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No. 67721-7

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION,

Appellant,

v.

PORT OF SEATTLE, *ET AL.*,

Respondents.

RESPONDENT PORT OF SEATTLE'S OPENING BRIEF

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I. INTRODUCTION

The Port of Seattle's ("Port's") contract with Puget Sound Dispatch LLC ("Yellow Cab") for taxi services at Seattle-Tacoma International Airport (the "Airport") was the result of a thorough, open, honest, and competitive process. Port staff with significant knowledge and experience related to taxi service at the Airport analyzed, evaluated and scored each proposal submitted in response to a Request for Proposals ("RFP"). The Port Commission ("Commission") received the staff's recommendation, listened to extensive public testimony (the majority of which came from Appellant Seattle-Tacoma International Taxi Association ("STITA")), debated, and voted to authorize the Port CEO to award the concession to Yellow Cab at an open public meeting.

Despite this deliberate process, STITA has brought multiple disappointed bidder claims in an effort to first invalidate the RFP itself and now to void the contract under which Yellow Cab has been providing service to the traveling public at the Airport for over a year. Like STITA's first wave of claims, which this Court rejected, STITA's current claims are without merit.

The Port acted within its legal authority and in accordance with Washington law and the RFP in contracting with Yellow Cab. STITA failed to assert its argument that Port staff violated the Open Public Meetings Act ("OPMA") in evaluating the proposals during its first lawsuit when it should have. Regardless, the Port staff's scoring of responses to the RFP was not subject to the OPMA. Nor did the

Commission conduct any official business in private. Although the Port complied with the OPMA throughout the RFP process, the Commission's final action to award the contract in an open public meeting, at which STITA fully participated, cured any potential OPMA violation.

Further, the Port CEO acted within his authority, and in compliance with the RFP, in negotiating the final contract. That authority was subsequently reconfirmed and ratified by the Commission leaving no doubt that the Port CEO's actions were not *ultra vires*.

STITA's new constitutional theories – raised for the first time in an opposition brief at a third summary judgment hearing – are without merit. This Court should affirm the trial court's dismissal of STITA's claims.

II. STATEMENT OF ISSUES

- A. Whether the OPMA required Port staff to evaluate and score RFP responses in a public meeting or required the Commission to independently score the individual RFP responses before authorizing the award of the contract?
- B. Whether the Commission violated the OPMA by discussing via email whether an issue was ripe to place on a meeting agenda?
- C. Whether the Commission's final action authorizing the award of the taxi concession at an open public meeting, during which the Commission received public testimony, including from STITA, and thereafter publicly debated and voted on the issue cured any alleged OPMA violations?

- D. Whether the Port CEO acted within the scope of authority delegated by the Commission by negotiating the final terms of the concession agreement with Yellow Cab?
- E. Whether the Port Commission's ratification of a contract that it was legally authorized to enter in the first place moots STITA's claims based on the terms of that contract?
- F. Whether STITA's due process rights are violated where it has failed to assert a protected property right?
- G. Whether the concession agreement constituted an unconstitutional gift of public funds when there was no prior contract that was modified, and the final agreement was in substantially the same form as the sample agreement?

III. STATEMENT OF THE CASE

A. Port Staff Created the Airport Taxi Concession RFP.

For 20 years, STITA enjoyed a monopoly on on-demand taxi service at the Airport. CP 2214. Consistent with Commission direction to increase competitive opportunity at the Port, Port staff determined that it was time to put the on-demand taxi concession out to bid. *Id.*

Port staff has the responsibility for contracting on behalf of the Port. *Id.*; CP 2223-24. As part of that responsibility, staff regularly creates, issues and evaluates RFPs as a means to implement the Commission's desire to use open, competitive processes for selection of service providers. CP 2214. Staff does so pursuant to authority over day-

to-day operations at the Airport delegated to the Port CEO by state law and Commission resolution. *See* RCW 53.12.270; CP 2220-44.

In 2008, Port staff began developing a RFP for the Airport taxi concession. CP 2214. After consulting with myriad stakeholders (including the City, the County, the taxi owners association, and the taxi drivers association), Port staff drafted and published a RFP, conducted preproposal meetings and responded to questions. *Id.* STITA and its drivers were active participants in the process. CP 2215. Throughout the process, Port staff periodically updated the Commission on the RFP process. *See e.g., id.*, CP 2246-47.

The RFP – issued on September 25, 2009 – solicited proposals for the management and operation of exclusive on-demand taxi-cab services at the Airport for a five-year period. CP 2215, 2500-60 (RFP). The concession included the right to operate 210 taxi cabs at the Airport. CP 2504. The RFP was drafted to achieve four objectives for the Port: (1) Maintain safe, efficient service with maximum five-minute wait times; (2) Operate an environmentally superior fleet and reduce deadheading; (3) Provide economic benefit to taxi associations, operators, drivers and the Port; and (4) Standardize taxi rules and regulations within the Region to the greatest extent possible. CP 2266.

The RFP set forth the proposal requirements, the minimum qualifications for the proposers, the criteria upon which the proposals would be evaluated, and the Port staff that would evaluate the proposals. CP 2507-08, 2511-13, 2552. It further provided that the successful

proposer would enter into an agreement with the Port “substantially in the form” of a sample contract attached to the RFP. CP 2510. The RFP contained a “Proposer’s Certification” in which all proposers acknowledged that “[t]he Port has the right to negotiate fees and other items it deems appropriate for the benefit of the Port and the traveling public.” CP 2514 (emphasis added). Indeed, STITA recognized the importance of post-award negotiations. Prior to submitting a proposal, STITA’s consultant and proposal drafter wrote to STITA’s attorney that:

[T]he RFP was written with...a series of analytical challenges that are better hammered out in discussion and negotiation. ... [T]here is no getting around the fact that the RFP opens a Pandora’s Box of economic modeling, strategic planning, and risk analysis that doesn’t preclude negotiation – it makes negotiation more important than ever.

CP 3630 (emphasis added).

B. Port Staff Evaluated the Responsive Proposals.

Six taxi associations submitted proposals in response to the RFP. CP 3072. Port staff most familiar with airport ground transportation operations and requirements analyzed and evaluated each proposal. CP 2215, 2255. The evaluators scored each proposal based on the RFP’s criteria including business, customer service, and operations plans; revenues to the Port; deadhead reduction¹; financial stability; and experience, qualifications and references. CP 2215, 2249. Based on these five criteria, staff determined that Yellow Cab had received the most

¹ Deadheading is the term used to refer to the situation when a taxi leaves the Airport with a passenger, but then returns to the Airport without a passenger.

points (81 out of a possible 100). *Id.* STITA finished third, 11 points behind Yellow Cab. CP 2216, 2249.

C. The Commission Authorized the Port CEO to Award and Negotiate the Concession Agreement with Yellow Cab.

At an open public meeting on November 30, 2009, Port staff told the Commission that it was close to making a recommendation on the taxi RFP award. CP 3073. In early December 2009, the Commissioners discussed via email whether the time was ripe to put the taxi RFP award on the agenda for the December 15, 2009 Commission meeting, or to delay consideration of the issue until two new Commissioners took their positions in January 2010. CP 2954-57, 2959.

On December 9, 2009, Commission President Bill Bryant emailed the Commission's Chief of Staff Mary Gin Kennedy to determine whether the Commissioners had decided to place the taxi RFP on the December 15th meeting agenda. CP 2961-62. In response, Ms. Kennedy relayed her efforts to ascertain the Commissioners' views on whether to do so:

Commissioner Bryant: "I agreed to put this issue to a vote on the 15th based on an assurance a majority of the commission wanted to proceed. Is there a majority wishing to proceed? ... I was not sure a consensus existed, but if you are confident one does we should move forward... Are there three votes to proceed on the 15th?"

Ms. Kennedy: "I circulated John's [Commissioner Creighton] motion this afternoon. He indicated he would vote for the RFP along with his motion. So, I have 2 yes votes, 1 probably yes (JC), 1 yes, maybe or not (Lloyd [Commissioner Lloyd Hara]) and you. I'm still working the issue."

CP 2961 (emphasis added). The next day, December 10, Ms. Kennedy

emailed Commissioner Bryant informing him there were now “4 yes votes for awarding the taxi contract” at the December 15th meeting. CP 2964.

STITA argues that these emails show that the Commissioners had taken final action to award the contract to Yellow Cab. But Ms. Kennedy explained in her deposition that the “4 yes votes” meant that “four Commissioners wanted to put the item on the agenda” for December 15th rather than wait until January. CP 2971-72, 2974-75, 2979. The “votes” were not to award the concession. *Id.*; *see also* CP 2982 (Commissioner Tarleton stating “I am ready to vote whenever it comes on the agenda.”); CP 2985 (Commissioner Creighton indicating that he would support Commissioners Davis and Hara in putting the issue on the Dec. 15th agenda); CP 2988 (“I support adding it to the 12/15 meeting agenda.”).

Indeed, staff did not notify the Commission of its recommendation of the award to Yellow Cab until a memorandum was sent to Commissioners on December 11, 2009 – the same day that the recommendation was made public. CP 2992, 2973-74. Prior to that time, the recommendation was kept secret and known only to the evaluators, Port counsel, and members of Port senior management. CP 3073.

On December 11, 2009, the Port also sent a letter to the proposers announcing the Port staff’s recommendation. CP 2251-56, 3073-74. This letter stated that Port staff intended to request that the Commission authorize the Port CEO to award the concession to Yellow Cab. *Id.* The letter further stated “[o]nce the Commission gives that authorization, the Port will commence negotiations with Puget Sound Dispatch, Inc.” *Id.*

At the December 15th meeting, Port staff stated that the question before the Commission was whether to authorize the Port CEO to award the concession agreement to Yellow Cab. CP 2265-69, 2995, 3002. The Commission received written materials regarding the recommendation, including the proposal scoring sheet, and was briefed by staff orally. CP 1379-80, 2265-69, 2994-3015. This included a review of the four objectives of the RFP process and the on-demand contract. CP 2266.

The Port staff did not know how the Commissioners would vote at the meeting. CP 3073-74. While the staff was hopeful that the Commission would support its recommendation, staff was not certain the Commission would do so. *Id.*, CP 2979 (Ms. Kennedy: “I don’t believe that until the actual meeting I was sure on several of the Commissioners how they would actually vote.”). Indeed, based on public testimony and questioning from the Commission at the December 15th meeting, Paul Grace (the Airport Operations Director who presented the RFP award to the Commission for consideration) believed the Commission may reject the staff’s recommendation. CP 3074.

During the December 15th meeting, the Commission discussed and heard testimony on the issue for over two hours. CP 2265-69. Thirty-one people submitted public comments or testimony on the issue. *Id.* STITA was well represented – 21 individuals from STITA presented testimony, and 26 of the 31 public comments spoke on behalf of STITA’s position,

including STITA's attorney.² CP 2266-68.

The Commissioners debated the issue after the testimony, some of them expressing conflicting feelings on how to vote and struggling with the decision to move away from STITA while acknowledging that it was best for the Port to do so. CP 2268-69, 3006-09, 3012-14. The trial court recognized that Commissioners "expressed angst at the decision they were being called upon to render" and ruled that the Commissioners were not "bound" by the staff's recommendation. CP 3019-20.

At the conclusion of the meeting, the Commission approved the staff recommendation by a vote of 4-1. CP 3074. In discussing the Commission's formal action, Commissioner Bryant stated: "Just to clarify what we're deciding here today, it's my understanding that we're authorizing the CEO to go forward and negotiate the contract. Does the contract come back before the Commission, or is this authorization the final act on the part of the Commission?" CP 3002. Mr. Grace responded: "I believe this is the final, Commissioner Bryant." *Id.*

In a separate motion after the vote to authorize the CEO to make the award, the Commission discussed the issue of deadheading at the Airport. CP 2269. The Commission voted to direct the CEO and staff to further discuss deadheading with the City of Seattle and King County, and

² Video and audio of the December 15, 2009 meeting is available online. The discussion of the taxi concession agreement is available at http://www.scctv.net/posvod/pos_2009_12_15_6i.asx.

to “negotiate in good faith to accommodate and incorporate any such solutions within the terms of the [taxi concession] agreement.” *Id.*

Following the Commission’s authorization, Port staff engaged in a series of negotiation meetings with Yellow Cab as contemplated by the RFP, the Proposer’s Certification, the December 11, 2009 letter, and the Commission. CP 2216.

D. STITA’s First Lawsuit and Contract Execution.

STITA filed a lawsuit against the Port on January 29, 2010, challenging the RFP and bidding process. CP 2345-60. Although STITA was aware that Port staff had evaluated and scored the proposals, no claim was made in that litigation that such action violated the OPMA. STITA moved for a temporary restraining order (“TRO”) to prevent the Port from entering into a contract with Yellow Cab. After complete briefing and a full hearing on the merits, the trial court denied STITA’s motion on February 8, 2010. CP 2362. The court concluded that STITA had not timely protested the RFP, instead participating in the process hoping to win, and therefore waived its opportunity to challenge the RFP. CP 2641.

STITA immediately appealed the trial court’s ruling to this Court, which granted a stay prohibiting the Port from entering a contract with Yellow Cab while the appeal was pending. On June 7, 2010, this Court affirmed the trial court’s denial of STITA’s motion for a TRO, and held that STITA’s claims were without merit. CP 2364-75 (opinion in *STITA v. Port of Seattle*, No. 64857-8-I, 2010 WL 2283621 (2010)).

STITA petitioned the Washington Supreme Court for review of this decision. The Supreme Court denied STITA's petition for review on August 5, 2010, thereby terminating the stay in proceedings. CP 2377.

On August 6, 2010, almost nine months after the original award, the Port and Yellow Cab formally executed the concession agreement for on-demand taxi services. CP 2217. As a result of STITA's legal action against the Port and Yellow Cab, the contract start date was delayed by two months, to November 1, 2010. *Id.* As a result of the stay of execution pending appeal, the ramp-up period between contract execution and contract start was squeezed from eight months to less than three months. CP 2217, 3076. The delay led to a change in dates for certain contract terms. CP 2217. The Port's ability to implement its priorities as reflected in the RFP, including deadheading and revenue priorities, was also delayed by the stay STITA obtained. *Id.* In all cases, however, the revised dates never provided Yellow Cab with more time to comply with the terms of its proposal than was originally contemplated in the RFP and sample contract. Yellow Cab has successfully provided taxi service at the Airport under the concession agreement for over a year. CP 4040.

E. This Lawsuit and STITA's Late-Filed Cross-Claims.

On February 12, 2010, four days after the trial court in STITA's action denied the motion for a TRO, Rainier Dispatch, LLC filed the current action alleging collusion between proposers. CP 1-6. On June 28, 2010, three weeks after this Court affirmed the denial of STITA's

challenge to the award, STITA filed six cross-claims against the Port in this action, again challenging the concession award. CP 274-308.

In October 2010, the trial court ruled on a number of claims over the course of two lengthy summary judgment hearings. STITA asserted new legal theories throughout the summary judgment proceedings, including arguing new theories for the first time in reply briefs and moving for a writ of mandamus on the eve of the second summary judgment hearing (and only moving to amend its complaint to include the claim for a writ after the trial court denied the motion). CP 2777-89, 3020, 3873-77. Ultimately, the court granted the Port summary judgment on all of STITA's cross-claims except for an *ultra vires* claim. CP 3878-87, 3994-99. STITA's *ultra vires* claim was based on an allegation that:

The Port's contract with Yellow is...void because the CEO acted beyond his authority by executing a contract that was substantially different from the version Yellow promised to sign.

...

[T]he CEO was limited by the authority the Commission granted. In other words, the CEO lacked authority to execute the new agreement because the Commission had not delegated *carte blanche* authority to the CEO to make any contract he wanted....

CP 975. Accordingly, the trial court based its initial ruling denying the cross-motions on the *ultra vires* issue on whether the Port CEO's negotiation and signing of the final concession agreement was within the authority delegated to him by the Commission. CP 3021.

In June 2011, the Commission took action to clarify that the final terms of the Yellow Cab concession agreement were within the Port

CEO's authority to negotiate. CP 4039-40. On June 14, 2011, the Commission voted unanimously to ratify the Port CEO's "exercise of authority pursuant to the previous Port Commission's December 15, 2009 direction and delegation of authority." CP 4042. The briefing provided to Commissioners prior to the vote made clear that the Commission was being asked to affirm the Port CEO's "exercise of authority and the resultant agreement" with Yellow Cab. CP 4040, 4046-49. The Commission also was provided a document reflecting all of the changes between the final concession agreement and the draft agreement that was attached to the RFP. CP 4050-95.

Based on the Commission's confirmation and ratification of the Port CEO's authority, the Port moved for summary judgment on STITA's *ultra vires* claim. CP 4028-38. In opposition, STITA argued for the first time that the Port's actions violated due process and the constitutional prohibition on gifts of public funds. CP 4101-32. STITA did not raise these theories in its original cross-claims, amended cross-claims, or affirmative motion on the *ultra vires* issue. The trial court granted the Port's motion and dismissed STITA's claims in their entirety. CP 4578-81. The trial court did not rule on STITA's newly raised constitutional claims. *Id.*

STITA now appeals some of the rulings from the three summary judgment hearings.

IV. ARGUMENT

A. Staff Evaluation of RFP Proposals and Negotiation of Final Contract Terms are not Subject to the OPMA.

1. *Res Judicata Bars STITA's Claim that Port Staff Should Have Evaluated the Proposals in Open Public Meetings.*

As an initial matter, the trial court ruled that STITA waived its argument that the Port violated the OPMA when staff evaluators did not conduct open public meetings because STITA did not bring the claim in its first action. CP 3018-19, 3022-23. STITA does not offer any argument in its brief on this point. Consequently, the issue is not before this Court, the ruling stands, and STITA's argument fails. *J-U-B Engineers, Inc. v. Routsen*, 69 Wn. App. 148, 152, 848 P.2d 733 (1993); RAP 10.3.

The trial court's ruling was well-founded. "The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again." *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009) (quotations omitted). The doctrine applies to any matters that were considered or could have been considered. *Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.*, 118 Wn. App. 617, 627-28, 72 P.3d 788 (2003). In short, "when the parties to two successive proceedings are the same, and the prior proceeding culminated in a final judgment, a matter may not be relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding." *Id.* (quotations omitted).

STITA's OPMA claim related to the evaluation of proposals rests on the same pre-award evaluation at issue in its initial litigation. STITA could have known of and raised its claims at the time. STITA examined the RFP process, evaluation and scoring, and sent five protest letters to the Port prior to filing its initial lawsuit. As a participant in the RFP process, STITA was aware that Port staff scored the RFP in private. Despite this, STITA did not raise its OPMA claims in its initial lawsuit. It was not until STITA lost in that action that it brought cross-claims on these long-known grounds in this case. Res judicata bars STITA's claims on this point.

2. Port Staff Who Evaluate RFP Proposals and Negotiate Contracts are not "Governing Bodies" under the OPMA.

STITA's OPMA claim based on the staff evaluators' actions also fails on its merits. The OPMA applies to "[a]ll meetings of the governing body of a public agency." RCW 42.30.030. The term "governing body" is defined as "the multimember board, commission, committee, counsel, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2). The Port does not dispute that the Commission is subject to the OPMA. But Port staff does not act as a "committee thereof" whenever it makes evaluations and recommendations related to Port business, and did not in this case specifically. Simply put, the staff did not act on behalf of the Commission, conduct hearings, or take testimony or public comment. Their actions are not within the scope of the OPMA.

For the OPMA to apply to a committee, the governing body must appoint or create the committee. In *Clark v. City of Lakewood*, the Ninth Circuit held that a task force considering the development of a new adult entertainment ordinance in the City of Lakewood was a committee of a governing body subject to the OPMA where it “was created as a committee of the Planning Advisory Board (a ‘governing body’) and it took testimony and public comments, conducted hearings and acted on behalf of the Board and the City Council (both ‘public agencies’).” 259 F.3d 996, 1013 (9th Cir. 2001).

The legislative history of the “committee thereof” clause further confirms that the OPMA only applies where the governing body creates the committee to perform its work. The clause was added to the definition of “governing body” by Laws of 1983, ch. 155, § 1, p. 669. Prior to the amendment, the OPMA only applied to committees created by or pursuant to a statute, ordinance or other legislative act. See AGO 1986 No. 16 at 4.³ The additional language was inserted to make the OPMA apply to “all committees created by a governing body pursuant to its executive authority.” *Id.* at 5 (emphasis added).

³ Attorney General Opinions, although not controlling, are entitled to “great weight.” *Thurston County ex rel. Bd. of County. Comm’rs v. City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151 (2004); *Org. to Preserve Agric. Lands v. Adams County (“OPAL”)*, 128 Wn.2d 869, 883, 913 P.2d 793 (1996) (quoting Attorney General Opinion interpreting the OPMA). AGO 1986 No. 16 analyzes the application of the OPMA to “committees thereof,” and contains a comprehensive discussion of the legislative history of RCW 42.30.020(2) that is directly on point to the issues before this Court.

There is no dispute that the staff team that evaluated the RFP proposals was not appointed, created or brought into being by the Commission. The RFP process was created by and vested in Port staff from the beginning, as part of its duty to carry out daily operations. The OPMA does not apply to the staff's evaluations of the proposals.

3. *Port Staff Did Not Engage in Policy or Rulemaking.*

This conclusion is consistent with the OPMA's general limitation that it applies only to a "policy or rule-making body of a public agency." RCW 42.30.020(2). Where, as here, staff or a committee does not engage in policy or rulemaking, the OPMA does not apply. The statute's legislative history is again informative. In explaining the 1983 amendment applying the OPMA to committees, Representative Hine stated that:

It's the intent of the legislation, we believe, subject to the deliberations of the governing body, that this apply only to the deliberations of the governing body or subcommittees which the governing body specifically authorizes to act on its behalf, or which policy, testimony or comments are made in its behalf. In other words, it's when making policy or rules, not for general comments or any kind of informal type meeting they may have. Those would not require the official formal notice.

House Journal, 48th Legislature (1983), at 1294 (emphasis added).

STITA incorrectly suggests that the OPMA should be read to include all staff actions that inform the Commission. Such an overbroad interpretation is not supported by the text of the legislation. Indeed, such a broad reading would render meaningless the language limiting application of the OPMA to only when a committee acts "on behalf of the governing

body, conducts hearings, or takes testimony or public comment.” RCW 42.30.020(2). As the Attorney General points out, if the OPMA applied any time a committee “performs a specified function in the interest of the governing body,” then the Legislature could have simply left out the limiting language. AGO 1986 No. 16 at 7-12. Accordingly, where the ultimate policy or rulemaking decision resides with the governing body, and the committee only provides advice or information to that body, the OPMA does not apply. *See Salmon For All v. Dep’t of Fisheries*, 118 Wn.2d 270, 278-79, 821 P.2d 1211 (1992) (employees of a state agency do not constitute the governing body of that agency where the agency head is not bound to accept the recommended regulations and policies).

Here, Port staff did not act in a policy or rulemaking capacity. The details of the RFP process, evaluating bids and negotiating specific terms are not actions that create new policies or rules for the Commission. Port staff briefed the Commission on the RFP’s creation and progress, but the Commission took no formal action until it authorized the award in an open public meeting. Notwithstanding STITA’s suggestion that certain Commissioners may have had questions about parts of the staff recommendation, a majority of Commissioners agreed to adopt it.

4. *The OPMA Does Not Apply to Normal and Customary Public Employee Operational Evaluations, Recommendations, and Negotiations.*

STITA’s view of the OPMA would require public agencies to evaluate proposals and negotiate all contract terms in open public meetings whenever an RFP process is used. Such a result is not supported

by the OPMA and would render a major change in how public agencies contract in Washington.

First, contract negotiations by agency employees are not subject to the OPMA generally. In *Salmon For All*, the Supreme Court held that “[n]egotiations of employees of a state agency involved with other jurisdictions do not constitute the ‘governing body’ of that agency even though the agency may ultimately, after evaluation by a director or a ‘governing body,’ ratify or accept the results of the negotiations of its employees.” 118 Wn.2d 270 at 278-79. At issue was whether Department of Fisheries employee discussions and negotiations with the State of Oregon and treaty tribe officials regarding policies and regulations that ultimately became Department rules were subject to the OPMA. *Id.* at 275. The Supreme Court unanimously rejected the argument that the Department of Fisheries “merely ‘rubberstamps’ the recommendations of the...negotiations.” *Id.* at 278. The staff was given latitude to engage in negotiations and bring forth recommendations, as long as any final policy or rulemaking authority rested with the director or governing board. *Id.* at 279. STITA brings a parallel “rubberstamp” argument against the Port. STITA’s Br. at 41 (“the committee’s decision was...subject to only a procedural rubber-stamp from the Commission.”). Like in *Salmon For All*, STITA’s OPMA claim should be rejected. *See infra* IV.C.

Second, such a reading of the OPMA would void most public contracts in Washington, an absurd result. Public agencies regularly engage in competitive RFP processes to solicit and evaluate proposals and

bids for contracts. But in the state's competitive contracting rules, followed by the state's General Administration ("GA"), there is no mention of the OPMA in the regulations concerning proposal evaluation and contract negotiation. See WAC 236-51-410, 236-51-605. In fact, STITA's position directly contradicts this regulatory scheme, which requires that GA bids "shall not be released or otherwise distributed until after the agency completes the evaluation and issues its notice of intent to award." WAC 236-51-405; see also RCW 43.19.1911(8) (requiring bids submitted pursuant to GA procurement procedures be kept confidential until after letting of contract); RCW 39.10.360(4) (requiring bid information be kept confidential until bids are opened). Requiring proposals to be evaluated in open public meetings is contrary to the confidentiality required to ensure the integrity of the evaluation process. This Court should decline STITA's invitation to undermine the regulatory and statutory principles governing evaluation of proposals, the result of which would be to void numerous public contracts in existence today.

Cathcart v. Andersen, 85 Wn.2d 102, 530 P.2d 313 (1975), upon which STITA relies, is inapposite. In *Cathcart*, the court held that the University of Washington law school faculty was a governing body to which the OPMA applied. The court found that the faculty was a governing body because it made rules and set policy as authorized by statute and also served in a quasi-legislative capacity. *Id.* at 106. Contrary to STITA's reading, the court did not hold that the faculty was a governing body because the board of regents adopted its decisions as a matter of

course. Rather, the court held that the faculty was a governing body because of the types of decisions it made, and that the board of regents' perfunctory approval of those decisions did not take away the fact that the faculty was conducting activities subject to the OPMA. *Id.* at 107. Unlike the law school faculty in *Cathcart*, here the evaluators did not make policies, rules or quasi-legislative decisions.

STITA's reliance on non-Washington authority is similarly unpersuasive. In *Wheeling Corp. v. Columbus & Ohio River RR. Co.*, 771 N.E.2d 263, 272 (Ohio Ct. App. 2001), the court held that a an RFP evaluation committee was subject to Ohio's open meetings act where "[a] majority of the Selection Committee's members were commissioners of the commission itself...[and] the Selection Committee was established by the [public body]". Here, no Commissioners served as evaluators and the Commission did not establish the group of Port staff that evaluated the proposals.⁴ Moreover, the *Wheeling Corp.* court's construction of the Ohio open meetings act is much broader than and contrary to the scope of the OPMA as set forth in *Salmon For All, Clark* and its legislative history. Compare *e.g., id.* (implying that Ohio's open meetings act applies to any public group that makes decisions) with RCW 42.30.020(2) (OPMA applies only to the "policy or rule-making body of a public agency").⁵

⁴ STITA asserts without citation that the Port argues that the OPMA does not apply because no Commissioners served on the committee. STITA's Br. at 42. The Port has never asserted this argument. Regardless, the fact is no Commissioners worked with the Port staff in evaluating proposals, contrary to the facts in *Wheeling Corp.*

⁵ STITA's citation to *Great Falls Tribune Co., Inc. v. Day*, 959 P.2d 508, 513 (Mont. 1998), fails for the same reason. In that case, the court held that Montana's constitutional

5. *The Commission was Not Required to Score the Proposals.*

STITA provides no legal support for its blanket assertion that the Commission was obligated to evaluate and score RFP proposals itself.⁶ As established above, Port staff (and governmental agencies generally) regularly draft RFPs, solicit, evaluate and score proposals, and negotiate contract terms. From the very beginning of the RFP process, indeed within the RFP itself, it was clear that Port staff would score the proposals and make a recommendation to the Commission based on the outcome of that scoring process. The Commission's role was to authorize the Port CEO to award the concession agreement to the highest scorer.⁷ To the extent STITA is claiming that the Commission, rather than Port staff, should have scored the proposals it is barred from asserting that challenge to the RFP process. *Supra* IV.A.1.

STITA overstates the court's holding in *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 611 P.2d 396 (1980), when it claims that the case stands for the proposition that governing bodies must evaluate and score

provision regarding open meetings applied to all committees that involve "governmental responsibility." This interpretation of Montana's constitution is broader than the scope of Washington's OPMA.

⁶ STITA asserts that the Port claims it left "it to the Port Commission to actually score the proposals." STITA's Br. at 43. The Port has made no such claim.

⁷ STITA provides no basis for its suggestion that the Commissioners were compelled to accept the staff's recommendation. *See infra* IV.C. STITA's quotation of a Commissioner's statement that "the commission cannot do anything about the outcome of the decision" is taken out of context. STITA's Br. at 41. The "outcome" the Commissioner referred to is the objective selection of the high scoring proposal based on the RFP. The Commission could not, in fairness, change the outcome of the competitive process the staff undertook in evaluating the proposals. But the Commission was not bound to accept the staff's recommendation; it could reject the recommendation and establish a different process or ask for proposals to be rescored using different criteria.

RFP proposals in order to authorize staff to award a contract. In *Equitable Shipyards*, the court addressed the OPMA in one paragraph and simply held that a commissioner’s independent and separate examination of documents outside of an open meeting did not constitute an “action” or “meeting” that implicated the OPMA. *Id.* at 482. The court further noted that the plaintiff had not alleged any facts supporting an OPMA violation. *Id.* The court did not address, much less lay out a roadmap, for how a public body may comply with the OPMA as STITA suggests.

Moreover, STITA misstates the facts when it asserts that the Commission had no information on which to make its decision to approve or reject the award to Yellow Cab.⁸ The Commissioners had significant information before them on which to make a final decision, including the proposal scoring sheets, written materials, oral briefing by staff and email and meeting updates prior to December 15th. No decision was made until hours of public testimony, much of it coming from STITA, was heard and considered. *See infra* IV.C. The Commission’s significant experience

⁸ STITA misconstrues Commissioner Tarleton’s statements during the December 15th meeting. STITA’s Br. at 44. Commissioner Tarleton’s statement that she didn’t “know the reason for” STITA’s low ranking on the revenue factor was not an indicator that she did not know how scores were reached, as STITA asserts. Rather, Commissioner Tarleton did not “know the reason” that STITA gave such a low revenue proposal in comparison to the other proposers. CP 3007 (“I don’t know how you were so far below the other top four.”). Commissioner Tarleton’s point was reflecting on whether the weighted formula should have been drafted differently in the RFP to give revenue less importance. CP 3009 (“I am asking myself whether we can delay this for the new commissioners to make a decision in January about whether the evaluation criteria for revenue to the Port should have been weighted at 30 percent.”).

with the taxi concession and the content of the December 15th open public meeting were a sufficient basis on which to make its decision.

B. The Commission’s Vote on the Taxi Concession Agreement Award Complied with the OPMA.

The only action the Commission took on the award was at the open public meeting on December 15th, where the Commission voted to authorize the CEO to award the contract. This final action fully complied with the OPMA. STITA’s argument that the Commission voted to award the taxi contract to Yellow Cab in private does not survive scrutiny.

Not all non-public discussions between members of a governing body violate the OPMA. *See Wood v. Battle Ground School District*, 107 Wn. App. 550, 564, 27 P.3d 1208 (2001). In *Wood*, the court addressed when exchanges of emails constitute a “meeting” that violates the OPMA. The court held that not every email discussion is automatically a meeting because there is a “balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively.” *Id.* (emphasis added). Thus, the mere use or passive receipt of email is not a *per se* violation of the OPMA. *Id.* Rather, for the OPMA to apply (1) a quorum must be present, (2) “the participants must collectively intend to meet to transact the governing body’s official business,” and (3) the communication must be about issues that will come

before the governing body. *Id.* at 564-65 (emphasis added).⁹ The OPMA is not violated where Commissioners merely receive documents and information about upcoming issues or independently examine the same. *Id.*; *Equitable Shipyards*, 93 Wn.2d at 482.

Here, there was no collective intent to decide the taxi RFP award prior to the December 15th meeting. STITA mischaracterizes emails to assert that the Commission met “secretly” to award the taxi contract prior to the December 15th meeting. No reasonable reading of those emails supports this claim. The email string between Commissioners and Port staff relied on by STITA only relates to whether the taxi RFP and a companion motion should be placed on the agenda for a vote at the December 15th meeting. CP 2982 (Commissioner Davis stating “I would like to request that we put the taxi RFP on the Dec. 15 agenda” and response from Commissioner Tarleton indicating she was “ready to vote whenever [the issue] comes on the agenda.”); CP 2988 (Commissioner Creighton stating “I support adding it to the 12/15 meeting agenda”). Commissioners’ emails from the same time period reflect that no substantive discussion or vote on the award itself took place. *See* CP 3025 (Commissioner Davis stating in Dec. 2nd email that at the Dec. 15th meeting “[w]e either approve or not”); CP 2988 (Commissioner Creighton’s reply to the Dec. 3rd email stating that his vote at the meeting

⁹ STITA omits the second requirement, collective intent, in its citation to *Wood*. STITA’s Br. at 45.

will depend on if certain terms can be included in the contract).¹⁰

STITA points to a December 10th email from Ms. Kennedy stating that there were four “yes” votes on the issue. CP 2964. As Ms. Kennedy explained in her deposition, this email only indicated that she had confirmed the required four “yes” votes to place the issue on the meeting agenda rather than to wait until newly elected Commissioners took office in January to address the issue. CP 2971-72, 2974-75, 2979. Further, the December 10th email between Ms. Kennedy and Commission President Bryant does not refer to or reflect any meeting of Commissioners in private or otherwise. Only one Commissioner, not a quorum, is present on the December 10th email string. CP 2964. The email merely states that staff believed they “have 4 yes votes for awarding the contract.” *Id.* This is not proof of a private vote by the Commission to take final action on the issue. Indeed, if there was a secret vote as STITA claims, there would be no need for a staff person to convey such information to a Commissioner.

Subsequent emails from Port staff to the Commission provide further evidence that a substantive vote did not take place. For example, in a December 14th email, Ms. Kennedy advised Commissioners that on December 15th “[t]he Commission can vote to uphold the recommendation or not to (or delay to January).” CP 3029. Until the day of the meeting,

¹⁰ Commissioner Creighton’s email related to the general barriers to finding deadheading solutions, and how it would have to be discussed in the future with the City of Seattle. CP 2988. When the taxi RFP award came up at the December 15th meeting, Commissioner Creighton repeated these concerns in public and later introduced a separate motion on the issue. CP 2999.

Commissioners were receiving information from staff to help inform their vote. CP 3031 (email from Port staff transmitting to the Commissioners “a FAQ...on the Taxi RFP you will be considering at today’s Commission meeting.”). Indeed, Port staff did not know how the Commission would vote until the December 15th meeting. CP 3074.

Discussion of which items should be placed on a future meeting agenda is not the type of discussion subject to the OPMA. Rather, such discussions are necessary for the governing body to function properly. *See Wood*, 107 Wn. App. at 564. Setting an agenda in advance of an open public meeting also facilitates public participation by providing notice of what will be discussed. Thus, putting the taxi concession agreement on the agenda in advance allowed STITA notice and opportunity to present public testimony, an opportunity of which it took full advantage.

Nor do such discussions concern the substance of “the governing body’s official business” as required for an OPMA violation. *Id.* at 565. The substance of the official business here would be whether to award the concession agreement to Yellow Cab. Scheduling the date on which to discuss the RFP award, however, is no more than a procedural prerequisite to that future open discussion. The Commission’s actions here contrast starkly with the OPMA violation found in *Wood*. In that case, the governing body discussed board business extensively over email, including deciding whether or not to institute a declaratory judgment, evaluating a former employee’s performance and actively exchanging information and opinions. *Id.* at 565-66. The Commission’s emails here

do not establish similar substantive decision making.

Further, there was no back and forth among Commissioners that would constitute a discussion in violation of the OPMA. While the OPMA defines “action” to include “discussions” of an issue, the term “discussions” is not defined. RCW 42.30.020. The dictionary defines “discussion” as: “consideration of a question in open usu. informal debate; argument for the sake of arriving at truth or clearing up difficulties.” *Webster’s Third New Int’l Dictionary* at 648 (3d ed. 1986) (emphasis added). Inherent in this definition is that discussion requires dialogue and exchange of opinions or views between more than one person. In one email on which STITA relies, Commissioner Creighton expresses his opinion regarding putting forth a motion on the deadheading issue. CP 2988. While Commissioner Creighton expressed his view on the issue, there was no “discussion” in violation of the OPMA because no dialogue about the substance of the proposed motion took place.

C. The Commission’s Approval of the Award to Yellow Cab During an Open, Public Meeting Cured any Alleged OPMA Violations.

Although the Port complied with the OPMA leading up to the December 15th meeting, the Commission cured any alleged violations when it received briefing from Port staff, heard over two hours of public testimony, debated the issue on the record, and voted to authorize the CEO to award the concession to Yellow Cab at the December 15th meeting.

Meetings held in violation of the OPMA will not invalidate a later final action taken in compliance with the statute. *OPAL*, 128 Wn.2d at

883-84. In *OPAL*, county commissioners discussed in private how they would vote on an issue at an upcoming meeting. *Id.* at 881-82. Without deciding whether such discussions violated the OPMA, the Supreme Court held that the discussions “were irrelevant because the final vote occurred in a proper, open public meeting.” *Id.* at 883-84.

In reaching that conclusion, the *OPAL* court examined a limited exception to the general rule that a subsequent valid open public meeting cures any prior violations. The exception only applies where the subsequent public meeting is “merely summary approval of decisions made in numerous and detailed secret meetings.” *Id.* at 884. In *OPAL*, the court held the open public meeting at issue was more than a summary approval of prior voting based on “the extensive opportunity for input by opposing parties in this case,” and that the meeting therefore cured the alleged violations. *Id.* The court looked to authority from the Florida Supreme Court that similarly held a subsequent open public meeting cured prior violations where the complaining party “was given a full opportunity to express his views in a formal meeting.” *Id.* (citing *Tolar v. School Bd. of Liberty of County*, 398 So.2d 427, 428 (Fla. 1981)). Accordingly, the exception to the general rule does not apply where the complaining party had a full and fair opportunity for input prior to the final action.

Here, the Commission met on December 15th in an open public meeting and authorized the CEO to award the contract to Yellow Cab. As set forth above, this meeting was anything but a routine, rubber-stamp of the contract award. It instead included staff presentations, a public

hearing and a debate by Commissioners. STITA was well represented – 21 individuals from STITA presented testimony, and 26 of the 31 public comments spoke on behalf of STITA’s position, including STITA’s attorney. CP 2266-68. “Here, unquestionably the [Commission] adopted the [award] in a public meeting after listening to a great deal of public comment, both for and against the project, much of the opposing comments coming from [STITA]. Accordingly, even if the challenged meetings violated OPMA, such violations will not nullify the properly enacted [award].” *Eugster v. City of Spokane*, 118 Wn. App. 383, 423, 76 P.3d 741 (2003), *review denied*, 151 Wn.2d 1027 (2004) (inserting current parties’ names to quote for context).

The Commissioners’ actions at the meeting reflect the legitimacy of the December 15th vote. Port staff introduced the taxi RFP at the meeting as a decision for Commissioners to make that day. *See* CP 2996 (“should the commission authorize this today”; “if awarded today”). Indeed, Commissioners were conflicted at the meeting as to how to vote. For example, Commissioner Gael Tarleton stated:

I was actually coming into this commission meeting, and I had told all of my fellow commissioners that I was really torn. I did want to hear the public testimony on all sides. I really wanted to hear what the impacts were of this. ... [S]o despite the fact that I think this RFP and this competition was conducted completely fairly, completely transparently and completely honestly with the best interest and intentions on the part of the staff, I am asking myself whether we can delay this for the new commissioners to make a decision in January.... I actually would welcome devil’s advocate opinions, different ways of looking at it from my fellow commissioners. Because I actually am very torn here.

CP 3006-09; *see also* CP 3012 (Commissioner Davis: “Well, I’m the person here who probably is going to have the most anguish over this...”). Commissioners had discretion to approve or deny the award and weighed their options seriously. As the trial court ruled, the Commissioners were not bound by the Port staff recommendation.¹¹ The vote was genuine, valid and taken only after considering STITA’s extensive input. Consequently, the December 15th meeting cured any potential earlier OPMA violations.

STITA cites no Washington authority for its position that an OPMA violation cannot be cured unless the Commission rescinds the alleged prior vote and independently evaluates and scores proposals. Indeed, this is contrary to *OPAL*. Final action in compliance with the OPMA on an issue cures prior OPMA violations related to that issue. *OPAL*, 128 Wn.2d at 883-84. The principle that a public entity can cure an irregularity related to an act by subsequent lawful action dates back at least to *Jones v. City of Centralia*, 157 Wash. 194, 289 P. 3 (1930) (holding that prior unlawful acts of municipal officials could be validated

¹¹ STITA asserted two arguments in support of its theory that the Commission’s December 15th meeting was a “sham”: (1) because the Commissioners were “bound” by the staff recommendation and (2) because e-mails between Commissioners showed a decision was made in secret beforehand. CP 3019-20. Neither theory has merit. While STITA provides some legal argument on the latter theory, it offers no support other than conclusory statements on the former. Accordingly, the ruling that the Commissioners were “bound” is not before this Court. *J-U-B Engineers, Inc.*, 69 Wn. App. at 152 (court of appeals will not consider “conclusory statements without support” and “[i]n the absence of argument and citation of authority”).

or ratified through a subsequent election of the voters).¹² As long as the action was not beyond the entity's authority, it can cure with a procedurally proper enactment.

STITA's reliance on out-of-state authorities is unavailing. In *Zorc v. City of Vero Beach*, 722 So.2d 891 (Fla. Dist. Ct. App. 1998), the court invalidated a decision reached in a meeting that, unlike the December 15 Commission meeting, did not include any "significant discussion of the issues," finding the city failed to conduct a full, open hearing sufficient to cure prior violations of Florida's Sunshine Law. *Id.* at 903. Similarly, in *Polillo v. Deane*, 379 A.2d 211, 219 (N.J. 1977), the New Jersey Supreme Court held that the content of a charter commission's subsequent meetings was insufficient to cure past open public meeting law violations.¹³ The same cannot be said here, where the Commission heard extensive public testimony and several Commissioners expressed angst at the decision they were facing. In *Port Everglades Auth. v. Int'l Longshoremen's Ass'n, Local 1922-1*, 652 So.2d 1169, 1171 (Fla. Dist. Ct. App. 1995), no "cure" of a violation of Florida's Sunshine Law occurred because the governing

¹² See also *Henry v. Town of Oakville*, 30 Wn. App. 240, 246, 633 P.2d 892 (1981) (holding that when an act is deemed unlawful due to a procedural irregularity, it may be cured by subsequent action compliant with the applicable procedure).

¹³ New Jersey's standard for curing past violations is significantly different from the Washington standard set out in *OPAL*. New Jersey's statute states that a cure is only effective if there is "de novo" action taken by the public body. *Polillo*, 379 A.2d at 219. This is not the standard in Washington for curing OPMA violations.

body never reconvened “in the sunshine”. *Id.* Here, the Commission’s December 15th open public meeting cured any OPMA violations.¹⁴

Moreover, STITA provides no analysis of what occurred at the December 15th meeting or evidence that supports its claim that the open public meeting was somehow deficient. Absent any analysis or evidence on the issue, STITA provides no basis for its conclusory allegation that the Commission did not adequately “retrace” its steps. *See J-U-B Engineers, Inc.*, 69 Wn. App. at 152 (conclusory statements insufficient on appeal).

D. The Port Acted Within Its Authority in Contracting with Yellow Cab.

An *ultra vires* act is one “performed with no legal authority and [is] characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed.” *South Tacoma Way LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). Thus, a governmental act is *ultra vires* and void only where done “wholly without legal authorization or in direct violation of existing statutes” and does not include acts within “the broad governmental powers conferred, granted or delegated, but which powers have been exercised in an irregular manner or through unauthorized procedural means.” *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968). In other words, “[a]n *ultra vires* act is one performed without any authority to act on the subject.” *Haslund v. City of*

¹⁴ STITA’s suggestion that there can be no cure for the alleged OPMA violations, and reliance on *Wheeling Corp.* in support, is contrary to Washington law as demonstrated by *OPAL* and *Eugster*, *supra*. As argued earlier, Ohio’s public meetings law is significantly different from and contrary to Washington’s OPMA, including that Ohio does not recognize a cure for violations of its law. *Wheeling Corp.*, 771 N.E.2d at 275.

Seattle, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976). Where a governmental entity has been “generally authorized” by law to undertake governmental action, it does not act *ultra vires* in taking such action. *See South Tacoma Way*, 169 Wn.2d at 123 (stating that “[i]f... the State was generally authorized to sell the surplus property, its act of doing so was not ultra vires.”). “Consequently, a contract formed between a government entity and a private entity will be void only where the government entity had no authority to enter the contract in the first place.” *Id.* (emphasis added).

1. *The Port’s Award of the Contract to Yellow Cab was Within Its Authority.*

Without question, the Port had the statutory authority to enter into the concession agreement. STITA does not challenge, nor could it, that the Port as an entity is generally and legally authorized to negotiate and enter into a concession agreement for taxi service at the Airport.¹⁵ *See* Ch. 14.08 RCW (authorizing the Port to regulate and control use of Port facilities at the Airport, and to contract by concession agreement for use of those facilities); RCW 14.08.120(5) (the Port may “grant concessions [at the Airport]...by private negotiation and under such terms and conditions that seem just and proper....”); Title 53 RCW (authorizing the formation of port districts and setting forth general grants of authority).

Nor can STITA challenge the Port’s authority to enter into the concession agreement with Yellow Cab. In STITA’s first lawsuit

¹⁵ Indeed, this is exactly the process the Port and STITA engaged in for the 20 years that the Port contracted with STITA for taxi service at the Airport.

challenging the award to Yellow Cab, this Court rejected STITA's challenges to the Port's authority to enter into a taxi concession agreement with Yellow Cab, affirmed the denial of STITA's request for a TRO and lifted the stay that had prevented the Port and Yellow Cab from signing the agreement. *STITA*, 2010 WL 2283621 at *12 (available at CP 2375). This Court's holding, and the Supreme Court's denial of STITA's petition for review, affirmed the Port's legal authority to enter into the concession agreement with Yellow Cab. Accordingly, the question is not whether the Port acted *ultra vires* (because it was legally authorized to enter into the concession agreement with Yellow Cab in the first place), but whether the Port CEO acted within the authority delegated to him in negotiating the final terms of the agreement. Indeed, the trial court ruled that the action was *ultra vires* only if "the CEO did not have the authority to sign, according to the commissioners' directive." CP 3021. The key to the initial denial of the cross-motions on the *ultra vires* issue was the scope of the Commissioners' directive.

2. *The Port CEO Acted Within His Authority in Negotiating the Final Contract with Yellow Cab.*

Pursuant to state law, the Commission has delegated certain powers and duties to the Port CEO. *See* RCW 53.12.270 ("The commission may delegate to the managing official of a port district such administrative powers and duties of the commission as it may deem proper for the efficient and proper management of port district operations."); CP 2317-27 (Port of Seattle Bylaws); CP 2220-44 (General Resolution 3605);

State ex. rel. O'Connell v. Port of Seattle, 65 Wn.2d 801, 803, 399 P.2d 623 (1965) (recognizing that port districts have incidental powers to accomplish their basic purposes). Among those powers is the authority to negotiate and enter into contracts related to Port operations. *See, e.g.*, CP 2224 (the CEO is responsible for “[e]xecution of contracts and other documents related to Normal Port Operations that are (a) related to or pursuant to a project or matter approved by the Commission,”), 2233 (the CEO is “authorized to prepare, negotiate, and manage all aspects of Port contract administration and procurement activities in order to conduct the Port’s business”). Thus, the Port CEO possesses general authority to negotiate contracts such as the agreement at issue here.

Moreover, the Port CEO is authorized to perform tasks that implement the Commission’s policy and rulemaking decisions: “It is the Commission’s responsibility to establish policy...It is the CEO’s responsibility to implement the policies, inform the Commission on how they are implemented, and report on how funds are expended.” CP 2223. Here, staff drove the RFP process and contract negotiation and informed the Commission as to implementation. Nothing more was required.

In addition to this general authority, the Commission separately authorized the CEO to award the contract to Yellow Cab at the December 15th meeting. As reflected in the meeting minutes, the Commission set out general parameters within which Port staff was directed to work in negotiating the final agreement. But, the Commission did not, contrary to

STITA's suggestion, limit the Port staff's authority to negotiate specific contract terms or wording.

The December 15th meeting minutes contain only one explicit condition on the terms of the final contract: that the Port and Yellow Cab "negotiate in good faith to accommodate and incorporate" solutions identified in future deadheading discussions. CP 2269. The minutes also reflect that the Commission took its vote after hearing and considering the Port's four objectives for the RFP process. CP 2266. Accordingly, the Port staff operated within its scope of authority by taking into account future deadheading discussions and negotiating a final contract that met the Port's general objectives for the on-demand taxi concession.

Contrary to STITA's suggestion, the final contract conforms to the principles underlying the RFP process. The final contract requires five-minute wait times, reduces deadheading, provides for an environmentally superior fleet, provides economic benefit to the Port and traveling public, and standardizes operations at the Airport. *See* CP 3225-29, 3248-49. Port staff negotiated a final contract that addresses deadheading and met the four policy objectives on terms that were favorable to the Port and taxpayers. Such action cannot be considered *ultra vires*.

STITA's argument that the Port went beyond the terms of what was contemplated in the RFP is without support. In the RFP, the Port reserved "the right to negotiate fees and other terms as it deems appropriate for the benefit of the Port and the traveling public". CP 3094 (emphasis added). Every proposer, including STITA, signed a Proposer's

Certification attesting to its agreement with this reservation of rights. *Id.* The argument is also contrary to the Commission’s understanding (as reflected in Commissioner Bryant’s “understanding that we’re authorizing the CEO to go forward and negotiate the contract” and its directive to “negotiate in good faith” future deadheading solutions). STITA’s argument conflates contracts made pursuant to strict public bidding laws that require contracts be made with the lowest bidder (and cannot be negotiated post-award) with an RFP process where “while it is true that all who submit proposals must be treated fairly, there is no legal requirement that a final contract must conform to the original RFP.” 10 Eugene McQuillin, *The Law of Municipal Corporations* § 29:33 (3d ed. 2009). The RFP process here authorized “negotiating the terms of the contract with the highest ranking bidder.” *Id.*

The Port CEO acted within his general and specific authority and pursuant to the RFP in negotiating terms of a final contract with Yellow Cab to the Port’s and traveling public’s benefit. Accordingly, the final contract negotiation was not “wholly without legal authority” and therefore is not *ultra vires* and not subject to being voided.

3. *The Commission’s Ratification of the Port CEO’s Authority to Negotiate and Enter into the Yellow Cab Concession Agreement Moots STITA’s Claim.*

In June 2011, the Commission reconfirmed and ratified the Port CEO’s authority to negotiate and enter into the final Yellow Cab concession agreement. This action removed any doubt that the Port CEO had the authority to execute the negotiated concession agreement.

“That an unauthorized contract may be ratified...will not be denied...” *Ettor v. City of Tacoma*, 77 Wash. 267, 274, 137 P. 820 (1914). In *Ettor*, the City of Tacoma claimed that certain contracts for work done on annexed land, entered into by the county prior to the city’s annexation, were *ultra vires* and void. The Supreme Court rejected this argument, reasoning that the city could legally have entered into the contracts in the first place. *Id.* at 272-75. The court held that the city ratified the contracts, and they were therefore enforceable. *Id.* at 275. This conclusion has been repeatedly reached. *See, e.g., Pierce County v. State*, 159 Wn.2d 16, 40-41, 148 P.3d 1002 (2006) (holding a properly enacted statute remedied defects in an earlier enacted statute).¹⁶

These holdings apply here. The Port was legally authorized to contract for taxi service with Yellow Cab. The Port and Yellow Cab entered into a contract for taxi service at the Airport on specific terms. Even if the Commission’s delegation to the Port CEO did not initially clearly encompass authority to negotiate all the changes in the final contract, the claimed irregularity was curable by subsequent ratification. In other words, the Commission was allowed to ratify the Port CEO’s actual exercise of the delegation of authority at the June 14, 2011 meeting. And the Commission did expressly so ratify the Port CEO’s “exercise of

¹⁶ *See also Jones*, 157 Wash. at 212 (recognizing a municipal authority’s ability to ratify contracts where the municipal authority had the power to enter into the contract in the first place); *Henry*, 30 Wn. App. at 246-47 (“[W]here a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defects by reenactment with the proper formalities.”).

authority pursuant to the previous Port Commission's December 15, 2009 direction and delegation of authority." CP 4042. STITA's *ultra vires* claim based on the Port CEO exceeding his negotiating authority is moot.

4. *Regardless, the Contract is in Substantially the Same Form as the RFP.*

Notwithstanding the fact that the final contract conformed with the Commission's direction and the objectives of the RFP process (both originally and as reconfirmed by the Commission's ratification), the final contract is in substantially the same form as the sample contract provided with the RFP. STITA makes much of the fact that the final Yellow Cab contract contains terms that are not identical to those in the sample contract. What STITA fails to acknowledge, however, is that the changes were nonmaterial and that many just relate to changes in timing necessitated by STITA's own action of filing a lawsuit and moving for a TRO. While STITA's motion for a TRO was ultimately found to be meritless, the stay in proceedings prohibited the Port and Yellow Cab from entering into a contract for almost nine months.

For example, the sample contract required 50% of the taxi fleet be "green" by September 1, 2010, and 100% by September 1, 2011. CP 3117-18. These dates were based on a ramp-up period for the winning proposer of eight months. CP 2217, 3076. STITA's litigation prevented the Port and Yellow Cab from contracting for almost nine months, yet the final contract only moves those dates six months to 50% by March 1, 2011 and 100% by March 1, 2012. CP 3248. The same is true of the

requirement for 210 dual-licensed cabs. Originally, Yellow Cab would have had eight months to contract with drivers to meet its obligation. But because of the delay induced by STITA's stay, Yellow Cab had only six months to meet this requirement, which it did.¹⁷

Other changes in terms of the final contract were nonmaterial. For example, STITA complains about changes in the deadheading requirements despite the fact that the Commission directed the Port and Yellow Cab to negotiate deadheading, and that the RFP's sample contract did not propose a particular solution or numerical goal. The sample contract contained language that the concessionaire use "all reasonable effort to minimize 'deadheading'." CP 3100. The final contract requires that Yellow Cab "use reasonable efforts to minimize 'deadheading'" – almost exactly the same language and substantively the same requirement. CP 3226. The final contract includes language that allows the Port to take into account Yellow Cab's "good faith efforts" in meeting deadheading goals. *Id.* But considering "good faith efforts" is not a material change where "reasonable" efforts were required in the sample contract.

STITA then creates smoke where there is no fire by pointing to changes in the provision for damages related to the five-minute wait requirement. The substantive requirement that passengers not wait more

¹⁷ STITA's suggestion that Yellow Cab was required to have 210 dual-licensed cabs at the time of proposal is baseless. No company, including STITA, had 210 dual-licensed cabs at the time proposals were submitted. That is exactly why the eight month ramp-up period was built into the process – so the winning proposer would have time to contract with enough cabs.

than five minutes for a taxi and a per-occurrence penalty of \$50 remain unchanged. *Compare* CP 3100 *with* CP 3226. The underlying principle – that the concessionaire should be penalized if it does not meet this term – is reflected in the final contract, notwithstanding the per day cap on penalties. Nor does the cap excuse performance; the Port can seek remedies for breach of the contract for failure to comply. Phase-in of this requirement until all 210 vehicles are available as required by the contract is attributable to the delay caused by STITA.

STITA’s also takes issue with the addition of a standard exceptional circumstances clause. The clause states that Yellow Cab will not be deemed in default for circumstances that are “unforeseeable, beyond its reasonable control, and without its fault or negligence.” CP 3234. This includes acts of God, terrorist actions, airline bankruptcies and other extraordinary circumstances. CP 3234-35. This clause merely reflects the concept of the common law contract defense of impossibility of performance – a condition that would be read into the contract regardless. *See generally Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 363-64, 705 P.2d 1195 (1985) (describing impossibility of performance). There is nothing unusual about such a clause and its addition is not a material change. STITA’s suggestion that it releases Yellow Cab from its financial guarantee is speculative and baseless. Regardless, Yellow Cab has met that guarantee. CP 4040.

STITA cannot establish that the Port CEO contravened law or went beyond his authority in negotiating the contract terms with Yellow Cab.

E. STITA's Due Process Claim is Without Merit.

STITA argues that its due process rights were violated, attempting to shoehorn this argument into its *ultra vires* claim. But STITA neither pled nor sought summary judgment on its due process claim below, instead raising it for the first time in opposition to the Port's motion for summary judgment. *See* CP 4101-32. As such, the argument was untimely and properly should be ignored. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) ("A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along."); *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (citing *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) ("a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment")); *see also Molloy v. City of Bellevue*, 71 Wn. App. 382, 385-86, 859 P.2d 613 (1993) (rejecting plaintiff's "veiled attempt" to amend complaint by raising claim in summary judgment response). STITA's tactics were improper at the trial level, and should be equally unavailing on appeal.

Regardless, STITA's due process claim fails as a matter of law. STITA contends that it has a "constitutionally protected property interest in seeing [the RFP] procedures followed", and that the Port's "refusal to follow the RPF [sic] process violated STITA's due process right to a fair bidding process". STITA's Br. at 28, 30. But as STITA's own authority establishes, "there can be no property interest in a procedure". *Three*

Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F. Supp. 1118, 1128-29 (W.D. Pa. 1980) (emphasis added). Indeed, the *Three Rivers* court found that a bidder does not have a “protected property interest in the [government’s] adherence” to procedures set forth in an RFP. *Id.* at 1128. The notion that one “cannot have a ‘property interest’ . . . in mere procedures” is well-established. *Doe by Nelson v. Milwaukee County*, 903 F.2d 499, 503 (7th Cir. 1990); *see also Olim v. Wakinekona*, 461 U.S. 238, 250-51, 103 S. Ct. 1741, 1748-49, 75 L. Ed. 2d 813 (1983).

Rather, to articulate a due process claim, STITA must establish that it had a protected property interest in the award of the concession agreement itself, a showing it simply cannot make. *Three Rivers*, 502 F. Supp. at 1129 (protected property interest, if any, is in the “award of the contract”). To establish such an interest, STITA must prove that it has a “legitimate claim of entitlement” to the contract, not merely an “abstract need or desire” or a “unilateral expectation” of its award. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). “[T]he sufficiency of the claim of entitlement must be decided by reference to state law.” *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L. Ed. 2d 684 (1976).

It is well-established in Washington that “a bidder on a public works contract has no constitutionally protected property interest in being awarded a government contract.” *Quinn Const. Co., L.L.C. v. King County Fire Protection Dist. No. 26*, 111 Wn. App. 19, 32, 44 P.3d 865 (2002). STITA ignores this authority, instead basing its argument of

entitlement on *Three Rivers* and its Sixth Circuit progeny. STITA's Br. at 29. But the *Quinn* court noted that while a "minority of federal jurisdictions have held that an unsuccessful bidder on a state contract possesses a constitutionally protected property interest", this is not the law in Washington. 111 Wn. App. at 31-32. STITA's reliance on inapposite federal authority despite controlling state law is improper. *Quinn* forecloses any argument that STITA has a protected property interest in the award of the concession agreement.

STITA additionally claims that the Port "assumed a due process duty" to adhere to what it claims were the "specific, mandatory procedures" set forth in the RFP. STITA's Br. at 28-29. But again, STITA's argument is that it had a protected property interest in a particular process, not in the award of the concession agreement. Regardless, STITA's own authority illustrates the errors in its argument. Both *Conard* and *United of Omaha* held that the processes at issue did not create a property interest because they provided for discretion on the part of the decision maker. *Conard v. Univ. of Wash.*, 119 Wn.2d 519, 536-37, 834 P.2d 17 (1992) (no protected property interest in renewal of athletic scholarship); *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34-35 (6th Cir. 1992) (no protected property interest in award of government contract). Indeed, the *United of Omaha* court noted that, because the state "retained discretionary authority to reject any and all bids and to 'accept' a bid only by signing a contract," the plaintiff in that case was unable to

establish that any law or rule limited the state's discretion in awarding the public contract. 960 F.2d at 34-35.¹⁸

The type of discretion found in these cases is identical to that retained by the Port in its RFP. For example, the Port retained the right to “accept or reject any or all proposals in their entirety or in part, and to waive informalities and minor irregularities.” CP 2506. The Port could refuse to evaluate any proposal for any reason. CP 2507-08. It retained the right to “negotiate fees and other items it deems appropriate for the benefit of the Port and the traveling public.” CP 2514. And the Port could, in its “sole determination”, find that none of the responses were acceptable and “enter into direct contract negotiations with any party it chooses . . . notwithstanding any provisions of th[e] RFP.” CP 2506.¹⁹ Simply put, the Port retained substantial discretion to accept, reject, and select a successful proposal (if it found one suitable), and ultimately negotiate terms in the best interests of the public.

¹⁸ This proposition is echoed throughout the case law. See, e.g., *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987) (stating that “no one has an entitlement to receive the contract” when the bid invitation permitted the government to “accept or reject any or all proposals and to negotiate with any qualified source”, among other limitations); *Quinn Const.*, 111 Wn. App. at 32 (because district “reserved the right to waive the bid’s tardiness as an immaterial irregularity” *Conard* did not apply). Cf. *Parks v. Watson*, 716 F.2d 646, 657 (9th Cir. 1983) (contrasting statute in that case with Nevada statute that gave government “full and absolute authority to deny any [license] application” noting that this language gave government “unbridled discretion” in licensing decisions).

¹⁹ The evaluation criteria set forth in the RFP also gave the Port significant latitude in evaluating the proposals, permitting it to assess a variety of discretionary factors, including the proposer’s “customer service standards”, “financial capacity”, “experience in managing and operating taxi services at airports or other high traffic public areas”, and “defined business and marketing plan”. CP 2508.

Moreover, STITA cannot establish the Port failed to follow the procedures set forth in the RFP. It concedes that the Port evaluated, scored and awarded the RFP to the proposer with the highest score, Yellow Cab. This was all the “process” arguably required by the RFP. Acknowledging as much, STITA contends that the Port’s post-RFP conduct somehow violated the terms in the RFP, but it cites no authority for the proposition that the Port was prevented from exercising its authority (as contemplated by the RFP itself) to negotiate the final terms of an agreement with its selected bidder. *See, e.g., Winton Transp., Inc. v. South*, 2007 WL 2668131 at *15-16 (S.D. Ohio 2007) (rejecting argument that post-RFP award negotiations violated due process rights noting the lack of “any precedent for a continuing property interest in a public bid” after the award decision, among other reasons).²⁰ Nor is there any merit to STITA’s claim that the Port “radically change[d]” the terms of the RFP in the final concession agreement. As discussed above, the alleged “changes” STITA mentions were either not material or were the result of the delays caused by STITA’s own litigation. *See supra* IV.D.4.

In sum, STITA had only a “unilateral hope of being awarded the contract, not a right to it.” *United of Omaha*, 960 F.2d at 35. STITA has failed to articulate any protected property interest, or that the Port was bound by a particular process that it failed to follow.²¹

²⁰ Southern District of Ohio Local Rule 7.2(b)(4) permits citation to this opinion. Pursuant to GR 14.1(b), a copy of this case is filed with the Port’s brief.

²¹ Even assuming STITA had a protected property interest here, STITA’s rights only existed until the contract was signed. *See, e.g., Dick Enterprises, Inc. v. Metro. King*

F. STITA's Gift of Public Funds Argument is Meritless.

STITA also argues that the concession agreement constituted an unconstitutional gift of public funds because it contends that the terms of the concession agreement were more favorable to Yellow Cab than the commitments made in its proposal.²² STITA Br. at 33-37. STITA's claims legally and factually fail.

STITA's claim is based on the flawed premise that that the proposal process alone created an enforceable contract between Yellow Cab and the Port. The terms of the RFP establish that this was not the case. The RFP stated that the "successful Proposer or Proposers shall enter into an [agreement], substantially in the form attached [to the RFP]." CP 2509-10. The RFP did not state that a contract would be formed upon selection of a given proposal, and it is distinguishable from bid invitations containing this type of express term. See *Peerless Food Products, Inc. v. State*, 119 Wn.2d 584, 592, 835 P.2d 1012 (1992) (invitation provided that "[a] bid response becomes a contract when officially accepted by the State"). Rather, as STITA conceded, the RFP process contemplated that

County, 83 Wn. App. 566, 569, 922 P.2d 184 (1996) (aggrieved bidder may sue to enjoin award of an illegal contract until time of contract formation); *Marco Outdoor Adver., Inc. v. Reg'l Transit Auth.*, 489 F.3d 669, 675 (5th Cir. 2007) (when an "unsuccessful bidder may seek an immediate injunction through a summary proceeding . . . the injunction prevents the deprivation 'of any significant property interest' and is therefore an adequate pre-deprivation remedy"). This Court rejected STITA's attempt to enjoin the Port's entry of the concession agreement with Yellow Cab, the Supreme Court denied review, and the Port and Yellow Cab signed the agreement. STITA fully availed itself of the available processes for challenging the concession award and lost.

²² Again, STITA failed to properly plead this claim before the trial court, raising it for the first time in opposition to the Port's final motion for summary judgment below.

post-award negotiations would occur. CP 3630 (STITA's consultant's statement that certain terms would be "better hammered out in discussion and negotiation"). "[T]here is no legal requirement that a final contract must conform to the original RFP." McQuillin § 29:33, *supra*; *see also Winton Transp.*, 2007 WL 2668131 at *16 (recognizing post-award negotiations are "often necessary" and "did not materially or erroneously alter the terms of the RFP"). The Port's post-award negotiations with Yellow Cab were consistent with the law and the RFP.

STITA does not cite any authority for the proposition that a gift of public funds results when a final contract differs in some way from a RFP response. And the authority STITA does cite is wholly inapposite to the present case. In each case, the government attempted to relieve a private contractor from an existing obligation, or otherwise alter the terms of an already-executed contract, without obtaining additional consideration. *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 270, 534 P.2d 114 (1975) (legislature passed bill relieving public works contractors from financial hardships resulting from increased fuel costs); *McGovern v. City of New York*, 138 N.E. 26 (N.Y. 1923) (government agreed to alter contract terms due to increased labor costs resulting from WWI); *State of New York v. Upstate Stor., Inc.*, 145 A.D.2d 714 (N.Y. App. Div. 1988) (government attempted to release potential claim related to contractor's performance of existing contract). These cases are simply not relevant here.

Regardless, as set forth above, STITA's arguments that the terms of Yellow Cab's proposal deviated substantially from the final concession

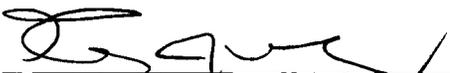
agreement are meritless, and STITA's claim that any such deviations harmed the public are without support. *See supra* IV.D.4. And to the extent that the terms were altered in any way, it was primarily due to STITA's own litigation. A use of public funds is presumed constitutional, and it is STITA's burden to overcome this showing. *CLEAN v. State*, 130 Wn.2d 782, 797-98, 928 P.2d 1054 (1996). STITA does not even attempt to establish that the Port's actions in entering the concession agreement were done either with donative intent or without sufficient consideration. *Id.* It has failed to articulate a cognizable gift of public funds claim, and its belated argument should be rejected.

V. CONCLUSION

The Port conducted a fair RFP process to obtain the best benefit to the public for the taxi concession at the Airport. The final concession agreement signed by the Port and Yellow Cab is true to that process and the law. The Port complied with the OPMA and the Port CEO acted within his authority in negotiating the final concession agreement. STITA's run of baseless disappointed bidders claims must come to an end. This Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 3rd day of February, 2012.

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United States District Court,
S.D. Ohio,
Western Division.

WINTON TRANSPORTATION, INC., Plaintiff
v.
Pat SOUTH, in her official capacity as Warren
County Commissioner, et al., Defendants.

Nos. 1:05CV471, 1:06CV646. | Sept. 6, 2007.

Attorneys and Law Firms

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Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION TO STRIKE

SUSAN J. DLOTT, United States District Judge.

*1 This matter is before the Court on Defendants' Motion for Summary Judgment (doc. 70),¹ Plaintiff's Corrected Response to Defendants' Motion for Summary Judgment (doc. 96), and Defendants' Reply (doc. 89).² Also before the Court is Defendants' Motion to Strike Affidavit of Don Berry and Improper Exhibits Attached to Plaintiff's Response to Defendants' Motion for Summary Judgment (doc. 88). For the reasons that follow, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES AS MOOT** Defendants' Motion to Strike.

I. BACKGROUND

A. Procedural History

This case relates to a dispute over the public bidding of a Rural Transit System Contract in Warren County. Plaintiff Winton Transportation, Inc. ("Winton") was the

provider of Warren County's Rural Transit System from 1995 to 2004. The County rebid the contract in December 2004 and awarded the contract to another company, MV Transportation. Winton subsequently filed suit in the Southern District of Ohio against Defendants Pat South, C. Michael Kilburn, and David G. Young, all in their official capacities as Warren County Commissioners, claiming that the award was invalid and seeking an order directing Warren County to rebid the contract. Both parties thereafter engaged in discovery and eventually filed cross-motions for summary judgment. (Docs.16, 23.)

Subsequent to the ripening of those motions and the completion of discovery, Winton moved the Court for leave to amend its complaint. (Doc. 51.) With its proposed amended complaint, Plaintiff sought to add Warren County Grants Coordinator Jerry Haddix in his individual capacity and to assert a new claim against the Defendant Commissioners for violation of its First Amendment rights. Due to Plaintiff's delay in seeking leave to amend, and because both parties had already moved for summary judgment as to the original complaint, the Court denied Plaintiff's Motion for Leave to File an Amended Complaint on September 5, 2006. (Doc. 59.) Shortly thereafter, Plaintiff filed a new lawsuit (hereinafter referred to as "Winton II") with this court, asserting essentially the same claims as it raised in its proposed amended complaint. (Case No. 1:06CV646, doc. 1.)

On October 13, 2006, the Court held a conference to discuss the status of the two cases. During this conference, Plaintiff's counsel assured the Court that the claims raised in Winton II were independent and did not overlap with the claims raised in Winton I. However, after reviewing the complaints in both cases and the parties' motions for summary judgment in Winton I, the Court found that common questions of law and fact predominate in these two actions. Accordingly, the Court consolidated Winton I, No. 1:05CV471, and Winton II, No. 1:06CV646, pursuant to Fed.R.Civ.P. 42(a). The Court further ordered Winton to file an amended consolidated complaint in Case No. 1:05CV471, and it denied without prejudice the parties' cross-motions for summary judgment. (Doc. 62.)

*2 On November 2, 2006, Winton filed a Consolidated Complaint (doc. 66) adding a fourth defendant, Jerry Haddix, the Warren County Grants Coordinator, in his individual capacity. The consolidated complaint alleges, pursuant to 42 U.S.C. § 1983, that the Warren County Commissioners, acting in their official capacity, and Haddix, acting in his individual capacity, unlawfully deprived Winton of a constitutionally protected property interest without due process of law. The complaint also asserts a First Amendment retaliation claim as well as a

claim under Ohio Rev.Code § 307.90 against the Defendant Commissioners. After Plaintiff filed its consolidated complaint, the Court reopened discovery and set new motion deadlines. Defendants filed their motion for summary judgment on May 15, 2007 (doc. 70), and after a series of filing errors, Plaintiff filed a corrected response on August 6, 2007 (doc. 96). The matter is now ripe for review.

B. Factual History

The Warren County Transportation Service (“WCTS”), which provides subsidized transportation to Warren County residents, has been in service since 1980. In addition to offering transit services to the general public, WCTS also contracts with agencies such as the Warren County Board of Mental Retardation and Developmental Disability and the Warren County Department of Jobs and Family Services. The Warren County Commissioners operate WCTS with a combination of county, state, and federal funding.³ Warren County does not directly provide services, but rather contracts with outside providers who essentially run the day-to-day operations and are responsible for hiring all WCTS employees, including dispatchers, drivers, maintenance, and management.⁴

Winton, which does business under the trade names UTS and Universal Transportation Systems, served as the WCTS provider from January 1996 through December 31, 2004 under a series of separate contracts awarded after competitive review and selection.⁵ (Haddix Dep. 24; South Aff. ¶ 3; Kilburn Aff. ¶ 3.) When Winton’s last contract was approaching expiration, the Commissioners resubmitted the WCTS service contract for bidding and solicited proposals for services beginning in 2005 for a contract term of one-year with renewal options for four additional years. (Haddix Dep. 41, Ex. 6; South Aff. ¶ 4; Kilburn Aff. ¶ 4.)

1. Solicitation and Review of Bids for the 2005 Contract

The procedure for soliciting bids began with a Request for Proposals (“RFP”), which Warren County Grants Administrator Jerry Haddix⁶ drafted in consultation with

the Ohio Department of Transportation (“ODOT”). (Haddix Dep. 45.) The Commissioners reviewed the draft and authorized publication of the RFP on September 23, 2004. (*Id.*, Ex. 5.) On October 5, 2004, the Commissioners obtained permission from ODOT to advertise the RFP. (*Id.*, Ex. 4.) Once the RFP was advertised, the County provided copies of the RFP to interested bidders upon request. (*Id.* at 60.) Among those bidders were Plaintiff Winton and MV Contract Transportation, Inc. (“MV”)—the company to which the County ultimately awarded the contract.

*3 The RFP included a general project description as well as a description of contractor responsibilities and service requirements. It also outlined the project schedule and conditions for responding. (*Id.*, Ex. 6.) All proposals were to be based on the conditions set forth in the RFP and were to provide the requested information. (*See id.*, Ex. 6 at 17, ¶ 1.) However, the County expressly reserved “the right to accept or reject any or all of the proposals submitted, waive informalities and technicalities, and negotiate any or all elements of the proposals.” (*Id.*, Ex. 6 at 19, ¶ 22.)⁷

With regard to the standard for evaluating proposals, the RFP noted that any resultant “contract will be authorized by ODOT and the FTA and in accordance with the standards and guidelines established by the Warren County Board of Commissioners.” (*Id.*, Ex. 6 at 5.) As Winton points out, the RFP nowhere explicitly states that the County will adhere to the “lowest and best” bidder standard set forth in Ohio Rev.Code § 307.90, the Ohio statute governing the competitive bidding process. Instead, the RFP outlines the selection procedures as follows:

A selection committee appointed by the Warren County Board of Commissioners will review and analyze each response. Proposals will be evaluated based upon the following criteria, but not limited to:

- Preclusion from proposing (Federal, State, local)
- Proper documents submitted and executed/signed/notarized
- Meet proposal deadline

Technical Criteria and personnel experience Operations Manager	total available points	20
Disadvantage Business Enterprise	total available points	10
Reliability and financial stability of	total available points	20

company

Understanding of the overall project & Organizational structure	total available points	10
Maintenance approach	total available points	10
Safety and risk management plan	total available points	10
Cost	total available points	20
		100

Interviews and/or negotiations may be conducted with each or any of the respondents. As illustrated, cost will be considered, but is not the determining factor for a contract award. After the interviews or negotiations, Warren County will award a contract to the proposer which, in its opinion, has made the best offer, with concurrence from the Ohio Department of Transportation.

Warren County reserves the right to accept or reject any or all proposals.

(*Id.*, Ex. 6 at 14-15.)

All interested bidders had until November 8, 2004 to submit proposals. Pursuant to the RFP, responsive proposals included two components: (1) the technical portion, which consisted of the plan for operation of services; and (2) the cost proposal. The bidders had to submit each component in a separate, sealed envelope. (*Id.* at 61-62, Ex. 6 at 2.) Five companies, including both Winton and MV, submitted proposals.

The Commissioners appointed a three-person selection committee to evaluate the proposals.⁸ (*Id.* at 66; South Aff. ¶ 5, Ex. 1.) However, Haddix was actually the first person to unseal and initially review the submissions. (Haddix Dep. 61-62.) Just as the proposals were submitted in two parts, the review process was similarly bifurcated. First, Haddix opened the technical portion of the proposals. (*Id.* at 62.) He reviewed each submission for compliance with the RFP and prepared a review sheet matrix that rated compliance in particular areas with a plus or minus. (*Id.* at 63-64.) In mid-November 2004, Haddix turned the technical proposals and the matrix over to the selection committee. (*Id.* at 64; Ferrell-Sauer Aff. ¶ 4; Craig Aff. ¶¶ 4-5; Price Aff. ¶ 5.) The selection

committee scored each technical component using the point system set forth in the RFP. (Haddix Dep. 65, 68; Ferrell-Sauer Aff. ¶ 6; Craig Aff. ¶ 7; Price Aff. ¶ 5.) Based on their review, the committee members determined that MV and Winton submitted the top two technical proposals.

*4 After the committee members reviewed the technical portions of the proposals, they repeated the process with the cost portions. (Ferrell-Sauer Aff. ¶¶ 5, 6; Craig Aff. ¶¶ 5-6; Price Aff. ¶¶ 5-6.) Winton claims that MV's cost proposal did not conform to the requirements of the RFP in at least three respects. First, the RFP specified that the bidders were to base their cost proposals on certain figures including a total number of 33,422 vehicle hours. (Haddix Dep. Ex. 6 at 4.) For unstated reasons, MV based its cost proposal on a total of 33,000 vehicle hours. To reconcile this irregularity, Haddix estimated MV's proposed cost for a total of 33,422 hours by calculating the hourly rate and multiplying this by 33,422. (*Id.* at 127-28.) Using the same procedure, Haddix then determined what the other four bidders proposed cost would be at 33,000 hours rather than 33,422 hours. (*Id.*) Haddix included both calculations on the matrix he submitted to the selection committee. (*Id.*, Ex. 13.)

Second, Winton claims that MV's cost proposal did not account for many of the cost items required by the RFP. The County included in the RFP a cost summary form that the bidders were to use in their proposals. This cost summary sheet called not only for a total cost, but also for a break down of that total cost. In other words, it required the bidder to indicate how it determined the total cost by dividing that total cost into specific operating expenses. Thus, the form suggests certain expense categories, such as the labor costs for management, dispatching, drivers, and maintenance, and the costs of insurance and advertising. (*See* Haddix Dep. Ex. 6 at 33-34.) In total, the

form lists twenty-four expense categories. The cost matrix that Haddix prepared essentially streamlined the bidders' responses to these criteria into one spreadsheet. It appears from the matrix that MV did not include an estimated cost for "Advertising/Marketing" or for the "Services" section, which broke down further into the following items: (1) Professional; (2) Technical; (3) Custodial; and (4) Miscellaneous. (*Id.*) While Plaintiff focuses solely on MV's proposal, the matrix indicates that all five of the responding companies, including Winton, neglected to provide a cost estimate for at least one item specified in the cost summary sheet. (*Id.*)

Third, Winton argues that MV should have included a "cost allocation plan," but failed to do so. The RFP specifies that if the bidder planned to use a facility in part for the WCTS contract and in part to provide services under another contract, the bidder must provide a cost allocation plan for the use of that facility. (*Id.*, Ex. 6 at 34.) MV indicated in its proposal that it planned to use its facility in Beaver Creek, Ohio to service vehicles used under the WCTS contract as well as vehicles used under a contract with Greene County. (*Id.* at 117.) However, MV failed to provide a cost allocation plan detailing how it would split the cost of the facility between the two contracts. (*Id.*, Ex. 21.)

*5 Despite these inconsistencies, the selection committee again found that MV and Winton were the top two bidders. In fact both companies received a score of 87 points. (Ferrell-Sauer Aff. ¶¶ 5-6, Ex. 1; Craig Aff. ¶¶ 6-7, Ex. 1; Price Aff. ¶¶ 6-7, Ex. 1.) Winton contends that MV's score was inflated due to misrepresentations Haddix made to the committee. Whether or not based on accurate calculations, the selection committee ultimately determined that MV and Winton received the same score, and to resolve the tie, the committee elected to interview representatives of MV and Winton. (Ferrell-Sauer Aff. ¶ 7; Craig Aff. ¶ 8; Price Aff. ¶ 8.)

The interviews took place at 9:30 a.m. on December 8, 2004. (Haddix Dep. 166.) At approximately 11:30 a.m. that same day, Haddix forwarded to the Commissioners the selection committee's formal recommendation that the County award the contract to MV. (Haddix Dep. Ex. 20.) The Commissioners concurred in the committee's recommendation that MV offered the lowest cost and the best proposal and that it was in the County's best interest to award the contract to MV. (South Aff. ¶ 7; Kilburn Aff. ¶ 6.) The Commissioners approved the selection committee's decision by resolution at a public hearing on December 21, 2004. That same day, the Commissioners notified MV by letter of its intent to award the contract to MV for the amount listed in its proposal. (South Aff. Ex. 2.) ODOT formally approved the decision by letter on December 23, 2004. (South Aff. Ex. 3.)

2. Negotiating the 2005 Contract

Shortly before making the award to MV, concern arose that the Commissioners would not be able to complete the review process in time for the selected company to begin operations by January 1, 2005. (Haddix Dep. 94-95, Ex. 9.) In order to prevent any possible lapse in service, the Commissioners sought ODOT's authorization to extend Winton's 2004 contract for a short period of time. (Haddix Dep. 95; Price Aff. ¶ 4.) After receiving authorization, the County proposed the extension to Winton, but Winton refused to extend its contract. (Haddix Dep. 95; South Aff. ¶ 6; Kilburn Aff. ¶ 5.)

With time being of the essence, almost immediately after the County announced the selection of MV as the new transit provider, the Commissioners and MV entered into negotiations to reach a mutually agreeable contract. Haddix and the County Prosecutor were also involved in the negotiation and review of the final contract, which was approved on December 28, 2004 at a public meeting. The County maintains that the contract negotiations were lawfully undertaken pursuant to the original RFP, in which the County expressly reserved the right to engage in contract negotiations. (*See* Haddix Dep. Ex. 6 at 19, ¶ 22.) Specifically, the RFP provided that "Warren County reserves the right to accept or reject any or all of the proposals submitted, waive informalities and technicalities, and negotiate any or all elements of the proposals." (*Id.*)

*6 During negotiations, MV proposed several changes to the terms contemplated in the RFP. The County attributes several of these concessions to the fact that MV was given very little time to prepare for taking over operation of the transit system, due largely to late notice of the award and Winton's refusal to extend its existing contract through the first portion of 2005. Among the concessions was the County's agreement that it would waive, for a limited period lasting the first three months of the contract, all penalties, defaults, and/or liquidated damages that may have otherwise been imposed for failure to meet performance requirements. (*See* Haddix Dep. 222, Ex. 36.) The County agreed to include a provision in the contract allowing MV to recover all costs associated with the start-up transition, up to \$68,329, in the event the contract was cancelled by the County for any reason other than default prior to December 31, 2005. (*Id.*)

Other modifications to the terms set forth in the RFP include, but are not limited to:

1. The inclusion of a nonsolicitation provision under which the County was barred from hiring any MV employees for one year following the termination of the contract (*see* Haddix Dep. Ex. 36, at 7);

2. A waiver by the County of the “no indemnification” provision included in the RFP (*see* Haddix Dep. Ex. 36, at 5);

3. The inclusion of a clause entitling MV to termination costs in the event the County ever terminated the contract for any reason except the providers default (*see* Haddix Dep. Ex. 36, at 2, 10).

In addition to the changes the County agreed to make to the actual contract, Winton claims that the County made additional informal concessions that contributed to MV unfairly receiving a better deal than that offered to the bidders in the RFP. Specifically, Winton points to the fact that for a five-month period at the start of 2005, the County waived its requirement that the service provider procure its own facilities to operate the transit system by providing MV with free parking for WCTS buses. (*See* Haddix Dep. 170-73.) This situation arose after MV had difficulty securing a parking lot. During the bidding process, MV had represented to the commissioners that it had located a parking lot on Main Street in Lebanon that it planned to lease. However, when MV later tried to secure this lot, it encountered problems with the City of Lebanon’s regulatory requirements. Accordingly, the County allowed MV to park the buses on County property for approximately five months until MV was able to secure its own lot. Finally, Winton contends that the County also deviated from the conditions set forth in the RFP by permitting MV to transport WCTS buses to and from its maintenance facility outside of Warren County using fuel supplied and paid for by the County.

3. Continuing Dispute Between Winton and the County

After Winton learned that the Commissioners had decided to award the 2005 contract to MV, Winton contacted Haddix to inquire into the basis of the decision. Winton also sent a letter to then-County Administrator Bob Price, offering to meet MV’s bid price and reduce annual incremental increases from 8%, as Winton proposed in its original bid, to 4.9%. When it did not receive a response, Winton then lodged a formal written complaint that was denied without substantive explanation. (Tipton Aff. ¶ 13, Ex. A.) Over the next few months, Winton continued to protest the award of the contract to MV.

*7 Meanwhile, a separate but related dispute arose between the parties regarding Winton’s final invoice to the County. Winton claimed that it was still owed a certain amount of money and sued the County in state court. The parties ultimately settled that lawsuit.

Also during the early months of 2005, the contract with MV manifested a number of problems. The problems

largely centered around three areas: (1) customer service; (2) system efficiency; and (3) administrative requirements. (*See* Haddix Aff. Ex. 11.) Winton Claims that Haddix attempted to mask these problems when they first arose by highlighting certain minor successes and intercepting customer complaints. (*See* Haddix Dep. 261-64, 304; Berry Aff. ¶¶ 4-11.) Nevertheless, the Commissioners were aware of the problems and pointed them out to MV after several months of service, publicly declaring that if performance did not improve within a few months the County would not renew MV’s contract at the end of 2005.¹⁰ The Commissioners do not appear to have been confident that MV would turn around its performance in time, as evidenced by Commissioner South’s November 14, 2005 email stating that he was “ALL in favor of putting this contract out for bid.” (South Dep. 84.)

Around that same time, Winton’s president, Tom Burer, learned of MV’s operational problems from a newspaper article. The article prompted Burer to contact Commissioner Kilburn to request once again that the County either void the MV contract and award it to Winton, or rebid the contract. (Tipton Dep. 253.) Burer claims that Commissioner Kilburn stated that because Winton had filed several lawsuits against it, the County would choose to run the transit service itself before rebidding it. (Burer Dep. 78; Tipton Dep. 253 .) Commissioner Kilburn does not recall making this statement, but does not discount the possibility that he and Burer discussed the lawsuits. (Kilburn Dep. 40.) Instead, he recalls telling Burer that he felt it was important for the Commissioners to honor the County’s contract with MV and to try to work out the problems. (Kilburn Dep. 39.) Along the same lines, Winton also alleges that Haddix told a former transit employee who had quit after MV took over operations that it would be a “cold day in hell” before the contract was rebid. (Christy Aff. ¶ 7.)

The Commissioners publicly discussed MV’s status at a January 3, 2006 Commissioners’ meeting. Prior to the meeting, Haddix and David Gully, the new County administrator, provided the Commissioners with a report of MV’s performance and made recommendations regarding whether or not the County should renew the contract. The official transcript of the January 3, 2006 meeting indicates that the transit contract issue took up a large portion of the meeting. Approximately one-half of the transcript, starting at page 26 and continuing through page 56, relates to discussion of the contract and MV Transportation’s performance. (*See* doc. 70, Ex. J1, Tr. of Commissioners’ Meeting, Jan 3, 2006.) As indicated therein, the discussion began with Haddix reporting the status of MV Transportation’s operations, focusing on what, if any, improvements the transit company had made since the last meeting. (*See id.* at 27-32.)

*8 Following Haddix's report, a representative of MV spoke and answered questions about the company's attempt to analyze and address ongoing problems. (*See id.* at 32-48.) The representative indicated that MV had entered into a long-term lease for, and had invested its own resources in, a maintenance and parking facility for WCTS vehicles in Warren County. Among other things, he also indicated in response to the Commissioners' recommendations regarding MV's staff that MV had reassigned its General Manager away from Warren County and promoted long-time Warren County residents and transit employees to management type positions, including scheduler and safety manager. (*Id.* at 33-35.)

Commissioner Kilburn brought up the instant litigation, expressing concern about whether the Commissioners should consider the lawsuit before deciding whether or not to renew MV Transportation's contract.¹¹ (*Id.* at 48-49.) Commissioner Young then made an official motion to go into executive session. (*Id.* at 50.) When the Commissioners returned from the session, Commissioner Young stated on the record, "For the record, I think it's important to note what we talked about, that it was essentially how any type of a contract extension would affect our pending litigation." (*Id.* at 52.) Commissioner Young then stated that they were ready to "discuss moving forward with ... [the] contract," made a motion to extend MV Transportation's contract, and stated his reasons for supporting the extension:

COMMISSIONER YOUNG: I can make a motion to extend this contract for (inaudible) because that does a couple of things in my opinion, it essentially gives certainty to our constituents as to continuation of service and, number two, and just as important, it gives them some continuity to the actual drivers so that they know what's coming down the pike and, you know, that another company's not going to come down and be employing them or are they going to lose their jobs in six months. So with that said, I would also like to inform the-the folks at the company here that I think we're still all of the notion of this-we don't want to use the word probationary, but you guys are, you know, on the job, you know, performance every day, that you're (inaudible) a job interview. You know, if the level of complaints rises or the bus drivers have an-you know, as Commissioner Kilburn says that the indians revolt against the chiefs, you know, there's going to be a problem.

And it's just the rebidding process takes three to six months anyway, so it wouldn't be fair to say, you know, here's a six-month extension simply because we would be bidding this starting in 30 days or something, so-and, you know, that wouldn't be fair to you guys that we are impressed with-with, you know, you listening to us and saying, you know, let's

take some folks that are in the system, let's forget about this complicated, you know, new scheduling software that has worked in other areas, but doesn't necessarily work here when, you know, you've got a fairly well-oiled machine that's been working. Just use that model.

*9 (*Id.* at 52-54.) Commissioners Kilburn expressed similar sentiments, stating:

COMMISSIONER KILBURN: And I concur. It gives the employees some-some sense of security and its also fair to MV with their renewed spirit of wanting to succeed and wanting to provide this good service. I don't think six months would be fair to you to do that. I think one year will be-prove some footing, you know, that could eventually turn into a multi-year contract if everyone's happy with the service and you're happy with your job to be done here and (inaudible) operations, successes will continue, then hopefully that will be all of your goals. So I'll second Dave's motion to extend for one year.

(*Id.* at 54-55.) South concurred with the motion, and the Commissioners voted to extend MV Transportation's contract for another year.

II. LEGAL STANDARD

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). On a motion for summary judgment, the movant has the burden of showing that no genuine issues of material fact are in dispute, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must go beyond the pleadings and "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The nonmoving party "must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The task of the Court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for

trial.” *Liberty Lobby*, 477 U.S. at 249. A genuine issue for trial exists when the evidence is not “so one-sided that one party must prevail as a matter of law.” *Id.* at 252.

II. DISCUSSION

As indicated above, Winton asserts the following claims: (1) 42 U.S.C. § 1983 procedural due process claims against the Warren County Commissioners, acting in their official capacity, and Haddix, acting in his individual capacity; (2) a First Amendment retaliation claim against the Defendant Commissioners; and (3) claims under Ohio Rev.Code § 307.90 against the Defendant Commissioners. Defendants move for summary judgment as to all claims. The Court construes all official capacity claims against the Commissioners as claims against the County. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (“As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1245 (6th Cir.1989) (“A suit against an individual ‘in his official capacity’ has been held to be essentially a suit directly against the local government unit and can result in that unit’s liability to respond to the injured party for his injuries.”).

A. Procedural Due Process

*10 42 U.S.C. § 1983 creates a private right of action against anyone who, under color of state law, deprives an individual of “any rights, privileges, or immunities secured by the Constitution or laws of the United States.” *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); 42 U.S.C. § 1983. Section 1983 does not itself create any rights but merely provides a mechanism for enforcing individual rights “secured” elsewhere. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). In the instant case, Winton seeks to protect its procedural due process rights rooted in the United States Constitution. The Due Process Clause of the Fourteenth Amendment provides that no state “shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend XIV, § 1. “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Phipus*, 435 U.S. 247, 259 (1978).

To establish a procedural Due Process violation, Winton must prove: (1) the existence of a protected property interest, (2) a deprivation of that property interest, and (3) that state remedies for redress of the alleged deprivation were inadequate. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Hudson v. Palmer*, 468

U.S. 517 (1984); *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir.1999) (quoting *Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir.1983)). Defendants argue that Winton’s procedural due process claims fail as a matter of law because Winton fails to establish a constitutionally protected property interest and cannot show that state remedies for redress of the alleged deprivation were inadequate. Additionally, Defendants argue that neither the County, nor Haddix, individually, is liable under § 1983 for any actions taken by him in connection with the public bid.

1. Protected Property Interest

Winton claims it has a constitutionally protected property interest in its bid for the 2005 transit contract. The Sixth Circuit has in the past “refuse[d] to adopt [the] argument that the mere submission of a bid under a discretionary award procedure is sufficient to create a legitimate claim of entitlement to the award.” *Peterson v. Ohio*, No. 89-3347, 1989 WL 143563, at *2 (6th Cir. Nov. 29, 1989) (unreported opinion). However, in *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir.1992), the Sixth Circuit recognized that under certain limited circumstances an unsuccessful bidder may have a constitutionally protected property interest in the award of the contract. To prove the existence of such a property interest, the bidder must show that: (1) it was awarded the contract at any procedural stage and then the award was revoked; or (2) the state official had limited discretion as to whom the contract should be awarded and abused that discretion. *See Enertech Electrical, Inc. v. Mahoning County Comm’rs*, 85 F.3d 257, 260 (6th Cir.1996).

*11 Winton does not allege that it was awarded the contract at any stage in the selection process. Instead, Winton claims that Ohio Rev.Code § 307.90 limited the County’s discretion as to whom it could award the contract and that the County abused this discretion by failing to award the contract to the “lowest and best bidder.” Ohio Rev.Code § 307.90 states in relevant part, “The award of all contracts subject to sections 307.86 to 307.92 of the Revised Code shall be made to the lowest and best bidder.... The contracting authority may reject all bids.” Interpreting § 307.90 to grant local governments broad discretion in awarding government contracts, the Ohio Supreme Court has held that “when the statute provides for the acceptance of the lowest and best bid the [county] is not limited to an acceptance of merely the lowest dollar bid.” *Cedar Bay Constr., Inc. v. City of Fremont*, 50 Ohio St.3d 19, 552 N.E.2d 202, 205 (1990) (citations omitted). Rather, the statute “places in the hands of the [county] authorities the discretion of determining who under all of the circumstances is the lowest and best bidder.” *Id.* (emphasis added). Because this discretion is

vested in the contracting authority rather than the courts, “the courts cannot interfere in the exercise of this discretion unless [the contracting authority] abused its discretion or acted fraudulently.” *Enertech*, 85 F.3d at 260 (quoting *Wilson Bennett, Inc. v. GCRTA*, 67 Ohio App.3d 812, 588 N.E.2d 920, 925 (1990)); see also *Miami Valley Contractors, Inc. v. Montgomery County*, No. 15477, 1996 WL 303591, at *1 (Ohio App. 2 Dist. June 7, 1996.) (unreported opinion) (“In Ohio, [§] 307.90 provides a Board of County Commissioners with considerable discretion in selecting the “lowest and best bidder,” and as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works contract.”).

Consequently, Winton can establish a constitutionally protected property right only if it shows that the County abused its substantial discretion in awarding the WCTS contract to MV. “In this context, an abuse of discretion implies an unreasonable, arbitrary or unconscionable attitude. Arbitrary means without adequate determining principle; ... not governed by any fixed rules or standard. Unreasonable means irrational.” *Enertech*, 85 F.3d at 260 (internal citations and quotations omitted). Winton cites several aspects of the bidding process that it claims amounted to abuse of discretion sufficient to create a property right, each of which is discussed below:

a. Lack of Objective Criteria

Winton first alleges that the County abused its discretion by failing to apply any discernable or objective criteria to evaluate the proposals. According to Winton, the County arbitrarily declined to follow Ohio Rev.Code § 307.90’s “lowest and best” standard, and instead “applied some other, unannounced, standard.” (Doc. 35 at 12.) Winton relies heavily on Haddix’s testimony that because the County received federal funding for the transit services, it had to apply the federal procurement standard of “most responsible firm”¹² rather than the standard of “lowest and best bidder.” (Haddix Dep. 42-43.) Defendants contend that the precise label Haddix applied to the County’s selection criteria is immaterial because the County’s evaluation and ultimate decision was nonetheless consistent with Ohio law. In other words, Defendants claim the selection committee’s actual review process fit well within either of the standards, both of which accord the County discretion to choose the “best” proposal.

*12 After evaluating the County’s RFP and selection procedure, the Court finds that the standards the County applied to the selection of a service provider were well within the ambit of § 307.90 and did not amount to an abuse of discretion. First, Plaintiff’s allegation that the

County applied no discernable or objective criteria in selecting the award recipient is patently false. As described above, the RFP specifically describes the overall evaluation process as well as the point system the County applied for rating each proposal based on specific disclosed criteria. The criteria set forth in the RFP take into account both cost and other factors related to the company’s ability to perform the contract. The evaluation process was divided into two parts, with the committee members considering cost and technical ability to perform the contract separately. In other words, the committee members attempted to discern the “lowest and best” proposal.

Second, Haddix’s testimony aside, the general standard of review set forth in the RFP closely tracks the language of § 307.90. The RFP describes the selection standard as follows:

As illustrated, cost will be considered, but is not the determining factor for a contract award. After the interviews or negotiations, Warren County will award a contract to the proposer which, in its opinion, has made the best offer, with concurrence from the Ohio Department of Transportation.

Warren County reserves the right to accept or reject any or all proposals. (Haddix Dep. Ex. 6 at 15.) This language fully conforms with Ohio courts’ interpretation of § 307.90 as vesting local governments with wide discretion in awarding the contract to the best bidder.

Finally, Winton argues that the County did not actually apply the criteria set forth in the RFP, but rather selected MV based on some unannounced factor. In doing so, Winton claims that MV was not the lowest bidder. The Court is unclear as to how Winton reaches that conclusion. The evidence shows that MV did indeed make the lowest bid, whether its cost proposal is considered based on a 33,000 or 33,422 hour calculation.

Winton additionally claims that the County cannot identify its ultimate reason for choosing MV over Winton after determining that the overall numerical score of the two contractor’s bids were tied. According to the Defendants, the selection committee rated each proposal based on the criteria set forth in the RFP. The committee considered cost to be an important factor, but also evaluated each of the other criteria and for several reasons determined MV’s proposal to be the best offer. First, MV proposed a slightly lower cost than did Winton. (Ferrell-Sauer Aff. ¶ 8; Craig Aff. ¶ 9; Price Aff. ¶ 9.) The Defendants specifically cite Winton’s proposed cost increases over the four year option period, pointing out that Winton’s figures were higher than the figures that MV proposed. (Ferrell-Sauer Aff. ¶ 8; Craig Aff. ¶ 9.) Winton counters that prior to the interviews, it requested a

copy of MV's cost proposal, but the County refused to provide a copy. (See Haddix Dep. 183-84.) Winton claims that had it been able to view MV's proposal, it could have lowered its own cost proposal to provide a more competitive bid. Haddix confirmed that the County denied Winton's request to see MV's proposal, but claims that it did so on the basis of the RFP, which states that the bids do not become public information until after completion of the selection process.¹³ (*Id.*) In any case, Winton has not shown that it was entitled to view the competing proposals.

*13 Winton argues that the committee members and the Commissioners gave conflicting testimony about the decision. However, the Court has reviewed the relevant testimony and does not find their statements to be inherently inconsistent. To the contrary, the committee members rather consistently indicate that while cost was not a deciding factor in their decision, it was important, that they believed that the time had come for a change, and that MV had suggested more creative ideas for improving service. (See Craig Dep. 21-23; Price Dep. 18-19; Sauer Dep. 19-22; Craig Aff. ¶¶ 8, 9, 11, 13; Price Aff. ¶¶ 8, 9, 11, 13; Sauer Aff. ¶¶ 8-10, 12.) Along the same lines, the Commissioners indicated that they believed MV was the lowest and best bidder, was qualified, dependable, and able to do the job, and was willing to enhance service and performance and to provide the Warren County residents with the service they desired. (See South Aff. ¶¶ 7, 16; Kilburn Aff. ¶ 6.) None of these considerations implicate factors or standards independent from the specific criteria set forth in the RFP.

Winton latches onto a statement that Haddix made in a 2006 email indicating that the reason the County chose MV was because Winton had been providing too much flexibility to its drivers. (See Haddix Dep. 321.) However, Haddix also testified that he did not recall anyone else sharing this opinion, suggesting that this was not, in fact considered by either the selection committee or the Commissioners. (*Id.*) Indeed, Haddix was never, at any point during the County's review of the proposals, a decision-maker. Instead, he submitted information about the proposals to the selection committee, which in turn made a recommendation to the Commissioners. There is absolutely no evidence that Haddix has any basis to testify as to the Commissioners' ultimate reasons for awarding the contract to MV. Accordingly, statements such as that highlighted above—an offhand comment made two years after the selection process purporting to explain the County's motivation for awarding the Contract to MV—do not create a material issue of fact.

In support of its position, Winton cites to *Dayton, ex rel. Scandrick, v. McGee*, for the proposition that the absence of a clear standard is an abuse of discretion. 67 Ohio St.2d 356, 423 N.E.2d 1095 (1981). In *Scandrick*, Dayton

decided not to award a public contract to the lowest bidder, favoring instead another bidder who was a city resident. The unsuccessful lowest bidder brought suit claiming that Dayton abused its discretion in favoring the resident bidder because the bid specifications stated nothing about the contractor's residency being a consideration. The Ohio Supreme Court found the use of this unannounced standard an abuse of discretion. *Dayton, ex rel. Scandrick*, 67 Ohio St.2d at 360-61, 423 N.E.2d at 1097-98. *Scandrick* is inapplicable to the instant case for several reasons. First, in this case, MV was the lowest bidder. Second, as addressed above, there is no evidence that the County based its decision on any criteria not expressly stated in the RFP.

b. Waiver of MV's Non-Compliance with the RFP

*14 Winton next argues that the County abused its discretion by waiving the following irregularities in MV's proposal: (1) that MV based its cost proposal on 33,000 total vehicle hours rather than the 33,422 hour figure set forth in the RFP; (2) that MV failed to supply cost estimates for certain expense criteria set forth in the RFP; and (3) that MV did not provide a cost allocation form with its initial proposal, as required by the RFP. Winton acknowledges that the RFP expressly states, "Warren County reserves the right to ... waive informalities and technicalities" (Haddix Dep. Ex. 6 at 19, ¶ 22), but argues that, under Ohio law, the County cannot legally reserve this right. Contrary to Winton's assertion, the Ohio Supreme Court has held that where a local government expressly reserves such rights it does not abuse its discretion in waiving initial irregularities. *Cedar Bay Const., Inc. v. City of Fremont*, 50 Ohio St.3d 19, 21-22, 552 N.E.2d 202, 206 (Ohio 1990); *but see Rein Construction Co. v. Trumbull County*, 138 Ohio App.3d 622, 741 N.E.2d 979 (Ohio App.2000) (holding that the county defendant abused its discretion by allowing a bidder to submit a "clarification" letter that amounted to a material and substantial deviation from the county's bid specifications).

Even where a request for proposals includes a similar reservation, the question to be asked in each case is whether the irregularities in the disputed bid are material:

Bids for public contracts must conform in all material respects to the contract specifications. Not every deviation from the specifications will, however, constitute a deviation that renders the bid nonresponsive. So long as a bid complies with the specifications in all material respects, and contains no irregularities which give one bidder a competitive advantage over others, the bid will be deemed responsive, notwithstanding the omission of an item

called for by the specifications. Thus, for a bid to be rejected as nonresponsive, the deviation must both be substantial and provide the bidder an advantage over his competitors.

Kokosing Constr. Co. v. Dixon, 72 Ohio App.3d 320, 328, 594 N.E.2d 675, 680 (Ohio App.1991); *see also Rein Construction Co.*, 741 N.E.2d at 985.

The irregularities the County chose to waive in this case were not material. Winton focuses mainly on the fact that MV proposed a total cost based on 33,000 hours rather than the 33,422-hour figure set forth in the RFP. Winton claims that because of this irregularity and other related cost issues, MV's overall cost was actually higher than Winton's, and the Commissioners based their decision on a mistaken belief as to the overall cost that MV had proposed.¹⁴ As to the total cost proposal, the County waived this irregularity by calculating the cost per hour for each proposal and then determining what each bidder's total cost would be for 33,000 hours of service as well as 33,422 hours per service. Under each calculation, MV's total proposed cost was the lowest. Winton claims that the cost matrix that Haddix prepared for the selection committee was misleading in that the "Total Cost" row listed MV's bid based on the 33,000 hour calculation, while every other bidder's total cost was based on the 33,422 hour calculation. (*See* Haddix Dep. Ex. 13.) However, just below that row, the Matrix also listed each bidder's total cost at both 33,000 hours and 33,422 hours. Accordingly, the cost matrix is not substantially misleading. Additionally, Winton presents no evidence that any of the committee members based their decision on an erroneous misunderstanding of the total proposed cost.

*15 Winton also claims that the committee did not adequately investigate or consider the cost that would result from MV's plan to service vehicles at its Beaver Creek, Ohio facility. According to Winton, this arrangement resulted in additional cost because, unlike Winton, MV had to drive the vehicles a significant distance outside of Warren County to service them. Defendants counter that the committee compared this plan with Winton's practice of using its maintenance facility in Monroe, Ohio and determined that MV's plan would not result in significant fuel cost increases. (Haddix Dep. 228-30; Ferrell-Sauer Aff. ¶ 9; Craig Aff. ¶ 10; Price Aff. ¶ 10.) In any case, such costs would have already been factored into MV's total proposed cost, and thus did not alter that figure.

As for the next allegedly material nonconformity, Winton points to the various cost estimates that MV left out of its proposal. As described above, the RFP required each bidder to provide a breakdown of costs for approximately twenty-four different expense categories, and MV omitted

to provide a figure for five categories. These omissions would only materially effect the validity of the overall proposal if subsequent to winning the contract MV raised its proposed cost or failed to provide certain services to account for the omissions. Plaintiff offers no evidence of this. To the contrary, the omissions were immaterial because the winning bidder was nonetheless bound to provide all of the services specified in the RFP at the total cost that the bidder proposed. (Haddix Dep. 154.) Moreover, to the extent that Plaintiff argues the County should have rejected the proposal due to these inconsistencies, the Court notes that MV was not the only company that failed to account for all of the required cost items. None of the five proposals included a projected cost for every specific item. Winton, for example, did not provide an estimated cost for fuels and lubricants. (Haddix Dep. Ex. 13.) It is entirely possible that where each company chose to omit estimates for specific items, it did so because the cost of those items was already figured into another category. Indeed, that is how Haddix interpreted the omissions. (Haddix Dep. 154.)

Likewise, MV's failure to submit a cost allocation plan for the shared use of its maintenance facilities under both the WCTS contract and the Greene County contract was similarly immaterial because the omission did not effect MV's total cost proposal. (*See* Haddix Dep. 198, 202.) Additionally, Defendants point out that Winton similarly failed to include a required cost allocation plan in its initial proposal. (Haddix Dep. 65.) Nor did the fact that the selection committee allowed MV to correct this omission give MV any discernable or apparent competitive advantage.

c. Post-Award Negotiations

Winton next claims that the County abused its discretion by engaging in **post-award negotiations** with MV that resulted in material changes to the terms set forth in the RFP. The Court is unaware of, and Winton fails to identify, any precedent for a continuing **property interest** in a public bid that extends beyond the decision of to whom the **contract** should be awarded. Winton relies heavily on an Opinion of the Ohio Attorney General stating that, under Ohio's competitive bidding laws, a public body may not extend a contract subject to competitive bidding for an additional five-year term not contemplated in the original RFP. Ohio Attorney General's Opinion No. 89-064, 1989 WL 455402. This opinion states nothing about whether such modifications amount to an abuse of discretion under Ohio Rev.Code § 307.90. Nor does it suggest that an unsuccessful bidder has any property right in this context. The Sixth Circuit has previously held that "the failure of a governmental body to follow a given procedure does not create a

property right. More specifically, the Seventh Circuit has stated that in the absence of an underlying property interest, the Due Process Clause does not require states to obey their own procedural rules in awarding municipal contracts.” *Willie McCormick*, 61 Fed. App’x at 956 (internal citations and quotations omitted).

*16 Courts have addressed challenges to negotiations that occurred after the bids were opened but *before* any award was made. In those cases, the courts have generally held that where, as in this case,¹⁵ the governing body expressly reserved the right to conduct such negotiations, there has been no abuse of discretion. See *Charlie’s Towing & Recovery, Inc. v. Jefferson County, Kentucky*, 183 F.3d 524, 528 (6th Cir.1999).¹⁶ Even if Winton had identified a continuing **property interest**, the Court would nonetheless find that the **negotiations** between MV and the County did not materially or erroneously alter the terms of the RFP. **Post-award negotiations**, as Winton recognizes, are often necessary and occur at various points during any given **contract** term to address unforeseen events. For example, in the 2005 Contract, several of the changes made to the terms proposed in the RFP stemmed directly from the fact that the County was giving MV only eight days to prepare to assume control of operations, and foresaw that it might be difficult for MV to become fully operational and make a smooth transition within that short of a window. Other post-award concessions, such as the County allowing MV to park the WCTS vehicles for free in a lot owned by Warren County for five months, related to unforeseen problems that arose when MV took control of WCTS operations. There is no evidence or precedent suggesting such negotiations are an abuse of discretion under Ohio Rev.Code § 307.90.

d. Haddix’s Manipulation or Distortion of Competitive Bidding Process

Winton finally argues that Haddix used his position to manipulate and control the selection process and that the County failed to adequately investigate his representations to the selection committee and Commissioners. Defendants, citing *Leatherman v. Tarrant County Narcotics and Intell Coord. Unit*, 507 U.S. 163, 166 (1993) and *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 691 (1978) for the proposition that a municipality cannot be held liable under 42 U.S.C. § 1983 under a theory of respondeat superior or simply because an employee deprived an individual of constitutional rights, argues that the County cannot be held liable for any wrongful acts Haddix is alleged to have committed.

As Defendants suggest, a city or municipality may be “liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue.” *City of*

Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989). Respondeat superior is not available as a theory of recovery under § 1983. *Monell*, 436 U.S. at 691. Therefore, a plaintiff seeking to subject a city or municipality to § 1983 liability for the actions of its employees must show that the employee was acting pursuant to an official policy or custom of the municipality. *Bd. of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997). Alternatively, a municipality “may be liable under § 1983 for a single decision by its properly constituted legislative body-whether or not that body had taken similar action in the past or intended to do so in the future-because even a single decision by such a body unquestionably constitutes an act of official government policy.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Accordingly, to the extent that Winton seeks to hold the County liable for Haddix’s actions, Winton must show that Haddix was either a final policymaker or that he acted pursuant to official policy or custom of the County.

*17 There is no evidence to indicate, and Winton does not argue, that Haddix is in any manner a final policymaker. Instead, Winton argues that Warren County ratified Haddix’s behavior by failing to adequately investigate Winton’s objections and formal protest of the award of the WCTS contract to MV. Indeed, a municipality may ratify the acts of its employees-and thus subject itself to § 1983 liability-if it fails to meaningfully investigate alleged constitutional violations. See *Otero v. Wood*, 316 F.Supp.2d 612, 627-28 (S.D. Ohio 2004) (holding that “evidence that a municipality inadequately investigated an alleged constitutional violation can be seen as evidence of a policy that would condone the conduct at issue”).

Plaintiff presents little to no evidence regarding the nature of the investigation, if any the County took after Winton lodged its formal complaint. However, the Court need not determine the extent to which the County may be found to have ratified Haddix’s conduct, because the Court finds that Haddix took no action amounting to an abuse of discretion. The Court has already indirectly addressed several of the disputed acts above. For instance, as to Haddix’s role in allegedly misrepresenting MV’s proposed cost to the selection committee, the Court has determined that MV did indeed propose the lowest cost and that Haddix’s recalculation of MV’s proposed cost at 33,422 operational hours was not arbitrary or erroneous.

Winton claims Haddix was responsible for several other material misrepresentations, beginning with its allegation that Haddix misrepresented Winton’s past performance as the WCTS provider by describing its performance as merely “satisfactory.” (See Haddix Dep. 32, 36-37, 106-07, 162.) According to Winton, it actually had high customer satisfaction and had always exceeded the service requirements of its contract at no extra charge to

the County. However, Winton fails to show that these are the only two criteria Haddix was to consider in offering his assessment of Winton's performance. In fact, Haddix testified that Winton's ridership was static and that its efficiency was not optimal. (See Haddix Dep. 107-108.) In any case, that Haddix chose to describe Winton's service as satisfactory is not abuse of discretion. Winton may quibble with the precise adjective used to describe its performance, but the fact that it would perhaps prefer "excellent" over "satisfactory" is irrelevant.

Winton next alleges that Haddix misrepresented that Winton's bid did not include a cost allocation plan, when in fact, it did, and that Winton's proposal included similar "deadhead miles" to its maintenance facility as did MV's. (Doc. 35 at 13.) Again, Winton fails to demonstrate abuse of discretion because it does not show that it actually did submit a cost allocation or that the committee members took this into consideration when determining whose bid they should recommend to the Commissioners. Similarly, as to the "deadhead miles," Winton claims that it had designed its routes to minimize extra mileage that resulted from transporting the vehicles for maintenance purposes, but offers no evidence that Haddix's assessment of the "deadhead miles" under either Winton's or MV's proposal was patently incorrect. Instead, the evidence shows that the selection committee evaluated this aspect of each bidder's proposal and determined that it was not a significant factor in its decision.

*18 In a somewhat perplexing move, Winton next argues that Haddix purposefully denied Winton access to the other bids and claims that if it had seen those bids it would have been able to explain the alleged deficiencies in MV's proposal. As indicated above, Haddix confirmed that the County denied Winton's request to see MV's proposal, but claims that it did so on the basis of the RFP, which states that the bids do not become public information until after completion of the selection process.¹⁷ (*Id.*) Considering the fact that Winton appears to have taken the stance that any deviation from the RFP, no matter how small, is an abuse of discretion, the Court cannot understand why it now suggests the County should have ignored this particular clause in the RFP.

Not for lack of trying, Winton points to no evidence of abuse of discretion. Instead, the evidence indicates that the Commissioners' decision to award the contract to MV was neither arbitrary nor irrational, but rather was based on a careful consideration of proposals submitted by each bidder based upon the factors set forth in the RFP. As Winton fails to demonstrate the existence of a constitutionally protected property interest, its § 1983 procedural due process claims are hereby dismissed.

2. Inadequate Remedy of the Alleged Due Process

Violation

Because the Court has held that Winton does not have a constitutionally protected property right, the Court need not address whether Winton has an inadequate remedy under Ohio law. See *Curtis Ambulance of Florida, Inc. v. Bd. of County Comm'rs of the County of Shawnee, KS.*, 811 F.2d 1371, 1375 (10th Cir.1987) ("The process requirement necessary to satisfy fourteenth amendment procedural due process comes into play only after Plaintiff has shown that it has a property or liberty interest.").

B. First Amendment Retaliation

The Court turns now to Winton's First Amendment retaliation claim. With this claim, Winton alleges that the County retaliated against it for protesting the award of the 2005 WCTS contract to MV and for filing the instant lawsuit by refusing to rebid the transit contract for the 2006 term. According to Winton, the Commissioners' decision to renew MV's contract at the end of 2005 resulted at least in part from a desire to prevent Winton from bidding for the contract. Defendants respond that Winton lacks standing to bring this claim because it has not suffered any actual injury and that even if it has standing it cannot prove a prima facie case of retaliation.

To establish standing, Winton " 'must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir.1999) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The injury must be " 'distinct and palpable' rather than abstract, conjectural, or hypothetical" in order to confer standing. *Id.* For purposes of a First Amendment retaliation claim, an injury is sufficient to confer standing for purposes of a retaliation claim if it would "likely chill a person of ordinary firmness from continuing to engage in that constitutionally protected activity." *Bloch v. Ribar*, 156 F.3d 673, 678-81 (6th Cir.1998).

*19 In the instant case, Winton's claimed injury is the loss of an opportunity to compete for the transit contract in 2006. Despite Winton's assertion that the County's decision to renew MV's contract rather than reopen it for public bidding "has an obvious chilling effect," Winton fails to show that this decision amounts to an actual injury as Winton had no right to submit a bid in the first place. The County was under no obligation to rebid the WCTS contract for 2006. As Defendants point out, MV's 2005 contract contained options for subsequent contract renewals in 2006, 2007, 2008, and 2009. These options were entirely consistent with the 2004 RFP, which

provided for bidding and award of “a one (1) year contract with a renewal option for four (4) additional years per mutual agreement.” (Haddix Dep. Ex. 6 at 5.)

Winton fails to point to, and this Court is unaware of, any precedent suggesting that a potential bidder suffers an injury when a municipality lawfully chooses to exercise an option to renew an existing public contract rather than rebid it. In the procedural due process context, courts have held that potential bidders have no property interest stemming from a public body’s decision not to submit a contract to competitive bidding. *See TriHealth Inc. v. Board of Commissioners*, 347 F.Supp.2d 548, 558 (S.D. Ohio 2004). As a potential bidder lacks any protected interest in the mere opportunity to compete for a contract, it necessarily follows that the loss of this opportunity does not amount to an actual injury.

Because the Court finds that Winton lacks standing to assert a First Amendment retaliation claim, it need not address the merits of the claim. However, the Court notes that if it were to reach the merits, the claim would nonetheless fail for the same reasons that it lacks standing. Specifically, Winton would be unable to demonstrate that it was subjected to an adverse action or deprived of some benefit, as is required to make out a

prima facie case of retaliation. *See Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir.2003).

C. State Law Claims

As the Court has dismissed all of Winton’s federal claims, it declines to exercise jurisdiction over and dismisses without prejudice Winton’s remaining state law claims. *See* 28 U.S.C. § 1367(c)(3).

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendants’ Motion for Summary Judgment (doc. 70) as to all of Plaintiff’s federal claims and dismisses without prejudice Plaintiff’s state law claims. The Court additionally **DENIES AS MOOT** Defendants’ Motion to Strike (doc. 88).

IT IS SO ORDERED.

Footnotes

- 1 Unless otherwise indicated, all references to the record for this case refer to the docket in Case No. 1:05CV471.
- 2 At this time, the Court notes that, for one reason or another, neither Plaintiff nor Defendant felt it necessary to comply with local rules governing page limits for pleadings. The Court’s Civil Trial Procedure Order, which incorporates Local Rule 7.2(a)(3), provides that briefs and/or memoranda filed in support of or in opposition to motions for summary judgment shall not exceed twenty pages absent prior approval of the Court. This Court also requires all parties moving for summary judgment to file a proposed statement of undisputed facts, “which sets forth in separately numbered paragraphs a *concise* statement of each *material* fact as to which the moving party contends there is no genuine issue to be tried.” Standing Order Governing Civil Motions for Summary Judgment at 1. The Court further requires the party opposing summary judgment to file a response admitting or denying each proposed fact. The statement of proposed undisputed facts is not to be utilized as a supplementary statement of facts, but rather a list of those facts referenced in the movant’s motion for summary judgment that the movant argues are undisputed. In the instant case, Defendants appear to have utilized the statement of proposed undisputed facts to circumvent the twenty-page limit set forth in Local Rule 7.2. Defendants’ statement is not, as the Court’s standing order requires, a concise statement of the proposed undisputed *material* facts. Instead it is a general statement of facts spanning twenty-six pages. As Defendants utilized the proposed statement of undisputed facts to spawn a sprawling description of the allegedly relevant facts, they had no need to include a statement of facts in their memorandum in support of their motion for summary judgment and could devote the whole twenty pages to addressing their legal arguments. In other words, Defendants essentially filed a forty-six page motion for summary judgment. Plaintiff, for its part, responded with a response to Defendants’ proposed statement of undisputed facts and a twenty page memorandum in opposition to Defendant’s motion for summary judgment, both of which on the surface appeared to comply with local rules. However, upon closer inspection, the Court found that within Plaintiff’s twenty page memorandum, it had incorporated a significant portion of its earlier response to Defendants’ previous cross-motion for summary judgment (doc. 35). Thus, Plaintiff’s brief measured approximately thirty pages and required the court to navigate two separate statements of the Plaintiff’s argument. Complicating matters further was the fact that though Plaintiff claimed, in its *Corrected* Response to Defendants’ Motion for Summary Judgment, to have attached its previous opposition memorandum as Exhibit B, what it actually attached as Exhibit B is a copy of its opposition to Defendants’ current motion for summary judgment. The Court has chosen to overlook these follies rather than strike the parties’ briefs, but cautions the attorneys to be more conscientious of the local rules in future proceedings before this Court.
- 3 Because it receives federal and state funding, WCTS must comply with certain federal and state guidelines governing public transit.

- 4 One result of this arrangement is that WCTS employees are not considered employees of Warren County.
- 5 During that time, Winton experienced no significant performance problems. The County's decision to rebid the service contract was merely a matter of course. (Haddix Dep. 24-25, 30.)
- 6 Haddix serves as an intermediary between the Commissioners and ODOT and FTA in procurement matters. (Haddix Dep. 10.) Haddix's role in the selection of a transit services provider was limited-he merely reviewed the incoming proposals and provided information to the selection committee and the Commissioners. He had no authority to reject, rank, or determine the compliance of any proposals, and made no recommendations to the selection committee or to the Commissioners about the proposals. (Haddix Dep. 63-64, 67.)
- 7 In its proposal, Winton expressly acknowledged this reservation of rights:
The undersigned, Martha Tipton, Sr. VP, agrees that the County reserves the right to reject any and all proposals, to waive any informalities or irregularities in the proposals received, and to accept that proposal which is in the best interest of the Warren County Board of Commissioners.
(Haddix Dep. Ex. 11 at 35.)
- 8 The members of the committee were Robert Craig, Tiffany Ferrell-Sauer, and Robin Price. All three had participated in the review of proposals for transit service in the past. (Haddix Dep. 66.)
- 9 The RFP set the award notification deadline at December 1, 2004. (Haddix Dep. Ex. 6 at 16.) However, the selection committee's review of the proposals was unexpectedly delayed because of the holiday season and because one committee member was absent.
- 10 The 2005 contract included, consistent with the RFP, renewal options for four years beyond 2005. (See Haddix Dep. Ex. 36.)
- 11 According to the official minutes of the January 3, 2006 meeting, Commissioner Kilburn requested an executive session to "discuss pending litigation relative to the complaint from Winton Transportation as it relates to the agreement with MV Transportation ." (Doc. 85, Ex. A.)
- 12 This standard apparently comes from the October 1, 2004 Federal Transit Administration ("FTA") Master Agreement and FTA Circular 4220.1. (See doc. 70, Exs. N, O.) Defendants argue that because the WCTS was funded in part through a FTA grant, as noted in the RFP, the selection process is not solely governed by Ohio Rev.Code § 307.90, but also by the standards set forth in the FTA Master Agreement. The Court need not address which standard takes precedence or determine how these standards work in conjunction with each other as the County's selection criteria comport with both standards. Indeed, the standards are similar in all material respects; namely, both accord the County wide discretion and neither requires the County to select the lowest bidder, but rather require a "best value" determination based upon a variety of possible considerations.
- 13 The RFP states that "All proposals and supporting documents become public information after the completion of negotiation and a Service Provider has been selected, unless confidentiality is specifically requested and justified by the proposer." (Haddix Dep. Ex. 6 at 14.) Elsewhere, the RFP states, "All proposals and supporting proposal documents become public information after award or rejection of all proposals and are available for inspection by the general public." (*Id.* at 17.)
- 14 Winton relies on *Ohio Asphalt Paving, Inc. v. Board of Commissioners of Coshocton County*, No. 2:05-CV-0336, 2005 WL 1421952 (S.D. Ohio June 17, 2005), a case in which another court in the Southern District of Ohio found abuse of discretion where the award of a public contract was based on a mistaken belief about material requirements due to the prevailing bidder's misrepresentation and the receipt of misinformation from ODOT.
- 15 The County explicitly reserved the right, in the RFP, to "negotiate any or all elements of the proposals." (Haddix Dep. Ex. 6 at 19 ¶ 22.)
- 16 Winton argues that *Charlie's Towing* is inapplicable because it does not apply Ohio law. The Court finds, however, that *Charlie's Towing* is sufficiently analogous and notes that in *Willie McCormick & Assoc. v. City of Detroit*, 2003 WL 1465513, 61 Fed. App'x 953 (6th Cir. March 19, 2003), which dealt with Michigan law, the Sixth Circuit applied the premise discussed above from *Charlie's Towing*, which dealt with Kentucky law.
- 17 The RFP states that "All proposals and supporting documents become public information after the completion of negotiation and a Service Provider has been selected, unless confidentiality is specifically requested and justified by the proposer." (Haddix Dep. Ex. 6 at 14.) Elsewhere, the RFP states, "All proposals and supporting proposal documents become public information after award or rejection of all proposals and are available for inspection by the general public." (*Id.* at 17.)

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

SEATTLE-TACOMA
INTERNATIONAL TAXI
ASSOCIATION,

Appellant,

v.

PORT OF SEATTLE, *et al.*,

Respondents.

No. 67721-7-I

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on February 3rd 2012, I caused the original and one copy to be filed with the Court of Appeals, Division I, and true and correct copies of the following documents:

1. Respondent Port of Seattle's Opening Brief; and
2. Certificate of Service;

to be delivered via U.S. Mail, First Class, to the following:

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