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No. 67721-7

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION,

Cross-Claimant/Appellant,

v.

PORT OF SEATTLE, et al

Defendants/Respondents

**REPLY BRIEF OF PETITIONER SEATTLE-TACOMA
INTERNATIONAL TAXI ASSOCIATION**

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INTRODUCTION

The Port's wrongful conduct provides this Court with a needed opportunity to clarify the rules applicable to "negotiated procurement." Although there is only one published case on negotiated procurement,¹ it is a process widely employed by municipalities in this state to enter contracts not covered by competitive bidding statutes.

As the Port did here, negotiated procurement entails the municipality issuing a Request for Proposal ("RFP"), and then engaging in some deliberative process resulting in an award of the contract to the successful proposer. But the Port's cavalier approach to negotiated procurement raises two issues that are important not just in this case but to the process of public contracting statewide.

First, if a municipality's RFP contains mandatory provisions (for example that the contract "will" be awarded to the party receiving the highest score), are those commitments made in the RFP binding or may they be avoided by the municipality? The Port here claims that regardless of the mandatory provisions in its RFP, it was free to negotiate any contract it wanted, and, moreover, that it could ratify a contract award that varied materially from the terms of the RFP. STITA maintains that under *Conard v. Univ. of Washington*, 119 Wn. 2d 519, 834 P.2d 17 (1992), where

¹ *Equitable Shipyards, Inc. v. State By & Through Dept. of Transp.*, 93 Wn.2d 465, 611 P.2d 396 (1980).

an RFP has specific provisions limiting the government's discretion, a proposer has a due process right to enforcement of those provisions, and that a contract awarded in violation of the RFP process is void.

Second, to what degree does the Open Public Meetings Act apply to when a municipality delegates its decision-making authority on a contract to a committee? The Port concedes it engaged in a deliberative process when it considered the proposals submitted pursuant to the RFP and ultimately entered into a contract with Yellow Cab. But the Port claims the staff committee that actually scored the proposals was entitled to meet in private and that OPMA did not apply to those deliberations, even though the real decision to award the taxi concession to Yellow Cab occurred in those private meetings.

The Port further claims that its Port Commissioners could communicate in a quorum by email concerning the award of the taxi concession without violating OPMA, even though OPMA applies broadly to all "discussions" and "deliberations." Finally, the Port claims that the limited discussion concerning the award of the contract that occurred at the Port Commission's December 15, 2009 public meeting was sufficient to cure the OPMA violations.

The Port's contract with Yellow Taxi should be set aside (1) because it was awarded in violation of the Port's RFP requirements and (2) because the Port violated OPMA, rendering the contract void under

RCW 42.30.060. The Port's acts and omissions are either undisputed or raise factual issues that must be decided by the trial court, but all facts must be taken in the light most favorable to STITA on appeal because this case is here on appeal from summary judgment.² Therefore, the trial court's summary judgment orders must be reversed.

The Port's RFP Contained Mandatory Procedures

First, the Port cannot dispute that its RFP (CP 1091) contained mandatory provisions that limited its discretion to award the contract on terms that varied from the RFP. For example, the Port was *required* to score all responsive proposals (CP 1098), to award the contract to the highest scorer (CP, 1100), to rescore all proposals if the requirements changed (CP 1097), and to award the contract on terms substantially in accord with the form agreement attached to the RFP (CP 1101). All Proposers were required to certify that they could perform as promised in their proposals. (CP 1105) The Port breached each of these provisions.

Second, the Port's RFP went even further and allowed the Port to privately negotiate a taxi contract only if certain conditions were met. For the Port to enter into unfettered negotiations "notwithstanding any provisions of this RFP," the Port had to first determine that there were *no*

² *Miller v. Jacoby*, 145 Wn.2d 65, 71, 33 P.3d 68, 71 (2001) ("In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court and considers the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party.")

responsive proposals. (CP 1097) But here the Port treated all proposals as responsive by accepting and scoring them (CP 1187), and the Commission admitted that STITA's proposal was fully responsive (CP 1048).

The Port's RFP also allowed the Port a limited right after the award to negotiate with the successful proposer. But the Port overstates this provision: the Port could only negotiate changes "for the benefit of the Port and the travelling public," but this provision did not allow the Port to dilute the contract. (CP 1105)³

The Port Staff Met Privately and Decided that Yellow Cab was the Winner

The Port concedes that its staff committee met privately, discussed and deliberated, and then scored the proposals. Port Brief at 7. While the Port now claims that this scoring is exempt from OPMA because it was only a recommendation, the Port Commissioners treated the staff scoring as binding.⁴ Moreover, since the Port's RFP requires that the contract be awarded to the Proposer with the highest score, if the Port staff scoring was only advisory, then there was no "scoring" at all since the Commission neither ratified the staff scoring, nor independently scored the

³ The Port did not try and improve upon Yellow Cab's proposal. Instead, in private meetings after the Port Commission meeting, the staff amended certain terms to be more favorable to Yellow Cab. *See* Pet. Opening Brief at pp. 14-22.

⁴ CP 1056 (Commissioner Davis: "I think it's dangerous to open the door to anything except doing what it looks as if this has led us to, which is to approve the process."); CP 1060 (Commissioner Hara: "if the process, the RFP, everything else is in sync, then I don't think for myself to have much choice but to move ahead and approve the contract.").

proposals, as is reflected in the transcript of the hearing. (CP 1022-62).

The Port Commissioners Communicated in a Quorum by Email

Before the Port's December 15, 2009 public meeting, three or more (a quorum) of Port Commissioners exchanged email about awarding the Taxi Contract. (CP 2011-14) Contrary to the Port's suggestion, these private discussions went beyond mere scheduling: the emails state that a quorum of Commissioners agreed they had to approve the committee's selection of Yellow Cab, and "cannot do anything about the outcome of the decision." (CP 2012)

The Port Commission in an Open Public Meeting Rubber Stamped the Staff Scoring and Instructed the CEO to Award to Yellow Cab

The Port Commission met on December 15, 2009. The Commission did not rescore the proposals and the comments reflect the Commissioners lacked an understanding of the scoring. (CP 1050) (Commissioner Tarleton did not know why STITA received such a low score); (CP 1044-45) (Commissioner Davis *and* Staff member Paul Grace had "no idea" why Orange Cab received the highest financial score). Although the Commissioners purported to take public testimony, their position was that they were bound to the staff scoring and that this process "is what reform looks like." CP 1062

The Port staff privately negotiated with Yellow Cab and materially altered and lessened the terms before entering the contract

On January 5, 2010 the Port staff received a memo from Yellow

Cab seeking to lessen the burdens imposed by the contract. (CP 1194-1205) Even though Yellow Cab had certified that it would perform under the terms in its proposal (CP 1212), for no additional consideration, the Port materially reduced the terms Yellow Cab would be held to.⁵ Judge Ramsdell ruled on summary judgment that whether the changes were material was an issue of fact:

If it's determined that the contract substantially conforms to the RFP, then it seems to me that there is no argument that the act of the CEO was ultra vires. If it did not, ***then the CEO did not have authority to sign***, according to the commissioners' directive. Accordingly, it appears to me that ***a factual dispute exists as to whether these changes were material*** or whether the contract was in substantially the same form as the RFP. So I think I need to deny summary judgment of both parties on that particular issue. (CP 3504) (emphasis added)

The Port later purported to "ratify" the altered contract, claiming that it could do so regardless of the mandatory terms in the RFP. On that basis, a different judge dismissed STITA's *ultra vires* claims. (CP 4582-84)

ARGUMENT

The Port's contract with Yellow Cab should either be set aside as void based on OPMA violations or this matter should be remanded for trial on the issue specified by Judge Ramsdell: whether the changes to the contract were material. Either way, the trial court's serial summary judgment orders were in error and should be vacated.

⁵ See Pet. Opening Brief, pp. 14-22 and discussion *infra* at p. 14.

First, the Port ignores the rule under *Conard*, where the Washington Supreme Court held that a due process right may be established where government procedures “contain ‘substantive predicates’ to guide the discretion of the decision makers.” 119 Wn.2d at 527. Indeed, in *Quinn Const. Co., L.L.C. v. King County Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 32, 44 P.3d 865, 872 (2002), the Court of Appeals applied this rule in the context of a disappointed bidder case. Although that court went on to find that no due process violation occurred, because the government had explicitly reserved its right to waive the bid defect at issue, that is not the case here. The Port’s RFP limits both the Port’s discretion to alter the terms of the RFP, and even limits the circumstances under which the Port may engage in private negotiations with a Proposer.

The Port’s purported award of the contract on materially different terms from the RFP is both *ultra vires* and unconstitutional, and is therefore void. The Port simply could not award this substantial contract⁶ outside the terms of its RFP without giving the other proposers an equal chance to adjust their proposals and to be rescored. The Port’s unconditional surrender of its right to enforce Yellow Cab’s certification that it could perform to the terms it had committed to also renders the

⁶ The taxi concession contract at issue runs for five years, involves taxi fares in excess of \$125 million over that term, and involves important policy issues concerning the environmental impact of providing taxi service (a major topic addressed in the RFP), and the fair treatment of the Proposers.

award void as a gift of public funds.

Second, apart from the Port's failure to adhere to its RFP terms, the Port's underlying process was also flawed, rendering the contract void under Washington's Open Public Meeting Act. The Port admits the proposals were not scored in a public meeting. The Port claims—unconvincingly—that the staff scoring was only advisory. That claim is not only contradicted by the public testimony of the Commissioners; it also contradicts the RFP's requirement that the awarding decision be based on scoring. Finally, the Port's OPMA violations are compounded by the undisputed fact that a quorum of Commissioners substantively discussed the award by email and not in a public meeting.

The Port's answer to all of this is disappointing for a public agency purportedly committed to "transparency." Rather than acknowledging that it had not treating the proposers equally, the Port sought to "ratify" its award on terms outside the RFP. And rather than acknowledging the violations of OPMA and taking steps to ensure that the process complied with OMPA's fundamental policy, the Port attempts to seize on a few stray comments made in the public meeting, as if that could cure the OPMA violations.

A. **The Trial Court's Summary Judgment Order Dismissing STITA's Ultra Vires Claim Was Error**

1. **The Port's RFP Provided Mandatory Procedural Guarantees that Were Later Ignored by the Port**

Because the Port committed itself to follow certain procedures in evaluating, scoring and awarding the contract, due process binds the Port to adhere to those procedures. When the Port argues it had the discretion to renegotiate the contract, it utterly ignores the many mandatory provisions in its RFP:

- “During the evaluation process, if the Port *determines* that a particular requirement may be modified or waived, then the requirement(s) *will be modified or waived for all Proposers and all proposals will be re-evaluated in light of the change.* (CP 1097)(emphasis added)⁷

First, the Port made no determination (as required by the RFP) that any terms needed to be modified. To the contrary, the Port accepted six proposals as responsive and scored them. But the Port changed the terms for Yellow Cab anyway. Second, the Port violated the explicit mandate of the RFP by not telling the other proposers about its negotiations with Yellow Cab, not allowing other proposers to submit alternative terms, and not rescored the Proposals based on relaxed requirements.

- “The Port *will* award the concession to the Proposer submitting the proposal with the highest score.” (CP 1100)

⁷ Use of the term “will” makes the action mandatory under Washington law. *See State v. Stivason*, 134 Wn. App. 648, 656, 142 P.3d 189, 193 (2006) (“In construing statutes and court rules, the words ‘will’ and ‘shall’ are mandatory”).

It is not clear that the proposals were ever scored at all, since the Port now claims the staff scoring was only advisory. But even assuming the original scoring met this requirement, the Port's private negotiation and resulting relaxed contract with Yellow Cab still violated the requirement that the concession be awarded to the "Proposer submitting the proposal with the highest score." (CP 1100) When the Port privately agreed to lower the requirements only for Yellow Cab, it effectively awarded the contract based on a new proposal that was not scored at all, and certainly not on the proposal receiving the highest score.⁸

- "in the event that, in the Port's sole determination, *there is not an acceptable response*, the Port reserves the right to enter into direct contract negotiations with any party it chooses on such terms and conditions as shall then be acceptable to the Port, *notwithstanding any provisions of this RFP.*" (CP 1097)(emphasis added)

The Port's RFP conditioned the Port's right to enter into private negotiations "notwithstanding any provisions of this RFP"⁹ on a "determination" that "there was not an acceptable response..." But here,

⁸ In similar circumstances, a Florida court noted that "to countenance the [government's] entry into a contract that was materially different than [the winning bidder's] proposal would encourage responders to RFPs to submit non-competitive, unrealistic proposals solely for the purpose of receiving the highest ranking for subsequent negotiations." *State, Dept. of Lottery v. Gtech Corp.*, 816 So.2d 648, 652 (Fla. Dist. Ct. App. 2001).

⁹ The Port's argument that it had an unlimited right to privately negotiate the contract terms would render this provision meaningless. See *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279, 1283 (1980) ("An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.").

the Port could not negotiate outside the RFP because, far from making a determination that there was no acceptable response, the Port Staff accepted and scored all six of the Proposals it received. (CP 1187) Moreover, Commissioner Tarleton explicitly confirmed to the public that STITA's proposal was "fully responsive to every single element of the RFP." (CP 1048)

- "The successful Proposer or Proposers *shall* enter into an exclusive On-Demand Service Lease and Concession Agreement with the Port, *substantially in the form* attached as Exhibit 2."

The Port simply did not enter a contract "substantially in the form" attached to the RFP, and Judge Ramsdell found at least an issue of fact on this issue.

2. The Port's RFP Limited the Port's Discretion Sufficiently to Give Proposers Due Process Rights

The Port misstates STITA's due process right to a fair contracting process. The Port ignores the rule stated by our state Supreme Court that "[p]rocedural guarantees may create protected property interests when they contain 'substantive predicates' to guide the discretion of the decision makers." *Conard*, 119 Wn.2d at 529.¹⁰ The Port further misapplies *Quinn Const. Co., L.L.C. v. King County Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 44 P.3d 865, (2002), which it cites for the mistaken proposition that

¹⁰ Washington's rule is in accord with the Ninth Circuit. *See Parks v. Watson*, 716 F.2d 646, 656-57 (9th Cir. 1983) (government rules "providing for particular procedures amount to 'entitlements' protected by due process").

bidders have no rights of any kind. But in *Quinn*, after noting that the plaintiff had no cognizable right to the award of the contract, the Court still evaluated a separate *Conard* procedural due process claim on its merits.¹¹ *Quinn*, 111 Wn. App. at 32.

The Port's attempts to avoid the *Conard* rule are meritless. The Port first argues that STITA's due process claim is barred because STITA has no property interest in the award of the contract. But that argument a strawman—STITA has not argued that it is entitled to an award of the contract, or any other substantive outcome.¹² Rather, STITA's due process right is grounded in the "procedural guarantees" that the Port's RFP imposed on the contracting process, as stated in *Conard*. Next, the Port cites the Ohio federal court decision in *Winton Transp., Inc. v. South.*, 1:05CV471, 2007 WL 2668131 (S.D. Ohio Sept. 6, 2007). But far from supporting the Port's theory, the *Winton* Court there noted that the plaintiff could establish a due process claim if "it shows that the County had *abused its discretion* in awarding the WTCS contract to MV." *Id.* at *11.

The Port's citation to *United of Omaha* does not help the Port

¹¹ The *Quinn* court ultimately found that a claim under *Conard* was not created under the facts of that case, but, as discussed below, that does not mean a *Conard* challenge could not prevail here, with an RFP that substantially limits the discretion of the Port.

¹² The Port devotes much ink to the holding in *Three Rivers Cablevision* that a property interest in the contract itself is necessary for a due process claim. *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1131 (W.D. Pa. 1980). But that is clearly not the law in Washington. STITA did not cite *Three Rivers* for the specific proposition that it is entitled to be awarded the contract, but for the broader proposition that due process imposes responsibilities on agencies that put contracts out for bid.

either, because although the court there ultimately found for the government on those particular facts, it nonetheless stated the general rule that a “‘disappointed bidder’ to a government contract may establish a legitimate claim of entitlement protected by due process by showing *either* that it was actually awarded the contract at any procedural stage *or that local rules limited the discretion* of state officials as to whom the contract should be awarded.” *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir. 1992) (emphasis added).

Similarly, while the Port cites McQuillin elsewhere in its brief, it neglects to mention the rule stated in the very same section of that treatise: “In awarding a public contract, a public body is not entitled to omit or alter material provisions required by its request for proposals (RFP) because in doing so the public body fails to inspire public confidence in the fairness of the RFP process.” 10 Eugene McQuillin, *The Law of Municipal Corporations* § 29.33 (3d ed. 2009) (citing *Emerald Corr. Mgmt. v. Bay County Bd. of County Com'rs*, 955 So. 2d 647 (Fla. Dist. Ct. App. 2007)).¹³ The common thread is that a due process right *can* be created if the discretion to award the contract is limited, but that whether one *is* created depends on the unique facts of the case at issue.

¹³ In *Emerald*, another closely analogous RFP contracting case, the court held that “requesting modifications of figures from one bidding party but not the other and then relying on those modifications and accepting non-compliant termination and price setting clauses [would amount] to impermissible favoritism.” 955 So. 2d at 653.

The Port argues only that because *Conard* and various other cases did not find a protectable property interest on the very different facts before them, STITA could not have one here. But the law in Washington is that government procedures *can* create such a right, provided “they impose significant substantive restrictions on decision making.” *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 963, 954 P.2d 250, 257 (1998).

The Port also makes a halfhearted argument that, as a factual matter, the changes to the final contract are less than material (Port Brief, p. 40-42). But as Judge Ramsdell recognized, that is a disputed issue of material fact. For purposes of this appeal, this Court must assume that the Port made material modifications to the RFP by, *inter alia*, relaxing Yellow Cab’s supposedly mandatory deadheading reduction commitment (CP 1146), postponing a green fleet requirement that was supposed to be a cornerstone of the new contract (CP 1268), capping late fees against Yellow Cab at only \$500 per day, versus unlimited liability in the draft contract (CP 1246), and adding an unforeseen circumstances provision (CP 1254-55) that excused Yellow Cab from its previous pledge to pay the Port “guaranteed revenue regardless of change in business.” (CP 1028); *see Miller*, 145 Wn.2d at 71 (court reviewing summary judgment must view facts in light most favorable to nonmoving party).

Finally, the Port’s argument that it possessed blanket discretion to deviate from the RFP procedures is disturbing on a public policy basis,

particularly since at the December 15 public meeting, the Port Commissioners went out of their way to tell the public that the Port had operated on “a completely level playing field” (CP 1048) with “an open competitive request for proposal[s]” (CP 1062). For the Port to make the self-congratulatory announcement that it had followed a rigid competitive process, but now take the position that its RFP did not constrain its discretion in any way whatsoever, certainly “fails to inspire public confidence in the fairness of the RFP process.” McQuillin, *supra*, at § 29.33.

3. As A Matter of Law, The Port Cannot Ratify an Unconstitutional Act.

Once it is understood that the Port’s RFP established due process protections for the bidders, the Port’s ratification argument quickly fails. As a matter of law, government agents lack the authority to take any unconstitutional action, and such action is *ultra vires*. See *Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wn. App. 207, 211, 627 P.2d 1010, 1012 (1981) (“The alleged agreement is therefore void as beyond the power of the Water District and contrary to the state constitution.”). And while the Port argues that the Commission’s June 14, 2011 vote to retroactively “ratify” the CEO’s actions was sufficient to cure any *ultra vires* action, this is flatly contradicted by the black-letter law in *South Tacoma Way* that “Ultra vires acts cannot be validated by later ratification or events.” *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123,

233 P.3d 871, 874 (2010). In other words, materially departing from the RFP was *ultra vires*, and no amount of ratification can cure it.

4. The Port's Waiver of Yellow Cab's Binding Commitments Was a Gift of Public Funds

The Port's insistence that a contractual relationship is a *sine qua non* for a gift of public funds is misleading. The test is not whether a contract exists, but whether the government surrenders something of value to a private entity without obtaining a public benefit. See *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98, 558 P.2d 211, 214 (1977). Here, while the Port was not in a contract, it had the right to enforce Yellow Cab's promise by accepting the proposal on the original terms. Its refusal to do so was a gift of public funds, just as it would have been under a contract.

This point is illustrated in *Ackerley Communications, Inc. v. City of Seattle*, 92 Wn.2d 905, 602 P.2d 1177 (1979). In that case, the state Supreme Court ruled that the Legislature could not require the City of Seattle to compensate owners when it removed billboards, because the City had a preexisting right to remove them without compensation:

Of key importance in this regard is the fact that . . . respondents' signs had already been subject to immediate removal without compensation under the City's exercise of its police power for more than 2 years. . . . The legislature could not then give new life to the signs and require compensation for their removal without requiring the City to make a gratuitous expenditure of public funds.

Id. at 918. Here, the Port had an absolute right to accept Yellow Cab's binding offer and hold Yellow Cab to those terms. The Port was therefore constitutionally barred from giving Yellow Cab more favorable terms than was required, without any corresponding new benefit for the public.

In response, the Port again can only claim in conclusory fashion that the renegotiated terms did not materially change the contract – it cannot point to a single change that actually favored the public and thus showed that the public interest was served through the renegotiation.

B. STITA's OPMA Claim Should Not have Been Dismissed

Apart from the Port's decision to abandon the procedures laid out in the RFP and negotiate new terms with Yellow Cab, the Port also runs afoul of the Open Public Meetings Act. The Port violated OPMA when the evaluation committee (whose findings the Commission considered binding) scored the proposal in private, and the Commissioners further violated OPMA when they deliberated by email in advance of the public hearing. Because the Commission did not revisit these decisions in more than a nominal sense at its public meeting, none of these violations are cured. The award of the contract is thus rendered null and void due to the failure to comply with OPMA. RCW 42.30.060.

1. STITA Did Not Waive Any OPMA Claims

The Port's contention that STITA waived this issue is incorrect. STITA assigned error to the trial court's dismissal of all the OPMA

claims, including the pre-award claims. Pet. Opening Brief at p. 6.

Moreover, the trial court's dismissal of the OPMA claims under res judicata was incorrect. (CP 3018-19; 3022-23). Under *Hayes v. City of Seattle*, STITA's OPMA claim is sufficiently separate from its claims in the first action that res judicata does not apply. 131 Wn.2d 706, 934 P.2d 1179 (1997) *opinion corrected*, 943 P.2d 265 (Wash. 1997). Whether two causes of action are the "same" for res judicata purposes turns on:

(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Id.* at 713.

STITA's first challenge concerned whether the Port's intention to split fare receipts with the winning bidder violated state and local laws governing taxi fares. It was a challenge to the Port's authority to enter into a particular substantive type of contract. In contrast, the OPMA claim is a challenge to the process used by the Port in determining who to contract with. The two claims rely on markedly different evidence: the substantive claim only examined the terms of the proposed contract against the backdrop of state law, while the OPMA claim examined the actions taken by the Port staff (*i.e.*, whether meetings were open, what was considered or decided at public vs. private meetings, etc.). Similarly, a ruling in the second action would not destroy or impair a right vindicated

in the first. A decision here that the Port must complete the contracting process in public would not have any adverse effect on the prior decision that the Port was substantively entitled to enter into a fare-splitting agreement.

Second, to the extent the trial court ruled that a prospective bidder can waive an OPMA claim by failing to bring a challenge to an OPMA-noncompliant procedure, that ruling was incorrect. “Any person may commence an action to enjoin a violation of OPMA.” RCW 42.30.130. It would simply make no sense if a citizen could still challenge such a procedure, but a bidder (who, as a practical matter, may be the only party likely to bring a challenge) could not. Under the Port’s argument, a government agency could effectively contract around OPMA simply by writing an OPMA-noncompliant procedure in an RFP; but that is clearly not consistent with the Act’s remedial purpose.

2. The Evaluation Committee Violated OPMA When it Scored the Proposals in Private

The Port Commission delegated powers to the Port CEO and his staff, who, in turn formed the evaluation committee. The Port’s argument that the OPMA does not apply under these circumstances elevates form over substance, and runs counter to the OPMA’s purpose of guaranteeing open government. This Court should follow the well-considered opinions in other jurisdictions holding that it is the type of activities a committee performs that controls whether the Act applies. *See, e.g. Wood v.*

Marston, 442 So. 2d 934, 941 (Fla. 1983); *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 162, 547 S.E.2d 862, 865 (2001).

The Port also tries to limit OPMA only to government functions that “create new policies or rules for the Commission.” Port Brief at 18. But under the Port’s view, any decision that dealt with a specific transaction or event would fall outside OPMA since it would not establish a “policy or rule” going forward. However, OPMA is not so confined. See, e.g., *Wood v. Battle Ground School District*, 107 Wn. App. 550, 566, 27 P.3d 1208, 1218 (2001) (OPMA applied to the school board’s discussion of a non-policy issue: “the possibility of instituting a declaratory judgment in regard to [the Superintendent’s] contract with the District and otherwise evaluating [his] performance.”).

The Port also argues that the Committee was not subject to OPMA based on the factual claim that the Port Commission made the final decision and did not simply “rubber stamp” the committee recommendation.¹⁴ But when considering the evidence in the light most favorable to STITA, at least three of the five Commissioners agreed:

that *the commission cannot do anything about the outcome*

¹⁴ Beyond the live question of whether the Commission was merely a “rubber stamp,” the Port’s reliance on *Salmon for All* is misplaced for additional reasons. *Salmon For All v. Dep’t of Fisheries*, 118 Wn.2d 270, 278, 821 P.2d 1211, 1215 (1992). Chiefly, that court did not base its decision on (and only addressed in passing) the issue of whether the negotiating committee’s decision was merely “rubberstamped.” Instead, the court found OPMA did not apply because the agency was governed by a unitary executive rather than a “governing body,” and because the challenged compact involved negotiations between Washington and other jurisdictions.

of the decision, because it has gone through all the procedural and legal hoops. It is ripe for approval. We *cannot change* the process, the elements, *or the evaluation committee's selection*, whether it is now or next year. (CP 2012) (emphasis added)

Several Commissioners reiterated this sentiment at the December 15 meeting, saying they had no choice but to rubber-stamp the committee's choice, rather than making their own decision on the merits of the proposals. (CP 1056) (Commissioner Davis: "I think it's dangerous to open the door to anything except doing what it looks as if this has led us to, which is to approve the process."); (CP 1060) (Commissioner Hara: "if the process, the RFP, everything else is in sync, then I don't think for myself to have much choice but to move ahead and approve the contract.")

While the Port says STITA's allegations are merely "conclusory," it is the Port—not STITA—that lacks evidence for its position. At a minimum, it is an open factual question whether the Commissioners considered themselves to be bound by the committee's "recommendation," meaning summary judgment was inappropriate.

The Port also argues that "the Commissioners had significant information before them on which to make a final decision, including the proposal scoring sheets." Port Brief at 23. But that merely underscores the problem—the Commission chose to rely on (and considered itself bound to follow) a set of numerical scores that the committee had produced in private, and that the Commissioners did not fully understand.

Finally, the Port is also unable to refute or distinguish *Cathcart v. Andersen*, where the state Supreme Court reiterated that “the purpose of the Act is to allow the public to view the decision-making process at all stages,” and rejected the claim that a faculty committee was not a “governing body” because its decisions were subject to nominal ratification by the board of regents. 85 Wn.2d 102, 107, 530 P.2d 313, 316 (1975).

Simply put, the Port is trying to have its cake and eat it too. Under its view the committee can do all of the substantive evaluation and scoring work in private, and then the Commission can adopt that decision at an open meeting, but without conducting the kind of public vetting that would be necessary for the public to understand how the decision was made. This is the exact sort of hide-the-ball situation that open public meeting laws are designed to prevent. *See, e.g., Polillo v. Deane*, 74 N.J. 562, 578, 379 A.2d 211, 219 (1977) (the law does not “allow an agency to close its doors when conducting negotiations or hammering out policies, and then to put on an appearance of open government by allowing the public to witness the proceedings at which its action is formally adopted”).³

Whether the Commission Voted in Private is a Question of Fact that Cannot Be Decided on Summary Judgment

At the trial court and in its opening brief, STITA offered evidence of a further OPMA violation because the Commissioners decided how they would vote in advance, which constitutes an OPMA violation under *Battle Ground School District*. 107 Wn. App. at 566. The Port’s only response is to make the *factual* claim that the Commissioners were only

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talking about whether to schedule the contract decision for a public vote, not how they would ultimately vote. But the email exchanged by the Commissioners plainly reveals that the discussion went far beyond scheduling and addressed the issue of whether the staff recommendation was binding—an issue that in itself could only be addressed by a quorum of Commissioners in an open public meeting. (CP 1011-12).

The Port also alleges that the email cannot be grounds for an OPMA violation because only one commissioner was copied on them. But the Port forgets that what OPMA prohibits is the *action* (*i.e.*, a deliberation or decision), whether that act is conducted through the Commissioners' own emails, through emails by their staff, or through any other means (as the Port staff member's email evidences in stating that they have four "yes votes.>"). In other words, the Port cannot avoid the requirements of OPMA merely by having the Commissioners talk to each other through proxies such as their staff.

4. The December 15 Meeting Was Not Sufficient to Cure the OPMA Violation

Finally, the Port incorrectly argues that any OPMA deficiencies were cured by the open meeting on December 15, 2009, at which the Port adopted the committee's recommendation. However, that meeting amounted to nothing more than a "summary approval of decisions made in numerous and detailed secret meetings," and thus did not suffice to cure the preexisting OPMA violations. *Org. to Pres. Agr. Lands v. Adams*

County, 128 Wn.2d 869, 884, 913 P.2d 793, 802 (1996).

To effectively cure an OPMA deficiency, an organization must “retrace its steps” and *fully* repeat the required actions in public. This necessarily includes steps taken to analyze and make decisions, so that the public may be informed about *why* a particular action was taken, not just what action was taken. *See, e.g., Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. Dist. Ct. App. 1998) (requiring “a full reexamination of the issues . . . a full, open public hearing . . . [with] significant discussion of the issues”).

Here, although the briefing given to the Commission summarized the committee’s scoring decision (albeit in a general and non-quantitative fashion) there was not nearly enough information for a public observer to understand the reasons Yellow Cab was selected. Even the Commissioners did not understand how the scores came out the way they did—as Commissioner Tarleton stated:

So I looked at the revenue to the Port. I said you got killed. STITA got killed in that ranking. You were 5th out of six. *I don't know the reason for that.* I don't know how you were so far below any of the other top four. That was the difference between your coming in first on the scoring and your coming in third. CP 1050 (emphasis added).

Commissioner Davis stated that he was confused as to why Orange Cab received the highest score in one category, and asked Staff member Paul Grace—who, in turn, said that he had “no idea.” (CP 1044-45) And at the

final vote, the Commissioners reiterated that they were voting in deference to the *private* evaluation done by the committee, not based on their own evaluation of the merits of the proposals. *See supra* note 4.

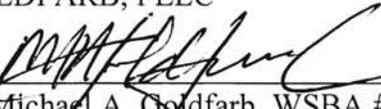
Simply put, the Commission did not do enough at its December 15 meeting to ensure that the public could understand how the Port's decision was reached. STITA and the public were therefore deprived of "a full opportunity to express [their] views in a public meeting." *OPAL*, 128 Wn.2d at 884. At the very least, whether the Port "retraced its steps" and conducted an adequate consideration of the issues is yet another factual issue that cannot be decided against STITA on summary judgment.

CONCLUSION

For the reasons stated above, the Port has failed to rebut STITA's argument that the trial court erred in granting summary judgment for the Port and Yellow Cab. If the Port was not bound to honor the terms of its RFP, then the entire process is a sham that allows elected officials to argue they are engaging in a fair process while the Port staff is negotiating in a backroom. The summary judgment rulings should be reversed, and this Court should either set aside the Concession Agreement or remand for further proceedings at the trial court.

RESPECTFULLY SUBMITTED this 27th day of April, 2012.

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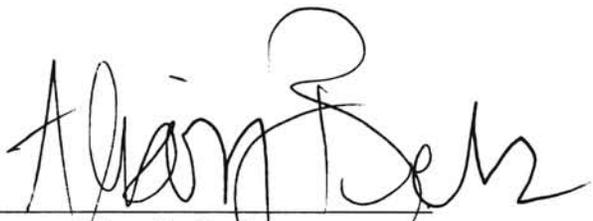
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on April 27, 2012, a copy of this document was sent for service on the following persons:

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