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MEMORANDUM

TO: Peggy McLaughlin, Chris Hladick
City of Unalaska

FROM: Patrick W. Munson
Boyd, Chandler & Falconer, LLP

RE: Federal Shipping Act Requirements Regarding Preferential Use Agreements

DATE: March 2, 2015

You requested an analysis of whether federal law requires the City to solicit bids for a potential preferential use agreement ("PUA") at the Port of Dutch Harbor. In our opinion, federal law neither requires nor prohibits such agreements from being offered for public bid. Thus, the City may offer PUAs for public bidding or negotiate them privately, provided that the resulting contract does not "unreasonably" prefer or prejudice a particular user.

ANALYSIS

The Federal Shipping Act is the anti-monopoly statute applicable to ports and harbors. It acknowledges that competition is necessarily limited to a certain degree at marine terminals, and establishes a special system for preventing unreasonable favoritism and discrimination. In this regard, it is primarily a result-oriented statute, focusing more on whether an arrangement between shippers and terminal operators is unreasonable than on how such deals are negotiated.

The Shipping Act applies to the City/Port of Unalaska as a "marine terminal operator" ("MTO").[1] The City therefore may not

> (1) agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp;
> (2) give any undue or unreasonable preference or advantage or impose any undue or

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[1] *See* 46 USC § 40102(14) *and* 46 CFR 525.1(c)(13) (defining "marine terminal operator"); 46 U.S. Code § 40102(6) *and* 46 CFR 535.104(f) (defining "common carrier").

unreasonable prejudice or disadvantage with respect to any person; or
(3) unreasonably refuse to deal or negotiate.[2]

Notably, none of these restrictions require a particular process between carriers and operators. Rather, the first two restrictions establish qualitative criteria for terms of final agreements that are not allowed: "unreasonable discrimination", "undue or unreasonable preference or advantage" and "prejudice or disadvantage". These provisions leave the negotiation process up to the entities involved. Only if the resulting deal violates these standards will the Federal Maritime Commission ("FMC") find a violation of the Shipping Act. Thus, 46 USC § 41106 neither requires nor prohibits the City from soliciting proposals or bids for a PUA *as long as the resulting deal does not unreasonably prejudice or discriminate against another similarly-situated carrier*.[3] Note that a deal is not "unreasonable" if there is a reasonable basis for granting some preferential treatment to a particular entity. In other words, the Act does not mandate equal treatment; it mandates that disparate treatment have a "reasonable" basis (such as one party being willing to pay more to have preferential use of a particular area of the port).

However, an MTO may not "unreasonably" refuse to negotiate or deal with a carrier that wishes to engage in such negotiations. 46 USC § 41106(3). This is a very high threshold that cannot be satisfied simply by asserting, for example, that the MTO did not agree to a particular deal that the complaining shipper believes was reasonable. Rather, it prohibits an MTO from refusing to negotiate in good faith, refusing to even consider a bona fide offer, or take some other action that essentially cuts the complaining party out of a negotiation process. While this standard neither requires nor prohibits an MTO from requesting bids for a PUA (or, conversely, from engaging in sole source negotiations), it demonstrates the Shipping Act's underlying preference for fostering competition to the extent possible in this unique industry.

So while the Shipping Act does not *require* the City to open the process for bidding, the City clearly *can* do so because the process would increase competition, not limit it. Sole sourcing the negotiation would be more likely to lead to a claim from an excluded carrier that the

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[2] 46 USC § 41106(1)-(3); *see* 46 C.F.R. 525.1(c)(15) (broadly defining "person").

[3] That is an extremely fact-intensive question, and one that we cannot answer in the abstract. The Federal Maritime Commission (FMC) has determined that MTOs may prefer or disadvantage similarly-situated parties if doing so is justified by "differences in transportation factors." *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251 (1997). "Transportation factors" are conditions that relate to day to day operations or are "necessary to the operation of the terminal." *A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.*, 13 F.M.C. 166, 173 (1969).

City "refused to deal" with that carrier. Even though such a claim might very well fail, the safer course is to open the process for bidding even if that is not required.