

Maritime Administration, DOT

Sec. 3

Sec. 1 Purpose.

This part prescribes the standard form of marine terminal contract to be entered into by the United States of America, acting by and through the Director, National Shipping Authority (NSA) of the Maritime Administration, U.S. Department of Transportation, with State or municipal authorities or private terminal operators for the provision of terminal operating services during civil defense emergencies or national emergencies declared by the President of the United States in accordance with existing statutory authority or by concurrent resolution of the Congress.

Sec. 2 Stand-by agreements.

The Director NSA, Maritime Administration, in advance of an emergency, may negotiate the standard form of terminal operating contract specified in Section 3, with terminal operators on a stand-by basis. Stand-by arrangements establish the framework of rapid initiation of government shipping operations at the outset of an emergency.

At port facilities, (as defined in section 1(e) of 32A CFR part 1901) under the control of the Maritime Administration and allocated for long term exclusive use by the Department of Defense (DOD), provisions will ordinarily be made for the use of contractors under DOD contracts to move DOD cargo through selected ports, to perform such services as pre-stowing, receipt, intransit storage and loading of cargo under DOD procedures for the Defense Transportation System. When it becomes necessary to move DOD cargo through marine terminals under the control of the Maritime Administration, but not allocated for long term exclusive use by DOD, contractors will be required to perform such services as DOD requires for handling cargo and documenting shipments under the Defense Transportation System, with corresponding contractual obligations.

Sec. 3 Terminal operating contract.

Contract MA _____

TERMINAL OPERATING CONTRACT

This agreement, made as of _____, 19____, between the United States of America (herein called the "United

States"), acting by and through the Director, National Shipping Authority (NSA) of the Maritime Administration, Department of Transportation, and _____, a _____ organized and existing under the laws of _____ (herein called the "operator").

WITNESSETH

That in consideration of the covenants and agreements of the parties hereinafter contained and set forth, the parties here to do mutually covenant and agree as follows: Part. 1.

Article 1. *Relationship of parties.* (a) The United States engages the operator as an independent contractor to do and perform or arrange for the performance of all the customary duties and functions of a terminal operator, subject to the terms, covenants and conditions of this agreement and to such rules, regulations and orders as may be issued by the United States from time to time, with respect to such cargo and vessels as the United States may from time to time direct or designate, and at the following terminals: _____, more specifically described in Schedule A hereto attached and made a part hereof by reference, and at such other terminals as the United States may from time to time designate, which the operator may use under temporary assignment in order to expedite the loading and discharging of vessels under jurisdiction of the NSA.

(b) The operator hereby accepts such engagement and agrees to do and perform all the work required by it to be performed under this agreement in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence to protect and safeguard the interests of the United States in all respects and seek to avoid any delay, loss or damage whatsoever to United States shipping. The operator represents and warrants that it is the _____ of the herein before specified terminals.

Art. 2. *Compensation.* (a) As full and complete compensation for the work done and performed by the operator, the United States agrees to pay to the operator, as soon as practicable after the completion of each calendar month's work under the provisions of this agreement the following:

(1) For terminal services, an amount calculated on the basis of rates and charges contained in tariffs on file with the Federal Maritime Commission during the time this agreement is in effect: *Provided, however,* That the operator will be compensated, as a minimum, the amount per month set forth for each terminal in schedule A attached: *And provided further,* That, when the operator, with the approval of the Director, NSA, utilizes the terminal for cargo not controlled by the Director, NSA (that is, for commercial cargo), the compensation received by the operator for handling such cargo shall

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apply against the minimum compensation; and

(2) For stevedoring services provided or arranged for by the operator and any related contractual services not specified in the terminal tariff such as handling lines or additional lashing or carpentry required for proper stowage or discharge activities, reimbursement for all direct costs of labor as well as those directly related or allocable to the provision of such labor and employee service expenses and costs of materials and equipment, an allowance of 15 percent for GAE is authorized except for those items which are ordinarily provided by the contractor and the basis for charges for which already includes GAE.

(3) An additional amount in payment or credit for any service, loss, cost of expense, whether or not specifically provided for or excepted herein; if, and to the extent that, such payment or credit is found by the Director, NSA, or his designated agent, in his sole discretion, to be fair and equitable and in accordance with the basic principles or intent of this agreement.

(b) Monies due and owing to the operator shall be paid to it only upon the submission of vouchers properly and duly supported and certified. All such vouchers under this agreement shall refer to the date and number of this agreement.

(c) In the event a voucher submitted for payment for the work, or any portion thereof, is not properly supported or certified, the United States may nevertheless make partial payment thereof or payments on account of such voucher as has been properly supported or certified. Such partial payment or payments on account shall not be deemed or held to be a waiver of the right of the United States to revise or adjust such partial payment or payments on account upon the basis of any data or information later received or submitted by the operator.

(d) No payment will be made for handling ship stores or providing services properly billed under vessel contracts or agency agreements related to vessel operations and repairs.

Art. 3. Effective Date, Implementation, Duration and Termination

(a) This agreement is effective as of the day and year set forth above.

(b)(1) if entered into on a standby basis, this agreement shall be operational as of the day and year when the United States notifies the contractor that the services specified in this agreement are required during a period of war or national emergency: *Provided*, That during the standby period, the contractor will carry out the obligation specified in paragraph (a) of Article 2. No compensation will accrue to the contractor during the standby period.

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(2) if entered into during a period of war or national emergency, this agreement shall be operational when executed.

(c) Unless sooner terminated, this agreement shall extend until 6 months after the termination of the emergency.

(d) This agreement may be terminated upon thirty (30) days' written notice by either party to the other party hereto: *Provided, however*, That, notwithstanding any such termination, the operator shall, at the option of the United States, continue to be responsible for the completion of any work which the operator is performing on the effective date of termination. Termination or expiration of this agreement shall neither affect nor relieve any party of any liability or obligation that may have accrued prior thereto.

(e) This agreement may be amended, modified or supplemented in writing at any time by mutual consent of the parties hereto. This agreement may not be amended, modified or supplemented otherwise than in writing.

Art. 4. Contract documents. This agreement consists of part I, part II, and schedule A (the latter being hereto attached and made a part hereof by reference) and such other schedules or writing as may be made by the parties in accordance with the provisions of this agreement. Each and every one of the provisions of said part II, schedules and writings are part of this agreement as though hereinbefore set out at length.

In witness whereof, the parties hereto have duly executed this agreement in triplicate as of the day and year first above written.

(Seal)

Attest:

UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION, MARITIME ADMINISTRATION
Secretary _____, Maritime Administration.

By: _____
Director, National Shipping Authority _____

(Corporate Seal)

Attest:

Secretary _____
Approved as to Form:

By: _____
General Counsel _____, Maritime Administration.

TERMINAL OPERATING CONTRACT

PART II.

Article 1. Definitions. (a) *Cargo* as used in this agreement means all general freight and commodities in bulk (including those damaged or solidified), merchandise, material, mail, baggage, express, ship's and subsistence stores, explosives, petroleum products, petroleum and other similar liquid cargo.

(b) *Terminal Work* as used in this agreement means the operation of the terminals specified in schedule A, as terminals and not for any other purpose, including the handling, receiving, delivering, assembling, checking, sorting, storing, cooperating, protecting, and shifting of cargo at the said terminals; stowing and snugging cargo in the space on the terminal; issuing and receiving proper receipts for cargo; loading and discharging boxcars, lighters, scows, barges, carfloats, containers, trailers, and chasis; handling vessel's lines on docking and undocking; doing maintenance, and repair in accordance with the terms of this agreement; any and all other services, operations and functions usually or customarily done or performed by a terminal operator; and any and all other duties, services, operations or functions required by the terms of this agreement to be done or performed by the operator.

(c) *Port Terminal Facilities* as used in this agreement means piers, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk loading and/or unloading structures, landings and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers.

Art. 2. *Duties of the operator.* The operator shall:

(a) If lessee or licensee of the terminals, perform, comply with and abide by all applicable terms, covenants and conditions of the lease or license under which it occupies and uses said terminals;

(b) Make available and operate for the requirements of the United States (which requirements include all cargo and vessels designated by the NSA, whether or not owned by the United States all terminals hereinabove described;

(c) Perform the terminal work as defined and furnish all labor of every nature and description and furnish and use all gear and mechanical devices or other equipment necessary for the most efficient performance;

(d) When requested to do so by the NSA or when incident to its terminal operations, perform or arrange for the shifting of lighters, barges, scows, rail cars and/or carfloats and load and discharge the same;

(e) Insure that the terminals are maintained and kept in proper condition and all berths suitably dredged;

(f) Supply all telephone service, clerical work, light, heat, power, fuel, water and other supplies and services connected with or incidental to the work, within the limits imposed by national resource allocation and priorities systems in effect at the time.

(g) Insure that sub-contractors engaged are experienced and competent to perform adequately in their respective functional field, e.g., handling lines; directing tug operations

for docking vessels; planning and conducting cargo stowage with ship or quayside gear and fully complying with all documentation requirements and safety, health and sanitation regulations.

Art. 3. *General labor and other provisions.* (a) The operator shall comply with the Social Security Act, the unemployment insurance laws of any State in which work is done, and the provisions of applicable collective bargaining agreements.

(b) The operator recognizes the relation of trust and confidence established between it and the United States by this agreement, and agrees to furnish its best skill and judgment in planning, supervising and performing the work, to make every effort to complete the work in the shortest time practicable, and to cooperate fully with the United States in furthering the interests of the United States. The operator agrees to furnish efficient business administration and superintendence in performing the work.

(c) Upon the execution of this agreement the operator shall immediately furnish to the Regional Office, NSA, written schedules of the wages and contractual working conditions, (including overtime, pay, insurance benefits and other compensation and employment benefits) payable by the operator in performing the work, and whenever requested from time to time thereafter, the operator shall furnish similar written schedules to the Regional Office, NSA, covering the then existing conditions. The operator shall notify the NSA concerning any proposed or actual change, modifications or alteration in such schedules as soon as knowledge thereof is available to the operator.

(d) The operator shall, if required by the NSA, employ identification cards with individual photograph affixed, or other methods of identification, as issued by the United States Coast Guard or other responsible Government authorities.

(e) Overtime work under this agreement shall be incurred or performed by the operator only when required. However, the operator whenever requested by the NSA, shall work overtime.

Art. 4. *Notice of labor disputes.* Whenever any actual potential labor dispute is delaying or threatens to delay the timely and efficient performance of the work, the operator will immediately give written notice thereof to the NSA.

Art. 5. *Liability of the operator.* (a) While performing the work, the operator shall, except as provided in paragraph 6(c) of part II hereof, be responsible for any and all loss, damage or injury, including death to persons, cargo, vessels, their stores, apparel or equipment, wharves, docks, piers, lighters, elevators, cars, carfloats or other property or thing, arising through the negligence or

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fault of the operator, its employees or terminals: *Provided*, That, to the extent not covered by insurance, the operator shall not be responsible to the NSA, for any loss, damage or injury resulting from the negligence or wrongful acts of the NSA; or from acts of the operator and its employees performed only because specifically so directed by the NSA; or from defects or other gear supplied by the United States.

(b) The operator shall be under no liability to the United States in the event that the operator should fail to perform any work hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lock-out or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the operator, whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

Art. 6. *Insurance requirements and indemnification.* (a) The operator shall procure, and maintain during the term of this agreement, pay for one or more policies of insurance insuring it as follows, as the basis for calculating compensation payable under paragraph 5(a) above:

(1) Coverage of all piers, wharves, buildings, structures, facilities and equipment, as owner or in accordance with terms of lease.

(2) Standard workman's compensation insurance and employer's liability insurance, including longshoremen and harbor worker's compensation insurance, or such of these as may be proper under applicable State or Federal statutes. Such insurance shall, unless otherwise required by applicable State or Federal statutes, be subject to \$50,000/100,000 limits and shall be full coverage with occupational disease endorsement. The operator may, however, be a self-insurer against the risks in this subparagraph, if it has obtained the prior approval of the Director, NSA, such approval to be given upon the submission of satisfactory evidence that the operator has duly qualified as a self-insurer under applicable provisions of law.

(3) Public liability insurance with limits of at least \$1,000,000 for the death or bodily injuries to one person and at least \$5,000,000 for the death or bodily injuries to more than one person in any one accident or occurrence.

(4) Property damage liability insurance covering damage to or loss of property resulting from the negligence of the operator with a limit of \$1,000,000 for each occurrence.

(b) All liability insurance obtained by the operator as provided in paragraph (a)(3) of this section above shall name the United States as additional insured or provided for a waiver or subrogation.

(c) The operator's work is incident to war activities of the United States and will involve risks and hazards far in excess of those normally incident to peacetime commercial operations. To induce the operator to under-

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take the performance of the work for the compensation herein provided, and thus obtain for the United States the resulting benefit of such reduced compensation, the United States undertakes to and does indemnify the operator and hold it harmless against any loss or damage to the terminals (whether owned, leased or occupied under license) and against expense (including expense of litigation), liability to and claims of third persons because of loss, damage or injury to persons, cargo, vessels, their stores, apparel or equipment, wharves, piers, docks, lighters, barges, scows, elevators, rail cars, carfloats, or other property or thing, arising through the negligence or fault of the operator, its employees, gear or equipment, or otherwise, all subject, however, to the following conditions and limitations:

(1) The undertaking of the United States shall be applicable only and limited to:

(a) For public liability the amount such loss, expense, or liability arising from any single catastrophe, accident or occurrence exceeds the sum of \$1,000,000 each person and \$5,000,000 per accident or the sum of insurance approved or required to be carried in excess of these limits, whichever sum is greater and

(b) For property damage liability the amount such loss, expense or liability arising from any single catastrophe, accident or occurrence exceeds the sum of \$1,000,000 per accident or the sum of insurance approved or required to be carried in excess of these limits whichever sum is greater.

(2) The undertaking of the United States shall not be applicable and the United States shall have no obligation or liability in respect of such undertaking or otherwise, in situations in which such loss, expense or liability is due in whole or in part to willful and deliberate disregard of instructions of the Administrator or the personal failure to exercise good faith or insofar as the character of the work permits under wartime operations that degree of care normally exercised under like conditions in the performance of the operator's peacetime commercial operations, by the elected corporate officers of the operator or by the representative of the operator having supervision and direction of all operations at any terminal where the operator may perform services hereunder.

(3) As soon as practicable after occurrence of any event from which the obligation of the United States to hold the operator harmless against loss, expense and liability might arise, written notice of such event shall be given by the operator to the United States, which notice shall contain full particulars of the event. If claim is made or suit is brought thereafter against the operator as a result or because of such event, the operator shall immediately deliver to the United States every demand, notice, summons or other process

received by it or its representatives, and the United States shall provide appropriate attachment or appeal bonds or undertakings where required in the course of such litigation.

(4) The operator shall cooperate with the United States and, upon the request of the United States, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct (including defense) of suits; and the United States shall reimburse the operator for reasonable out-of-pocket expenses, other than loss of earnings, incurred in so doing. The operator shall not voluntarily, except at its own cost, make any payment, assume any obligation or incur any expense, other than for such immediate medical and surgical relief to others as shall be imperative at the time of said occurrence of such event.

(5) This undertaking of the United States to hold the operator harmless against loss, expense and liability as herein provided, shall not create or give rise to any right, privilege or power in any person or organization, except the operator, nor shall any person or organization be or become entitled to join the United States as a co-defendant in any action against the operator brought to determine the operator's liability or for any other purpose; *Provided, however,* That as to any risk borne or assumed by the United States through the undertaking set above, the United States shall be and hereby is subrogated by the operator to any claim, demand or cause of action against third persons or organizations which exists or may arise in favor of the operator, and the operator shall, if so required, forthwith execute a formal assignment or transfer of such claim, demand or cause of action.

(6) This undertaking of the United States shall not apply against any loss or expense resulting from enemy attack upon the United States.

Art. 7. *Covenant against assignment or sublease of terminals.* The operator shall not assign or sublet the terminals or any portion thereof nor grant any license with respect thereto, except in the ordinary course of terminal operations and subject to the approval of the NSA.

Art. 8. *Custom of the port.* No rule or custom of the port in conflict with any provision or term of this agreement will be binding upon the United States, unless the operator is legally obligated to comply with the same pursuant to the laws of the United States or laws of any State thereof or pursuant to the terms, provisions, covenants and conditions of any lease covering the terminals and entered into between the operator and its lessor or licensor thereof.

Art. 9. *Extra work.* The United States will neither compensate nor make any payments to the operator for any extra work in connection with the operation of terminals

which it may render in addition to the work specifically required by this agreement, except as provided in paragraph 3(e) of part II hereof.

Art. 10. *Status of employees.* All employees of the operator or of any other person or organization employed in performance of the work shall at all times be the employees of the operator or of such other person or organization, as the case may be, and are not employees of the United States.

Art. 11. *Delegation of authority.* Wherever and whenever any right, power or authority herein is granted or given to the United States, such right, power or authority may be exercised by the NSA or such agent or agents as the United States may appoint, and the act or acts of such agent or agents when taken shall constitute the act of the United States hereunder. In performing the work, the operator may rely upon the instructions and directions of the Director, NSA, his officers and responsible employees, or any person or agency authorized by him. Whenever practicable, instructions and directions to the operator shall be in writing and oral instructions or directions given shall be confirmed promptly in writing. No Director's orders or regulations shall have retroactive effect without the written consent of the General Counsel, Maritime Administration.

Art. 12. *Warranty against contingent fees.* The operator warrants that it has not employed any person to solicit or secure this agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage, or contingent fee.

Art. 13. *Equal opportunity.* During the performance of this agreement, the operator agrees as follows:

(a) The operator will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age or national origin. The contractor will take affirmative action to insure that all action related to employment is taken without regard to race, color, religion, sex, age or national origin. Such action shall include, but not be limited to, employment, promotion, layoff or termination, direct or indirect compensation and selection for training, except where such provisions are governed by State civil service commissions or comparable government agencies. The contractor agrees to post in conspicuous places, available to employees and applicants, notices to be provided by the NSA setting forth the provisions of this non-discrimination clause.

(b) The operator will, in all solicitations or advertisements for employees placed by or

on behalf of the operator, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, or national origin.

(c) The operator will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the NSA, advising the labor union or worker's representative of the operator's commitments under section 202 of Executive Order No. 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The operator will comply with all provisions of Executive Order No. 11246, as amended, and by the rules, regulations and orders of the Secretary of Labor.

(e) The operator will furnish all information and reports required by Executive Order No. 11246, as amended, and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the NSA and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(f) In the event of the operator's non-compliance with the nondiscrimination clauses of this agreement or with any of such rules, regulations or orders, this agreement may be cancelled, terminated or suspended in whole or in part, and the operator may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246, as amended, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law.

(g) The operator will include the provisions of this paragraph in every subcontract or purchase order unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246, as amended, so that such provisions will be binding upon each subcontractor or vendor. The operator will take such action with respect to any subcontract or purchase order as the NSA may direct as a means of enforcing such provisions, including sanctions for non-compliance: *Provided, however,* That in the event the operator becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of such direction by the NSA, the operator may request the United States to enter into such litigation to protect the interests of the United States.

Art. 14. *Officials not to benefit.* No persons elected or appointed as members of or delegates to Congress, themselves or by any other persons in trust for them, or for their

use or account shall hold or enjoy this agreement in whole or in part, except as provided in Section 433, Title 18, United States Code. The operator shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

Art. 15. *Right of Controller General to examine books and records.* The Controller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers and records of the operator or any of its subcontractors engaged in the performance of the work under this agreement.

Art. 16. *Renegotiation.* This agreement shall be deemed to contain all the provisions required by section 104 of the Renegotiation Act of 1951. The operator shall, in compliance with said section 104, insert the provisions of this paragraph in each subcontract and purchase order made or issued in carrying out this agreement.

Art. 17. *Headnotes.* The use of headnotes at the beginning of the articles of this agreement is for the purpose of description only and shall not be construed as limiting or in any other manner affecting the substance of the articles themselves.

SCHEDULE A—TERMINAL OPERATING CONTRACT

Description of Terminal(s) and the agreed minimum dollars per month for each.

[44 FR 9384, Feb. 13, 1979. Redesignated at 45 FR 44587, July 1, 1980, and amended at 46 FR 36710, July 15, 1981]

PART 349—REEMPLOYMENT RIGHTS OF CERTAIN MERCHANT SEAMEN

Sec.

- 349.1 Purpose.
- 349.2 Application for certification.
- 349.3 Certification criteria.
- 349.4 Decision on application.
- 349.5 Reemployment rights and benefits.
- 349.6 Enforcement.

AUTHORITY: Secs. 204(b), 302, Merchant Marine Act, 1936, as amended (46 App. U.S.C. 1114(b), 1132); 38 U.S.C. 4301 *et seq.*; 49 CFR 1.66

SOURCE: 62 FR 5159, Feb. 4, 1997, unless otherwise noted.

§ 349.1 Purpose.

This part prescribes regulations implementing section 302, Merchant Marine Act, 1936 (Act), as amended (46 App. U.S.C. 1132), added by section 10 of Pub. L. 104-239, the Maritime Security Act of 1996. These regulations provide the procedures by which the Maritime