Alameda Reuse and Redevelopment Authority
Interoffice Memorandum

3-B

April 5, 2006

TO: Honorable Chair and Members of the
Alameda Reuse and Redevelopment Authority

FROM: Debra Kurita
Executive Director

RE: Recommendation to Approve 20-year Lease with the Department of Transportation Maritime Administration (MARAD)

Background

Staff has been negotiating the terms of a 20-year lease with the Maritime Administration (MARAD) since May 2002. Initially, Alameda Point Community Partners (APCP) took the lead in negotiations. The outline of the lease (term, space, new construction) was developed during those negotiations, however the process never resulted in a final agreement. In December 2003, former Deputy City Manager, Doug Yount, assumed responsibility for finalizing the long-term lease. After Mr. Yount's departure in February 2004, Development Services staff assumed responsibility to complete lease negotiations. In February 2006, staff presented the lease outline to the ARRA Governing Body. The ARRA asked for an opportunity to review the lease (Attachment 1), project cash flow and technical requirements of the lease. This item was continued from the February 2006 ARRA Board meeting, at which time staff was directed to prepare a full risk assessment of the lease.

Currently MARAD is leasing Pier 2 and portions of Piers 1 and 3 at Alameda Point (See Attachment 2). The rent structure is on a per ship/per day basis resulting in an average monthly rent of $145,000. This structure leaves the ARRA vulnerable if a major event sends ships to sea for long periods of time (tsunami in Indian Ocean, supply for military actions). MARAD also leases warehouse space in Building 168, which is 117,400 square feet. The rent for Building 168 is $34,000/month. Attachment 3 is an Exhibit from the lease that lists the revenue generated from the lease.

Discussion/Analysis

Lease Terms

The proposed terms for the new 20-year lease provides for flexibility to the ARRA at points that recognize MARAD's intensification of activity at Alameda Point.

Piers: Rent is structured as a flat fee. Initially pier rent is $150,000/month for the first two years. At month 25, the rent increases 3% annually. If Pier 3 becomes available for exclusive use to MARAD, the rent will increase one-time by 3.5%. The increase is an acknowledgement of the additional pier space. If the ARRA does not choose to make Pier 3 available to MARAD, only the annual 3% increases after year two will occur over the life of the lease.

MARAD leases only a portion of Pier 3. The Hornet Museum occupies the other portions of the Pier. While the ARRA maintains the option of making Pier 3 available to MARAD, MARAD strongly desires exclusive use of all the Piers, including Pier 3. MARAD is extremely concerned about security of the piers and has received citations from the Coast Guard for security violations. MARAD believes that increased public access makes security violations more likely. Last year, the ARRA installed security fencing near all MARAD ships to limit access, however MARAD believes that having a public use, such as a museum adjacent to their operation jeopardizes the security of their ships.

Warehouse: With the execution of a new lease, the warehouse rent will increase 11% to $38,000/month for Building 168 with 3% annual increases. In anticipation of the redevelopment of Alameda Point, the lease also contemplates that the MARAD Warehouse, Building 168, may need to be relocated or reconstructed to conform to future re-use plans. If this occurs, the lease sets the warehouse lease rate for a new building. The rent for the newly constructed warehouse will be $.70 sf adjusted at the time of construction to the May 2006 construction consumer price index.

In addition, early in the negotiations between MARAD and APCP, an architect developed a conceptual plan for a MARAD "complex" (Attachment 4). The complex is a secure, enclosed area adjacent to Piers 2 and 3 with a space for a newly constructed 88,000 sf warehouse. If the ARRA decides never to move the Hornet from Pier 3, the complex will not be feasible and MARAD will need to adjust its security plans. If the ARRA decides to move the Hornet from Pier 3 to Pier 1, as contemplated in an earlier long-term lease discussion, the ARRA will receive additional revenue (3.5% pier increase mentioned above) and satisfy MARAD's security concerns. If the ARRA decides to move the Hornet to a location other than the Alameda Point Piers, MARAD has requested first right of refusal for Pier 1, thereby securing use to all the Piers. A lease addendum would need to be negotiated for Pier 1.

The lease contains a provision that allows MARAD to audit the premises for physical deficiencies. Initially, MARAD staff planned to perform an audit of the premises after lease execution to ensure compliance with the technical requirements of the lease. As a result of the deferral of lease consideration, MARAD staff scheduled their audit and provided ARRA with their final audit report (Attachment 5 Alameda Point Layberth Facility Inspection). The ARRA will have four months from the contract execution to repair any deficiencies. The issues highlighted in the audit are minor. MARAD wants three things immediately addressed: Trash Collection, Billing for Water, and Security Fencing.

In response to the MARAD audit concerns, the MARAD budget for next year includes funding for security fencing. Trash Collection costs are included in the Pier Maintenance Line Item and MARAD misunderstood how they are billed for water, so that issue is no longer relevant. There are however two large capital projects that must be funded during the life of the lease. The projects are electrical system upgrades at Pier 2 and repairs to the fendering systems at Piers 2 and 3. Current engineer estimates for pier fendering improvements are $200,000. The electrical system project estimated at $800,000, is the highest priority and can be initiated soon after lease commencement. The project can span two fiscal years to lessen the impact to the ARRA cash flow. (See Attachment 8). These improvements will make the piers better functioning and will allow the ARRA to be fully compliant with the technical requirements of the lease (Attachment 6).

Dredging

Dredging the Alameda Channel is an ARRA requirement in the existing lease. In the new lease, MARAD is responsible to fund all dredging events. If the funds are not made available, the ARRA is not required to dredge. The ARRA will be responsible to perform annual soundings and perform dredging as needed, provided that funding is provided by MARAD. Currently, soundings are provided by the Army Corps of Engineers, as the Alameda Channel is a federal channel. To comply with these requirements, a 20-year dredging/dragging plan has been developed by the ARRA and has been accepted by MARAD (Attachment 7). (Dragging is a less expensive method of moving the shoaled material in the channel to maintain depth.)

Risk Assessment

When reviewing the lease, it must be noted that General Conditions reflect the fact that MARAD is a Federal Agency, and many provisions of the lease are generally required by Federal law, rules and practice. In addition, since the underlying real property at Alameda Point is still owned by the United States and controlled by ARRA only through the Lease in Furtherance of Conveyance (LIFOC), many provisions of the sublease are also required by the LIFOC.

Clause 1. Premises (sublessor optional changes to Premises) (iii) New Warehouse Building

Should the ARRA or its assignee desire to move MARAD from the Building 168 warehouse, $100,000 will be provided as full compensation for relocation to be applied as rent credit during the months succeeding the relocation, as Warehouse Rent becomes due.

Clause 4. Sublessor's Covenant to Pay Taxes and Assessments.

In the absence of an express waiver of sovereign immunity for the payment of tax assessments, federal agencies are prohibited from paying state and local taxes with appropriated funds and obligated to pay only for charges based on the quantum of services provided. The Federal government has not expressly waived immunity from paying taxes with respect to the lease between MARAD and Alameda. This provision implements the given immunity; however, because the land is currently owned by the Federal government and leased to Alameda Reuse and Redevelopment Authority (ARRA), no taxes are currently assessed on the property.

Clause 5. Sublessor's Covenant to Pay other Expenses

This provision outlines required insurance, expenses and taxes. These requirements and payments are mandated and required either by the LIFOC (Navy lease includes various provisions requiring insurance on the federally-owned property) or federal MARAD regulations (e.g. Wharfinger's Liability Policy in the amount of $5,000,000 per vessel). To the maximum extent possible, all insurance requirements are passed onto ARRA's subcontractors; for example, we require our port manager to maintain their own Workman's Compensation Policy that meets the Federal and State requirements.

Clause 16. Indemnification by Sublessor

This provision implements the insurance requirement for damage or loss resulting from actions of ARRA, or its agents. This is standard in Federal leases and contracts and is a reasonable requirement of the Sublessee to require the Sublessor to insure against the acts which are in the control of the Sublessor.

Clause 19. Maintenance & Technical Requirement

Additional obligations during the term of the lease include maintenance of the piers and related property "in good order" (primarily the piers, electrical systems, water systems, moorings, cleats, bollards and deadmen) Gross lease revenue from the lease for the Piers alone, will be $47,000,000 over 20 years. A maintenance reserve account of $70,000 annually will be created to provide for maintenance and repair of the piers, $20,000 for street maintenance, and $265,000 for piling replacement. The resulting net cash flow as presented on the attached proforma suggests that the ARRA/APCP still nets over $16,000,000 in 20 years. (See Attachment 8).

Clause 38. Termination for Convenience by Sublease

The Government reserves the right to completely or partially terminate a contract when it is in the Government's interest to do so. This is a standard clause mandated by the Federal Acquisition Regulations and included in Federal Government contracts and is predicated upon the sovereign nature of the Federal Government. The Regulations allow contract parties to pre-negotiate damages in the event the Government exercises its rights under this Termination clause. If the Government elects to terminate the Sublease, the language of the Sublease requires the Government to pay the unamortized costs of any improvements made to the property for the benefit of the Government. However, ARRA's damages may not include expected profits from the continuation of the Sublease.

Clause 42. Termination by Sublease for other than Default

Similar to Clause 38, this clause is driven by Federal sovereignty. MARAD will not agree to any lease terms that would limit the ability of the Federal government or the Congress to act in a sovereign capacity. That includes the cancellation of appropriated funds or Congressional failure to support the continuation of the sublease, or the reduction of vessels assigned to the Ready Reserve Force.

The authority of executive agencies to spend appropriated funds is also limited in time, amount and purpose. This is a required clause where portions of the property may be in excess of MARAD's needs because there is not proper purpose in maintaining premises in excess of their needs. Lastly as it relates to the unavailability of utilities, the use of the property may be limited due to the lack of utilities, and the purposes of the lease cannot be properly executed, and MARAD requires a release from the terms in those instances. Any termination other than by ARRA default will trigger the liquidated damages provision.

Clause 46. Availability of Funds

This is a standard clause included in Government contracts to ensure compliance with the Anti-Deficiency Act. The Act prohibits an officer or employee of the Federal government from making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation. The Congress appropriates funds to be used by the Executive branch and funds for payments under this lease are appropriated on a yearly basis. The Executive branch cannot spend money that Congress has not appropriated. This clause ensures MARAD is not in violation of the Act by Clarifying that the obligations under the lease are contingent upon the availability of the appropriated funds.

Attachment 6 (Lease Exhibit H – Technical Requirement & Reimbursable Services). Attachment 6 provides full existing condition inspection details of the physical deficiencies identified in the lease. As mentioned in the staff report, two issues are major items: one the electrical system upgrades and the pier fendering. The combined estimated cost to upgrade both deficiencies will be $1,000,000 over the next two years. Minor modifications noted in the inspection will cost less than $20,000.

Fiscal Impact

All revenues collected from the MARAD Lease are Tidelands funds. Attachment 3 lists the revenue generated from the lease. The funds currently go to the ARRA, but at conveyance of the property these funds, while still Tidelands dollars, are proposed to be utilized by APCP to maintain or make improvements to Tidelands Property at Alameda Point. While the property will not transfer to APCP, because it is Tidelands property and the City will remain a trustee, the revenue is included in the Alameda Point Development Pro Forma to be used for Tidelands eligible activities.

Recommendation

Approve a 20-year lease with the Department of Transportation Maritime Administration (MARAD).

Respectfully submitted,

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Development Services Director

Nanette Banks
by IG

By: Nanette Banks, Manager
Finance & Administration Division

Attachment 1 - Sublease
Attachment 2 - Map of MARAD Complex
Attachment 3 - 20-Year Dredging/Dragging Plan
Attachment 4 - Conceptual Plan for MARAD Complex
Attachment 5 - Alameda Point Layberth Facility Inspection
Attachment 6 - Technical Requirements and Reimbursable Services
Attachment 7 - Annual Maintenance Dredging Cost Summary
Attachment 8 - MARAD Cash Flow

EXHIBITS A thru H are on file in the City Clerk's office