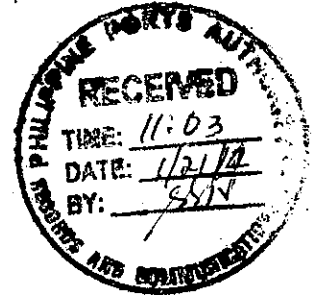




Bonifacio Drive, South Harbor, Port Area, Manila 1018, Philippines, P.O. Box 436, Manila, Philippines
Tel. No. (0632) 527-8356, Fax.No. (0632) 527-4855, <http://www.ppa.com.ph>

20 January 2014



PPA OPERATIONS MEMORANDUM CIRCULAR
NO. 01 - 2014

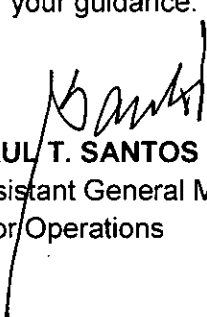
TO : All Port District Managers,
Port Managers,
Cargo Handling Operators,
And All Others Concerned

SUBJECT : Establishment of Performance Security of
Cargo Handling Operators (CHOs)

In order to prescribe a uniform basis for the establishment of Performance Security to be posted and maintained by CH Operators pursuant to their CH Contracts with PPA, furnished herewith is a copy of the Legal Services Department (LSD) Opinion No. 01-2014 – “Establishment of Performance Security of Cargo Handling Operators” which opines, and therefore prescribes the pertinent provisions of PPA Administrative Order (AO) No. 03-2009 as the legally correct bases for the computation of the Performance Security to be posted by CHOs.

Further, considering that PPA AO No. 03-2009 takes precedence over previous issuances relative to the establishment of Performance Security and pending amendment of the same, the issuance of clarificatory guidelines to this effect is not necessary.

For your guidance.


RAUL T. SANTOS
Assistant General Manager
for Operations

Encl.: As stated.

VISION

By 2030, customers doing business in our ports shall experience full and sustained productivity, efficiency comfort, connectivity, safety and security.

MISSION

We commit to provide reliable and responsive services in our ports, sustain development of our port communities and environment and be a model corporate agency of the government.



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January 8, 2014

OPINION

No. 01

Series of 2014

FOR : **The Assistant General Manager for Operations**

THRU : **The Manager
Port Operations Services Department (POSD)**

FROM : **The Manager
Legal Services Department (LSD)**

SUBJECT : **Establishment of Performance Security Of Cargo Handling Operators (CHO)**

I. Preliminary Statement

This refers to your Memorandum dated September 6, 2013 requesting comments/opinion on the initial draft of the proposed Guidelines in the Establishment of Performance Security of Cargo Handling Operators.

II. Antecedents

On January 1, 1997, PPA A.O. No. 13-96 entitled "Prescribing PPA Performance Standards and Rating System for Cargo Handling Contractors and Providing Sanctions Therefore" took effect. Appendix I of the said A.O. provides for the Table of Amount of Performance Bonds for Cargo Handling Contracts/Permits wherein the amount of cargo handling gross revenue corresponds to a definite amount of bond.

On April 12, 2006, PPA A.O. No. 01-2006 entitled "Compendium of Regulations on Cargo Handling Operations" was issued. It is provided there that the CHO should put up a performance bond/security in the amount prescribed by PPA.

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On October 26, 2007, PPA A.O. No. 04-2007 was issued providing for "Additional Table of Performance Bond for Cargo Handling Contracts/Permits" wherein Appendix I of PPA A.O. No. 13-96 was amended to expand the Cargo Handling Gross Revenue to up to 800,000,000.00.

On April 14, 2009, PPA A.O. No. 03-2009 entitled "Amendment to Article III (Guidelines in the Conduct of Public Bidding) of PPA Administrative Order No. 01-2006" was issued, providing for a different computation of performance security required to be posted by the CHO.

In a Memorandum dated September 6, 2013, the Manager of POSD, requested for comments and recommendation on the proposed draft PPA Memorandum Circular entitled "*Clarificatory Guidelines on the Establishment of Performance Security of Cargo Handling (CH) Operators*".

III. Issue/s

What Administrative Order should be the basis for the determination of the Performance Security of CHOs?

IV. Discussion

P.D. 857, as amended granted PPA the power, among others, to provide services (whether on its own, by contract, or otherwise) within the Port District¹, in accordance with this authority, PPA issued PPA A.O. 01-2006 which provides for the guidelines in conduct of public bidding for cargo handling services.

Paragraph (f) of provision no. 40 of PPA A.O. 01-2006 entitled Performance Bond, provides that:

"To guarantee the faithful performance of its obligations under the contract prepared in accordance with the bidding documents, the CH Operator within thirty (30) calendar days from the signing of the CH contract, put up a performance bond/security in the amount prescribed by the Authority and the contract to be secured from the Government Service Insurance System (GSIS) General Insurance Fund, subject to the requirements prescribed by this Order."

Perusal of pertinent PPA issued rules and regulations reveals that there are two (2) PPA regulations which provide for the performance security amount required by PPA to be put up by the CHOs namely, PPA A.O. 13-96,

¹ (v) a. section 6. Corporate Powers and Duties, PD 867, as amended

as amended by PPA A.O. 04-2007 and on the other hand the latest issued PPA A.O. 03-2009.

PPA A.O. 03-2009 intended solely to amend the bidding procedure as gleaned from the title itself "AMENDMENT TO ARTICLE III (Guidelines in the Conduct of Public Bidding) OF PPA ADMINISTRATIVE ORDER NO. 01-2006". However, said A.O. likewise provided for an entirely new system of computing the amount of performance bond required to be put up by the CHOs, as stated in paragraph 40 letter (f), Performance Security, to wit:

To guarantee the faithful performance by the winning bidder of its obligations under the contract, it shall post a Performance Security within thirty (30) calendar days from effectivity of the CH Contract. The performance security shall be in any of the following forms:

- (a) *Cash, certified check, cashier's/manager's check, bank draft/guarantee confirmed by a reputable local bank;*
- (b) *Irrevocable letter of credit issued by a reputable commercial bank or in case of an irrevocable letter of credit issued by a foreign bank the same shall be confirmed or authenticated by a reputable local bank;*
- (c) *Surety bond, callable upon demand, issued by the GSIS or other reputable surety or insurance company duly licensed by the office of the Insurance Commission; or*
- (d) *A combination of the foregoing.*

The required amount of the above forms of security shall be in accordance with the following schedule:

| <i>FORM OF PERFORMANCE SECURITY</i> | <i>P _____ (Total gross income from CH operations of the Port for the Immediately Preceding Year)</i> |
|---|---|
| <i>Cash, certified check, cashiers' check, manager's check, bank draft or irrevocable letter for credit</i> | <i>Five percent (5%)</i> |
| <i>Bank guarantee</i> | <i>Ten percent (10%)</i> |
| <i>Surety Bond</i> | <i>Thirty percent (30%)</i> |

On the other hand, PPA A.O. No. 13-96 and PPA A.O. No. 04-2007 provide for a graduated fixed amount of Performance Bond based on the annual gross revenue of the CHO. PPA A.O. No. 03-2009 requires that the amount of Performance Bond of the CHO be based on certain percentage, depending on the kind of performance security the CHO chooses, of the total gross income from the succeeding year.

Clearly, the two (2) previously cited provisions are contrary to each other and the following table shows an example of a comparative computation using the two (2) different systems:

| CHO annual gross revenue | Amount of Performance Bond to be put up under: | | |
|--------------------------|--|----------------------|-------------------|
| | PPA A.O. 13-96 as amended by 04-2007 | PPA A.O. 03-2009 | |
| Php 800,000,000.00 | Php16,000,000.00 | Cash (5%) | Php40,000,000.00 |
| | | Bank Guarantee (10%) | Php80,000,000.00 |
| | | Surety Bond (30%) | Php240,000,000.00 |

It is noted that the provision of PPA A.O. 03-2009 provided for a clear and definite repeal of the provisions of PPA A.O. Nos. 01-2006 and 04-2007 as the latter forms part of PPA A.O. 01-2006 as a supplemental provision, to wit:

“Pursuant to Section 6-a (iii), and (v), 6-b(vi) and 23 of Presidential Decree No. 857, as amended, and in order to further clarify the procedures for the bidding and award of cargo handling (CH) services and to harmonize the requirements thereof with the other pertinent regulations on the matter, Article III (Guidelines in the Conduct of Public Bidding) of PPA Administrative Order No. 01-2006, otherwise known as the “compendium of Regulations on Cargo Handling Operations”, is hereby amended and modified as follows:” (boldface ours)

It is basic in statutory construction that when the law is clear and unambiguous, the same must be applied to the letter accordingly without intepretation, as reiterated by the Supreme Court in the case of *PDEA vs. Brodett and Joseph* (G.R. No. 196390, September 28, 2011)

“Basic is the rule in statutory construction that when the law is clear and unambiguous, the court has no alternative but to apply the same according to its clear language. The Supreme Court had steadfastly adhered to the doctrine that the first and fundamental duty of courts is to apply the law according to its express terms, interpretation being called only when such literal application is impossible. No process of interpretation or construction need be resorted to where a provision of law peremptorily calls for application.”

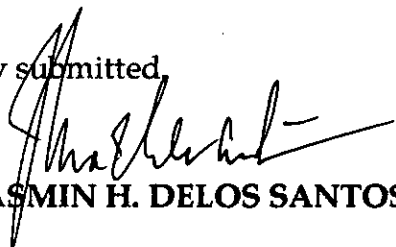
Moreover, since PPA A.O. 03-2009 was issued only in April 14, 2009, it is the most recent law issued on the matter and therefore should take precedence.

V. Conclusion/Recommendation

In view of the foregoing, it is our view that the provision of PPA A.O. No. 03-2009 is the legally correct bases in the computation of the performance security to be put up by CHOs.

It is therefore recommended that if Management opts to retain the system provided under PPA A.O. No. 13-26, as amended, there is a need to amend the provisions of PPA A.O. No 03-2009. Issuance of an internal guidelines to adopt said policy in the meantime prior to amendment is not legally acceptable.

Respectfully submitted,



M. A. HIYASMIN H. DELOS SANTOS

