CARGO HANDLING EQUIPMENT FLEET MODERNIZATION INCENTIVE PROGRAM - PHASE II
AGREEMENT BETWEEN
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
AND “__________________________”
TENANT’s name

This agreement ("Agreement"), dated as of ____________________, 20____ is between The Port Authority of New York and New Jersey ("Authority" or “Port Authority”), a body corporate and politic, created by Compact between the States of New York and New Jersey with the consent of the Congress of the United States of America and having an office at 4 World Trade Center, 150 Greenwich Street, New York, New York 10007 (“Port Authority”) and ____________________________, having an office at ________________________________
TENANT’s name TENANT’s corporate address

WHEREAS, the Port Authority has developed and wishes to promote for the Port of New York and New Jersey a Clean Air Strategy ("Strategy") that identifies and takes actions to reduce emissions of air pollutants and greenhouse gases from all port-related sources; and

WHEREAS, cargo handling equipment ("CHE") utilized by tenants at the Port Authority’s marine terminal facilities in New Jersey ("Marine Terminals") has been identified as generating a significant portion of emissions at those facilities; and

WHEREAS, those Marine Terminals are located within an area designated by the U.S. Environmental Protection Agency ("EPA") as a non-attainment area for Nitrogen Oxides (NOx); and

WHEREAS, the Port Authority has been awarded $2.0 million in federal Congestion Mitigation and Air Quality Improvement ("CMAQ") grant funding for a Cargo Handling Equipment Fleet Modernization Incentive Program – Phase II ("Program" or “CHE Program”); and

WHEREAS, the Port Authority has established the CHE Program to provide an incentive to tenants at the Port Authority’s Marine Terminals to retire and replace older tiered CHE with new Tier IV emission CHE or new alternative powered CHE, (including but not limited to diesel-electric and diesel-hydraulic hybrids and all-electric or compressed natural gas (“CNG”) /liquefied natural gas (“LNG”) units that meet Tier IV standard or that meet the most recent Federal EPA on-road and/or off-road air emissions standards); and

WHEREAS, the replacement of approximately 100 pieces of older CHE with new and cleaner models is expected to result in significant emission reductions of NOx, Particulate Matter and CO2; and
WHEREAS, the Port Authority believes that modernization of CHE with new and more efficient equipment would also enhance productivity at the Marine Terminals; and

WHEREAS, TENANT is an entity that leases property on a Port Authority facility; and

WHEREAS, TENANT wishes to participate in the Program in accordance with the terms and conditions contained herein.

NOW, THEREFORE, in consideration of the promises and covenants set forth below, the Port Authority and TENANT (each, individually, a “Party” and collectively, the “Parties”) agree as follows:

1. To be eligible for reimbursement as provided for herein, TENANT must purchase new CHE that: (a) meets Tier IV emission standards, or (b) meets or exceeds the most recent Federal EPA on-road or off-road air emission standards, or (c) is new alternative powered CHE.

2. The TENANT shall complete and submit Attachment A, which is a detailed list of the desired CHE that it wishes to purchase and a detailed list of the equipment that will be replaced. Submittals shall be sent to the Port Authority’s Program Manager, Charles Liou, for approval via electronic mail at cliou@panynj.gov. Upon review of the lists, the Port Authority will notify TENANT in writing which, if any, pieces of CHE the Port Authority approves for reimbursement. Reimbursement amounts shall be up to 20 percent of the TENANT’s costs, not to exceed an amount of $20,000 per unit, with all remaining costs to be funded by the TENANT.

3. TENANT acknowledges that this Program is open to all Port Authority Marine Terminal Tenants in New Jersey and that approval for any requested reimbursement will be on a sequential approval basis, until the Port Authority’s $2.0 million CMAQ award has been committed. Under the sequential approval basis, the Port Authority will not approve a Tenant’s application unless and until (a) the Tenant has submitted to the Program Manager, a fully completed Attachment A (as determined by the Port Authority in its sole judgment), and (2) the Port Authority has approved in its entirety the TENANT’s submittals, as required by Paragraph 5 below. The Port Authority will disburse reimbursements based on the order in which it receives correct and complete submittals from TENANTs, as required in Paragraph 5 below, provided that one or more applications may be granted only in part due to depletion of funding.

4. TENANT shall submit a minimum of five (5) photographs to the Port Authority which show that the old CHE has a hole drilled through its engine block. In at least one of the photographs both the drilled hole in the CHE engine block as well as the engine block’s serial and/or model number shall be evident. Notwithstanding any of the requirements set forth in this Paragraph, if no photographs can be taken that show both the hole in the engine block as well as the serial and/or model number(s) in the same photograph, or if the serial and/or model number(s) are illegible then the TENANT shall submit
supporting documentation as may be required by the Program Manager. TENANT shall not scrap the CHE until it has received written approval from the Port Authority that the submitted photographs are acceptable, which means they show the CHE have been destroyed as required.

5. TENANT shall submit to the Program Manager the following: (a) a copy of the seller’s invoice demonstrating the actual purchase price of the new CHE, (b) documentation that the invoice has been paid, (c) written verification that the old CHE was destroyed as described above and (d) written verification that the new CHE meets the Tier IV standard or the most recent on- or off-road air emission standards or alternative powered equipment as described above. Upon its receipt and approval of the required submittals, the Port Authority will reimburse TENANT for up to twenty percent (20%) of the Purchase price, not to exceed an amount of $20,000 per unit, with all remaining costs to be funded by the TENANT.

6. 

a. As used in this Agreement, “Date of Receipt” shall mean the date on which incentive payments were received by the TENANT for the new CHE.

b. The TENANT shall ensure that the new CHE acquired through the Program remains operating at the Marine Terminals for a period of five (5) years from the Date of Receipt. The TENANT, on an annual basis, shall certify in writing to the Port Authority that the new CHE is operating at the Marine Terminals and shall provide required data using the form titled “Port Authority CHE Fleet Modernization Incentive Program – Phase II Terminal Operator Certification” attached hereto as Attachment B.

c. Certification required under this Paragraph 6. shall be provided by the TENANT on the first day of each Annual Period. An “Annual Period” shall mean the twelve-month period commencing on the Date of Receipt and each succeeding twelve-month period commencing on that same date occurring thereafter during the term of this Agreement. By way of example only, if the Date of Receipt is October 1, 2018, then the first Annual Period would commence on October 1, 2018 and end on September 30, 2019, and on October 1, 2019 (which would mark the commencement date of the second Annual Period) the TENANT would need to provide a completed Attachment B for the first Annual Period. Notwithstanding the required certification above, for the final Annual Period the TENANT shall provide the Port Authority with a completed Attachment B no later than 15 days before the fifth Annual Period ends, or if the Agreement is terminated before the five year term, then TENANT has 15 days before the date of termination to provide a completed Attachment B. Any failure by the TENANT to provide the required certification as set forth above may be considered a TENANT default of this Agreement.
7.

a. If the TENANT willingly fails to service the Marine Terminals with the replacement equipment during the five-year period for any reason other than as set forth below, the TENANT shall be considered in default of this Agreement. Upon the occurrence of a default, in addition to any other right available to the Port Authority at law or in equity, the Port Authority may terminate this Agreement and revoke the TENANT’s participation in the Program or in any future similar program, and the Port Authority may require that the TENANT make proportional repayment to the Port Authority of the money paid to the TENANT under this Agreement.

b. In the case of TENANT’s default, then at the sole discretion of the Port Authority, the Port Authority shall have the right to require the Tenant to repay a proportional amount of the Port Authority’s CHE reimbursement funds for each replacement CHE unit no longer operating at the Marine Terminals in accordance with the amounts specified below:

   i. One hundred percent (100%) of the dispersed funds for each new CHE no longer operating at the Marine Terminals if the default occurs within the first Annual Period;

   ii. Eighty percent (80%) of the dispersed funds for each new CHE no longer operating at the Marine Terminals if the default occurs within the second Annual Period;

   iii. Sixty percent (60%) of the dispersed funds for each new CHE no longer operating at the Marine Terminals if the default occurs within the third Annual Period;

   iv. Forty percent (40%) of the dispersed funds for each new CHE no longer operating at the Marine Terminals if the default occurs within the fourth Annual Period;

   v. Twenty percent (20%) of the dispersed funds for each new CHE no longer operating at the Marine Terminals if the default occurs within the fifth Annual Period.

c. Should the TENANT claim that mitigating factors beyond its control were the cause of any default, the Port Authority, at its sole discretion, may take those factors into account when deciding whether to terminate this Agreement and whether to require the default repayment.

d. In the event that the CHE purchased through this Program is, in the Port Authority’s sole determination, destroyed due to uncontrollable circumstances, such as an equipment crash due to the negligence of a third party, or due to a force majeure event including but not limited to fire, flood or other natural disaster, then the
TENANT’s five-year obligation to service the Marine Terminals with that destroyed CHE shall be deemed fulfilled.

8. TENANT acknowledges and agrees that the Port Authority’s role with respect to the Program is limited to providing the funds designated herein. The Port Authority shall not be responsible or liable in any respect for the operation of the equipment or for any injury, death or property damage that may arise or result from the operation of the CHE. TENANT shall indemnify and hold harmless the Port Authority, its employees, consultants, contractors, licensees, and agents from and against any claim arising from the negligence or intentional wrongdoing of TENANT in carrying out this Agreement or raised by any third party.

b. If so directed, the TENANT shall at its own expense defend any suit based upon any claim or demand, even if such suit, claim or demand is groundless, false or fraudulent, and in handling such shall not, without obtaining express advance permission from the General Counsel of the Port Authority, raise any defense involving in any way the jurisdiction of the tribunal over the person of the Port Authority, the immunity of the Port Authority, its Commissioners, officers, agents or employees, the governmental nature of the Port Authority or the provision of any statutes respecting suits against the Port Authority.

9. This Agreement shall take effect upon the date of this Agreement as first stated above and shall remain in effect for a period of five (5) years from the Date of Receipt. This Agreement may be amended in writing at any time through mutual agreement by both Parties.

10. TENANT shall set up and maintain in accordance with generally accepted accounting principles during the term of this Agreement and any extensions thereof, and for three years after the final payment and/or expiration, termination or revocation thereof, records and books of account recording all transactions of TENANT in any way connected with or related to this Agreement, including but not limited to records and books of account reflecting the cost of CHE reimbursed hereunder, which records and books of account shall be physically kept at all times within the Port District.

11. TENANT shall permit during ordinary business hours during the term of this Agreement, including any extensions thereof, and for three years thereafter, any and all examinations and audits by the officers, employees and/or representatives of the Port Authority and the State of New Jersey of such examinations and audits, including any records and books of account. However, if within the aforesaid three-year period the Port Authority has notified TENANT in writing of a pending claim by the Port Authority under or in connection with this Agreement and to which any of the aforesaid records and documents relate, either directly or indirectly, then the period of such right of
access shall be extended to the expiration of six years from the date of final payment with respect to the records and documents involved.

12. Neither the Commissioners of the Port Authority nor any of them, nor any officer, agent or employee thereof, shall be charged personally by TENANT with any liability, or held personally liable to TENANT under any term or provision of this Agreement, or because of its execution or attempted execution, or because of any breach, or attempted or alleged breach, thereof.

IN WITNESS WHEREOF, the Parties hereto, agreeing to be legally bound hereby, have caused this Agreement to be executed as of the date first written above.

THE PORT AUTHORITY OF
NEW YORK & NEW JERSEY

BY: ______________________________
    Richard Cotton

(TENANTS NAME)

BY: ______________________________

(Print Name)_______________________

Title: Executive Director

Date: ____________________________

Title: ____________________________

Date: ____________________________