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Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 22, 2010

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CASE #: 64857-8-1

Seattle-Tacoma International Taxi Association, Appellant v. Port of Seattle, Respondent

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Case No. 64857-8-I, STITA v. Port
February 22, 2010

Enclosed is the ruling of the Commissioner entered today in the above case.

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

emp

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

SEATTLE-TACOMA)	
INTERNATIONAL TAXI)	No. 64857-8-1
ASSOCIATION, a Washington)	
nonprofit association,)	
)	COMMISSIONER'S RULING
Petitioner,)	GRANTING A STAY PENDING
)	APPEAL
v.)	
)	
PORT OF SEATTLE,)	
a municipal corporation;)	
AIRPORT JOINT VENTURE)	
RESPONSE PARTNERSHIP,)	
LLC, an unincorporated entity;)	
CHECKER CAB OF SEATAC)	
CORPORATION, a Washington)	
corporation; ORANGE CAB)	
COMPANY, a Washington)	
corporation; PUGET SOUND)	
DISPATCH, LLC, dba Yellow)	
Taxi Association, a Washington)	
limited liability company; and)	
RAINIER DISPATCH, LLC, a)	
Washington limited liability)	
company,)	
)	
Respondents.)	
_____)	

Seattle-Tacoma International Taxi Association filed a notice of appeal of a trial court order denying its motion for a preliminary injunction and simultaneously filed an emergency motion for a stay to prevent the Port of Seattle from entering into a concession agreement with Puget Sound Dispatch, LLC, d/b/a Yellow Cab relating to taxi service at Seattle Tacoma International Airport for the next five years. A stay gives STITA a chance to present its

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arguments more fully to a panel of judges. Expediting the appeal minimizes the risks of harm to the Port, Yellow Cab, and the public. For the reasons stated below, a stay is granted, review is expedited, and no bond is required at this time, but the parties may file additional materials on the issue of a bond.

FACTS

The Port of Seattle is a municipal corporation that owns and exercises exclusive management and control over Seattle Tacoma International Airport (Sea-Tac or airport). The Port has had exclusive airport taxicab service for approximately twenty years. Seattle-Tacoma International Taxi Association (STITA) is a Washington non-profit association formed in 1989. In 2003 the Port signed a concession agreement with STITA to provide exclusive on-demand taxi service at the airport. STITA currently provides 166 taxis to serve the airport. Under the concession agreement, STITA pays the Port a per-trip fee that is calculated according to a formula. STITA also pays an exclusivity fee equal to ten percent of each per-trip fee for each outbound trip from the airport. Between April and December 2009, STITA paid a per-trip fee of \$3.05 (\$2.76 per trip + \$.028 per-trip exclusivity fee). STITA passes on \$1 of the fee to its customers. In 2008 STITA made 740,867 trips from the airport, and during the first nine months of 2009 it made 504,069 trips. The per-trip fees are calculated to approximate the Port's costs for facility management, maintenance, and improvements for ground transportation providers. Based on a cost recovery model, the Port lowered STITA's per-trip fee in 2009 from the fee charged in

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2008. From 2004 to 2008, STITA paid the Port approximately \$10,587,000 pursuant to the concession agreement.

The current five-year concession agreement ends August 31, 2010. Accordingly, in late September 2009, the Port released a Request for Proposal (RFP) for a new five-year concession agreement to provide exclusive on-demand taxi service at the airport. The agreement will include the right to operate 210 taxis, which is the number of taxis the Port has concluded best suits its needs over the next five years. The RFP provides that the Port may enter a concession agreement with one bidder, but is willing to split the concession rights between up to three bidders, each of whom must be able to supply at least seventy taxis. At least half the bidder's fleet must meet or exceed the Port's "green" standard, and the bidder must demonstrate that all of its fleet will meet this standard by 2011. Bidders must also describe plans to reduce the number of "deadhead" trips, i.e. trips in which the taxi has no passengers.

A key change in the RFP is the shift from a per-trip fee based on a cost recovery approach, to gross revenue percentage fee based on a market-rate approach. The RFP provides at III. Proposal Requirements:

5. Revenue to the Port

- A. Describe, in detail, how much you propose to pay the Port of Seattle.
 - i. The Port will require each Proposer to pay the Port a minimum, annual amount equal to the number of out-bound trips multiplied by the then-current per trip fee calculated by the Port. Each Proposer may, but is not required, pay the Port guaranteed amounts in excess of this sum. If Proposer proposes to pay the Port any additional minimum amount,

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clearly specify any guaranteed amount. Describe, in detail, how the proposed additional guaranteed amount paid to the Port will escalate on an annual basis.

- ii. The Port will require each proposer to pay the Port a minimum concession fee equivalent to 10% of gross revenues generated from outbound trips The minimum 10% concession fee will include the minimum annual guaranteed described in i. above. At no time will the amount owed to the Port be below the minimum annual guarantee described in i. above. However, if the minimum concession fee of 10% applied to gross revenues from outbound trips results in an amount that exceeds the minimum annual guarantee, the proposer will be required to pay to the Port the additional amount up to the minimum 10% fee. Each proposer may, but is not required, pay the Port a concession fee higher than 10%. . . .

Under the RFP, bids would be evaluated on a 100 point scale, with 30 points awarded based on the amount of revenue guaranteed to the Port.

On October 8, 2009, the Port held a conference to discuss the RFP process. Interested bidders also submitted written questions, which the Port answered in an addendum on October 14, 2009. The deadline to submit a proposal was November 6, 2009. Six proposals were submitted by Airport Joint Venture Taxicab, Checker Cab of Seatac Corp., Orange Cab Co., Yellow Cab, Rainier Dispatch LLC, and STITA. Yellow Cab was the highest bidder. The joint venture formed by Yellow Cab, Orange Cab and Rainier Dispatch was the second highest bidder, and STITA was the third highest bidder.

On December 11, 2009, Port staff recommended that the Port sign a concession agreement with Yellow Cab. On December 14, 2009, STITA sent the Port a memo objecting to the RFP on multiple grounds and asking the Port to release a new RFP. On December 15, the Port accepted its staff

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recommendation to sign with Yellow Cab. On December 24, 2009, STITA sent the Port a written protest, requesting two days notice before the Port signed a concession agreement with a bidder. On December 31, STITA sent a follow up letter explaining the grounds for its protest in further detail and asking the Port to withdraw and redraft the RFP. The Port declined to do so.

On January 29, 2009, STITA filed a complaint for declaratory and injunctive relief. The complaint alleged that the Port's bidding process was flawed and unfair in several ways: (i) allowing proposers to bid individually and also as a joint venture, gave bidders, including Yellow Cab, access to the competitive bidding information from other bidders; (ii) the Port failed to distinguish between for profit and non-profit entities (like STITA) that by definition would not have profits; (iii) evaluating bidders based on how much profit they would remit to the Port unfairly favored Yellow Cab because most of its cabs hold dual licenses in Seattle and King County; and (iv) the Port's bidding criteria ignored the economic effect on the community such that the award would benefit a handful of Yellow Cab owners who each own dozens of cabs, at the expense of the 450 owners and lessees operating STITA cabs.

In addition to these general allegations, STITA alleged that the new market-based gross revenue model violates the Revised Airports Act, RCW 14.08.120(6), which provides:

In addition to the general powers conferred in this chapter, and without limitation thereof, a municipality that has established . . . airports . . . is authorized:

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....
(6) To determine the charges or rental for the use of any properties under its control and the charges for any services or accommodations, and the terms and conditions under which such properties may be used: PROVIDED, That in all cases the public is not deprived of its rightful, equal, and uniform use of the property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. . . .

STITA alleged that by allowing and encouraging bidders to set their concession fees through a process of unlimited bidding, the Port is violating RCW 14.08.120(6) because concession fees are not reasonable, are not uniform for the same class of service (i.e. across all ground transportation operators), are without due regard to the property and improvements used by concessionaires, and are without due regard for the Port's cost of operating the airport.

STITA also asserted that the gross revenue model would have the effect of reducing the regulated taxi cab rate received by licensees in King County and thereby violates King County Ordinance 6.64.760 and infringes on the County's rate-making authority. STITA sought a declaration that the RFP is null and void and a preliminary and permanent injunction enjoining the Port from entering into a concession agreement based on the RFP.

Along with its complaint, STITA filed a motion for a temporary restraining order to prevent the Port from entering into a concession agreement with Yellow Cab. The parties agreed to a shortened briefing schedule on STITA's motions, and the Port agreed it would not sign any agreement until after the court decided the motion for a preliminary injunction or temporary restraining order.

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The Port opposed STITA's motion for a preliminary injunction or temporary restraining order, arguing that it has broad discretion to set airport fees, that market-rate concession fees are reasonable and uniform, that concession fees based on gross revenue approximate use of the airport property, and that the RFP does not infringe on King County's taxi rate-setting authority. The Port also argued that Addendum 3 to the RFP required proposers to bring any challenges to the RFP prior to the deadline for written questions and that STITA waived any objection to the RFP by failing to challenge the RFP until after it lost the bidding process. The Addendum provides:

2. Q: Does the Port have a deadline or process for challenging the RFP itself or any substantive or procedural requirement it sets forth?

A: The Port has yet to promulgate a formal bid protest procedure for non-public works. Nonetheless, a potential proposer who believes that there is a problem with the RFP (as opposed to any particular proposer's response) should bring the issue to the Port's attention, in the manner for written questions, prior to the deadline for questions. The Port may then address any such issue *before* proposers have submitted their proposals. The Port specifically reserves the right to deny any protest arising from the RFP or any substantive or procedural requirement it sets forth if such protest is not submitted in this manner. With respect to any other protests, they should be submitted to the Port as soon as possible after a proposer learns of the basis for the protest. The Port is committed to carefully reviewing any protest submitted. As a result, the Port specifically agrees to follow RCW 39.04.105 (even though not otherwise applicable to this request for proposals) and provide not less than two-days' written notice to any party submitting a written protest before making an award.

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Yellow Cab also opposed a preliminary injunction or temporary restraining order on similar grounds and noted that it had relied on the competitive bidding process set out in the RFP.

On February 8, 2010, the trial court denied a preliminary injunction. In its oral ruling, in analyzing STITA's likelihood of prevailing at trial, the court found that STITA was not likely to prevail on the issue of whether taxi service is a class of providers that is distinct from other ground transportation providers. The court also found that STITA had made a good case that the Port did not meet the statutory requirement of due regard to the property and improvements and expense of operation. But the court found the determinative issue was that STITA likely had waived its protest by proceeding through the RFP process and then objecting.

Late in the day on February 8, 2010, STITA filed a notice of appeal, along with an emergency motion for temporary injunctive relief to stop the Port from entering into a concession agreement. I granted a temporary stay until further order of the court to maintain the status quo pending review of the motion.

On February 9, 2010, I heard telephone argument for the limited purpose of discussing an abbreviated briefing schedule on the motion for stay and then entered a ruling setting an expedited schedule, noting that once the Port enters into an agreement, STITA, as the unhappy bidder, would lose the opportunity to seek relief. On February 11, 2010, STITA filed its amended motion, on

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February 16, 2010, the Port and Yellow Cab filed their responses, and on February 17, 2010, STITA filed its reply, along with a motion under RAP 9.11 for this court to take additional evidence of a related case, Rainier Dispatch v. Port.

On February 12, 2010, Rainier Dispatch, another unsuccessful bidder, filed a complaint against the Port, Yellow Cab, and other bidders, seeking declaratory and injunctive relief. Rainier Dispatch alleges: that as allowed by the RFP, it joined with Yellow Cab and Orange Cab to submit a joint proposal; that the participants agreed the joint proposal would not be prepared by someone preparing an individual proposal; that Yellow Cab's individual proposal was prepared by the same person who prepared the joint proposal; and that Yellow Cab took the intellectual property, business plan and trade secrets used in preparing the joint proposal and used it in its individual proposal. Rainier Dispatch alleges three claims against Yellow Cab: breach of fiduciary duty, breach of contract, and fraudulent inducement in violation of the Securities Act of Washington. Rainier Dispatch also alleges that in light of the evidence of collusion, the Port's acceptance of Yellow Cab's proposal violates the express terms of the RFP and Washington public works statutes. Rainier Dispatch seeks damages, an injunction preventing the Port from awarding the concession agreement to Yellow Cab, and an injunction preventing Yellow Cab from competing in any rebid.

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On February 19, I heard oral argument on STITA's motions. STITA seeks a stay under RAP 8.1(b)(3) and/or RAP 8.3 temporarily enjoining the Port from entering into a concession agreement with Yellow Cab pending appeal and a minimal bond. STITA also asks that the appeal be expedited to minimize any harm to the Port or other parties.

DECISION

Appealability. Under established Washington case law, once the Port enters into a concession agreement, an unsuccessful bidder like STITA has no standing to challenge the bid process. Instead, STITA's remedy is to seek a preliminary injunction before the agreement is signed, and if unsuccessful, seek an immediate appeal. As the court stated in Dick Enters., Inc. v. King County, 83 Wn. App. 566, 571, 922 P.2d 184 (1996),

While using contract formation as a bright-line cutoff point for bidder standing necessarily limits the protection of bidder rights, the bidder is not without a remedy: It may seek an injunction before contract formation. If the contractor fails to obtain a temporary restraining order and the parties threaten to enter into a contract, it can immediately appeal the trial court's decision.

Accordingly, because STITA's claims effectively become moot once a concession agreement is signed, the trial court's decision affects a substantial right which in effect determines the action and prevents a final judgment or discontinues the action. RAP 2.2(a)(3). See Quinn Constr. Co., L.L.C. v. King County Fire Prot. Dist. No. 26, 111 Wn. App. 19, 25, 44 P.3d 865 (2002) (injunction was only relief available to unsuccessful bidder); Dick Enters., Inc. v.

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King County, 83 Wn. App. at 569 (unsuccessful bidder may not sue for damages, but instead may sue to enjoin the award of an illegal contract) (citing Bellingham Am. Publ'g Co. v. Bellingham Publ'g Co., 145 Wash. 25, 26-30, 258 P. 836 (1927) (request to enjoin the award of a contract was moot once a contract was signed).

Standard for Stay Pending Appeal. The relief STITA seeks is an injunction from this court prohibiting the Port from entering into a concession agreement with Yellow Cab until STITA's appeal can be heard by a panel of this court. Essentially, STITA seeks a stay pending appeal. The parties dispute the applicable standard for such a stay.

In "other civil cases" not involving money judgments or decisions affecting property, RAP 8.1(b)(3) authorizes this court, "before or after acceptance of review, to stay enforcement of the trial court decision upon such terms as are just." In evaluating whether to stay enforcement of such a decision, the court considers whether the moving party can demonstrate that debatable issues are presented on appeal and compares the injury that would be suffered by the moving party if a stay were not granted with the injury that would be suffered by the nonmoving party if a stay were imposed. RAP 8.1(b)(3).

RAP 8.3 also gives the appellate court broad "authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party." Because