To: The Honorable Carlos Alvarez, Mayor, Miami-Dade County

The Honorable Chairman Bruno A. Barreiro
and Members, Board of County Commissioners, Miami-Dade County

From: Christopher R. Mazzella, Inspector General

Date: June 9, 2008

Subject: Memorandum of OIG Observations, Review and Comments on the Proposed Terminal Agreement between Miami-Dade County and Terminal Link (Miami) LLC; and Execution of Termination, Release and Reservation of Rights Agreement between Miami-Dade County and Maersk, Inc., Ref. IG07-74

As part of the Miami-Dade Office of the Inspector General’s (OIG) continuing oversight of Seaport Department (Seaport) operations, the OIG has been monitoring the contract negotiations process and reviewing the current and proposed agreements with the current terminal operators (Operators) serving the Port of Miami (POM). The three Operators serving the POM are Maersk, Inc. (Maersk), Port of Miami Terminal Operating Company, L.C. (POMTOC), and Seaboard Marine, Ltd. (Seaboard).

This memorandum sets forth the OIG’s observations and comments with respect to the proposed agreement for the parcel of terminal land currently leased to Maersk on the Transit Committee’s Agenda for June 11, 2008.

The OIG would again like to express its gratitude to the Seaport and the Operators for their cooperation and assistance during this process. In particular, the Seaport ensured that the OIG was kept informed of all meetings, provided it with copies of correspondence and documentation, and, in general, provided information on cargo terminal operations.

SUMMARY OPINION

While there are certain terms of this agreement that we believe could be improved upon, overall we believe that it does foster fair and balanced competition, which may be a catalyst towards attracting new business and eventually increasing growth in container business at the Port of Miami. The aspects of the agreement, however, that the OIG has concerns about are:
1. **A NEW AGREEMENT WITH A NEW ENTITY** - The proposed Terminal Agreement with Terminal Link (Miami), LLC (TLM) is a new agreement with a newly formed entity, which was not the result of a public procurement process but through negotiations involving the current lessee, Maersk, even though Maersk is no longer a party to the agreement. The OIG is also concerned that the newly formed entity does not have the financial strength of its parent company, and thus we recommend that the parent company serve as the guarantor of the agreement.

2. **FINANCIAL TERMS – REFRIGERATED CONTAINER REVENUE LOSSES** - While it appears that the financial terms of the proposed Agreement significantly increase near-term revenues, the OIG is concerned about the true value of land rent.

3. **CAPITAL IMPROVEMENT AND DEVELOPMENT** – A review of the projects listed in the Agreement indicate that the main beneficiary of the upgrades would be TLM. The OIG believes that the Seaport should not commit capital contributions to the extent proposed in the Agreement.

4. **SIDE-LETTER AGREEMENT** – The OIG is concerned about a 1995 Side-Letter Agreement valued at $1.2 million that was never brought to the attention of the Board of County Commissioners for approval, and we troubled by the proposed $65,000 settlement which would, in effect, retroactively authorize the $1.2 million credit and, thus, void a $879,812 account receivables.

Each of these issues will be discussed in further detail.

**BACKGROUND**

In July 2007, the Seaport Director advised the OIG that the Seaport was about to begin terminal operating negotiations with the Operators at the POM. Due to the complexity of simultaneous negotiations with the Operators and the future implications of any or all of those agreements, the Seaport Director requested that the OIG observe and comment on the negotiation processes.

Since that time, OIG activities have included attendance at all scheduled negotiation meetings with the Operators and review of all existing terminal operating contracts, their amendments, Port tariff, historical statistical and financial data, current financial data, and two independent studies of POM operations.\(^1\) OIG staff also made numerous site visits to observe cargo operations and facility conditions. Meetings and interviews were held with various Seaport staff members representing the Administration, Finance, Planning and Economics Group, May 24, 2006, and Port of Miami Cargo Terminal Capacity Analysis, TranSystems, October 26, 2007.

Maritime, and Marketing divisions. Thus far, the OIG has issued a final report relative to the Seaboard Marine Terminal Agreement.

With respect to the TLM proposed Agreement, OIG comments have been forwarded to the Seaport Director and his staff since November 2007. Our comments on the most recent terms of the proposed agreement were presented to the Seaport Director in the form of a draft memorandum dated May 2, 2008. His written response to the OIG is attached. (Appendix A) The OIG has taken the Seaport’s response into consideration and made revisions to our draft memorandum as appropriate. The following “final” memorandum discusses the agreement as “proposed” for the upcoming June 11th Transit Committee Meeting.

1995 AGREEMENT WITH MAERSK, INC.

On July 11, 1995, the Miami-Dade County Board of County Commissioners adopted Resolution R-944-95, which authorized the current agreement with Maersk, Inc. (Maersk) for terminal operations at the Port of Miami. This agreement provided for an initial term of 5-years with three 5-year options for Maersk but is silent on the methodology for exercising renewal options. The agreement is mid-way through the second renewal period and the entire agreement will expire in 7 years in the year 2015.

The Seaport Director informed the OIG that since Maersk did not take affirmative action to renew the agreement for an additional 5-year term, he had placed them on notice as having a month-to-month agreement.

OIG AREAS OF CONCERN

1. A NEW AGREEMENT WITH A NEW ENTITY

The OIG is concerned that the process of terminating the current agreement with Maersk and entering into a new agreement with the newly created entity, TLM, was not done with the benefit of an open public procurement process to ensure that the County is receiving the best possible terms.

At the first Maersk negotiation session attended by the OIG on September 5, 2007, the Maersk representative stated that Maersk would like to propose a joint venture with CMA CGM\(^2\) (CMA) to provide terminal operating services and requested that negotiations continue on that basis; the Seaport agreed and negotiations continued. At a later meeting in January 2008, the OIG requested further clarification of the identities and relationships of the various entities relative to the Agreement. The CMA representative stated that the proposed joint venture between CMA and Maersk would

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\(^2\) CMA CGM is the third largest shipping company in the world, headquartered in France.
provide the terminal services. When prodded further by the OIG as to “Which entity would sign the agreement or hold the lease?”, the response from the CMA representative was “CMA.” It was further explained that CMA would create a wholly owned subsidiary called Terminal Link that would enter into the Agreement with the Seaport. In addition, a joint venture between CMA and Maersk would be created to provide the actual daily terminal services; the joint venture would be 51% CMA CGM and 49% Maersk.

As negotiations neared closure, it was further clarified that Terminal Link USA would create a new subsidiary named Terminal Link (Miami) LLC (TLM) that would actually sign the Agreement. Further, it was stated that the joint venture to provide the terminal services would be named South Florida Container Terminals (SFCT). Maersk would not be a signatory to the Agreement.

For clarity, below is an illustration containing a brief description and relationships of the new entities involved:

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AP Moller-Maersk, S/A
The largest shipping container company in the world, headquartered in Denmark

CMA CGM, S.A.
The 3rd largest shipping container company in the world, headquartered in France

Maersk, Inc.
A wholly owned subsidiary.

APM Terminals
A wholly owned subsidiary.

Terminal Link France
A wholly owned subsidiary headquartered in France

Terminal Link USA
A wholly owned subsidiary. Registered in the State of Florida on April 8, 2008

Terminal Link (Miami)

South Florida Container Terminals
A joint venture company. Registered in the State of Florida on April 14, 2008
51% Terminal Link (Miami)
49% APM Terminals
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In his response of May 23, 2008 (see Appendix A), the Seaport Director concurs that the proposed agreement is a new agreement resulting from direct negotiations and not a public bidding process. Furthermore, he added that Florida Statutes §125.35 provides the authorization and latitude to conduct these types of negotiations. While the OIG concurs that F.S. §125.35 may provide the authorization to conduct these types of negotiations, the OIG believes that conducting negotiations in this manner may not provide the Seaport with an appropriate forum for determining the true value of the Port of Miami land for terminal operations.

The Seaport Director explains in his response to the OIG that “POM had no ability to bid out this terminal operating agreement as Maersk retains certain contractual rights to the terminal for the next several years which they were unwilling to surrender.” However, it is the OIG’s contention that the Seaport did not fully pursue negotiations with Maersk to determine if a renewal could be agreed upon, but rather proceeded directly to what was thought to be a joint negotiation with Maersk and CMA. In fact, early in the process, it was unclear since one individual represented both Maersk and CMA. Moreover, the door opener for a new round of negotiations was the Seaport’s position that since Maersk did not take affirmative action to renew the agreement for an additional 5-year term and, thus, was on a month-to-month agreement, the Seaport required renewal renegotiations. The end result was not a renewed agreement with Maersk but a completely new agreement with a new entity—Terminal Link (Miami)—which was incorporated in Delaware two months ago and registered to do business in Florida less than a month ago.

This issue ties with another OIG concern over who is the “guarantor” of the agreement. While this issue has been recently resolved by the parties to the agreement, the OIG is still concerned about whether the guarantor, Terminal Link France, is substantial enough to provide a meaningful guarantee. The Seaport originally requested that CMA be the guarantor. However, CMA was unwilling and insisted that Terminal Link France should be sufficient since it is a wholly owned subsidiary of CMA.

In addition to the Terminal Link corporate and financial information provided by CMA, the Seaport obtained additional information from Dunn & Bradstreet. Based on this information, the Seaport was still not comfortable with the financial strength of Terminal Link to act as the sole guarantor to the Agreement and, as a result, requested additional assurances. These assurances would be in the form of submitting annual financial statements showing a net worth of not less than $45 million with regular quarterly updates and certification that its net worth has not fallen below that threshold for any quarter. Should Terminal Link fail this requirement, CMA would then be

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3 According to the Dunn & Bradstreet report obtained by the Seaport in April 2008, the Dec. 31, 2006 Net Worth for Terminal Link France is reported as €17.5 million (US $27 million). See footnote 4, regarding the retroactive shareholder loan.
required to submit either an irrevocable Letter of Credit for $30 million or an irrevocable guarantee from CMA.

The OIG believes that a more substantial guarantor would be CMA directly, as the Seaport initially requested. Furthermore, having CMA, as the guarantor, would eliminate the need for the Seaport to timely follow up and review one annual report and three quarterly financial reports during each of the 25 years of this Agreement to ensure that the shell company, Terminal Link S.A.S., has the required minimum net worth.

The BCC, in reviewing this proposed Agreement, should ensure that the County’s financial interests are adequately protected by the most substantial guarantor available, namely CMA, and not wholly owned subsidiary with limited liability that has received artificial infusions of cash to enhance its appearance of net worth.  

2. **Financial Terms – Refrigerated Container Revenues Losses**

Although it is stated in the County Manager’s Memorandum that this Agreement will generate approximately $15.3 million in revenues, it must be emphasized that $3.9 million would be new revenues to the Seaport due entirely from the land rent component at $1.25 per square foot. But the OIG notes that Seaport gross revenues would need to be reduced by approximately $850,000 due to the Seaport turning over the refrigerated container operations to TLM. Currently, the Seaport charges Maersk a contracted daily rate for each refrigerated container that is connected to the Seaport’s electrical infrastructure. The Seaport nets in excess of $850,000 annually after paying for maintenance and electric costs. Under the proposed Agreement, TLM would reimburse the Seaport only for the cost of electricity used. The resulting revenue loss is approximately $850,000 annually.

A substantial portion of this loss ($776,675) is recaptured in the land rent component with the addition of $0.25 per square foot. For comparative purposes, Seaboard Marine’s new agreement requires the payment of $1.00 per square foot for land that is acknowledged by all (including the Seaport) to be less desirable. Conversely, TLM will pay $1.25 per square foot for land that is much more desirable. However, when discounting the land rent by the loss of refrigeration revenues, the rent between the two yards of $1.00 per square foot is the same. We believe that the Seaport Department

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4 On April 7, 2008, the OIG received a copy of letter, dated July 17, 2007, by Pricewaterhouse Cooper Audit, the independent auditor for CMA, addressed to the Directors of CMA CGM S.A. stating that the Year ended December 31, 2006 Net Worth of Terminal Link is US $89,516,865. The letter further states “Net worth amounting to 89,516,865 US Dollars as at December 31, 2006 reflects on a pro forma basis, the effect of the amendment of the 50,000,000 euros (US $75 million) shareholders loan dated July 17, 2007.” (Emphasis added by OIG.)
could have obtained a much higher premium land rental price, especially in light of
added third party rights in the Agreement.

3. **CAPITAL IMPROVEMENT AND DEVELOPMENT – MAINTENANCE, DRAINAGE, AND
RUBBER TIRE GANTRY (RTG) PADS**

The Agreement requires the Seaport to make phased capital contributions of up to $16
million towards the implementation of a Rubber Tire Gantry (RTG) infrastructure.
TLM is required to share in the infrastructure costs by providing up to $12.5 million.
The OIG believes that the Seaport should not commit as large a financial contribution as
outlined in the Agreement for the following reasons:

- The minimum throughput guarantee of 2,750 TEUs\(^5\) per acre does not justify a
  Seaport investment in RTG infrastructure.

- The projected cargo volume is 4,206 TEUs per acre.
  - Maersk cargo volume has been steadily declining and is projected to be
    2,804 TEUs per acre.
  - CMA cargo volume is projected at 1,402 TEUs per acre. This projected
    volume is not new cargo to the POM but instead is cargo transferred
    from one operator to another.

The OIG believes that the proposed financial structure of the development plan is not in
the best interest of the POM; however, certain considerations may make it more
palatable, such as:

- Increasing the minimum throughput guarantee to a level that justifies the need
  for RTGs;
- Reducing terminal acreage that would result in a higher throughput per acre for
  the projected cargo volume; or
- Decreasing the Seaport’s financial contribution towards the RTG upgrades.

In his May 23, 2008 response, the Seaport Director states that the projected volume of
4,200 TEUs is at the Sustainable Practical Capacity threshold for considering upgrades
to RTGs as recommended in the TranSystems Report and, therefore, justifies the capital
upgrades. As previously stated, the OIG does not question the need for the
infrastructure upgrade, but is concerned about the amount to be paid by the Seaport
since fully one-third of the projected volume (100,000 TEUs) is being transferred from
another terminal yard, thus causing the threshold to be attained. This business

\(^5\) TEU = Twenty Foot Equivalent Unit – an industry measure for shipping containers; e.g. a 40 foot
container is counted as 2TEUs.
arrangement fully benefits TLM and not the Seaport. The OIG stands by the three alternatives suggested above, of either increasing the minimum TEU throughput guarantee, reducing the leased acreage, or decreasing the Seaport’s financial contribution towards the improvements.

As a point of reference, in the recently approved amendment to the Seaboard Marine Agreement, the terminal operator agreed to a minimum throughput guarantee of 4,000 TEUs per acre without the benefit of or requirement for RTGs. Seaboard’s TEU throughput minimum guarantee is 45% higher than the minimum guarantee proposed in this agreement.

4. SIDE-LETTER AGREEMENT (ARREARAGE)

On November 13, 2007, the OIG advised the Seaport that its own financial report, as of 10/24/07, entitled *Analysis of Outstanding Customer Balances*, reported a total outstanding balance of $1,023,881.64 in excess of 90-days for Maersk, of which $879,812.31 (86%) dates between 1997 and 1999, as shown below:

<table>
<thead>
<tr>
<th>Category</th>
<th>&gt;90 Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maersk/Sealand</td>
<td>24,725.84</td>
</tr>
<tr>
<td>P&amp;O Nedlloyd</td>
<td>27.15</td>
</tr>
<tr>
<td><strong>Electric Cont</strong></td>
<td><strong>879,812.31</strong></td>
</tr>
<tr>
<td>Late Document</td>
<td>13,094.95</td>
</tr>
<tr>
<td>Late Payment</td>
<td>103,465.57</td>
</tr>
<tr>
<td>Misc. Rev</td>
<td>1,763.60</td>
</tr>
<tr>
<td>Released Cargo</td>
<td>987.80</td>
</tr>
<tr>
<td>Undefined Section</td>
<td>4.42</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$1,023,881.64</strong></td>
</tr>
</tbody>
</table>

As a result of the OIG’s intervention and review, Maersk has since issued two payments totaling $53,267.29 towards the outstanding balance. At that time, Maersk also advised that they do not owe and will not pay the $879,812.31 in *Electric Cont* and the related $103,465.57 in *Late Payment* (interest) charges because it represents the remainder of a “refrigerated container credit” that was owed to them as part of a 1995 side-letter agreement for a $1.2 million operational credit with the Port Director at that time, Carmen Lunetta.7

$1.2 MILLION CREDIT

From interviews with various individuals and review of certain documents, the OIG was told that in 1995 former Port Director Lunetta gave Maersk a $1.2 million credit

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6 Electric Cont refers connecting refrigerated containers to the Seaport’s electrical system.

7 Carmen Lunetta, Seaport Director, resigned May 1997
against future terminal expenses to be paid by Maersk to the Seaport. The OIG was advised that the rationale for the credit was that a terminal operating agreement was verbally agreed to in 1993; however, at the request of Lunetta, it was delayed for 2 years before being brought to the BCC for approval in 1995. During that time Maersk claimed that they lost the benefit of the lower contract prices, hence the $1.2 million credit.

HOW IT WORKED

There is a letter from former Seaport Director Lunetta, dated May 30, 1995, agreeing to give Maersk a credit of $1.2 million. The letter contains a credit schedule showing how the credit would be applied against future terminal expenses from October 1995 to December 1996. Apparently, the credit schedule, as proposed in the Lunetta letter, was not immediately implemented. By March 1997, additional correspondence proposed that the $1.2 million credit be applied towards future refrigeration rates in that the Seaport would invoice only 50% of the contract rate until $1.2 million had been reimbursed to Maersk as a result of the reduced charges. Because the Seaport’s application of the credit was in discounting the contract rate, the payment of those invoices would show payment in full and, thus, were cleared from the accounting system. Through review of other correspondence, we believe that this occurred from March 1997 to November 1997, although our search for pre-November 1997 invoices in storage was unsuccessful and we were unable to confirm whether the 50% reduction in unit price was actually applied to the invoices.

Following the resignation of Lunetta in 1997, the Seaport Transition Team issued instructions to immediately cease the practice of using the discounted rates and that the full contracted rates were to be applied. We believe these instructions were issued in November or December 1997. Nevertheless, Maersk, in a March 24, 1998 letter to the then new Port Director, Mr. Charles Towsley, informed him that since the Port stopped issuing the 50% invoice credits on its monthly invoices, Maersk would continue paying future invoices as if the credit was being provided, until the entire $1.2 million credit had been obtained.

OIG review of the invoices, payments and financial reports of balances shows that Maersk then began paying 50% of future electrical connection (i.e. refrigerated containers) invoices. Because only partial payments were made, those invoices

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8 Many of the correspondences referenced herein were provided to the OIG by Maersk. Oftentimes, the Seaport did not have copies of the relevant correspondences, and also were provided copies by Maersk.
9 May 30, 1995 Letter from Carmen Lunetta, Port Director, to Jorgen Palmbak, General Manager – APM Terminals, Subject: Miami Terminal Agreement - Sideletter
10 March 26, 1998 Memorandum from John Ballestero, Chief of Operations to Charles Towsley, Port Director, Subject Maersk Lines
remained open in the financial system. As a result, $879,812.31 appears in the Seaport’s accounts receivable records for Maersk.

**SIDE-LETTER AGREEMENT AND SUBSEQUENT TERMINAL AGREEMENT**

The OIG has reviewed the July 11, 1995 County Manager Recommendation Memo accompanying the *Terminal Agreement with Maersk, Inc. for Shipping Terminal Operations at the Port of Miami*, Resolution R-944-95 authorizing the Agreement, and the Agreement itself. Not one of these three documents reference either a side-letter agreement or a $1.2 million credit towards future terminal charges.

In the current agreement with Maersk, Section 20 entitled *Entire Agreement*, states:

> This Agreement, including all exhibits, codes, or tariff attached hereto or referred herein, contains the entire agreement of the County and Maersk with respect to the matters stated herein, and may not be modified except by way of a written instrument and approved by the Board of Dade County Commissioners. Any oral or written representations or agreements regarding the subject matter hereof made prior to the execution on this Agreement are hereby merged into and superseded by the Agreement.

This agreement was signed by both Philip Connors, Executive Vice President, and Jorgen Palmbak, General Manager Operations for Maersk. The OIG notes that the Lunetta “side-letter agreement” was dated May 30, 1995 and was also signed by Jorgen Palmbak on behalf of Maersk.

According to the dates listed above, the Lunetta “side-letter agreement” is superseded by the execution and approval of the Terminal Agreement, which does not mention or include by reference the “side-letter agreement.” Furthermore, the OIG notes that any responses from Maersk as to its reliance on the apparent authority of the Port Director is clearly nullified due to the clause which states “and approved by the Board of Dade County Commissioners.” Jorgen Palmbak signed both documents on behalf of Maersk and should have been familiar with the contents of those documents.

In addition, the OIG is also concerned that if the Seaport Transition Team was aware of the “side-letter agreement” in 1997, and ordered the discount to cease, why was no action taken against Maersk for unilaterally applying the credit in the form of a 50% discount. Years later, this large account receivables (arrearage) have remained on the Seaport’s financial statements, as they do now. Since November 2007, the OIG has been telling the Seaport that this is still an outstanding issue that needs to be brought to the attention of the BCC for action and resolution prior to the assignment, renewal, or termination of any agreement involving Maersk, Inc.
In his May 23, 2008 response, the Seaport Director stated:

“We are pleased with your Office’s assistance in unraveling a complicated outstanding financial issue with Maersk .... Nonetheless, the arrearage issue and “side letter agreement” from a decade ago that your office researched, is an important issue for our Board. ... we intend to fully inform the Board on this issue. In this regard, I believe it best that we reserve our recommendation for resolving this issue for the County Manager’s memorandum.”

The OIG is pleased that the results of our research and analysis were of assistance to the Seaport in resolving an issue that has been outstanding for thirteen years. According to the proposed termination agreement with Maersk, the BCC is being asked to retroactively approve the “side-letter” agreement entered into in 1995 by the former Port Director and Maersk. According to the proposed termination agreement, the BCC is being asked to approve a settlement amount of $65,000 to be paid by Maersk. In essence, the settlement only applies to credits claimed by Maersk that exceeded the $1.2 million side deal. The $65,000 settlement is only a compromise between a $35,964 arrearage as acknowledged by Maersk versus $97,142 as calculated by the OIG exceeding the $1.2 million credit. As worded in the proposed agreement, the $65,000 settlement would nullify the $879,812 arrearage for non-payment of electrical connections invoices as shown in the chart on the previous page. Wiping out the $879,812 arrearage would essentially retroactively approve the former Port Director’s 1995 side-letter agreement.

The OIG does not condone the side-letter agreement made by the former Port Director but we recognize that the issue is over one decade old, and the Seaport must move forward. Nevertheless, the Board of County Commissioners must ultimately decide on what course of action should be taken to resolve this credit vs. arrearage issues. In conclusion, the OIG supports the Seaport in its efforts to promote competition thereby enhancing the Port of Miami’s financial viability and regional standing. However, we do have our concerns, as noted above.

cc: George M. Burgess, County Manager  
    Robert A. Cuevas, Jr., County Attorney  
    Ysela Llort, Assistant County Manager  
    Bill Johnson, Director, Miami-Dade Seaport Department  
    Denis Morales, Mayor’s Chief of Staff  
    Charles Anderson, Commission Auditor  
    Clerk of the Board (copy filed)

Attachments

IG07-74 Proposed Terminal Link (Miami) LLC Agreement  
June 9, 2008  
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