

BEFORE THE PUBLIC UTILITIES COMMISSION

IN RE:	REVIEW OF POLA SALES) AGREEMENT AND) INTERIM MAINTENANCE) AGREEMENT) _____)	PAG DOCKET 12-01 AMENDED ORDER
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INTRODUCTION

This matter comes before the Guam Public Utilities Commission (the “PUC”) pursuant to a Petition filed by the Jose G. Leon Guerrero Commercial Port, Port Authority of Guam (hereinafter referred to as “PAG” or the “Port”) on June 19, 2012, whereby PAG requested review and approval of the Sales Agreement, and the Interim Maintenance Agreement, related to the acquisition of certain Port of Los Angeles (hereinafter referred to as “PoLA” or “POLA”) cranes owned by Matson Navigation Company, Inc. (“Matson”) and Horizon Lines, L.L.C. (“Horizon”).

DETERMINATIONS

I. Enabling and Special Legislation

On September 11, 2009, Public Law (“P.L.”) 30-57 was enacted, which approved the implementation of “Phase I, First Stage 1-4 (2010-2012) and Second Stage I -B (2011-2013) of the Jose D. Leon Guerrero Commercial Port Master Plan Update 2007 Report.”¹ In addition, the public law established a debt ceiling of \$54,500,000 for the Port Modernization Program, to be used “exclusively in the implementation of the portion of this Master Plan.”² Moreover, the public law required PAG to purchase or lease to own “*at least two (2) Gantry Cranes,*” “*no later than December 31, 2012.*”³

¹ P.L. 30-57, Section 2, p. 2 (Sept. 11, 2009).

² *Id.* at Section 3, p. 3.

³ *Id.* at Section 4, p. 3 (italics in original).

On March 11, 2010, P.L. 30-100 was enacted, which reiterated the requirement that PAG “acquire, either through purchase or lease-to-own, *at least* two (2) Gantry Cranes *no later than* December 31, 2012.”⁴ On November 21, 2011, P.L. 31-145 was enacted, which amended P.L. 30-57. Under this public law, the Guam Legislature expressly found the following:

[T]here are five (5) cranes currently on the Port’s commercial docks, and that through a license agreement executed in December 2007 between the Port and Matson/Horizon, Inc. or its successor (the Carriers), three (3) of these cranes, referred to as POLA Cranes 15, 16 and 17, were purchased and refurbished by the Carriers and placed on the Port’s rails. Additionally, the Port currently maintains and operates two (2) older and smaller Gantry Cranes, referred to as Gantry 2 and Gantry 3, to service non-Matson/Horizon, Inc. or its successor vessels, and that due to their age and material condition are more expensive to maintain and provide less reliable service. Retirement of these cranes is overdue.⁵

The Guam Legislature additionally found that “the acquisition of the POLA Cranes by the Port has the potential to present a singularly unique opportunity and value to Guam given their presence on the rails, record of operational reliability, and the elimination of disruption to ongoing operations.”⁶ Moreover, the legislature further found that “it would be prudent to explore acquisition of the POLA cranes through direct purchase or lease-to-own, and that further to this exploration, acquisition should be authorized, provided that this unique opportunity and value can be realized through independent assessment of material condition, and fair and reasonable value, and follow-on negotiation of acquisition terms is uniquely and demonstrably favorable to Guam.”⁷

⁴ P.L. 30-100, Section 2, pp. 2-3 (Mar. 11, 2010) (italics in original).

⁵ P.L. 31-145, Section 1, p. 2. (Nov. 21, 2011).

⁶ *Id.* at Section 1, p. 3.

⁷ *Id.*

Pursuant to P.L. 31-145, PAG was required to perform, among other terms, the following: obtain, through purchase or lease to own, at least two (2) gantry cranes by December 31, 2012; create a negotiating team authorized “to engage in the negotiations with the Carriers”; engage the services of an independent consultant to obtain an assessment of the condition and life expectancy of the PoLA cranes, provide an “as is” valuation assessment, and determine a range of fair and reasonable value of the PoLA cranes; review the acquisition terms, and ratify such terms.⁸

In addition, under the law, PAG also was required to procure the services of “a Performance Management Contractor (PMC) to manage the performance, operation and maintenance of the newly acquired POLA Gantry Cranes, and other Gantry Cranes used in support of Port operations.”⁹ “During the interim period that the Port is procuring the PMC contract, the previous owners of the Cranes *shall* continue to provide maintenance of the cranes, on account of the Port.”¹⁰

II. PAG Board Ratification

On June 5, 2012, PAG’s Board of Directors approved the Sales and Interim Maintenance agreements, by way of Resolution No. 2012-05. Additionally, by way of Resolution No. 2012-04A, PAG’s Board of Directors also approved a crane surcharge fee, of up to \$125 for loaded container and \$5 per tonnage for non-containerized cargo, to fund the debt service, repairs, and maintenance for the PoLA cranes, as well as to establish a sinking fund to plan for replacement cranes in the future.

⁸ *Id.* at Section 3, pp. 4-6.

⁹ *Id.* at Section 3, pp. 6-7.

¹⁰ *Id.* (italics in original).

III. Petition for PUC Approval of Sales and Interim Maintenance Agreements

On June 19, 2012, PAG filed a Petition requesting that the PUC approve the Sales Agreement and the Interim Maintenance Agreement related to PAG's purchase of certain PoLA cranes owned by Matson and Horizon. The Petition contained the proposed Sales Agreement between PAG, Matson and Horizon, the proposed Interim Maintenance Agreement between PAG and Matson, and was supported by resolutions issued by PAG's Board of Directors, condition and evaluation reports related to the PoLA cranes, as well as a financial model depicting a crane surcharge to service the debt from the purchase of the cranes.

IV. Slater Nakamura Report

Pursuant to a request by the PUC, the consulting firm of Slater, Nakamura & Co., L.L.C. ("Slater Nakamura") reviewed the proposed acquisition of the PoLA cranes. On August 9, 2012, Slater Nakamura transmitted a draft of its report to PAG and the Administrative Law Judge of the PUC (the "ALJ") detailing its evaluation, assessment, findings, and recommendations related to PAG's acquisition of the PoLA cranes. On August 24, 2012, Slater Nakamura transmitted another draft of its report to the ALJ; and on August 27, 2012, it transmitted its final report (hereinafter referred to as the "Report") to the Chairman of the PUC, the ALJ, and PAG.

V. Slater Nakamura's Recommendations

Based on Slater Nakamura's investigation, it issued the following recommendations. First, it recommended that the PUC authorize PAG's acquisition of PoLA cranes 14, 16 and 17.¹¹ Second, it recommended that the PUC direct PAG to repair PoLA cranes 14, 16 and 17, as well as Crane 3 to meet the recommendations indicated in the reports

¹¹ Report by of Slater, Nakamura & Co., L.L.C., p. 45 (Aug. 27, 2012).

by PAG's consultants.¹² Next, it recommended that the PUC authorize PAG to fund the demolition of Crane 2 from its \$14.5 million fund.¹³

In addition, Slater Nakamura recommended that the PUC direct PAG to develop a tariff recommendation that would fully fund the acquisition, financing, maintenance, and ultimate replacement of PoLA cranes 14, 16, and 17, as well as Crane 3, within 15 years.¹⁴ It also recommended that PAG "develop a more accurate projection for cargo throughput that can be used to forecast revenues from tariffs."¹⁵ And finally, it recommended that PAG consider "placing one crane in layup pending an increase in cargo throughput demand."¹⁶

VI. The ALJ Report

On August 27, 2012, the ALJ filed an ALJ Report concerning his review of the proposed acquisition of the PoLA cranes, findings, and recommendations, based on the evidence contained in the record. In sum, the ALJ found that the Sales Agreement and the Interim Maintenance Agreement were fair and reasonable, and therefore recommended that the PUC approve these contracts pursuant to 12 G.C.A. §12004 and PAG's Contract Review Protocol, PAG Docket 09-01.

In particular, the ALJ found that under P.L. 31-145, the Guam Legislature mandated PAG's acquisition of at least two (2) PoLA cranes by December 31, 2012, and that the legislature considered this acquisition as a "*singularly unique opportunity and value to Guam* given their presence on the rails, record of operational reliability, and the elimination of disruption to ongoing operations."¹⁷ Based on the evidence in the record, the ALJ found

¹² Slater Nakamura Report, p. 45.

¹³ Slater Nakamura Report, p. 45.

¹⁴ Slater Nakamura Report, p. 45.

¹⁵ Slater Nakamura Report, p. 45.

¹⁶ Slater Nakamura Report, p. 45.

¹⁷ P.L. 31-145, at Section 1, p. 3 (emphasis added).

that PAG satisfied the statutory requirements. In addition, the ALJ also found that the PoLA cranes are in good condition. Specifically, the ALJ found that “the POLA cranes will serve the Port’s needs through the current 20-year planning horizon if the cranes and supporting wharf structures are well maintained.”¹⁸

Moreover, the ALJ found that the value of the PoLA cranes were fair and reasonable, but recommended that PAG complete its development of a Structured Maintenance Program for all of its cranes, which it initiated with Parsons Brinkerhoff and sub-consultant Sarandipity, L.L.C. The ALJ also recommended that PAG begin repairs to the PoLA cranes indicated in Casper’s Condition Survey. Finally, the ALJ found that PAG’s acquisition of three cranes was not unreasonable under the circumstances.

Accordingly, with respect to the Sales Agreement, the ALJ recommended the following: that the PUC approve PAG’s acquisition of three PoLA cranes, specifically cranes 14, 16 and 17; that the PUC require PAG complete its development of a Structured Maintenance Program for all of its cranes, which it has initiated with Parsons Brinkerhoff and sub-consultant Sarandipity, L.L.C.; that the PUC require PAG to begin repairs on the PoLA cranes indicated in Casper’s Condition Survey, as recommended by Slater Nakamura; that the PUC direct PAG to develop a tariff that fully funds the acquisition, financing, and maintenance resulting from the purchase of such cranes; that the PUC require PAG to develop a projection for cargo throughput that can be used to forecast revenues from its tariff, as recommended by Slater Nakamura; and, finally, that the PUC require PAG file a report with the PUC regarding the status, future plans, or demolition of Gantry Crane 2. Accordingly, the ALJ recommends that the PUC approve the form of the Sales Agreement contained in PAG’s Petition.

¹⁸ ALJ Report, p. 25 (quoting Casper, Phillips & Associates’ Final Detailed Condition Survey, p. 4 (Jan. 5, 2012)).

With respect to the Interim Maintenance Agreement, the ALJ found that P.L. 31-145 mandated PAG to procure the services of “a Performance Management Contractor (PMC) to manage the performance, operation and maintenance of the newly acquired POLA Gantry Cranes, and other Gantry Cranes used in support of Port operations.” The ALJ further found that the public law also mandated that “[d]uring the interim period that the Port is procuring the PMC contract, the previous owners of the Cranes *shall* continue to provide maintenance of the cranes, on account of the Port.” Thus, the ALJ concluded that Matson was required to provide the interim maintenance services under the law; and as a result, recommended that the PUC approve the form of the Interim Maintenance Agreement contained in PAG’s Petition.

The Commission hereby adopts the findings made in the ALJ Report and, therefore, issues the following.

ORDERING PROVISIONS

Upon consideration of the record herein, the August 27, 2012 ALJ Report, and for good cause shown, on motion duly made, seconded and carried by the affirmative vote of the undersigned Commissioners, the Commission hereby ORDERS that:

1. The Commission approves the Sales Agreement and the Interim Maintenance Agreement, which are attached to PAG’s Petition.
2. PAG shall complete its development of a Structured Maintenance Program for all of its cranes, which it initiated with Parsons Brinkerhoff and sub-consultant Sarandipity, L.L.C.
3. PAG shall begin repairs to the PoLA cranes indicated in Casper’s Condition Survey, and file a report with the PUC detailing the progress of such repairs by June 15, 2013.

4. PAG shall develop a tariff recommendation that would fully fund the acquisition, financing, and maintenance of PoLA cranes 14, 16, and 17, as well as Crane 3, and partially fund the replacement of at least one crane within 15 years.

5. PAG also shall develop a projection for cargo throughput that can be used to forecast revenues from tariffs.

6. PAG shall file a report with the PUC regarding the status, future plans, or demolition of Gantry Crane 2 by February 15, 2013.

7. PAG is further ordered to pay the PUC's regulatory fees and expenses, including and without limitation, consulting and counsel fees, and the fees and expenses associated with this docket. Assessment of the PUC's regulatory fees and expenses is authorized pursuant to 12 G.C.A. §§ 12002(b) and 12024(b), and Rule 40 of the Rules of Practice and Procedure before the PUC.

SO ORDERED this 30th day of October, 2012.

Jeffrey C. Johnson
Chairman

Joseph M. McDonald
Commissioner

Rowena E. Perez
Commissioner

Filomena M. Cantoria
Commissioner

Michael A. Pangelinan
Commissioner

Peter Montinola
Commissioner