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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

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

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I
2011 DEC -1 PM 4:30

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I. INTRODUCTION

Seattle-Tacoma International Taxi Association (“STITA”) respectfully requests that this Court reverse the trial court’s erroneous dismissal of summary judgment on STITA’s cross-claims against the Port of Seattle (“the Port”) and Yellow Cab.

This case arises out of the Port’s five-year contract for taxi services executed with Yellow Cab in August of 2010. The Port purported to place the taxicab concession at Sea-Tac Airport out for a competitive bid, but the Port – in violation of explicit provisions in its Request for Proposals (“RFP”) – ultimately chose to privately negotiate the terms of the contract. The Port staff’s private renegotiation of the contract renders the contract void for at least three reasons.

First, the Port’s RFP explicitly precluded the Port from any such action. No other bidder was even told of the private renegotiation, let alone rescored on the revised terms, even though rescoring was explicitly promised by the Port in its RFP. The Port’s failure to follow the *procedures* set forth in the RFP renders the contract *ultra vires* and void.

Second, the Port staff inexplicably “negotiated” a contract with Yellow Cab on terms much more favorable than the terms Yellow Cab had promised in its public bid. The Port’s unnecessary grant of benefits to Yellow Cab without any consideration in return also renders the contract void as a gift of public funds, barred by the Washington Constitution.

Third, the Port also awarded the contract to Yellow Cab without following the required open public meeting process, rendering the contract void for this additional reason as well.

After another bidder filed this action, STITA conducted discovery, learned of the private negotiations, and brought cross-claims against the Port and Yellow Cab to void the final contract, because it was *ultra vires* and because the Port failed to adhere to Washington's Open Public Meetings Act, Chapter 42.30 RCW ("OPMA"). The trial court erred when it dismissing these claims on summary judgment, and in doing so it misconstrued the applicable law and ignored substantial evidence supporting STITA's claims.

In 2009, after the Port was audited by the State Auditor's Office over management practices concerning the "third runway" at Sea-Tac Airport, the Port pledged in its amended Resolution 3605 to implement "increased accountability," "increased transparency" and "greater oversight" over staff. But old ways die hard, and in 2010, when the Port purported to award the Sea-Tac Airport taxi concession, which involves more than \$125 million in taxi fares over five years, to Puget Sound Dispatch ("Yellow Cab"), the Port only paid lip service to the public process while making all of the key decisions behind closed doors in a preordained decision to award the contract to Yellow Cab.

The Port's conduct raises important legal and policy issues that go far beyond this case, providing a platform to clarify the rules applicable to the bidding and award of public contracts not covered by competitive bidding laws for state agencies, counties or cities.

To begin with, although the Port has announced, to great internal fanfare, a commitment to competitive bidding for its contracts, actions speak louder than words, and the Port's award of the taxicab contract shows that even after the Auditor's report, little has changed.

The Port promised in its Request for Proposals that the taxi contract was to be awarded to the proposer with the highest score. But after the Port Commission purported to select Yellow Cab as the winning bidder based on the staff scoring of the proposals, Yellow Cab privately complained about the contract terms. Remarkably, the Port did not drop Yellow Cab as nonresponsive and move on to the next proposer. Instead, in direct violation of the terms of its RFP, the Port substantially renegotiated the contract so that it scarcely resembled what the bidders had proposed and the committee had evaluated. And more, the Port did not inform the other bidders or give them a chance to meet the new terms.

This return to backroom-deal contracting was not competitive bidding, and it is not what the Port committed to in the RFP. As a matter of law, the Port was required to adhere to the terms of its RFP when awarding the taxi contract. The Port's RFP contained explicit provisions

concerning whether the bid requirements could be changed at all, and, even when a change could be made, the RFP further required that “the requirements(s) will be modified or waived for all Proposers and all proposals will be re-evaluated in light of the change.” Finally, the Port’s RFP explicitly limited its discretion to negotiate a private contract to only the situation where the Port makes a “determination” that none of the responses were acceptable, which the Port concedes does not apply here. Because the Port ignored the RFP and ultimately entered into a privately negotiated contract with Yellow Cab, that contract is void as a matter of law, and the trial court’s dismissal of STITA’s claim that the contract was *ultra vires* and void was error.

Additionally, after Yellow Cab had delivered its proposal, which contained Yellow’s binding promise to adhere to certain commitments made in the proposal, the Port unilaterally – and inexplicably – substituted more lenient terms in the final, privately negotiated contract. This resulted in a boon for Yellow Cab, but left the public with less stringent financial, environmental and service commitments than what the RFP had required and less than what Yellow had promised to provide. The Port CEO’s private renegotiation of the contract terms with Yellow Cab, which relieved Yellow of its obligations without any new consideration, thus constituted an unlawful gift of public funds, rendering the purported contract void for a second reason – violation of Sections 8.7 and 2.25 of

the Washington Constitution. For this reason as well, dismissal of STITA's claim that the contract was *ultra vires* and void was error.

Furthermore, the Port ignored its obligations under the Open Public Meetings Act, by which Washington's people and legislature have demanded, in the strongest terms possible, that the government agencies such as the Port make their decisions within view of the public. The Port was required under OPMA to conduct all Commission business at a "meeting open to the public." RCW 42.30.060. Here, in violation of the OPMA, the Port Commission first delegated the evaluation of the competing taxi proposals to an internal committee that met in private. Privately scored Yellow Cab the highest and then declared Yellow the winner. Then, the Port Commissioners compounded the OPMA violations when, based on the evaluation committee's private evaluation of the proposals, the Port Commission conducted its deliberations, including a vote, via private emails and private discussions between members.

The Port's contract with Yellow Cab is void for the additional reason that the Port Commission's later perfunctory public vote to award the contract, which shed no light on the process by which the Port reached its decision, paid mere lip service to the requirements of the OPMA, and renders the award of the taxi contract void as a matter of law. For this reason, the trial further court erred by dismissing STITA's claim that the contract was void because of the Port's OPMA violations.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the Port's cross-motion for summary judgment, and by denying STITA's cross-motion, on STITA's claim that the contract was *ultra vires*, where the evidence shows that the Port CEO acted outside the scope of his authority by violating the Port's own binding rules, the Washington Constitution and the United States Constitution; and where such violations cannot be cured by ratification by the Port Commission.
2. The trial court erred by granting the Port's cross-motion for summary judgment, and by denying STITA's cross-motion, on STITA's claim that the Port violated the Open Public Meetings Act, where the evidence shows that the Port's actions were subject to OPMA and that the Act was not complied with.

III. STATEMENT OF THE CASE

1. **STITA was formed to provide adequate taxi service at Sea-Tac Airport.**

In the 1980s, the Port's Airport taxi service was in disarray, "marked by deteriorating service by untrained drivers, no control over the number of available taxis, disputes among drivers, and poorly maintained vehicles." CP 1017. In 1989, the Port helped form STITA, a nonprofit taxi association, to provide a single source for outbound taxi service from the Airport. STITA provided the Port with exemplary service throughout

the contact period. Commissioner Davis, who was on the Commission when STITA was formed, said: “We had a real taxi disaster when I started at the airport . . . and I lived through that. With you all, you straightened it out. We’ve had fantastic service for 20 years from you.” CP 1055.

2. **The Port’s unfavorable audit report and subsequent enactment of Resolution 3605.**

In December 2007, the Port received a critical audit from the State Auditor “directing the Port to review and revise the existing delegation of authority” and to “restore the Commission’s oversight authority” over the Port CEO and his staff. CP 1065.

In response, the Port Commission adopted Amended Resolution 3605, which re-defined the authority of the Port CEO. *Id.* Resolution 3605 requires that the Port “gives careful consideration to the economic, social and environmental impacts of its decisions.” CP 1066. The resolution also states that “The CEO works with the Commission *to enhance openness*, to achieve efficiencies and accountability, *and to develop instruments of transparency for the public.*” CP 1067 (emphasis added). Resolution 3605 further states that the Commission’s “*oversight function cannot be delegated away*, and nothing in this Resolution shall be construed as doing so” and further that “it is the Commission’s responsibility to . . . hold the CEO responsible for the implementation of” Commission policies. CP 1066-67 (emphasis added). Finally, the

resolution established a strong policy of competitive bidding on the Port's contracts. CP 1078 ("It is the Port of Seattle's policy to engage in competitive solicitation of bids for all services and purchases"). As Commissioner Creighton summarized, "we've made an effort to push forward and really go past the old ways of doing business and go more towards competitive bidding processes." CP 1053. Commissioner Davis was more direct: "the state auditor has demanded a competitive process." CP 1056.

3. **The Port places the taxi concession out for competitive bidding, subject to a rigid evaluation procedure.**

On September 25, 2009 the Port released its RFP for the taxi concession. (CP 1091). The RFP was built on a competitive bidding procedure, as the Port staff later affirmed. CP 1025 ("This has been bid competitively."). When they voted to approve Yellow Cab's proposal, several Commissioners emphasized that competitive bidding was essential to the contracting process. Commissioner Tarleton noted: "I followed very carefully this competitive process because I wanted to make sure that it was fair. I wanted to make sure that it created the sense that others could in fact compete fairly in a completely level playing field." CP 1048. Commissioner Bryant praised the integrity process of the process: "this open competitive request for proposal is what reform looks like." CP 1062. Commissioner Davis added that, if the Port failed to adhere to

competitive bidding, “it would create very many serious questions about the Port’s openness.” CP 1055.

In order to provide that “level playing field,” the RFP specified a number of procedures that the Port was *required* to follow in scoring the proposals and evaluating the contract. The Port was required to conduct an initial screening of every proposal for responsiveness, and then to score all responsive proposals according to the evaluation criteria. CP 1098. The RFP further *required* that “The Port *will award* the concession to the Proposer submitting the proposal with the highest score.” CP 1100. If the Port wished to alter or waive any requirement set out in the RFP, “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). And the Port’s authority to waive defects in any proposal was limited to “informalities and minor irregularities.” *Id.*

The RFP also required that proposers commit to be bound by the terms of their proposals. Proposals could not be withdrawn after the winner was selected. CP 1098. Each proposer had to sign a certification attesting that it had the capability to follow through on the terms of its proposal. CP 1105. The successful proposer was required to enter into a contract “substantially in the form of” the draft contract that was issued along with the RFP. CP 1101. While the proposers were required to acknowledge the Port’s “right to negotiate fees and other items it deems

appropriate *for the benefit of the Port and the travelling public,*” no provision empowered the Port to materially alter the terms for the sole benefit of the proposer, and to the detriment of the Port and the travelling public. CP 1105 (emphasis added).

Several key terms of the RFP specified even more clearly that bidders were required to make binding commitments. The RFP required proposers to commit to a “percentage of deadhead trips [that] will be reduced monthly by your efforts.” CP 1103. It specifically instructed proposers to “Use attainable and realistic goals only, as your percentage *will* become a term of the agreement to which the proposers *must* adhere or forfeit rights to the agreement.” *Id.* (emphasis added). Likewise, the RFP specified that “Revenue to the Port will be evaluated on structure, including guaranteed and variable payments, as well as total amount to the Port.” CP 1099. The amount the winning proposer guaranteed to pay the Port would be added directly into the final contract. CP 1112 (“Concessionaire shall pay a minimum annual guarantee (the ‘Minimum Annual Guaranty’) equal to _____.”).

4. **Yellow Cab’s proposal is selected by the Port Staff and Commission.**

The Port received six responses, including those of STITA, Yellow Cab, and a joint venture involving Yellow Cab. The Port formed an evaluation committee, consisting of Port managers familiar with the taxi

operation. CP 1149. This committee *privately* reviewed the criteria, *privately* discussed the proposals, *privately* developed additional criteria for how points would be awarded, and *privately* conducted evaluations. None of the committee's proceedings took place in what state law defines as an open public meeting.

By December 11, 2009 the Port's evaluation committee had completed its private evaluation, awarded final points for each proposal, and decided that Yellow Cab was the winner. All six bids had been scored and none were rejected outright. CP 1187. Yellow Cab's and STITA's bids were both found "fully responsive." CP 1048. On December 11 (*before* the commission had voted to award the contract) the evaluation committee sent letters to Yellow Cab and the other bidders stating that Yellow Cab was the winner. CP 1172.

Around the same time, Port Commission members began to converse by email regarding approval of the contract with Yellow Cab. These email exchanges included a quorum of Commission members. For example, on December 10 (five days before the Commission was supposed to reach a decision at its public meeting), a staff member wrote to Commissioner Bryant: "We have 4 yes votes for awarding the taxi contract." CP 2014. In addition to counting votes, the Commissioners and staff privately discussed conditions for voting. Commissioner Creighton, for example, told his colleagues that his "yes" vote was

contingent on a companion motion on deadheading reduction. CP 2011.

At the Port Commission meeting on December 15, 2009, the Port staff moved before the Commission for authority for the CEO to “award” the concession to Yellow Cab. CP 1180-84. The Commission deferred to the award of points made by the evaluation committee in private meetings, and voted to authorize the CEO to award the taxi concession to Yellow Cab. *Id.* There was virtually no discussion about why the committee had scored the proposals as they did. For example, Commissioner Tarleton stated that she “[did]n’t know the reason” for STITA’s low financial ranking. CP 1050. However, as discussed above, the Commissioners emphasized their commitment to the competitive bidding system, and praised the Port staff for adhering to the strictures of the RFP procedures. Commissioner Bryant summarized: “this open competitive request for proposals is what reform looks like.” CP 1062.

5. After the Commission accepted Yellow Cab’s proposal, Yellow Cab had “heartburn” over its ability to perform.

Yellow Cab “did not expect to win” the contract. CP 1191 at 65:14. It bid recklessly, and after the December 15, 2009 Commission meeting, Yellow Cab had “heartburn” and “buyer’s remorse” over its ability to perform the contract as promised. *Id.* at 65:4-6. Yellow Cab’s proposal had been prepared by Chris Van Dyk, a lobbyist with no operational experience in the taxi industry. After the evaluation

committee recommended Yellow Cab, Van Dyk had cold feet. He told his friends that he “hope[d] to God my financial models” in the Yellow proposal were correct. *Id.* at 65:21-23.

But Yellow Cab was legally committed to provide what it had promised. A proposal could not be withdrawn after the vote to award the contract. CP 1098. The RFP required that “the successful Proposer... *shall* enter into an exclusive On-Demand Service Lease and Concession Agreement with the Port, *substantially in the form*” of the draft contract issued with the RFP. CP 1109 (emphasis added). In other words, all six bidders, including Yellow, bid on the same prospective contract, and the winner had to enter a contract “substantially in the form” of that contract.

But instead, after it had won by making aggressive promises, Yellow Cab attempted to water down its commitments. On January 5, 2010, Van Dyk delivered a private memo to the Port entitled “Airport Contract Concerns” which requested substantial changes to the draft contract. CP 1194-1205. As addressed below, Yellow Cab had received its winning score based in large part on its “deadheading” proposal, its financial guarantee and its operational plan. But Yellow Cab was now requesting changes that would significantly erode those very same commitments by limiting Yellow Cab’s deadheading commitment, limiting Yellow Cab’s financial guarantee, and limiting penalties if

Yellow Cab did not meet its operational promises.¹

6. **Beginning on January 6, 2010, the Port met privately with Yellow Cab and substantially renegotiated the contract.**

The Port admits that beginning on January 6, 2010, its staff met *privately* with Yellow Cab and renegotiated the contract. Staff ignored the requirement that the successful bidder sign a contract “substantially in the form” of the contract attached to the RFP. Staff also ignored the provision in the RFP requiring that before the Port could modify or waive any contractual requirement, it had to “determine” that it was necessary to do so, and had to rescore all bids based on the modification. CP 1097.

Instead, the CEO’s staff substantially modified the contract in private negotiations with Yellow Cab, rendering the original scoring meaningless. None of the competing proposals were rescored and, in fact, other proposers were not even told of the private negotiation between Yellow Cab and the Port. An appendix prepared for the trial court summarizes the substantial changes made to the contract that the proposers had bid on. CP 4126-30. The most dramatic changes are briefly described here:

Changes to Deadheading Requirements

Deadheading is the practice of dropping a fare off and then

¹ Mr. Van Dyck had refused to produce his copy of the January 5 memo or any of his other documents, curiously citing the Fifth Amendment protection against self-incrimination. The trial court ultimately ordered him to produce his documents and appear for a deposition. *See* CP 252-53.

returning empty to the Airport to await the next fare. The Port's RFP established reduction of deadheading as one of the criteria to be scored for awarding the contract. CP 1099. Deadheading was an issue of special importance to the public and the Commission. CP 1151; 1169. Bidders were required to make a commitment to an "achievable *monthly* goal" for deadheading reduction. CP 1099 (emphasis added). The draft contract attached to the RFP provided that failure to meet the deadheading reduction commitment "shall constitute a material default" of the Agreement. CP 1111.

Yellow Cab's proposal promised to reduce deadheading on a monthly basis. The evaluation committee scored Yellow Cab 8 out of 10 on its deadheading promise. CP 1187. The Commissioners were assured on November 30, 2010 that the contract contained a termination provision for failure to reduce deadheading, which was intended to make the Concessionaire "realize there is a large penalty if they don't meet" the targets. CP 1154. On December 15, 2010 the Commission was again assured that Yellow Cab would reach its deadheading promises because "if the company doesn't meet those goals, they stand to forfeit their right to the contract." CP 1030.

But after January 6, 2010, Yellow Cab privately negotiated limitations on its deadheading promise. Despite the prior representations to the Commission, on August 6, 2010 the CEO consented that before

terminating the contract for failure to reach the deadheading targets, “the Port agrees to take into consideration Concessionaire’s *good faith efforts* to execute its deadheading goals” including whether there were changes “of lack thereof to the local regulatory approach to granting of taxicab licenses and all other factors affecting deadheading . . .” CP 1146.²

No other bidder had the opportunity to bid on deadheading reduction where the failure to meet the targets might be excused if “good faith efforts” were made. The evaluation team scored the Yellow Cab proposal without considering this limitation (including whether it rendered the Proposal not responsive), and the Commission was never told that the CEO had abandoned the promises the staff made in public hearings that a contractual default could be used to enforce deadheading commitments.

Changes to Green Fleet Requirement

Under the previous contract, the Port had required STITA to provide an entirely green fleet, and STITA had long met that requirement. But to encourage other bidders without green cabs, the RFP required only that by September 1, 2010 (the original start date) the Concessionaire have a 50% green fleet. CP 1128. Even this step backwards was questioned by Commissioner Bryant: “Well, my concern, and maybe you can address

² The August 6, 2010 contract signed by the CEO also says the Concessionaire must merely use “reasonable efforts” rather than the requirement of “all reasonable efforts” in the original contract, and further provides that review of deadheading reduction will be *annual*, not *monthly* as previously promised. CP 1246; 1263.

this, is that right now we have 166 green vehicles in the fleet. And while we hope to go up to 210 green vehicles in the fleet, on September 1st we're going to fall back to 105. Do we really have to fall back in order to go forward?" CP 1039.

The final Concession Agreement fell even further back than the RFP, postponing the 50% green requirement until March 1, 2011 – five months after the November 1, 2010 start date. CP 1268. Similarly, the original version of the contract had required the fleet to be 100% green by September of 2011. But the Port CEO, without Commission approval, moved that date out *a year* until September of 2012. *Id.* Given Commissioner Bryant's specific concern about any decline in the fleet's green credentials, the CEO's decision to waive the requirement for a 100% for a full year was another substantial change.

Changes to the Five Minute Wait Requirement

The Port's RFP required that there be no more than a five minute wait for any taxi customer. The Commission was told that staff's objective was "number one, maintain safe, efficient service and maximum 5-minute wait times." CP 1023. To enforce that requirement, the draft agreement (i.e., the form of agreement attached to the RFP) required a \$50 penalty anytime a customer had to wait for a cab for more than five minutes. CP 1111. This liquidated damages provision imposed a significant potential

penalty for late taxis.³

Yellow Cab's proposal promised that it "will fully service all on-demand service requirements, meeting a minimum wait time of five minutes, with a service improvement goal of 4 minutes after the first contract year." CP 1217. Partly due to this aggressive guarantee, Yellow received 29 out of a possible 40 points for its Operational Plan. CP 1187.

But without Commission approval, the CEO all but eliminated this requirement in the final Concession Agreement he signed. First, he excused Yellow Cab from complying with the requirement at all until March 1, 2011, if Yellow Cab did not have all 210 taxis it had promised in its bid. CP 1245. Second, the CEO agreed to cap the \$50.00 per late taxi penalty at *\$500 per day*, a huge reduction from the exposure possible under the original contract. CP 1246. All bidders had been scored based on the uncapped damages threatened in the draft RFP, Yellow Cab was scored on its proposal that did not demand this \$500 daily cap, and no other bidder was allowed to bid on the revised contract with this cap.

The Port recently admitted that Yellow Cab had "some initial difficulty dispatching cabs from the holding lot to the Ground transportation" and thereby failing to meet the five-minute requirement.

³ Based on the Port's estimate of 676,010 fares for 2009, the average number of fares per day is approximately 1,852. CP 1094. If Yellow Cab was late all day, liquidated damages could have reached \$92,600 per day (1,852 x \$50.00), a substantial incentive for the Concessionaire to meet the Port's five minute requirement for timely service.

CP 4048. The Port did not, however, specify how much money it has lost through the \$500 cap on damages for those late pickups. Nor did the Port discuss whether Yellow Cab would have addressed the problem more quickly if the financial consequences had been greater.

Changes to the Guarantee/Addition of “Exceptional Circumstances” Provision

Yellow Cab bid \$18.35 million as the “guaranteed minimum amount” it would pay the Port regardless of actual taxi traffic. CP 1028. The evaluation committee was impressed with Yellow Cab’s \$18.8 million guarantee, and gave Yellow Cab a high score of 27 out of 30 for the criteria “revenue to the Port.” CP 1187. The Commissioners were repeatedly assured that the commitment was absolute: “this is guaranteed revenue regardless of change in business.” CP 1028. And when the Commissioners discussed the one page scoring summary presented at the Commission meeting, several commented that it appeared that Yellow Cab’s financial guarantee was the main difference between Yellow Cab and STITA’s proposals. CP 1050 (“STITA got killed in that ranking . . . I don’t know the reason for that.”).

But having convinced the staff it should win based on its unconditional \$18.8 million guarantee, in the later private meetings Yellow Cab expressed concern that the number of taxi fares was down, and that it might have trouble meeting its commitment. CP 1281 (“remaining concern is the decline in GT [ground transportation]

business”). In response, and despite the staff’s previous assurance to the Commission that Yellow Cab had promised “guaranteed revenue regardless of change in business” (CP 1028), the CEO agreed to limit Yellow Cab’s financial guarantee. Section 18 (“Exceptional Circumstances”) was added to the new Concession Agreement and provides in part:

Notwithstanding anything to the contrary contained in this Agreement, if for any reason Concessionaire *shall be delayed in, prevented from, or impeded from performing any of its obligations* under this Agreement due to causes that are unforeseeable, beyond its reasonable control, and without fault or negligence, including but not limited to *reduction of Airport activities* arising from or related to terrorist threats or actions, airline bankruptcy or consolidation . . . or *any other condition beyond Concessionaire’s reasonable control*, Concessionaire shall *not be considered in breach* of or in default with respect to any obligation hereunder or progress in respect thereto. CP 1254-55 (emphasis added).

Yellow Cab can now claim relief from its guarantee if the number of taxi trips goes down because of the new light rail system, an airline bankruptcy or consolidation, terrorist event, the continuing recession, change in regulations, or a myriad of other things that Yellow Cab could claim are “beyond the Concessionaire’s reasonable control.” Yellow Cab received 27 points on an aggressive revenue promise that was not subject to these protections. CP 1187. Had Yellow Cab submitted a bid that imposed substantial limits on its obligation to guarantee revenue, it would

have been non-responsive or, at minimum, would have earned fewer points. STITA only received 17 points because it took the requirement that the revenue must be “guaranteed” at face value, and thus bid much more realistically. *Id.* No other bidder was advised that the CEO later decided to waive the unqualified guarantee, nor were they permitted to rebid on these more relaxed terms.

Changes to Number of Required Vehicles

The Port’s RFP required that the Concessionaire provide 210 taxis available at all times to serve the Port. CP 1095. In response, Yellow Cab promised “a dedicated fleet of 210 dual licensed taxis” (cabs able to pick up passengers in both Seattle and King County). CP 1214. This was a bold promise since Yellow Cab did not have 210 dual licensed cabs in its fleet at the time. Apparently Yellow’s plan was win the contract, then raid STITA and other cab companies with dual licensed cabs by offering their drivers the carrot of working at the airport. To allow Yellow more time to implement that plan, the CEO agreed in August of 2010 that Yellow need furnish only 170 cabs upon inception, and had until March 1, 2011 to bring in the rest. CP 1265. No other bidder was allowed the opportunity to reach the 210 cab requirement in phases, and Yellow had been scored based on a promise of immediate availability of all 210 cabs.

Failure to Include a Requirement for Dual Licensed Cabs in the Final Contract

Yellow Cab also promised that all 210 taxis in its dedicated airport

fleet would be “dual licensed,” another dangerous promise since when it bid, Yellow Cab did not have 210 dual licensed taxis in its fleet. The evaluation committee had told the Commission that Yellow’s promise of dual licensed taxis was a “very important” factor in its winning bid. CP 1029-30.⁴ But without Commission approval, the CEO completely waived the dual license requirement and did not include it in the final contract.

7. **The CEO ignored repeated challenges, and signed the August 6, 2010 agreement over STITA’s protest during litigation.**

On January 6, 2010, shortly after the Commission decision to award the contract to Yellow Cab, the Port began meeting in private with Yellow Cab to make the major contract revisions described above.

Unaware of those meetings, STITA commenced a lawsuit challenging the RFP itself (“the STITA action”). STITA’s main contention was that certain terms of the RFP violated the rate-setting system imposed by the Revised Airport Act and King County law. Although this action was unsuccessful in the trial court, the Court of Appeals granted a stay precluding the Port from executing the contract with Yellow Cab, but ultimately affirmed the trial court’s denial of an injunction. *See Seattle-Tacoma Int’l Taxi Ass’n v. Port of Seattle*, No.

⁴ Dual-licensed cabs were critical to meeting the new deadheading requirements, since a cab that could pick up a passenger from anywhere was obviously less likely to need to return empty to the Airport.

64857-8-I, 156 Wn.App. 1025, 2010 WL 2283621 (2010), *review denied*, 169 Wn.2d 1016 (2010).

Meanwhile, another unsuccessful bidder, Rainier Dispatch, commenced the present action against the Port and all bidders, including STITA, and challenging the Port's award. CP 1-6. STITA conducted discovery in this case, uncovered evidence of the private negotiations and the OPMA violations, and filed an objection with the Port. STITA then brought cross-claims against the Port and Yellow Cab, asserting, among other things, that the contract was *ultra vires* and violated the Open Public Meetings Act. CP 278-84.

On August 5, 2010, the state Supreme Court dissolved the stay that had been granted in the STITA action. *STITA v. Port of Seattle*, 169 Wn.2d 1016 (2010) (denying review). The next day, the Port CEO signed the renegotiated version of the Concession Agreement with Yellow Cab.

8. The trial court's dismissal of STITA's claims on summary judgment.

STITA's claims were dismissed piece-by-piece through several rounds of summary judgment motions. The parties first cross-moved for summary judgment on, among other things, STITA's OPMA and *ultra vires* claims. Although Judge Ramsdell dismissed the OPMA claims, he notably found that the *ultra vires* claims could not be resolved on summary judgment. As Judge Ramsdell explained in his oral ruling of

October 1, 2010:

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 parties conducted extensive motions practice on related issues throughout the remainder of 2010. Judge Ramsdell issued two written orders on these motions, on November 3, 2010 (CP 3878-87) and December 29, 2010 (CP 3994-99), respectively.

In June 2011, the Port Commission passed what was purportedly a "ratification" of the CEO's decision to sign the renegotiated contract with Yellow Cab. CP 4039. This action was taken as a direct response to STITA's claims that the final contract was *ultra vires* because the Commission had never authorized the revision of material terms. The Commission was advised that, "In the event that the Port Commission elects not to ratify the agreements executed as requested here, there will be a trial in early August 2011 to determine, as a matter of fact, whether the agreement executed by CEO Yoshitani with Puget Sound Dispatch conformed to the Port Commission's December 15, 2009 direction and delegation of authority." CP 4048.

With the Commission's supposed ratification in hand, the Port brought a new motion to dismiss the *ultra vires* claims. Judge Prochnau, who had replaced Judge Ramsdell, granted the Port's motion on August 19, 2011 (CP 4578-81). The court granted final judgment against STITA on September 7, 2011. CP 4582-84. Notice of appeal was timely filed on September 16. CP 4585-86.

IV. ARGUMENT

"The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300 (2002). "The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party," in this case STITA. *Id.* The respondents "bear the burden of showing no genuine dispute exists as to any material facts." *Blumenshein v. Voelker*, 124 Wn. App. 129, 133-34 (2004). On a summary judgment motion, the court may resolve factual questions only "when reasonable minds can reach only one conclusion." *Id.*

A. The Port's Abandonment of its Binding Commitment to a Competitive Bidding Process was *Ultra Vires*

As discussed above, the trial court (Judge Ramsdell) initially ruled that issues of material fact existed as to whether the final contract differed "substantially" from the terms of the RFP. The court further ruled that, if the

CEO did in fact negotiate substantial changes, such action was *ultra vires* and void. After the Commission voted to “ratify” the CEO’s decision, and after the case was reassigned, Judge Prochnau granted summary judgment to the Port, holding that the “ratification” cured any *ultra vires* problem. The latter ruling, however, was in error for several reasons.

First, it is black letter that “Ultra vires acts cannot be validated by later ratification or events.” *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123 (2010). The trial court’s first ruling, and the correct one, was that the CEO’s revisions, if found to be substantial, would be *ultra vires* and thus non-ratifiable. The Commission’s ostensible “ratification” did not and could not change the fact that STITA was entitled to a trial on whether the changes were substantial.

Second, once the Port had bound itself to follow a competitive process for the taxi concession, even the Port Commission itself lacked authority to renege on that commitment. Although the Port is not subject to a state-level statutory requirement for competitive bidding, the Commission could, and did, bind itself to award the taxi concession based on competitive bidding. *See Marriott Corp. v. Metro. Dade County*, 383 So. 2d 662, 665-66 (Fla. Dist. Ct. App. 1980) (county board, having “authorized competitive bidding by resolutions expressing its policy,” was prohibited from negotiating non-competitive airport concession contract). The Port Commission’s Resolution 3605 established a clear policy of competitive

bidding. CP 1078 (“It is the Port of Seattle’s policy to engage in competitive solicitation of bids for all services and purchases”).

Moreover, even when there is no preexisting mandate for competitive bidding, the terms of an RFP itself may bind the agency to a competitive process. *See Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St. 3d 590, 603, 653 N.E.2d 646, 657 (Ohio 1995) (“the District was bound to adhere to . . . conditions and provisions it had itself set forth in the RFP, as a public authority or administrative agency may by its actions commit itself to follow rules it has itself established, including rules governing the evaluation of proposals where statutory competitive bidding is not required”); *Waste Mgmt., Inc. v. Wisconsin Solid Waste Recycling Auth.*, 84 Wis. 2d 462, 477, 267 N.W.2d 659, 667 (1978) (although competitive bidding was not statutorily mandated, agency was required to “award its contracts in accordance with the rules and procedures it sets forth” in its RFP).

Here, the Commissioners understood they had imposed a competitive bidding requirement on the taxi contract, a commitment that they could not subsequently revoke. *See* CP 2012 (commissioners “agree that that *the commission cannot do anything about the outcome of the decision*, because it has gone through all the procedural and legal hoops”). Indeed, despite reservations about breaking the longstanding relationship with STITA, several Commissioners voted to award the Yellow Cab contract

purely out of deference to the competitive bidding process. CP 1055 (Commissioner Davis: “I would like to keep [STITA] as my baby. That’s where my heart is. But I’m an elected official. I have to observe a proper process, a thorough process, a fair and open process. I commend the staff for doing that for us.”).

Therefore, any attempt to deviate from the binding commitment to competitive bidding, even if ostensibly authorized by the Commission itself, is void. *See Marriott Corp.*, 383 So.2d at 668 (due to previous Board resolution requiring competitive bidding, “the Board based its award of the contract on erroneous considerations beyond its authority constituting an abuse of discretion . . . the contract award is invalid.”).

B. The Port’s Actions Violated STITA’s Due Process Rights

A division of state or local government may not “deprive any person of life, liberty or property, without due process of law.” U.S.Const. amend. XIV. Because the Port’s refusal to follow the RPF process violated STITA’s due process right to a fair bidding process, the award of the contract was unconstitutional and void, a defect which cannot be ratified by the Port Commission. *See Chehalis County v. Hutcheson*, 21 Wash. 82, 85 (1899) (because “the agents of the county, were without authority, because restricted by the constitution, to make a contract with appellant,” contract was void *ab initio* and unenforceable).

When the Port released an RFP containing specific, mandatory

procedures to be followed, it assumed a due process duty to adhere to that commitment. See *Parks v. Watson*, 716 F.2d 646, 656 (9th Cir. 1983) (government rules “providing for particular procedures amount to ‘entitlements’ protected by due process”); see also *Conard v. Univ. of Washington*, 119 Wn.2d 519, 535 (1992) (“Procedural guarantees may create protected property interests when they contain ‘substantive predicates’ to guide the discretion of the decision makers.”) (quoting *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 462, 109 S. Ct. 1904, 1909, 104 L. Ed. 2d 506 (1989)). In the context of a government contract, “the due process to which one possessing [a] protected interest [is] entitled [is] the non-arbitrary exercise by the [government entity] in making the award. And it follows that a deprivation of the substantive benefit (the protected property interest) without the process due is an actionable wrong.” *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1131 (W.D. Pa. 1980). Therefore, a “‘disappointed bidder’ to a government contract may establish a legitimate claim of entitlement protected by due process by showing . . . that local rules limited the discretion of [government] 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).

In order create a constitutionally-protected property interest, the government procedure must “contain ‘explicitly mandatory language,’ i.e., specific directives to the decision maker that if the regulations’ substantive

predicates are present, a particular outcome must follow.” *Conard*, 119 Wn.2d at 529 (quoting *Thompson*, 490 U.S. at 463); *see also Parks*, 516 F.2d at 657 (“if the procedural requirements were intended to operate as a ‘significant substantive reduction’ on the agency’s actions, a property interest might be created”); *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 963 (1998) (“procedural rights . . . create property rights when they impose significant substantive restrictions on decision making”).

Because the RFP required the Port to comply with the evaluation, selection and contracting procedures described therein, STITA has a constitutionally protected property interest in seeing those procedures followed. As discussed above, the Port bound itself to follow a specified competitive bidding procedure. Specifically, the Port was required to conduct an initial evaluation of every proposal for responsiveness. CP 1098 (“The port *will* initially evaluate each proposal for responsiveness”). The Port was required to score all responsive proposals according to the RFP’s evaluation criteria. *Id.* (“the responsive proposals *will* be further evaluated”); CP 1099 (“The Proposal Requirements received *will* be evaluated according to the following criteria”) (emphasis added). The Port was required to award the contract to the highest scoring proposal. CP 1100 (“The Port *will* award the concession . . .”) (emphasis added).

The Port plainly did not follow the mandated procedure because it did not award the contract based on the proposals it received and scored.

Instead, the Port only followed the procedures through to the selection of a presumed candidate, obtained Commission approval for that candidate, but then then abandoned the procedures and rewrote the contract into a form far different than what the RFP contemplated or the bidders – including Yellow Cab – had actually bid on or been scored on.

The Port may argue that the procedural requirements did not create a property right because the Port retained discretion to reject proposals and contract on new terms. CP 1097 (“The Port reserves the right to accept or reject any or all proposal in their entirety or in part, and to waive informalities and minor irregularities.”); CP 1098 (“The Port, in its discretion, may refuse to evaluate a proposal for any number of reasons”). But none of the discretionary provisions in the RFP gave the Port the authority to carry out the competitive bidding procedure, “award” to the contract to one bidder, and then radically change the terms of the contract. The Port did not merely accept one proposal or reject the others; it “accepted” Yellow Cab’s proposal and then renegotiated the terms such that the final contract no longer matched what Yellow Cab had proposed. Nor did the Port exercise its right to reject or “refuse to evaluate” all proposals, and then negotiate on new terms “in the event that . . . there is not an acceptable response.” CP 1097. Instead, the Port scored all of the proposals, (CP 1187), found both Yellow Cab and STITA’s bids to be “fully responsive,” (CP 1048), and concluded that Yellow Cab’s was

acceptable as the highest scoring proposal.

The RFP also denied the Port the authority to materially alter the provisions of the contract with respect to a single bidder. Rather, if the Port elected to modify or waive any RFP requirement, “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. The Port was similarly required to execute a contract “substantially in the form” of the draft contract that was attached to the RFP, meaning that it could not materially change the terms provided to all the bidders. CP 1101 (“The successful Proposer or Proposers *shall* enter into . . .”). Furthermore, the Port’s discretion to waive defects in a proposal was limited to “informalities and minor irregularities.” CP 1097. As Judge Ramsdell concluded, this limited power plainly did not allow the Port CEO to change material terms of a bid, and thereby confer a substantial advantage or benefit on one bidder at the expense of others. *See Parks*, 716 F.2d at 657 (procedural rules that required city to employ an “articulable standard” divested city of unfettered discretion); *Gostovich v. City of W. Richland*, 75 Wn.2d 583, 587 (1969) (“The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders.”)

Nor does the supposed later “ratification” of the renegotiated contract by the Port Commission do anything to cure this due process violation. Nothing in the RFP suggested that the mandated procedures

could be voided by a later decision from the Port Commission. If the Port did in fact create a constitutionally-protected right to a fair process when it issued the RFP, the Commission cannot retroactively revoke that right. *See State v. Schultz*, 138 Wn.2d 638, 646 (1999) (“A retroactive law violates due process when it deprives an individual of a vested right.”) (quoting *In re Santore*, 28 Wn. App. 319, 324 (1981)).

C. **The Ports’ Renegotiation of a Binding Offer in Favor of Yellow Cab, and to the Public’s Detriment, is an Unconstitutional Gift of Public Funds**

Washington’s constitution prohibits any governmental body from making a gift of public funds, or providing extra compensation, to a private entity. Const. Art. VIII, § 7 (“No county, city, town or other municipal corporation⁵ shall hereafter give any money, or property . . . to or in aid of any individual, association, company or corporation”); Art. 2 § 25 (“The legislature shall never grant any extra compensation to any public officer, agent, employee, servant, or *contractor*, after the services shall have been rendered or the contract entered into. . . .”) (emphasis added). A contract that makes an unconstitutional gift of public funds is *per se* void and unenforceable. *Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wn. App 207, 211 (1981) (“The alleged agreement is therefore void as beyond the power of the Water District and

⁵ Port districts are subject to this provision. *Port of Longview v. Taxpayers of Port of Longview*, 85 Wn.2d 216, 231 (1975) (“The transactions entered into [by the Port of Longview and Port of Tacoma] are violations of Const. art. 8 s 7.”).

contrary to the state constitution.”)

It is well-established that, when under contract with a private entity, the government cannot relieve the contractor of obligations without receiving adequate consideration in return. *See City of Tacoma v. O'Brien*, 85 Wn.2d 266, 270 (1975) (rejecting government’s argument that “disbursements made pursuant to the challenged act would merely be consideration for new contractual obligations and therefore not violative of the constitutional prohibition against legislative gift of public funds”); *see also State v. Upstate Storage, Inc.*, 145 A.D.2d 714, 715 (N.Y. App. Div. 1988) (“Plaintiff may not make a gift of public funds by releasing a contractual obligation without due consideration.”).

In an influential decision by New York’s high court, then-Judge Cardozo confirmed that, even when a contractor faces prospective economic hardship, the government is not allowed to relax the contractor’s commitments in “consideration” for performance that has already been promised:

Either there was no consideration at all, or the shred of value, if any, was so grossly disproportionate to the return that to uphold it as sufficient consideration would be to nullify the Constitution by subterfuge and fiction.

We are told that a right was surrendered when the contractors paid the wages that were necessary to keep the work in motion, and avert its disruption and suspension as the result of a protracted strike. In the circumstances disclosed by the complaint they could not have done less without being guilty of a wrong.

McGovern v. City of New York, 234 N.Y. 377, 385, 138 N.E. 26, 30 (1923).

The RFP and Yellow Cab's proposal make clear that Yellow Cab was bound by the material terms of its proposal. A proposer could only withdraw its bid *before* the winning bidder was notified. CP 1098 ("After opening of the proposals by the Port and prior to the time the selected candidate is notified, Proposer may withdraw its proposal"). The Port's ability to "modify or waive" a requirement was limited to the evaluation period, and the Port had to waive or modify for all proposers on equal terms. CP 1097. The successful proposer was required to enter into a contract "substantially in the form of" the attached draft contract. CP 1101. Yellow Cab was required to, and did, sign a certification warranting that "Proposer has the capability to successfully undertake and complete the responsibilities and obligations of the proposal being submitted." CP 1212.⁶

As discussed above, the RFP was especially clear that Yellow Cab's guarantees on deadheading and revenue to the Port became binding and material terms of the contract. The RFP warned that each proposer's deadheading percentages "will become a term of the agreement to which

⁶ The proposer certification acknowledged that the Port had the "right to negotiate fees and other items it deems appropriate for the benefit of the Port and the travelling public." CP 1105. But neither the certification nor any provision in the RFP gave the Port the authority to negotiate materially different terms that solely *benefit* the winning bidder, at the *expense* of the Port and the travelling public.

the proposers *must* adhere or forfeit rights to the agreement.” CP 1103 (emphasis added). Likewise, revenue payable to the Port became an essential term of the final contract. CP 1099. (“Revenue to the Port will be evaluated on structure, including guaranteed and variable payments, as well as total amount to the Port.”)

In sum, the Port had in hand from Yellow Cab a binding commitment to enter a contract under certain terms. The Port was obligated to hold Yellow Cab to those terms, not only by the conditions of the RFP, but also by its duty to obtain the most favorable terms possible for the public.⁷ By releasing Yellow Cab from those commitments and granting Yellow Cab more lenient terms, the Port reduced the value of the ultimate contract to itself, Port customers and taxpayers. This unconditional release of Yellow’s commitments was a gift of public funds.

For example, as discussed above, the Port surrendered the right to collect unlimited liquidated damages of \$50 for each failure by Yellow Cab to meet the five-minute equipment, and instead agreed to limit the damages to a total of \$500 per day. The undeniable consequence of this change was to deprive the public of the right to funds that would otherwise have been due under Yellow Cab’s binding offer. Similarly, the Port

⁷ The state Supreme Court has repeatedly confirmed that “[t]he primary purpose of public bidding is to benefit the taxpayers by procuring the best work or material at the lowest price practicable.” *Equitable Shipyards, Inc. v. State By & Through Dept. of Transp.*, 93 Wn.2d 465, 473 (1980).

surrendered the right to receive \$18.8 million in fully guaranteed revenue by allowing Yellow Cab to escape its revenue-sharing obligations if any of a myriad of adverse events happened to occur. The Port diminished environmental quality standards by withdrawing its requirement that the contractor immediately use 50% green cabs in its fleet. The Port surrendered the right to hold Yellow Cab to its deadheading reduction commitments, even though the RFP had warned that these commitments would become a binding term of the contract, the draft contract specified that failure to meet them would “constitute a material default,” (CP 1111), and even though the Port staff had told the Commission that “if the company doesn’t meet those goals, they stand to forfeit their right to the contract,” (CP 1030). These last two concessions are particularly egregious given that two of the contract’s primary objectives were to “operate an environmentally superior fleet and reduce deadheading.” CP 1024. And for all the advantages that Yellow Cab extracted in the post-award “negotiations,” it provided no new consideration in return. All of the contract revisions plainly accrued to Yellow Cab’s benefit alone, with no gains to the Port, the traveling public, or the taxpayers.

Finally, the Port Commission cannot cure this fundamental defect by “ratification.” The constitutional prohibition against giving away public funds applies to the Port Commission just as much as to the Port CEO and staff. The release of Yellow Cab’s obligations was thus void *ab*

initio and cannot be authorized by any level of authority.

D. The Port Violated the Open Public Meetings Act

Under Washington’s Open Public Meetings Act, “[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency.” RCW 42.30.030. “Any action taken at meetings failing to comply with the [OPMA] shall be null and void.” RCW 42.30.060.

The purpose of the OPMA is “to allow the public to view the decision-making process at all stages.” *Cathcart v. Andersen*, 85 Wn.2d 102, 107 (1975). The Act is remedial in nature and must be “liberally construed.” RCW 42.30.910. The declaration of intent codified at RCW 42.30.010, which uses “some of the strongest language used in any legislation,”⁸ emphasizes the mandate that public agencies not handle official business behind closed doors:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. *It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.*

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not

⁸ *Equitable Shipyards*, 93 Wn.2d at 482.

good for them to know. *The people insist on remaining informed so that they may retain control over the instruments they have created.* (emphasis added).

The Open Public Meetings Act applies to any “public agency,” including “special purpose districts” such as the Port. RCW 42.30.020(1)(b). The Act requires a public agency’s “governing body” to ensure that all meetings in which “action” is taken are *open* and *public*. RCW 42.30.030. A governing body is:

the multimember board, commission, committee, council, 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) (emphasis added).

The legislature amended the original OPMA and added the “any committee thereof” language in 1983. Laws of 1983, ch. 155, § 1, p. 669. This amendment extended the Act to committees that were created to conduct the public agency’s business. RCW 42.30.020(2). A committee comprised entirely of non-members of the governing body it is still subject to the Open Public Meetings Act. AGO 1986 No. 16. And a committee is not exempt from the act simply because a higher government body makes the final decision. *See Cathcart*, 85 Wn.2d at 107 (“Petitioners have suggested that the Act should not apply because faculty action is always ultimately subject to whatever rules the board of regents should choose to issue . . . We disagree . . . The decisions of the faculty are ‘conditional’ only in an abstract hypothetical sense and the board of regents adopts

faculty actions almost as a matter of course.”)

A meeting does not require the contemporaneous physical presence of the members, and “the exchange of e-mails can constitute a ‘meeting.’” *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550 (2001).

“Action” is also liberally construed. “The OPMA defines ‘action’ as ‘the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.’” *Id.* at 559 (quoting RCW 42.30.020(3)). “‘Final action’ is also defined as ‘a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.’” *Id.*

1. The Evaluation Committee Violated OPMA by Scoring the Proposals in Private

The Port admits that the evaluation committee conducted all of its business in private. The evaluation committee – which was specifically tasked with evaluating, discussing, reviewing, and deliberating on the bids from the taxicab companies in response to the RFP – qualifies as a “committee thereof” and therefore is also a “governing body” subject to the rules of the Open Public Meetings Act. *See Wheeling Corp. v. Columbus & Ohio River RR. Co.*, 2001-Ohio-8751, 147 Ohio App. 3d 460, 473, 771 N.E.2d 263, 273 (2001) (“[T]he Selection Committee was

subject to the requirement that such meetings be open to the public. Further, any action it took at such meetings, such as the scoring of the proposals which resulted in C&OR becoming the winning proposer, can be held invalid under [Ohio's Open Meetings Act]"); *Great Falls Tribune Co., Inc. v. Day*, 1998 MT 133, 289 Mont. 155, 167, 959 P.2d 508, 516 (1998) (proceedings of RFP evaluation committee were subject to state constitutional provision on open public meetings).

Although the Port has argued that the committee's decision was merely "advisory," in reality its decision was final, being subject to only a procedural rubber-stamp from the Commission. The Commissioners intended to instill the evaluation committee with full authority to determine the contract winner; this technocratic evaluation was seen as integral to the supposedly competitive process. Commissioner Davis's December 4, 2009 email left no doubt about this proposition: "Lloyd [Hara], John [Creighton] and I agree that that *the commission cannot do anything about the outcome 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 1011-12. Therefore, as in *Cathcart*, "the decisions of the [evaluation committee] are conditional only in an abstract hypothetical sense," since the Commission was required to adopt

their decision “as a matter of course.” 85 Wn.2d at 107.⁹

The Port has also argued that the evaluation committee does not fit the OPMA’s “committee thereof” language because the committee was appointed by the Port staff and contained no Commissioners. This is a distinction without a difference: regardless of their “day jobs” or who directly appointed them, the committee held decision-making power delegated by the Port Commission, and therefore, in the words of OPMA, “act[ed] on behalf of the governing body.” RCW 42.30.020(2). As the Florida Supreme Court explained under analogous circumstances:

[W]hen a member of the staff ceases to function in his capacity as a member of the staff and is appointed to a committee which is delegated authority normally within the governing body, he loses his identity as staff while operating on that committee and is accordingly included within the Sunshine Law.

Wood v. Marston, 442 So. 2d 934, 941 (Fla. 1983) (quoting *News-Press Pub. Co., Inc. v. Carlson*, 410 So. 2d 546, 548 (Fla. Dist. Ct. App. 1982)); see also *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 162, 547 S.E.2d 862, 865 (2001) (“The fact that the City Manager, and not the City Council, created the Committee and no council member served on the Committee, is not enough to remove the Committee from the definition of ‘public body’ as stated in FOIA”).

⁹ At a minimum, given the substantial evidence indicating the Port Commission was bound to ratify the committee’s decision, this issue should not have been decided in the Port’s favor on summary judgment.

2. Alternatively, the Port Commission Violated OPMA by Never Actually Scoring the Proposals

The Port has claimed that the Commission held the ultimate authority regarding how to award the contract, and that the committee's scoring decision was merely a recommendation, leaving it to the Port Commission to actually score the proposals. That position is contradicted by extensive evidence to the contrary, including the Commissioners' public and private statements that they were bound to follow the committee's decision. But even supposing for a moment that the Commission was the real decision-maker, the December 15 Commission meeting still failed to satisfy OPMA because the Commission's vote was based on, at best, a secret evaluation.

The Washington Supreme Court's decision in *Equitable Shipyards* lays out a roadmap for how a governing body may rely on an advisory recommendation without running afoul of OPMA. 93 Wn.2d 472. In that case, WSDOT's governing commission was tasked with selecting one of six proposals for a ferry construction contract. *Id.* at 467-68. WSDOT "retained a naval architect to assist in evaluating the proposals." *Id.* at 469. At an open, public commission meeting, the architect presented his findings, including a written report, and the bidders had an opportunity to speak. *Id.* After this preliminary meeting, "Both firms were then permitted to submit additional information and provide their own evaluation of the proposals." *Id.* At a second commission meeting, the

architect again presented his findings, including a revised written report, and the commission took further testimony from the bidders. *Id.* at 470. Only then did the commission vote to adopt the naval architect's recommended ranking of the proposals. *Id.* The court affirmed that this process complied with the commission's OPMA duties. *Id.* at 482. As the court recognized, it is unobjectionable for a governing body to rely on an expert's recommendation, so long as the basis for that recommendation is made public.

Here, the Port was bound to award the contract to the highest-scoring bidder. Thus, when the Port argues that the Commission made the final decision, then what it apparently means is that the Commission "scored" the proposals in the same way as the committee. But, in stark contrast to *Equitable*, the Commission was not provided with enough information to understand how the committee had made its decision, let alone enough to reach a scoring decision of its own. At the December 15 meeting, the Port staff briefly discussed the evaluation criteria and listed some of the reasons why Yellow did was favored, but failed to explain a basis for the specific scores awarded. As just one example, Commissioner Tarleton admitted that she had no idea why STITA received a fatally low score for revenue commitments:

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).

Thus, if the Commissioners were in fact scoring the proposals on their own initiative, despite having no idea why they were assigning those scores, that would surely be arbitrary and capricious. If, however, the Commissioners were relying on the committee's recommendation, OPMA requires the basis for that recommendation to be made public, as was done in *Equitable Shipyards*. In short, the Commission cannot simultaneously claim to be the final decision-maker, then make a decision on a factual basis that is either nonexistent or secret.

3. The Port Commission Violated OPMA by Conferring on the Final Vote in Private
The Port Commission Violated OPMA by Conferring on the Final Vote in Private

The Port Commissioners also plainly violated the OPMA when they discussed and ultimately decided, via private email, how they would vote at the December 15, 2009 meeting.

Email records confirm that a quorum of the commissioners via e-mail not only discussed but decided official business. CP 2011-12; 2014. In fact, that quorum specifically *agreed* upon their vote in private “about issues that may or will come before the Board for a vote.” *Battle Ground School Dist.*, 107 Wn. App. at 565. For example, on December 4, 2009 Commissioner Creighton wrote to his fellow-commissioners and staff, indicating that he would vote to award the contract if certain acts were

taken with regard to the deadheading guarantee. CP 2011-12.

Similarly, the Commissioners took final action, by voting 4-1 in private that the taxi concession would be awarded to Yellow, again in violation of the OPMA. CP 2014. Five days before the December 15 meeting, the Commission privately voted to approve the award to Yellow Cab without having a public meeting or taking public comment. The Port's private vote was disclosed in an email by a staff liaison to the Commission:

[Commissioner] Bill [Bryant] – we have 4 yes votes for awarding the taxi contract. Tay called Lloyd, and he will vote for the proposer. John [Creighton] will, too, along with his motion unless it, [his motion] doesn't pass. Gail [*sic* – Gael Tarleton] said she would second the taxi motion and support John's motion as long as Legal is on board. *Id.*

Although the Commission publicly voted on the contract, they neither disclosed that they had already reached their collective decision in private, nor retraced the process of political back-and-forth that had gone into that decision. Open public meetings laws, however, are designed precisely “to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” *Zorc v. City of Vero Beach*, 722 So. 2d 891, 902 (Fla. Dist. Ct. App. 1998).

4. The OPMA Violation Cannot be Cured Without a Public Evaluation and Selection Process

The Port argued at the trial court that any OPMA violations were “cured” when the Port Commission voted in public to award the contract

to Yellow, and when it publicly voted to ratify the CEO's signing of the revised contract. A public agency may indeed cure a violation by "retracing its steps" and performing all the necessary procedures in a public meeting. *Org. to Preserve Agr. Lands v. Adams City*, 128 Wn2d 869, 884 (1996) (hereinafter "*OPAL*"). However, the purely ceremonial December 15, 2009 Commission meeting certainly did not "retrace" the extensive evaluation done in secret by Port staff, nor the Commission's negotiations on how to vote – all issues the public deserves to know about. Nor did the June 2011 ratification of the CEO's decision to award the revised contract – which the Port executed solely to attempt to remove an issue in this litigation – offer the public any insight into how or why the Port decided to substantially renegotiate the contract in Yellow's favor.

Thus, none of these OPMA violations have been cured. *See OPAL*, 128 Wn.2d at 884 (ratification does not exist when there is "merely summary approval of decisions made in numerous and detailed secret meetings."); *see also Polillo v. Deane*, 74 N.J. 562, 578, 379 A.2d 211, 219 (1977) (summary ratification would improperly "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")

What, then, must the Port now do to award the contract in a lawful

manner? If a cure is possible at all,¹⁰ the Port must retrace *all* the steps that it conducted in private, from evaluation of proposals through a final decision on the merits. See *Port Everglades Auth. v. Int'l Longshoremen's Ass'n, Local 1922-1*, 652 So. 2d 1169, 1171 (Fla. Dist. Ct. App. 1995) (“ a ‘cure’ did not occur because the [Committee], before whom the competitors were excluded, did not reconvene ‘in the sunshine’ before the contract was awarded and *the Port did not conduct a full, open hearing on the competing bidders for the contract, before ratifying the Committee's recommendations.*”) (emphasis added); *Polillo*, 74 N.J. at 580 (“Therefore, the Commission is directed to embark again upon its task of considering an appropriate form of government to be recommended by it”); *Zorc*, 722 So.2d at 903 (requiring “a full reexamination of the issues . . . a full, open public hearing . . . [with] significant discussion of the issues”).

If evaluation of the original proposals is no longer feasible due to the lapse of time, then the only remedy is to re-open bidding and begin the contracting process anew. Although the Port and Yellow Cab may find that burdensome, the public’s right to open government is not subject to what agencies and contractors deem convenient. And in any case, the Port

¹⁰ Some courts have determined that is impossible to cure such pervasive violations of open public meeting requirements. See *Wheeling Corp.*, 147 Ohio App. at 476 (“At the very least, it was shown that the Selection Committee had three private meetings wherein it was determined that C&OR had the most points and that these meetings affected the final, formal resolution granting the operating agreement to C&OR. *There can be no cure for these violations.*”) (emphasis added).

and Yellow assumed that risk when they signed the renegotiated agreement under the cloud of litigation. *See Wheeling Corp.*, 147 Ohio App. at 482 (“The parties to the 2000 operating agreement were clearly aware of the litigation and based their new agreement in part upon the outcome in the trial court and, thus, were on notice that any new agreement, as an interest in the property subject of litigation, would be affected by the outcome of the case upon appeal, including any finding that the RFP process must be adhered to and the operating agreement awarded to appellant”).

V. CONCLUSION

For the reasons stated above, the Port’s award of the taxi concession breached its legal obligation to conduct a competitive bidding process, made an unconstitutional gift of public funds, and violated the Open Public Meetings Act. The Port’s unlawful action should be set aside, and trial court erred in granting summary judgment against STITA.

RESPECTFULLY SUBMITTED this 1st day of December, 2011.

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I certify under penalty of perjury under the laws of the State of Washington that on December 1, 2011, a copy of this document was sent for service on the following persons:

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