IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION, a Washington nonprofit association, Appellant, v. PORT OF SEATTLE, a municipal corporation; PUGET SOUND DISPATCH, LLC, dba YELLOW TAXI ASSOCIATION, a Washington limited liability company Respondents, AIRPORT JOINT VENTURE RESPONSE PARTNERSHIP, LLC, an unincorporated entity; CHECKER CAB OF SEATAC CORPORATION, a Washington corporation; ORANGE CAB COMPANY, a Washington corporation; and RAINIER DISPATCH, LLC, a Washington limited liability company, Defendants.	)	No. 64857-8-I DIVISION ONE UNPUBLISHED OPINION FILED: June 7, 2010

Appelwick, J. — Seattle Tacoma International Taxi Association (STITA) filed a motion for a preliminary injunction in King County Superior Court, requesting that the Port of Seattle be prevented from entering into a concession agreement with Puget Sound Dispatch, dba Yellow Taxi Association, to provide on-demand taxi service at Sea-Tac Airport. The trial court denied the preliminary injunction on the basis of waiver, and STITA filed an emergency motion for a stay in the Court of Appeals. STITA waived any right it had to

challenge the validity of the request for proposal when it submitted a proposal. The request for proposal does not violate the King County taxi rate ordinance, King County Code (KCC) 6.64.760, or the Revised Airport Act, chapter 14.08 RCW.[1] The trial court did not abuse its discretion in denying STITA's preliminary injunction. We decline to award attorney fees on appeal. We affirm.

The existing stay is lifted effective the thirtieth day following the filing of this opinion, unless STITA has filed a petition for review by that date. If STITA has filed a petition for review, then the existing stay will remain in effect pending denial of such petition or further order of the Supreme Court, whichever comes first.

FACTS

The Port of Seattle (Port) is a municipal corporation that owns and exercises exclusive management and control over Seattle-Tacoma International Airport (Sea-Tac). STITA is a Washington nonprofit association and is currently under agreement with the Port to provide exclusive on-demand airport taxicab service. Under the concession agreement, STITA pays the Port a per-trip fee for each outbound trip from the airport that is calculated according to a formula. The per-trip fees are calculated to approximate the Port's costs for facility management, maintenance, and improvements for ground transportation providers. STITA also pays an exclusivity fee equal to 10 percent of each per-trip fee.

[1] Because the case is time sensitive and further review is likely, we address the alternative bases argued by the parties.

The current five year concession agreement ends August 31, 2010. 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.[2] The agreement will include the right to operate 210 taxis, 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 proposer, but explains that it is willing to split the concession rights among up to three proposers, each of whom must be able to supply at least 70 taxis. At least half of the proposer's fleet must meet or exceed the Port's "green" standard, and the proposer must demonstrate that all of its fleet will meet this standard by 2011. Proposers 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 plus a specified exclusivity fee mark up, to gross revenue percentage fee based on a market rate approach where the per-trip fee is the minimum guaranteed fee. The RFP provides the following description of the revenue requirement:

> A. Describe, in detail, how much you propose to pay the Port of Seattle.
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> 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

[2] The Port represented that its RFP process was not subject to the competitive bidding rules.

> minimum amount, clearly specify any guaranteed amount. Describe, in detail, how the proposed additional guaranteed amount paid to the Port will escalate on an annual basis.
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> 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.[3]

On October 9 and 12, 2009, the Port held pre-proposal conferences to discuss the RFP process. Interested proposers 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.

The Port received six proposals in response to the RFP. Puget Sound Dispatch, LLC, doing business as Yellow Taxi Association (Yellow Cab), received the highest score based on the RFP's evaluation criteria. STITA was the third highest proposer. 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, requesting that the Port Commissioners set aside the staff recommendation that

[3] The other evaluation criteria are business, customer service and operational plan, 40 points; deadhead reduction proposal, 10 points; financial stability, 10 points; and experience, qualifications and references, 10 points.

the Port contract with Yellow Cab and asking the Port to release a new RFP. On December 15, the Port accepted its staff 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 proposer. 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 20, the Port rejected the protest and notified STITA that it would sign the new contract within 48 hours. The Port agreed to postpone signing the contract while it considered STITA's arguments but ultimately rejected them on January 28.

On January 29, 2010, STITA filed a complaint for declaratory and injunctive relief. In addition to general allegations that the bidding process was flawed and unfair,[4] STITA alleged that the new market-rate gross revenue model of the RFP violates the Revised Airports Act (RAA), RCW 14.08.120(6). STITA specifically alleged that by allowing and encouraging proposers to set their concession fees through a process of unlimited bidding, the Port is violating RCW 14.08.120(6), because the concession fees are not reasonable, are not uniform for the same class of service (i.e., across all ground transportation operators), and are without due regard to the property used by concessionaires or to the Port's operational costs.

STITA also asserted that the gross revenue model would have the effect

[4] Those issues are not before the court.

of reducing the regulated taxi cab rate received by licensees in King county, thereby violating KCC 6.64.760 and infringing 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 motion, 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.

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, issued on October 14, to the RFP required proposers to bring any challenges to the RFP prior to the deadline for written questions, therefore STITA waived any objection to the RFP by failing to challenge the RFP until after it lost. Addendum 3 provides that "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 [October 16]. . . . 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." Yellow Cab also opposed a preliminary injunction or temporary restraining order on similar grounds and noted that it had relied on the process set out in the RFP.

On February 8, 2010, the trial court denied the preliminary injunction. In its oral ruling, analyzing STITA's likelihood of prevailing at trial, the court noted that STITA was not likely to prevail on the issue of whether taxi service is a class of providers distinct from other ground transportation providers. The court also remarked 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 STITA had waived its protest by proceeding through the RFP process and then objecting. It denied the preliminary injunction on that basis alone.

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. A commissioner granted a temporary stay until further order of the court to maintain the status quo pending review of the motion. STITA then submitted briefing to the commissioner, seeking 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 asked that the appeal be expedited to minimize any harm to the Port or other parties.

The commissioner granted the stay pending appeal under RAP 8.3,[5]

recognizing that under Dick Enters., Inc. v. King County, 83 Wn. App. 566, 571, 922 P.2d 184 (1996), STITA would not have standing to challenge the RFP if the Port and Yellow Cab actually signed the concession agreement.[6]

DISCUSSION

I. Waiver

The trial court denied STITA's request for a preliminary injunction, explaining STITA had likely waived its protest by objecting to the legality of the RFP only after it submitted a proposal. We review a court's decision to grant or deny a preliminary injunction for abuse of discretion. Wash. Fed'n of State Employees, Council 28 v. State, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983).

A. Timeliness of STITA's Protest to the Port[7]

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[5] RAP 8.3 authorizes the court to, "[I]ssue orders, before or after acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party." In evaluating whether to stay enforcement of such a decision, the court considers whether the issue presented by the appeal is debatable, and whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation. Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985).

[6] On March 24, Yellow Cab filed a motion to modify the commissioner's February 22, 2010, ruling that granted the stay. In that motion, Yellow Cab presented issues that were functionally indistinguishable from the merits of whether the trial court properly denied STITA's request for a preliminary injunction. The commissioner's duty under RAP 8.3 was only to determine if the case presented a debatable issue about the validity of the RFP with regard to RCW 14.08.120(6), and about whether STITA waived the right to challenge the validity of the RFP. Purser, 104 Wn.2d at 177. The commissioner properly determined the stay was necessary to preserve for STITA the fruits of a successful appeal. Id. We deny the motion to modify the commissioner ruling. We address some of the arguments Yellow Cab raises in its motion to modify, as its brief on the merits incorporated the motion to modify.

[7] There is no dispute that STITA timely filed the request for the preliminary injunction. Under Dick Enterprises, a losing bidder must request injunctive relief before contract formation. 83 Wn. App. at 571. Although the Port has announced its intention to award the contract to Yellow Cab, the parties have not

The RFP gives the following instruction about submitting questions: "Interested associations are encouraged to present written questions to the Port's e-Bid website by 2:00 p.m., October 16, 2009, in order to allow adequate time for preparation of a response. . . . Any questions received after this deadline may not be addressed." The Port then issued addenda to the RFP. Addendum 3 specifically addresses the process and deadlines for submitting a challenge to the RFP itself, or any other substantive or procedural requirements the RFP set forth:

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

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actually signed the concession agreement.

Despite the parties' agreement that STITA timely filed the injunction under Dick Enterprises, Yellow Cab argues for the first time on appeal that STITA does not have bidder standing under that case. Because standing is a jurisdictional issue, a party may raise it for the first time on appeal. See Branson v. Port of Seattle, 152 Wn.2d 862, 875 n.6, 101 P.3d 67 (2004).

Dick Enterprises stands for the unremarkable proposition that an unsuccessful bidder in a competitive bidding context lacks "standing" to bring claims other than alleged violations of the competitive bidding statute, and then only before the contract is signed. 83 Wn. App. at 570–71. For this reason, and on account of the limited briefing provided, we decline to address the applicability of Dick Enterprises to an RFP process.

> 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' [sic] written notice to any party submitting a written protest before making an award.

Addendum 3 refers to the language in the RFP requiring questions to be submitted by October 16. The first notice the Port had of STITA's challenge to the RFP was on December 14, 2009, when STITA sent the Port a memo objecting to the RFP, requesting that the Port commissioners set aside the staff recommendation that the Port contract with Yellow Cab and asking the Port to release a new RFP.

Although Addendum 3 does employ permissive language[8] ("a potential proposer . . . *should* bring the issue"; the Port "*may* then address such issue *before* proposers have submitted their proposals" (some emphasis added)), it unequivocally states the Port, "[R]eserves the right to deny any protest arising from the RFP. . . if such protest is not submitted in this manner." The RFP had a clear process for protesting the substantive requirements of the RFP, and STITA failed to comply with the prescribed process in Addendum 3.

STITA nonetheless alleges it complied with the protest procedure under

[8] STITA argues that waiver should not apply here, characterizing the Port's bid protest procedure as permissive, not mandatory. STITA cites A&M Gregos, Inc. v. Robertory, 384 F. Supp. 187 (E.D. Pa. 1974), drawing parallels to the protest procedure in that case, which were phrased similarly to the ones here. The court in A&M Gregos was dealing with a slightly different question—whether the failure to follow regulatory procedures for protesting the award of a contract constituted waiver of the right to seek judicial review of the award of the contract. Id. at 191. The court held the permissive language of the protest regulations meant the protesting party was not required to exhaust administrative review. Id. Here, the contested language in Addendum 3 was not written in a manner that automatically waived judicial review by failing to meet its deadline.

RCW 39.04.105, because it submitted its written protest on Monday, December 14, 2009. Although the contract at issue here is not one for a public work,[9] the Port agreed to follow RCW 39.04.105, which requires it to provide two full business days written notice of its intent to execute a contract and requires a bidder to give notice of its protest "no later than two full business days following bid opening." The timing of STITA's protest complied with RCW 39.04.105.[10] However, we do not agree that allowing protest under RCW 39.04.105 reopened the protest period for substantive challenges to the RFP. It only provided a window to protest the evaluation of the proposals submitted and the award of the contract. STITA presented no protest to the evaluation of the proposals or to the award to Yellow Cab. See RCW 39.04.010(1), (2). No timely protest to the RFP itself was made.

B. Waiver by Submission of Proposal

STITA contends that even though it participated in the proposal process, it could not have waived its right to protest the validity of the RFP, because the Port has no authority to issue an RFP that violates the RAA and KCC 6.64.760—it was void ab initio. For this proposition, it relies on the following rule: "If officials of the Government make a contract they are not authorized to make, the other party is not bound by estoppel or acquiescence or even failing

[9] RCW 39.04.010(4) defines "public work" as "all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property therein."

[10] We reach this conclusion by assuming the Port's December 11 notification that it would award the contract to Yellow Cab constituted the "bid opening."

to protest." Chris Berg, Inc. v. United States, 426 F.2d 314, 317 (Ct. Cl. 1970) (citing Nautilus Shipping Corp. v. United States, 158 F. Supp. 353 (Ct. Cl. 1958)). While the broad rule announced in Berg seems applicable at first blush, the facts are distinguishable. There, the federal government refused to allow a winning bidder to reform the contract when the bidder realized it had made a computational error. Id. at 314, 318. The court held that the government had violated an armed services procurement regulation by refusing to consider evidence of error when the winning bidder submitted the evidence for the purpose of increasing the bid price. Id. at 315, 318–19. Berg controls as to disputes between parties to the contract, not between bidders and the government in the absence of a contract. STITA, as an unsuccessful proposer, does not occupy the same position as the party to the government contract in Berg.[11]

[11] Nor is the case Berg cites, Nautilus Shipping Corp., applicable. There, Congress had provided a statutory formula the Navy had to follow for the sale of its surplus ships, and the court reasoned that the aggrieved buyer could not irrevocably subject itself to an improper charge by "estoppel or acquiescence or mistake or ignorance of law or failure to protest." Nautilus Shipping Corp., 158 F. Supp. at 355. Again, the facts distinguish this case from the current one, where the alleged violation does not affect a party. MAPCO Alaska Petroleum, Inc. v. United States, 27 Fed. Cl. 405 (1992), superseded on reh'g by 30 Fed. Cl. 153 (1993), another case STITA cites in support of its waiver argument, is inapposite for similar reasons as Nautilus and Berg. MAPCO had been awarded a government contract containing economic price adjustments in a fuel supply contract. MAPCO, 27 Fed. Cl. at 406. The federal government argued MAPCO had waived its right to argue the economic price adjustments violated Federal Acquisitions Regulations. Id. at 416. The court concluded that "[t]he contractor cannot, by waiver, permit the Government to enter an illegal contract." Id.

Finally, the Washington authority STITA cites is not on point. In Platt Electric Supply, Inc. v. City of Seattle, 16 Wn. App 265, 279, 555 P.2d 421 (1976), the court stated that "[a] public contract which has been let in violation of a competitive bidding law is illegal and void." There, Platt Electric argued the

The Port and Yellow Cab cite Blue & Gold Fleet, LP v. United States, 492 F.3d 1308 (Fed. Cir. 2007), to support their argument that STITA waived its right to challenge the RFP by submitting a proposal. There, the National Park Service solicited proposals for ferry transportation to Alcatraz Island. Id. at 1311. The solicitation prospectus instructed bidders that questions had to be submitted in writing no later than 30 days in advance of the due date of the proposals. Id. Although Blue & Gold was the incumbent ferry operator and submitted a bid, the Park Service advised all of the bidders that it would offer the contract to another ferry operator, Hornblower. Id. Blue & Gold filed a bid protest in the Court of Federal Claims after the announcement of the Park Service's intention to award the contract to Hornblower, requesting the court to enjoin the Park Service from awarding the contract. Id. at 1311–12. The ground on which Blue & Gold sought the injunction was the alleged failure of the Park Service to solicit bids that would include the wages and benefits for its employees as required by the Service Contract Act, 41 U.S.C. § § 351–58. Blue & Gold, 492 F.3d at 1312.[12]

The court held, "[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the

City had violated competitive bidding laws, not other statutes that defined how the municipal corporation had to structure its contract, as STITA argues here. Id. at 268.

[12] Blue & Gold originally argued that it was Hornblower's proposal that was defective for not including wages and benefits in accordance with the Service Contract Act, but the court analyzed the claim as a defect with the solicitation, as the terms of the solicitation did not include any mention of the Service Contract Act. Blue & Gold, 492 F.3d at 1313.

close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." Blue & Gold, 492 F.3d at 1313. In so doing, the court looked to 28 U.S.C. § 1491(b) (which gave the Claims Court jurisdiction to hear the case) and noted the statutory mandate to give due regard to "the need for expeditious resolution of the action." Id. (quoting 28 U.S.C. § 1491(b)(1)) (emphasis omitted). The court considered its adoption of this iteration of the waiver rule consistent with the statutory mandate for efficiency. Id.

While neither the Port nor Yellow Cab has pointed to a specific statutory directive, like U.S.C. § 1491(b)(1), to support a waiver rule in this context, there are fairness concerns that drive us to conclude waiver is appropriate here. These fairness considerations are well articulated in Arizona's Towing Professionals, Inc. v. State, 196 Ariz. 73, 993 P.2d 1037 (1999). The Arizona Department of Public Safety (DPS) issued an invitation for bids to provide towing services in Phoenix. Id. at 74. The invitation and other regulations required bidders to file protests regarding errors apparent on the face of the invitation for bids before bidding opened. Id. DPS entertained a challenge by one of the bidders after bidding opened, and the Arizona Court of Appeals held that DPS had abused its discretion in considering the protest, explaining the fairness concerns that drove its conclusion. Id. at 76.

> Where a procedural requirement protects important rights or interests, a good cause exception to that requirement should be construed narrowly or the exception may swallow the rule. Requiring protests related to errors apparent on the face of the bid to be filed *before* the bid opening protects the integrity of the bid

> process. Otherwise, a bidder may wait until the bids are submitted and the contract is awarded to another candidate, then protest the bid solicitation, force another round of bidding, and adjust its prices and strategies after it has had the opportunity to view its competitors' bids. Because allowing such belated protests is prejudicial to the initial winning bidder, bidders should object to mistakes or ambiguities in a bid solicitation before they bid.

Id. (internal citations omitted). The court in Blue & Gold Fleet expressed similar policy concerns to undergird its adoption of the waiver rule:

> In the absence of a waiver rule, a contractor with knowledge of a solicitation defect could choose to stay silent when submitting its first proposal. If its first proposal loses to another bidder, the contractor could then come forward with the defect to restart the bidding process, perhaps with increased knowledge of its competitors. A waiver rule thus prevents contractors from taking advantage of the government and other bidders, and avoids costly after-the-fact litigation.

492 F.3d at 1314.

We hold the trial court did not abuse its discretion in determining STITA had waived its right to challenge the Port's RFP.

II. Legality of the RFP

Had STITA not waived its challenge to the RFP, the legal bases it asserted for a preliminary injunction were nonetheless insufficient. To obtain preliminary injunctive relief, the moving party must demonstrate (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual or substantial injury.[13] Kucera v. Dep't of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000). In examining whether the moving party has established a clear legal or equitable right, a court examines the likelihood that the moving party will

[13] Only the first element is in dispute.

prevail on the merits. Rabon v. City of Seattle, 135 Wn.2d 278, 285, 957 P.2d 621 (1998).

We review a court's decision to grant or deny a preliminary injunction for abuse of discretion. Wash. Fed'n, 99 Wn.2d at 887; Rabon, 135 Wn.2d at 284. "For purposes of granting or denying injunctive relief, the standard for evaluating the exercise of judicial discretion is whether it is based on untenable grounds, or is manifestly unreasonable, or is arbitrary." Wash. Fed'n, 99 Wn.2d at 887. At a hearing on a preliminary injunction, the party moving for the injunction bears the burden of showing that the injunction is necessary to protect a "clear legal or equitable right." Id. at 888.

A. King County Code 6.64.760

STITA argues the RFP is unlawful because it preempts the taxi rates set by King County. KCC 6.64.760(D) provides, "Except for special or contract rates as provided for in this chapter or any per trip fee established by the Port of Seattle and set forth in any operating agreement or tariff, it shall be unlawful for anyone operating a taxicab licensed by King County to charge, demand or receive any greater or lesser rate than the following [rates]." STITA contends this language means a taxi operator could not receive less than the metered rate for any reason, including the Port's gross receipts revenue model articulated in the RFP.

The RFP does not implicate this section of the King County Code. The ordinance sets rates, not profits. KCC 6.64.760(D) allows an exception for per trip fees established by the Port. KCC 6.64.760 standardizes rates charged to

the public, and it prohibits the cab company from passing on any other costs of business to riders, with the exception of per trip fees paid to the Port. The KCC does not guarantee the taxi company a profit margin. It does not prohibit the taxi company from paying a concession fee at 10 percent or higher any more than it controls what the company pays for gasoline, repairs, or drivers. This challenge lacks merit.

B. Revised Airports Act

STITA first argues the RFP creates a charge for use of airport property that is not uniform for the same class of service. RCW 14.08.120(6) specifies that charges be "reasonable and uniform for the same class of service." STITA specifically alleges the Port considers all ground transportation operators as one class.[14]

Paul Grace, the senior manager of Landside Airport Operations, explained in his declaration that there are five classes of ground transportation services: taxis, courtesy vans, airporters and door-to-door shuttles, limousines, and charter operators. The taxis benefit from use of airport property that the other ground transportation providers do not enjoy: taxis have exclusive use of the South 160th Street parking lot and have their administrative offices and dispatch center on airport property. They also enjoy two feeder lines, a customer service coordinator, and a separate staging area in the parking

[14] STITA also alleges the gross receipts model violates the reasonable uniform provision, because a taxi operator whose trip generated a $60 fare would pay more to the Port than an operator whose trip generated $6. There is no merit in this argument, as the RFP allows the proposers to determine the method by which the fees should be collected from the individual drivers.

garage. The record shows the other transportation services use the facility to a different extent and in a different manner than the taxi concessionaire. The other transportation services also lack the exclusivity that the taxi concessionaire enjoys. The record supports the conclusion that taxis are a class of service, not part of another class. The assertion that the RFP creates nonuniform charges within a class of service lacks merit.

STITA also argues the RFP violated the RAA when it required proposers to offer concession fees based on gross revenues without due regard to the Port's actual costs. The details of the Port's revenue requirements require the proposer to guarantee the Port a minimum fee equal to the number of out-bound trips multiplied by the per-trip fee (established by the Port). The revenue requirements also allow proposers to propose a specific additional amount beyond the per-trip fee. The Port also requires the proposer to pay a minimum concession fee of 10 percent of gross revenues generated from outbound trips, which, if larger than the minimum fee based on the per-trip model, becomes the minimum annual guarantee. Proposers were also invited to pay the Port a concession fee higher than 10 percent.

STITA's central contention is that a gross receipts model cannot, by definition, be driven by "due regard" for the Port's costs. STITA contrasts the gross receipts model with the cost recovery model the Port has previously employed, using this contrast to frame its argument that the Port has done nothing other than seek to maximize its revenue.

The RAA contains a statutory mandate that the Port consider its operating

expenses and the property and improvements used by the concessionaires when establishing use charges:[15]

> 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.

RCW 14.08.120.

The first step in statutory interpretation is to look to the plain language to determine the meaning of a statute. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). The statute does not define the term "due regard," so we resort to its common meaning which may be determined by referring to a dictionary. Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). Black's defines "due regard" as, "Consideration in a degree appropriate to demands of the particular case." Black's Law Dictionary 501 (6th ed. 1990). Inherent in this definition is the exercise of discretion.

[15] In its oral ruling, the trial court stated, "There was some regard, but I think that petitioner has made a good case that there was not due regard. That being said, I also think petitioner would likely not prevail on the issue of whether all of the providers are one class or whether the taxi providers are a distinct class." STITA urges that we should treat this statement as determination on the merits of the preliminary injunction. We decline to do so. The basis of the trial court's denial of the preliminary injunction was the waiver issue.

Indeed, the Supreme Court has already interpreted RCW 14.08.120(6) in Branson v. Port of Seattle as giving the Port broad discretionary power to set concession fees. 152 Wn.2d 862, 870–71, 101 P.3d 67 (2004) (There is a "'range of reasonableness within which a municipality's manner and means of exercising [its] powers will not be interfered with or upset by the judiciary.'" (alteration in original) (quoting 2A Eugene McQuillin, The Law of Municipal Corporations § 10.18.10, at 366 (Dennis Jenson & Gail O'Gradney eds., 3d ed. rev. vol. 1996))). As the court in Branson recognized when it looked to RCW 14.08.120(6), the legislature has not prescribed the specific means by which municipalities must set airport concession fees. Id. The court concluded, "Therefore, the Port has discretion to set airport fees in the manner it chooses, so long as the resulting fees comply with the basic limitations set forth in RCW 14.08.120(6)." Id. Because it is clear the Port has discretion to set fees, we must consider whether the Port's choice to switch to a gross receipts model was made with "due regard" to both operational costs and the specific property used by the taxi concessionaire. RCW 14.08.120(6).

When interpreting a statute, the court should read it in its entirety, and if possible each provision must be harmonized with other provisions: statutes "must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous." Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). RCW 14.08.120(7) relates to a facility charge upon customers of rental car companies at the airport. It limits the Port's discretion to setting that charge on a per-day basis and mandates that the charge "may not exceed the

reasonable costs of financing, designing, constructing, operating, and maintaining the consolidated car rental facilities and common use transportation equipment and facilities and may not be used for any other purpose." RCW 14.08.120(7). This particularly limited language contrasts with the broader language in RCW 14.08.120(6) that the Port's concession fee charges must be set with "due regard to the property and improvements used and the expense of operation to the municipality." The legislature would have had no need to adopt the limited language of RCW 14.08.120(7) if those concerns were already covered in subsection 6. We do not read RCW 14.08.120(6) as capping the fees charged under "due regard" at amounts which only recover actual cost.

Further, other jurisdictions with statutes quite similar to RCW 14.08.120(6) have affirmed port authorities' use of a gross receipts model, focusing on the benefit conferred upon the concessionaire by having access to a captive market in determining the propriety of concession fees. As our Supreme Court has already recognized, the fee a taxi company must pay under a concession agreement derives both from the burden of the taxi company's use of airport property and the benefit the Port bestows on the taxi company by providing it exclusive access to a market of potential customers. Branson, 152 Wn.2d at 872 (citing Enter. Leasing Co. v. Metro. Airports Comm'n, 250 F.3d 1215, 1220–21 (8th Cir. 2001)).

In Enterprise, the Eighth Circuit considered whether the Metropolitan Airports Commission (MAC) had violated Minnesota Statute (Minn. Stat.) 473.651 when it levied a fee equal to 8.5 percent of off-airport rental car

companies' gross revenues.[16] 250 F.3d at 1216–17. The statute at issue there read:

> "[MAC] shall have the authority to determine the charges for the use of any of the property under its management and control, and the terms and conditions under which such property may be used. Where there is reasonable basis for classification of users as to any use, [MAC] may classify users, but charges as to each class shall be reasonable and uniform for such use, and established *with due regard to the value of the property and improvements used and the expense of operation to [MAC].*"

Id. at 1218 (quoting Minn. Stat. § 473.651 (2001)) (alterations in original). The court compared this statute to the language of Louisiana's comparable law, which, like Minn. Stat. § 473.651 (2001), authorized the airport authority to charge off-airport rental car companies fees which are "'reasonable and uniform for the same class of privilege or service and . . . established with due regard to the property and improvements used and the expense of operation to the authority.'" Id. at 1220 (quoting La. Rev. Stat. Ann. § 2:605(B) (1992)) (alteration in original). The court noted the Louisiana statute additionally required that such fees "'be based upon the cost to the airport of the particular facilities or services used by such nontenant, auto rental user.'" Id. (quoting La. Rev. Stat. § 2:605(D) (1992)). Because of Louisiana's specific limitation of the airport authority's power to assess fees based only on the particular airport resources used by rental car companies, the court concluded Minn. Stat. § 473.651, by contrast, allowed Minnesota's airport authority to consider the value of the entire airport in

[16] Fees consisting of 10 percent of gross revenues, like the Port has included in the RFP at issue here, have been deemed reasonable. See, e.g., Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 906 F.2d 516, 520 (11th Cir. 1990).

developing its gross receipts fee model. Id. at 1221.

Like Minnesota's statute, RCW 14.08.120(6) allows the Port to consider both the specific property used by the taxi company *and* the expense of operating the airport as a whole. Operation of Sea-Tac is based on a "two till" system, where the airport's budget is split between aeronautical and non aeronautical operations, both for revenue generation and costs. The 2010 Aviation Division budget shows the Port's strategic goal is to increase non aeronautical net operating income to compensate for the loss of revenue on the aeronautical side. The budget also shows specific 2010 initiatives the Port needs to fund, including adding a transpacific passenger route, designing runway reconstruction, and completing an automated security exit door pilot project to reduce security staffing needs—all of which fall into its operating costs.

In addition to operating costs for the entire airport, the Port must also maintain the specific property used by the concessionaires. This includes updating and expanding roadway projects. We see sufficient indication that the gross revenue fee as articulated in the RFP reflects the Port's due regard to the property the taxi concessionaire will use, as well as the overall operating costs.

STITA cites two cases in support of its position that the Port did not give due regard to the concession fees.[17] STITA relies on Raleigh-Durham Airport

[17] STITA cites Alamo Rent-A-Car for the proposition that use fees must reflect an approximate cost of the use of facilities and must not be excessive in relation to the cost incurred by the airport. There, the court considered Alamo's challenge to the fee under the commerce clause and accepted the airport authority's imposition of a 10 percent use fee of gross receipts on rental car companies.

Authority v. Delta Air Lines, Inc., 429 F. Supp 1069, 1082 (D.N.C. 1976), where the court considered a challenge to landing fees under North Carolina General Statute 63-53(5), substantially similar to RCW 14.08.120(6). There, however, the court invalidated the landing fee, because "certain impermissible items [were included] in the total annual airfield costs which [the airport] seeks to recover from [the airlines] through their payment of landing fees." Id. at 1084. STITA has not alleged the Port included any impermissible items in calculation of its costs or in projection of its budget when establishing the revenue criteria in the RFP.

STITA also relies on Indianapolis Airport Authority v. American Airlines, Inc., 733 F.2d 1262, 1264–65 (7th Cir. 1984), abrogated on other grounds by Nw. Airlines v. County of Kent, Mich., 510 U.S. 355, 372, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994), where the court considered a challenge to the reasonableness of the user fees the airport charged to the airlines. We decline to consider that case in depth, because the statute there differed materially from Washington's RAA—it does not include the disputed "due regard" language. Id. The relevant statutory mandate, the Indiana Airport Authorities Act, authorizes airport authorities, "'To adopt a schedule of reasonable charges and to collect

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Alamo Rent-A-Car, 906 F.2d at 518–21. A fee contravenes the commerce clause if it does not "'reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed,'" and if it is "'excessive in relation to costs incurred by the taxing authorities.'" Id. at 518 (quoting Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707, 717, 719, 92 S. Ct. 1349 (1972)). While this standard is similar to that employed in cases considering what "due regard" means, STITA has not alleged a commerce clause violation, and the two standards, although similar, should not be conflated.

them from all users of facilities and services within the [airport] district.'" Id. at 1265 (quoting Ind. Code § 8-22-3-11(9)) (alteration in original).

STITA has the burden to show a significant likelihood of prevailing on the merits. Rabon, 135 Wn.2d at 285. The RFP does not implicate KCC 6.64.760(D) at all. The RFP does not violate the RAA's provision requiring fees to be uniform for the same class of service, because taxis are a distinct class of service in and of themselves. Finally, the Port's receipt of fees in excess of its costs is not a violation of the "due regard" provision of the RAA. As a matter of law, none of the legal bases STITA relies upon support a preliminary injunction. STITA has not demonstrated a clear legal or equitable right. The preliminary injunction was properly denied.

III. Attorney Fees

The Port claims it is entitled to attorney fees from both the preliminary injunction hearing and on appeal, under the equitable rule that fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction. Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wn.2d 734, 758, 958 P.2d 260 (1998). The purpose of the equitable rule in Johnson is to deter plaintiffs from seeking relief prior to a trial on the merits. Id. STITA correctly points out that fees are not proper where the disappointed bidder seeks an injunction as the only alternative to losing its rights. As the Johnson court explained, "The purpose of the rule would not be served where injunctive relief prior to trial is necessary to preserve a party's rights pending resolution of the action." Id.

We decline to award fees because of the exception to the equitable rule stated in Johnson. Even though STITA has not succeeded in obtaining injunctive relief, STITA still had to pursue the injunction to preserve its rights to challenge the RFP before the Port and Yellow Cab signed the contract.

IV. The Stay

The existing stay is lifted effective the thirtieth day following the filing of this opinion, unless STITA has filed a petition for review by that date. If STITA has filed a petition for review, then the existing stay will remain in effect pending denial of such petition or further order of the Supreme Court, whichever comes first.

We affirm.

WE CONCUR: