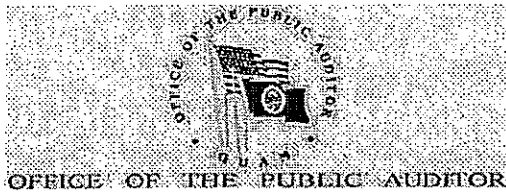
Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this ___ day of _____, 20__.

By: _____
DECLARANT

Print Declarant's Name



Appendix C: Notice of Hearing Form
PROCUREMENT APPEAL

In the Appeal of)
)
) **NOTICE OF HEARING**
) **FAR EAST EQUIPMENT CO., LLC**)
) **APPELLANT**) Docket No. OPA-PA _____
)
)
 _____)

You are hereby notified that a hearing will be held before the Public Auditor or the Hearings Officer for Procurement Appeals at the Office of the Public Auditor on the _____ day of _____, 20____, at the hour of _____, relative to the above referenced Procurement Appeal. You may be present at the hearing; may be, but need not be, represented by counsel; may present any relevant evidence; and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Hearings Officer for Procurement Appeals, Office of the Public Auditor.

Please acknowledge receipt of this Notice and return to the Office of the Public Auditor immediately.

Acknowledged receipt:

Receiver's Signature

Print Name

Date

GROUNDS FOR APPEAL

The facts in this case are briefly as follows:

On June 30, 2006, the Port Authority of Guam (hereinafter referred to as "PAG") issued Bid Invitation No. PAG-06-017 for the procurement of a used gantry crane. Far East Equipment Company, LLC (hereinafter referred to as "FEEC") submitted a bid on July 13, 2006. *See* Exhibit 1. On August 7, 2006, PAG cancelled the IFB and rejected the FEEC bid. *See* Exhibit 2. Two shipping companies, Matson Navigation Company, Inc. and Horizon Lines, Inc. (hereinafter respectively referred to as "Matson & Horizon") currently providing ocean carrier services to Guam offered to purchase, refurbish, transport and erect three used gantry cranes at the Jose D. Leon Guerrero Commercial Port (hereinafter referred to as "Port") at a cost of \$12 - \$15 million to be borne by Matson & Horizon. PAG was willing to grant Matson & Horizon a non-exclusive license to use the gantry rails and other related property in the Port for a five year term and to allow Matson and Horizon to use the cranes to load and unload their cargo and equipment at the Port from their vessels. PAG would then enter into an enforceable agreement with Matson & Horizon for the operation of the cranes by Port employees and for a reduction or abatement of its Tariffs for Stevedoring Services to reflect the fact that Matson & Horizon were providing their own gantry cranes for cargo operations. All of these terms were embodied in a Letter of Intent. *See* Exhibit 3.

On December 14, 2007, the PAG Board of Directors passed Resolution No. 07-07 (Exhibit 4) granting Matson & Horizon a non-exclusive license for a term of five years to use the Rails and other related property within the Commercial Port and to land, install, maintain and use the cranes. FEEC protested the PAG's acceptance of the unsolicited proposal of Matson & Horizon on December 18, 2007, (Exhibit 5) contending that the acceptance of the proposal was in violation of 5 GCA § 5219 and the unsolicited offer as then presented could not be evaluated as the financial terms of the transaction had yet to be negotiated. By letter dated January 8, 2008

PAG Legal Counsel on behalf of the PAG & GSA disagreed with FEEC's procurement protest contending that the Guam Procurement Laws do not apply to the Matson & Horizon gantry crane transaction. *See* Exhibit 6.

5 GCA § 5219 (a) defines unsolicited offers as "any offer other than one submitted in response to a solicitation". The procedure for considering and evaluating an unsolicited offer is stated in § 5219 (c) & (d) which provide that:

(c) Conditions for Consideration. To be considered for evaluation, an unsolicited offer:

- (1) must be in writing;
- (2) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to Guam and to the government;
- (3) must be unique or innovative to Guam's and the government's use; and
- (4) may be subject to testing under terms and conditions specified by the government.

(d) Evaluation. The unsolicited offer shall be evaluated to determine its utility to Guam and to the government, and whether it would be to Guam's and the government's advantage to procure such service.

If the unsolicited offer is considered desirable, then Section 5219 (e) requires that the unsolicited offer be subjected to the Competitive Sealed Bidding process under Section 5211. This section is at the heart of this procurement protest.

There is no doubt that the PAG Board may issue a license "for the use of its real property and other related facilities for a term not to exceed five years". 12 GCA § 10105 (i). However, the License Agreement (Exhibit 7) in this case goes far beyond the use of the gantry rails and the real property of the PAG. The License Agreement gives Matson & Horizon the "right to use and maintain the cranes and to load and off-load containers and cargo from their vessels calling upon the Commercial Port". License Agreement, paragraph 3, page 3. And, the cranes are to be operated by PAG employees subject to the direction and control of the General Manager of the Port. Even the repairs and maintenance to the Cranes are to be performed by PAG employees.

There is no mention of compensation to the PAG for the labor of Port employees performing these services.

More telling is the fact that according to the Letter of Intent the "Port is willing and fully intends to enter into an enforceable agreement with Matson & Horizon for the operation of the cranes by Port employees and for a reduction or abatement of its Tariffs for Stevedoring Services, or to establish a new Tariff for carriers providing their own gantry cranes, and/or to make other arrangements to reflect the fact that Matson & Horizon are providing their own gantry cranes for cargo operations, all subject to applicable requirements of law". Letter of Intent, paragraph 2, page 2.

Both the Letter of Intent and License Agreement were a "package" to be approved by Matson & Horizon. The Board Resolution No. 07-07 clearly states that:

The Board hereby gives Matson & Horizon a non-exclusive license for a term of five (5) years in the form attached hereto as Exhibit 1 (subject to the Agreement of all parties as to Exhibit A referenced in Exhibit 1) and also approves the execution by Port management of a letter of Intent in the form attached hereto as Exhibit 2, all subject to the acceptance and execution by Matson & Horizon of such documents and instruments ... (Emphasis added).

While the draft License Agreement makes no mention of an abatement of tariffs by the Port, negotiations between PAG and the two carriers, Matson & Horizon, were resumed according to the Port's General Manager in a news interview with KUAM TV last week. Such negotiations without public scrutiny are contrary to the procurement policy of Guam (2 GAR § 1102) and is one of the reasons we have a procurement law. The License Agreement denoted as Exhibit 1 to the PAG Board Resolution was the approved form of the License Agreement but no mention was made as to the substance of the Agreement.

This Licensing Agreement involves the expenditure of public funds. In return for Matson & Horizon's using their gantry cranes to offload their ships, PAG agrees to furnish PAG personnel to operate, repair, and maintain the cranes. Such labor is ordinarily charged to Port users by PAG as part of its tariff charges for stevedoring services. This provision of labor is

explicitly stated in paragraph 3 of the License Agreement. Probably, still to be negotiated are the costs of the labor and other reductions in port user fees or other arrangements to be made to reflect the fact that Matson & Horizon are providing their own gantry cranes for cargo operations.

As the licensing agreement does involve the expenditure of government funds as described above, the Guam Procurement Law applies to the licensing agreement pursuant to 5 GCA § 5004 (b) which provides that:

This Chapter shall apply to every expenditure of public funds irrespective of their source, ... under any contract, ...

Contract is defined in 5 GCA § 5030 (d) as:

Contract means all types of territorial agreements, regardless of what they may be called, for the procurement or disposal of supplies, services or construction.

Thus, regardless of the rubric, this Licensing Agreement is covered by the Guam Procurement Law.

The Matson Horizon proposal, Letter of Intent, and Licensing Agreement bring forth other questions. First, how are Matson & Horizon to recoup their investment of \$12 - \$15 million dollars in five years? Is there to be a separate enforceable side agreement or are there other considerations still to be negotiated which can be seen as rent for the cranes? Second, if this was a regular licensing arrangement why are the Port's employees going to operate, repair and maintain the cranes? What is the consideration for these Port employees' labor? As previously mentioned, if the provision of the Port employees' labor is in lieu of or is the abatement of Port user fees, then the Port is making an expenditure of funds which would subject this license to the Procurement laws of Guam.

Third, despite the rubric that the License Agreement gives a non-exclusive right to Matson & Horizon to use the Port's gantry rails, is the right really non-exclusive? How many

other gantry cranes can be placed on the Port's gantry rails? It would appear that three is the maximum.

Fourth, if these gantry cranes owned by Matson & Horizon are to be used to unload cargo from ships owned by shippers other than Matson & Horizon, is PAG going to charge the other shippers or is it Matson or Horizon that will charge the other shippers? If PAG is to charge the other shipper does PAG remit some of the charges to Matson & Horizon for the use of their cranes? Is this not rental for the cranes?

Fifth, is PAG going to charge other shippers a higher rate so that PAG can get its regular rate or tariff and then give the difference to Matson & Horizon?

Sixth, why is this entire used gantry crane acquisition and operation at the Port not part of the Port privatization? In fact, these same gantry operations were requested to be furnished in a prior Request for Proposal for Port privatization. Specifically, PAG RFP 05-020 "Privatization RFP for Cargo Operations at Jose Leon Guerrero Commercial Port" which required proposers to lease, operate and maintain all existing PAG equipment and required bidders to supply, operate and maintain additional equipment including gantry cranes and other container offloading equipment. Or, should this gantry acquisition and operation be part of a public-private partnership and lease agreement? Why is this part of the Port's operation now being handed over to Matson & Horizon in this unsolicited proposal after procurement solicitation for these functions have been cancelled by the Port in the past?

Seventh, will Matson & Horizon's cargo ships be given preferential treatment in off-loading their cargo because their companies own the cranes? For example, if there are two "non-Matson/Horizon" cargo ships waiting to be off-loaded and then a Matson ship comes, will the newly-arrived Matson ship be off-loaded ahead of the other two?

Eighth, why is PAG rushing into accepting the Matson Horizon proposal without knowing all essential information such as the answers to the questions posed above? Why is the PAG now negotiating with Matson & Horizon when in the past IFB's it has issued, PAG has not engaged in negotiations despite the IFB provisions allowing negotiations?

Ninth, ordinarily a license for real estate is "a personal privilege to do some particular act or series of acts on land without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor and is not assignable. Black's Law Dictionary (6th ed. West

Publishing Co.) citing Lehman v. Williamson, 35 Colo. App. 372, 533 P. 2d 63, 65. In this instance, while the parties intend that this license agreement is not a lease agreement, the license agreement does have the attributes of a lease agreement. For example, the draft license agreement is for a fixed term of five (5) years and is terminable for cause only and not at the will of the licensor. Moreover, prior to any termination action being taken there has to be 90 days prior written notice given to Matson & Horizon, and, they have to have failed to cure any default they may have within the 90-day notice period. This is certainly a lease provision.

Tenth, under paragraph 9 of the License, the license is assignable. It is assignable to any subsidiary or entity of Matson or Horizon and is even assignable to a third unknown entity which is wholly owned by either Horizon or Matson or both. This allows a totally new and unknown entity (provided it is owned by Matson or Horizon) to take over the Matson & Horizon obligations under the license. Thus, despite the rubric being a license agreement, this license can be construed as a lease under which the performance of the obligations of Matson & Horizon can be assigned to an unknown entity. It is a back door for a firm to get a sole source contract to lease gantry cranes to PAG for five (5) years.

This License Agreement sets a very dangerous precedent which the Procurement Law was meant to prevent. The court in The Matter of Signacon Controls, Inc. v. Mulroy, 298 N.E. 2d 670 (N.Y. 2d 1973) articulated the dangers as follows:

The agreement made between the county and (a private company) also opens the door to fraud, corruption, and favoritism, albeit there is no sign of such a situation in the case at bar. One of the purposes of the competitive bidding statutes is to eliminate the opportunity for fraud, favoritism, or corruption by office holders. And no matter how one views this agreement, it is still a public contract given to a private contractor without competitive bidding. A wayward public official could use the secrecy and ambiguity inherent in any agreement not requiring public advertising and bidding to do great mischief.

Id. at 673 [citations omitted].

The Court went on to conclude that:

To exempt this type of agreement from the competitive bidding requirements of section 103 of the General Municipal Law would allow public officials to do indirectly what they cannot do directly. Such an exemption would make it quite simple for most sellers and public officials, who wish to avoid the statute's requirement, to adopt an 'arrangement' whereby the government unit would pay no money but would be used as a rental or percentage conduit through which a seller could make large profits without having to subject his wares and price to the salutary effect of competitive bidding.

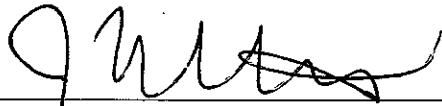
Id.

In view of the foregoing, it is respectfully requested that the OPA declare the Matson Horizon gantry proposal as an unsolicited offer and that the procedures for processing unsolicited offers be followed as required by law.

Dated this 22nd day of January, 2008.

**The Law Offices of John S. Unpingco
& Associates, LLC**

By: _____


John S. Unpingco, Esq.

RULING REQUESTED

That the Matson Horizon offer to renovate, ship, install and use three used gantry cranes at the Jose D. Leon Guerrero Commercial Port of Guam be declared an unsolicited offer subject to the Procurement Law of Guam and that the Port Authority of Guam follow the procedure for processing unsolicited offers delineated in 5 GCA § 5219 (b-e).

The Law Offices of John S. Unpingco & Associates, LLC

777 Route 4

Suite 12B

Sinajana, Guam 96910

Telephone: (671) 475-8545

Facsimile: (671) 475-8550

www.ualawguam.com

December 18, 2007

Sent via facsimile transmission

Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
Government of Guam
148 Route 1 Marine Corps Drive
Piti, Guam 96915
Via Facsimile Transmission: 472-4217

GENERAL SERVICES AGENCY
148 Route 1
Marine Drive
Piti, Guam 96925
DEC 21 2007

Kenneth T. Tagawa
General Manager,
Port Authority of Guam
1026 Cabras Highway, Suite 201
Piti, Guam 96925
Via Facsimile Transmission: 477-2689

RE: *Matson Navigation's & Horizons Lines' Unsolicited Offer of Gantry Cranes*

Dear Ms. Acfalle and Mr. Togawa,

We are the attorneys for Far East Equipment Company, LLC.

Recently, Matson Navigation and Horizon Lines jointly offered to bring in three refurbished gantry cranes and to install them (at a combined cost of \$12 - \$15 million dollars) at their expense at the Commercial Port of Guam. In return, the shipping companies seek to offset their gantry crane costs with their non-payment of some port user fees they pay to the Port Authority. The Port Authority has approved Matson & Horizon's joint Letter of Intent to buy three cranes, refurbish them and install them at the Commercial Port of Guam. The Port Authority also approved a license agreement for Horizon & Matson to use a license agreement for Horizon & Matson to use pier facilities for its cranes.

This is a protest letter. Far East Equipment Company hereby protests the Port Authority's acceptance of the aforementioned unsolicited offer of two shipping companies to bring in and install gantry cranes at the Commercial Port in exchange for an

offset of some of their port user fees. In accordance with 2 GAR § 9101 (c) (3) we furnish the following information:

- 1) Name and address of Protestor:
Far East Equipment Company, LLC
PO Box 10838 Tamuning, Guam 96931
Telephone: 473-4375, Cellular: 888-6270;

- 2) Unsolicited Proposal by Matson Navigation & Horizon Lines to bring in three refurbished gantry cranes to install and operate them for five years at the Commercial Port of Guam.

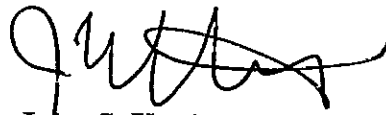
- 3) The basis for our protest is that such acceptance of the unsolicited offer is clearly in violation of 5 GCA § 5219. The unsolicited offer as currently presented cannot be evaluated to determine whether it would be to Guam's and the government's advantage to procure such service as the financial terms of this transaction have yet to be negotiated. Also, the acceptance of the unsolicited offer has to be subjected to the competitive sealed bidding process under 5 GCA § 5211. And, notwithstanding any other provision of law, sole source procurement cannot be used to award a contract in any procurement arising from an unsolicited offer. This protest is also based on our right to protest under 5 GCA § 5425(a).

- 4) Supporting exhibits are attached.

Your kind attention is most appreciated.

Sincerely,

THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC



John S. Unpingco, Esq.

LUJAN AGUIGUI & PEREZ LLP

ATTORNEYS AT LAW

January 8, 2008

Via Facsimile and U.S. Mail
475-8550

John S. Unpingco, Esq.
**THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC**
777 Route 4
Suite 12B
Sinajana, Guam 96910

Re: Your Letter Dated December 18, 2007

Dear John:

By this letter, the Jose D. Leon Guerrero Commercial Port (the "Port") responds to your letter of December 18, 2007, addressed to the General Manager of the Port and to Claudia S. Acfalle, the government's Chief Procurement Officer. Although your letter purports to "protest" the purchase by Matson Navigation and Horizon Lines (collectively "Matson/Horizon") of three (3) gantry cranes for their use, the Port does not agree that your client, Far East Equipment Company, LLC ("Far East"), may protest the transaction.

As explained more fully below, the Guam Procurement Laws (including the provisions of the GAR cited in your letter) do not apply to such a transaction.¹

Matson/Horizon are purchasing the cranes for loading and off-loading cargo from their ships. (Port Resolution No. 07-07 ("Resolution"); Letter of Intent at 1.²) The cranes

¹ Assuming that the Guam procurement laws applied to your December 18, 2007 letter – which they do not – section 9101(c)(1) of 2 GAR Div. 4 still requires that all protests be made in writing and "filed in duplicate." Furthermore, § 9101(c)(3) requires that the envelope containing the protest "should be labeled 'Protest.'" As to the Port, those requirements of form were not met, consequently providing another alternative reason for the dismissal of your client's purported "protest." However, as noted above, this is not a matter involving government procurement.

² Port Resolution 07-07, which approved the form of the License Agreement to Matson/Horizon and a non-binding letter of intent among the parties, was attached to your December 18 letter. Exhibit A to the Resolution is the approved form of the License Agreement. Exhibit A was omitted from the attachments to your December 18 letter. Exhibit B to the Resolution is the approved form of the letter of intent. A copy of Exhibit B was included as an attachment to your December 18 letter.

Letter to John S. Unpingco, Esq.
January 8, 2008
Page 2 of 3

are not new, and Matson/Horizon intend to refurbish and modify them for their use in Guam. (Letter of Intent at 1.) The Port is not procuring or leasing the cranes, and the Port has no role in the acquisition of the cranes from the Port of Los Angeles by Matson/Horizon. Nothing in either the letter of intent or the License Agreement states that the Port intends to pay or reimburse Matson/Horizon for the cost of purchasing the cranes.³ In fact, the non-binding letter of intent states that any reduction or abatement of tariffs or other appropriate arrangements (which have yet to be implemented and/or negotiated) would be accomplished simply for the purpose of reflecting that Matson/Horizon would provide gantry cranes for their ships calling at the Port. The current Port tariffs include a component for the use of Port-owned equipment such as cranes. (Letter of Intent at 2.) If a Port user provides its own equipment, rather than using the Port's equipment, then logically some consideration should be made in order to take that circumstance into account.⁴

The subject License Agreement is a mechanism through which the Port will receive funds (and *not* expend funds⁵) in consideration for the non-exclusive licensing of portions of the Port-owned rails to Matson/Horizon for the installation of their cranes. The Port is allowed to make, negotiate, and issue licenses of terms not exceeding five years pursuant to 12 GCA § 10105(i) notwithstanding any other provision of law. Section 10105(i) was added to the Port's enabling act by section 2 of Guam Public Law 26-28. See the full text of Public Law 26-28 for a discussion of the relevant legislative history and purpose of this statute. Moreover, the provisions of Guam law regarding unsolicited offers (5 GCA § 5219) do not apply to this matter. Matson/Horizon are not offering to sell or lease the cranes to the Port. They are purchasing the cranes for their own use.

³ To the extent any media reports are inconsistent with this concept, the Port takes the position that such reports are inaccurate.

⁴ A simple analogy would be, for example, rates for photocopying government documents for a member of the public. Such rates presumably take into account that the government is providing, *inter alia*, paper, equipment (photocopying machines), and ink. What about if a member of the public were to provide his or her own paper and equipment (e.g., a portable photocopying machine). Would the government still charge the same rates under those circumstances?

⁵ Procurement, by definition, involves the "expenditure of public funds". 5 GCA § 5004(b). But no public funds would be expended by the Port under the Matson/Horizon license. Furthermore, procurement, by definition, involves the government "buying, purchasing, renting, leasing or otherwise *acquiring* any supplies, services or construction". 5 GCA § 5030(o) (emphasis added).

Letter to John S. Unpingco, Esq.
January 8, 2008
Page 3 of 3

To the extent Far East believes it has a right to administrative or judicial review of this matter, it should seek legal advice, and consult the relevant provisions of Guam law. The Port, however, takes the position that no such review is sustainable as a matter of law, and that the seeking of such review by Far East would be frivolous and unwarranted, and that Far East could be subject to appropriate sanctions and other measures appropriate to such actions. The Port does not waive any applicable immunity it may be entitled to assert under the Organic Act of Guam and/or Guam law.

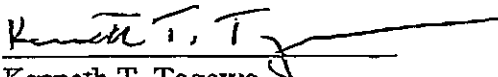
Although the Port welcomes a constructive dialogue on matters over which it has jurisdiction, it also believes that it has the responsibility to provide for the efficient operations of its facilities. A representative of Far East was present at the continued Board meeting held on December 14, 2007, and in response to questions he posed during the public comment portion of the meeting, he was informed that the Matson/Horizon crane issue was one that did not involve the Guam procurement laws. An informed review of the Board resolution and its exhibits which clearly set forth the merits of the transaction have been available at the Port since Monday, December 17, 2007. It is clear that Far East had an opportunity to review those documents as they were attached as exhibits to your December 18, 2007 letter. A review of those documents compels the conclusion that no violation of the procurement laws occurred, and that the matter is not subject to such laws. Accordingly, Far East's attempt to protest could be construed as frivolous, and consequently could also constitute grounds for procurement debarment or suspension under 5 GCA § 5426(b)(7) (debarment or suspension for "filing a frivolous or fraudulent petition, protest or appeal").

Very truly yours,

LUJAN AGUIGUI & PEREZ LLP


Ignacio C. Aguiqui, Esq.

Concurred:


Kenneth T. Tagawa
General Manager

cc: Chairman, Port Board of Directors
Claudia S. Acfalle, Chief Procurement Officer

2/14/07

LICENSE AGREEMENT

This License Agreement ("License") is made between the Jose D. Leon Guerrero Commercial Port (Port Authority of Guam) (the "Port") whose address is 1026 Cabras Highway, Suite 201, Piti, Guam 96915, the Matson Navigation Company Inc. ("Matson"), whose address is 1026 Cabras Highway, Suite 115, Piti, Guam 96915 and Horizon Lines, LLC whose address is 1010 Cabras Highway, Piti, Guam 96915 ("Horizon") (Matson and Horizon are sometimes referred to collectively as the "Crane Owners".)

RECITALS:

I. The Port of Los Angeles has offered for sale three 50-foot container gantry cranes (the "Cranes"). Matson and Horizon intend to purchase the Cranes, substantially renovate and improve them, ship them to Guam, and install them on the existing gantry crane rails (the "Rails") at the commercial pier area of the Jose D. Leon Guerrero Commercial Port of Guam (the "Commercial Port") and then use the Cranes for loading and off-loading cargo from their ships calling on the Commercial Port. Matson and Horizon estimate that the cost for purchasing, renovating, transporting and installing the Cranes will be from \$12,000,000 to \$15,000,000.

II. On December 13, 2007, the Board of Directors of the Port agreed to allow Matson and Horizon to use the Rails and other related property within the Commercial Port to land, install, maintain and use the Cranes and therefore has agreed to give Matson and Horizon this non-exclusive license to use the property more particularly identified below.

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III. The Port acknowledges that Matson and Horizon will not acquire and bring the Cranes to Guam unless the parties enter into this License.

IV. The Port Board of Directors ("Board") has the authority to make, negotiate, and issue a five (5) year license for the use of its real property and other related facilities pursuant to 12 Guam Code Annotated ("GCA") § 10105(i). Furthermore, the Board has jurisdiction, control, and management over all government of Guam lands within the areas of the Commercial Port pursuant to 12 GCA § 10104(f). Therefore the parties agree as follows:

WITNESSETH:

1. Grant of License:

Provided that the Crane Owners successfully acquire the Cranes, the Port hereby grants to the Crane Owners the non-exclusive right to use the Rails and those portions of the Commercial Port as are identified on Exhibit A for the exclusive use of and for landing, installing, using, and maintaining the Cranes. The Port further grants to the Crane Owners, their respective officers, contractors, employees and agents, the right of access over and across any and all property within the Commercial Port necessary to land, install, use, and maintain the Cranes. In the exercise of any privilege granted by this License, the Crane Owners shall comply with all applicable laws. Except as may be otherwise provided herein, the Crane Owners shall not cause any property of the Port or of the government of Guam to be destroyed, displaced, or

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damaged in the exercise of the privilege granted by this License without the prior written consent of the Port. The Crane Owners shall confine activities on the property strictly to those necessary for the enjoyment of the privilege hereby licensed, and shall refrain from marring or impairing the appearance of said property, obstructing access thereto, interfering with the transaction of the Port's or the government of Guam's business and the convenience of the public, or jeopardizing the safety of persons or property, except as may be otherwise provided for herein.

In order to protect public safety, the Crane Owners may use any and all reasonably appropriate means of restricting public access to the Cranes, subject, however, to Section 2 below.

2. **Port's Control Over Use:**

The Crane Owners' use of the Rails and related property, as set forth in Section 1 above, and use of the Cranes under the terms of this License, shall be at all times subject to the direction and control of the Port, through its General Manager. The Port shall have the right to determine the timing, placement and manner of use of the Rails for the purpose of ensuring the efficient, safe and proper operation of the Commercial Port.

3. **Use of the Cranes:**

The Crane Owners shall have the right to use and maintain the Cranes and to load and off load containers and cargo from their vessels calling upon the Commercial Port. To the maximum extent possible the Cranes shall be operated by qualified

employees of the Port, subject to the direction and control of the General Manager of the Port. The Crane Owners shall be responsible for all maintenance and repairs necessary to keep the Cranes in a good and safe working order and condition. In consultation with the General Manager, such repairs and maintenance shall be accomplished using skilled and qualified employees of the Port, to the extent reasonably available, who shall not for any purpose be considered employees of the Crane Owners. In consultation with the General Manager, the Crane Owners shall determine and control the nature, scope and finished quality of all repairs and maintenance to be completed by the Port employees. In the event the Crane Owners are dissatisfied with the work or services of a particular Port employee, then they shall so notify the General Manager in writing who shall then determine the placement of the employee subject to applicable law. In the event the Crane Owners, in consultation with the General Manager, shall reasonably determine that specific and necessary repair or maintenance work requires skills or expertise not then available through Port employees or that skilled or qualified Port employees are not immediately available to complete the required repairs, then the Crane Owners may use others, including their own employees, for such repairs or maintenance, at their own cost and expense.

The parties expressly acknowledge and agree that in no way shall this License be construed as a Public-Private Partnership Contract and Lease Agreement for terminal operations and maintenance, as described in the Port Public-Private Partnership Authorization Act of 2003 (12 Guam Code Annotated Section 10301 et seq.), or that any provisions of the Port Public-Private Partnership Authorization Act of

2003 be construed as applying to this License, except to the extent set forth in Section 10(d) below.

4. **Fee for the use of the Rails and Related Property:**

For the use of the Rails and related property within the Commercial Port under this License the Crane Owners shall pay to the Port the sum of ~~\$20,165.00~~ ^{\$23,556.61} per month commencing on the date the Cranes are landed and installation is begun at the Commercial Port. The fee shall be paid on or before the first (1st) day of each month of the term of this License. Fees for any partial month shall be prorated.

5. **Term of the Agreement:**

Matson and Horizon shall have the non-exclusive right to use the Rails and related property for the purpose of and on the terms set forth herein for a five (5) year period commencing on the date installation of the Cranes on the Rails is begun, and shall continue for a period of five (5) years, unless sooner terminated. The Crane Owners shall provide written notice to the General Manager of the date that such installation is to begin, and shall work together with the General Manager in good faith to ensure that such date is acceptable to Port and does not otherwise interfere with the operations of the Port.

The Crane Owners' right to use the Rails and related property shall not be revocable or terminated by the Port except as provided in Section 8 or 13 of this License.

6. **Insurance and Maintenance:**

(a) The Crane Owners warrant and agree that at all times that the Cranes are at the Commercial Port they shall be maintained in good condition and repair and, except while undergoing periodic repairs for reasonable time periods, fully operable for their intended purpose.

(b) The Crane Owners, either individually or jointly, shall procure and maintain property insurance covering the Cranes insuring against loss or damage caused by fire, wave and tidal action, typhoon, wind, earthquake, lightning, vandalism and all other perils customarily defined as "Extended Coverage". Such insurance may include a deductible in such an amount, as the Crane Owners shall reasonably determine, from time to time.

(c) The Crane Owners shall procure and maintain, or self-insure as permitted by applicable law, their respective obligations under applicable workers compensation laws and under the U.S. Longshoreman and Harbor Worker's Compensation Act, in the minimum amount of \$1,000,000 per accident.

(d) The Crane Owners shall procure and maintain, or self-insure as permitted by applicable law, comprehensive general liability insurance with a minimum limit of liability, bodily injury, death or property damage of \$5,000,000 for each occurrence and in the aggregate, for all claims arising from or related to the Cranes.

7. **Indemnification:**

The Crane Owners shall indemnify and save harmless the Port, its officers, directors, contractors, employees, agents, guests, invitees or customers

against any and all loss, damage, claims, or liability whatsoever, or against any fines or penalties imposed by any governmental entity or authority, in any way arising from or related to the Cranes or due to the exercise by the Crane Owners of the privilege granted by this license, except to the extent that such is caused by the wrongful or negligent acts or omissions of the Port, its officers, directors, employees, contractors, agents, guests, invitees or customers.

8. **Termination:**

The Crane Owners, on the one hand, or the Port, on the other hand may terminate this License and the Crane Owners' right to use the Rails and the property described herein, on ninety (90) days prior written notice to the other party for cause, provided that the party that is alleged to be in default fails to cure any such default within the ninety (90) day period. For purposes of this License, "cause" shall mean the non-compliance with any term or provision of this License, or non-compliance with any provision of applicable law. In the event that this License is terminated, then the Crane Owners shall, at their expense, cause the Cranes to be removed from the Commercial Port within ninety (90) days after the date of termination pursuant to this Section 8. The Crane Owners shall continue to pay the amount identified under Section 4, above, until the Cranes are removed from the Commercial Port.

9. **Assignment:**

The Crane Owners, either separately or jointly, may assign this License to a joint venture, partnership, corporation or limited liability company which is wholly owned by

Matson and/or Horizon, or any of its subsidiaries or affiliates, subject to the written consent of the Port, such consent not to be unreasonably withheld. Other than as stated in the preceding sentence, Matson and Horizon shall have no right to assign this License or any of their rights or obligations hereunder, except with the express written consent of the Port. A change in control of Matson and/or Horizon shall not be considered an assignment for purposes of this provision.

10. **Miscellaneous:**

(a) **Notice:** Any notice or other communication required or related to this License or the Cranes shall be given in writing to the other parties to this License by being personally delivered to the addresses set forth in the preamble of this License and by being simultaneously delivered by facsimile and deposited in the U.S. Mail to the following addresses:

Port Authority of Guam Attention: General Manager 1026 Cabras Highway Suite 201 Piti, Guam 96915 Facsimile: (671) 477-4445	Matson Navigation Company Attention: Gary J. North, Senior Vice President of Pacific P.O. Box 899 Honolulu, Hawaii 96808 Facsimile: (808) 242-6048
Horizon Lines LLC Attention: Mar Labrador Pier 51-A Sand Island Honolulu, HI 96819 Facsimile: (808)	

(b) **Severability:** If any term, provision, covenant or condition of this License is held by a court of competent jurisdiction to be invalid, void or unenforceable, then the rest of this License shall remain in full force and effect.

(c) **Entire Agreement:** This instrument contains the entire agreement of the parties concerning its subject matter. It is final and integrated. All prior understandings are merged herein. This License may only be modified or amended in a written instrument signed by all of the parties.

(d) **Binding Effect.** This License shall bind and inure to the benefit of the parties to this License and any of their respective permitted successors or assigns including any terminal operator designated by the Port pursuant to the Port Public-Private Partnership Authorization Act of 2003 or any other Port privatization or including any contractor designated by the Port pursuant to the "Public-Private Partnership Authorization Through a Performance Management Contract" (12 GCA sections 10401 et seq. (enacted by Public Law 29-23)), subject to any and all requirements of applicable law.

11. **Counterparts and Facsimile:**

The authorized representatives of the parties may execute this License in three or more counterparts and each counterpart shall be deemed an original instrument against any party which has signed it. This License may be delivered and the executed signature page may be transmitted by facsimile.

12. **Choice of Law/Resolution of Disputes:**

This License shall be construed, interpreted, and enforced under the laws of Guam. The exclusive forum for any court action that arises from or that is related to this License shall be the territorial or federal courts of Guam, which shall have the power to

specifically enforce this License subject to applicable law.

13. **Failure to Obtain and Install Cranes:**

This License shall be rendered void and of no effect if the Crane Owners have not obtained and installed the Cranes at the Commercial Port within one year from the date of this License.

THIS LICENSE AGREEMENT IS VALID ONLY IF SIGNED AND EXECUTED BY ALL PARTIES, AND WILL BE ENTERED INTO AS OF THE DATE THAT THE LAST REQUIRED SIGNATORY SIGNS AND EXECUTES IN THE APPROPRIATE SPACE BELOW.

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**JOSE D. LEON GUERRERO
COMMERCIAL PORT (PORT
AUTHORITY OF GUAM)**

By: _____

MONTE MESA
Chairman Board of Directors

Date: _____

By: _____

General Manager

Date: _____

MATSON NAVIGATION COMPANY, INC. HORIZON LINES, LLC

By: _____

GARY J. NORTH, Its senior vice
President

Date: _____

By: _____

MAR LABRADOR,
Its _____

Date: _____

By: _____

MEREDITH N. ENDSLEY, Its assistant
Secretary

Date: _____

