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AFFIRM; Opinion issued August 17, 2012

In The
Court of Appeals
Fifth District of Texas at Dallas
.....
No. 05-11-01259-CV
.....
DELCOM GROUP, LP, Appellant
V.
DALLAS INDEPENDENT SCHOOL DISTRICT AND
R.L.S. INTERESTS, INC. D/B/A PRIME SYSTEMS, INC., Appellees

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On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 11-09674-K
.....
MEMORANDUM OPINION
Before Justices O'Neill, Francis, and Murphy
Opinion By Justice Francis

Delcom Group, LP appeals the trial court's orders granting the plea to the jurisdiction filed by Dallas Independent School District and denying Delcom's application for a temporary injunction to enjoin DISD and R.L.S. Interests, Inc. d/b/a Prime Systems, Inc. from disclosing and using Delcom's trade secrets. In three issues, Delcom contends DISD waived immunity by entering into a contract for digital classrooms with Delcom, the trial court had jurisdiction over Delcom's takings claim against DISD, and the trial court abused its discretion in denying its application for temporary injunction. We affirm the trial court's orders.

Delcom is a Texas limited partnership specializing in "lifecycle technology solutions" for school districts and other large-scale institutions. The company's services include the custom audio- visual design of interactive, media-driven classroom environments, technology installation, customized professional development training and, at the end of the technology's life cycle, salvage and recycling services. In the past, Delcom has contracted with nineteen of the top twenty-five school districts in Texas, including DISD.

In early 2011, DISD issued a "Request for Proposal" soliciting bids for "Digital Classroom integration solutions with technology components including installation and service at multiple school facilities" as part of DISD's effort to provide advanced technology for instructional support in classrooms. RFP bids were due February 23, 2011. Delcom submitted two bids, and Prime Systems, a competing company, submitted one. Delcom was the highest ranked vendor, and Prime ranked second. In a letter dated May 27, 2011 and signed by Lizzie Harris, Senior Buyer, Technology for DISD, Delcom was informed the DISD Board of Trustees had given "Authorization to Negotiate and Enter into a Contract" with Delcom Group for digital classrooms.

About three weeks later, DISD notified Delcom it was ending contractual negotiations because Delcom had "not been forthright in reporting a Felony conviction for one of its operators as required" under the Texas Education Code. Thereafter, DISD notified Prime that DISD would enter contract negotiations with Prime.

Delcom filed this suit against DISD and Prime (as well as other

individuals who are not parties to this appeal), alleging DISD took certain trade secrets and shared them with Prime. Specifically, Delcom asserted the following were trade secrets: the contract price list

containing the list of parts proposed for the project and their part numbers as well as the specific pricing of those parts; and the scope of work document, containing the description of the digital classrooms project, Delcom's warranty, training offering, and best practices. Delcom sued DISD for breach of contract, misappropriation of trade secrets, unconstitutional takings/inverse condemnation, theft of services and theft of property. Delcom sued Prime for tortious interference with a contract and prospective relations, conspiracy to tortiously interfere with a contract and prospective relations, misappropriation of trade secrets, conspiracy to misappropriate trade secrets, theft of services, and theft of property. Delcom sought a temporary restraining order, as well as temporary and permanent injunctions, against DISD and Prime. DISD filed a plea to the jurisdiction and a motion to dismiss.

The trial court granted in part Delcom's request for a TRO and restrained DISD and Prime from disclosing, utilizing, copying, duplicating, or otherwise permitting the disclosure of Delcom's purported trade secrets until August 19, 2011, the date of the temporary injunction hearing. Prime returned to Delcom the documents Prime had been given by DISD. Following the temporary injunction hearing, the trial court granted DISD's plea to the jurisdiction and dismissed all of Delcom's claims against DISD. The trial court also denied Delcom's application for a temporary injunction against DISD and Prime. This interlocutory appeal followed.

In its first issue, Delcom claims the trial court erred by granting DISD's plea to the jurisdiction because DISD waived immunity from suit when it entered into a contract with Delcom. Under this issue, Delcom contends the RFP clearly states the digital classrooms contract would consist of three documents: the RFP, the vendor's offer, and the signed letter of acceptance. Delcom argues that because it submitted a bid and received a letter of acceptance from DISD, it had an enforceable, written contract with DISD.

Immunity from suit deprives a trial court of jurisdiction. City of Houston v. Williams, 353 S.W.3d 128, 133 (Tex. 2011). Whether a trial court possesses jurisdiction is a question of law we review de novo. Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002). When a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties to resolve the jurisdictional issues raised. Tex. Dep't of Parks and Wildlife v. Miranda, 133 S.W.3d 217, 227 (Tex. 2004). If the evidence creates a fact question regarding the jurisdictional issue, the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. Id. at 227-28. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. Id. at 228.

When performing governmental functions, political subdivisions derive governmental immunity from the state's sovereign immunity. See

Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 694 n.3 (Tex. 2003). For the Texas Legislature to waive the state's sovereign immunity, a statute or resolution must contain a clear and unambiguous expression of the legislature's waiver of immunity. Id. at 696. Section 271.152 of the local government code waives a local governmental entity's immunity from suit for certain breach of contract claims. Tex. Loc. Gov't Code Ann. § 271.152 (West 2011). It provides: A local

governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.
Id. A "[c]ontract subject to this subchapter" means "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." Id. § 271.151(2).
For a contract to be legally binding, it "must be sufficiently definite in its terms so that a court can understand what the promisor undertook." T.O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992). The material terms of the contract must be agreed upon before a court can enforce the contract. Id. When an agreement leaves essential terms open for future negotiation, it is not binding upon the parties and merely constitutes an agreement to agree. Fort Worth Indep.

Sch. Dist. v. City of Fort Worth, 22 S.W.3d 831, 846 (Tex. 2000).
Delcom contends the RFP, Delcom's bid, and DISD's letter of acceptance constituted an enforceable written contract with DISD. In support of this, Delcom cites two sentences from the RFP which read: "Notification of award will be by a letter of acceptance. The letter of acceptance citing the RFP consummates the contract which consists of the RFP, the vendor's offer, and the signed letter of acceptance." After reviewing the entire record in this case and the appropriate law, we cannot agree that the parties had an enforceable written contract on May 27, 2011.
The RFP, including attachments and addendums, is over 100 pages. The first sixty pages detail the purpose of the RFP, how to submit an proposal, the specifications, requirements, criteria, and evaluation of the proposals, and the form of the offer. The RFP contemplated four types of classrooms and sought pricing on each classroom type. Pages 64 through 97 of the RFP contain a sample contract between DISD and a vendor. Gary Kerbow, director of purchasing for DISD, said the sample contract is provided to "give vendors an opportunity to review it [and] see if they have any objections to any of the content of the contract, and state those in the response."
Delcom submitted two separate bids in response to the RFP. Option 1 was for 12,000 classrooms and totaled $79,334,300; option 2 was also for 12,000 classrooms and totaled $62,428,300. According to Doug Busey, Delcom's director of audio visual services, the two bids were

separate and written as though "two different companies" had submitted them. After DISD reviewed the proposals, Delcom was the first choice vendor although no option was selected.
On May 23, Gary Shuman, bond program manager for technology, sent an email to several DISD employees stating board approval was anticipated for the Digital Classroom project and Delcom "is ready to move beginning with a formal negotiation and detail design." The email scheduled various meetings for "final determinations on products and package contents" including a six-hour meeting scheduled for "Formal Negotiations with Delcom Group." The DISD Board of Trustees met on May 26 and authorized DISD "to negotiate and enter into a contract" between DISD and Delcom Group "not to exceed $40,000,000 over three years."
On May 27, Delcom received a letter of acceptance stating the DISD Board of Trustees "approved board document #60102 - Authorization to Negotiate and Enter Into Contract." Although the letter did not state which option the Board had approved, it noted the contract would begin May 27, 2011 and end May 27, 2014. That same day, Busey emailed Shuman about agenda items for meetings between DISD and Delcom the following week. The final paragraph of Busey's email read: We will also set up one

more meeting for the remainder of the day on Wednesday for contract negotiations and final system design. Delcom to bring lunch in for a working session. The agenda will include:
Final system design:
Projector selection
Interactive software and hardware selection
Cabling and control selection

Contract negotiations
Based on final system design calculate estimated total cost of 6000 classrooms
Finalize catalog items for individual purchase
Select from available warranty options
The evidence also shows the RFP originally sought pricing on four types of classrooms; by early June, the types of classrooms dropped to two, and the project total dropped to $30 million. According to Shuman, the scope of work, list of products, and scheduling all changed. Delcom and DISD still had to determine the installation strategy and timeline, and they were still negotiating the warranty.
Although Delcom is correct that the letter of acceptance states a contract term, the record shows other essential material terms were lacking, including total price, number and type of classrooms to be completed, system design, schedule for implementation, scope of work, and warranty. We conclude the evidence in the record establishes that, as of May 27, 2011, the DISD and Delcom did not have a written contract stating the essential terms of the agreement for providing goods or services to the DISD. Because Delcom did not satisfy the requirements for the legislature's waiver of sovereign immunity under section 271.152 of the local government code, the trial court lacked jurisdiction to consider Delcom's breach of contract claim. We overrule Delcom's first issue.
In its third issue, Delcom contends, in the alternative, the trial court had jurisdiction over its takings claim and erred in dismissing it.
The Texas Constitution provides, "No person's property shall be

taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . .." Tex. Const. art. I, § 17. A takings cause of action consists of three elements: (1) an intentional act by the government under its lawful authority (2) resulting in a taking of the plaintiff's property (3) for public use. State v. Holland, 221 S.W.3d 639, 643 (Tex. 2007). Although Delcom contends DISD took Delcom's trade secrets, the record shows Delcom gave the disputed information to DISD during the RFP period and during contract negotiations. When a party voluntarily gives or delivers property to the State, it cannot later claim the property was taken under the power of eminent domain. See Green Int'l, Inc v. State, 877 S.W.2d 428, 435 (Tex. App.-Austin 1994, writ dism'd); State v. Steck Co., 236 S.W.2d 866, 869 (Tex. Civ. App.-Austin 1951, writ ref'd). We overrule Delcom's third issue.
In its second issue, Delcom contends the trial court abused its discretion in denying Delcom's application for temporary injunction. The decision to grant or deny a temporary injunction lies within the trial court's sound discretion; that discretion can be reversed on appeal only if we are convinced that it represents a clear abuse of discretion. Amend v. Watson, 333 S.W.3d 625, 627 (Tex. App.-Dallas 2009, no pet.). When we review a trial court's order on an application for temporary injunction, we cannot substitute our judgment for that of the trial court even if we would have reached a different conclusion. Id.

Instead, we review the evidence in the light most favorable to the trial

court's order, indulging every reasonable inference in its favor, and determine whether the order is so arbitrary that it exceeds the bounds of reasonable discretion. Id. A trial court does not abuse its discretion by denying an application for temporary injunction if the applicant failed to prove one of the requirements for a temporary injunction. Id.

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002). An applicant must plead and prove a cause of action against the defendant, a probable right to the relief sought, and a probable, imminent, and irreparable injury in the interim. Id. An injury is irreparable if the injured party cannot be compensated adequately in damages or if the damages cannot be measured by any certain pecuniary standard. Id. To demonstrate probable injury or harm, an applicant must show an injury for which there can be no real legal measure of damages or none that can be determined with a sufficient degree of certainty. Marketshare Telecom, L.L.C. v. Ericsson, Inc., 198 S.W.3d 908, 925-26 (Tex. App.-Dallas 2006, no pet.). At a temporary injunction hearing, the trial court considers whether the applicant has shown a probability of success and irreparable injury. Id. at 922. Delcom alleged it was entitled to temporary injunction based on its cause of action against DISD and Prime for misappropriation of trade secrets. We

previously concluded the trial court did not err by granting DISD's plea to the jurisdiction with respect to Delcom's contract and takings claims. Delcom did not appeal the plea to the jurisdiction on any of its other claims, including misappropriation of trade secrets, theft liability act, or conspiracy. It follows that the trial court did not abuse its discretion by denying Delcom's application for temporary injunction against DISD. See Butnaru, 84 S.W.3d at 204 (applicant must plead and prove cause of action against defendant as well as probable right to relief sought).

With respect to the trial court's order denying Delcom's application for temporary injunction as to Prime, we likewise conclude, after reviewing the entire record, the trial court did not abuse its discretion. To establish a claim for misappropriation of trade secrets, Delcom is required to establish (1) a trade secret existed; (2) the trade secret was acquired through a breach of a confidential relationship or was discovered by improper means; (3) Prime used the trade secret without Delcom's authorization; and (4) Delcom suffered damages as a result. Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 366-67 (Tex. App.-Dallas 2009, pet. denied). A trade secret is any "formula, pattern, device or compilation of information" that is "used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." In re Bass, 113 S.W.3d 735, 739 (Tex. 2003). To determine

whether a trade secret exists, we apply a six-factor test: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of the measures taken by the claimant to guard the secrecy of the information; (4) the value of the information to the claimant company and its competitors; (5) the amount of effort or money expended by the company developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Id. The party claiming a trade secret is not required to satisfy all six factors because trade secrets do not fit neatly into each factor every time; in fact, other circumstances could be relevant to the trade secret analysis. Id. at 740. Thus, we weigh the factors in the context of the surrounding circumstances to determine whether the information qualifies as a trade secret. Id.

We first question, after reviewing the six Bass factors listed above, whether Delcom established, at the temporary injunction hearing, a likelihood that the information at issue was a trade secret. Although Busey stated he did not think others could duplicate the information, he conceded the product list as well as product parts numbers were not trade secrets. He also testified the majority of the warranty information was taken from the RFP and likewise was not a trade secret. Busey said the information was "secured on a server" at Delcom's facility, he controlled access to it, and it was his "understanding" the

information would not be made public. Nevertheless, he conceded the RFP clearly states "Trade secrets and confidential information contained in proposals shall not generally be open for public inspection, but DISD's records are a matter of public record." He also conceded Delcom did not mark any of the documents "confidential," "for attorney's eyes only," or "trade secrets" until after the litigation began. No Delcom employee asked DISD to keep the information confidential nor did anyone refer in email correspondence or phone conversations to the fact that this information was a trade secret. When Delcom built a model classroom as part of its RFP bid, it was reviewed and evaluated by thirty teachers and DISD personnel. Delcom did not require or request nondisclosure agreements from any of the people seeing the model. Finally, the record shows Delcom did not seek to seal any of the records in this case until part way through the hearing on the temporary injunction.

Even assuming the information was a trade secret, we conclude Delcom did not establish probable imminent and irreparable injury. The only evidence Delcom presented regarding this element was Busey's conclusory testimony that the information was "critical" to Delcom's business and he would lose his advantage in the marketplace if competitors had the information. Busey also claimed "ultimately we could be out of business . . . it's that great of an impact." Delcom did not, however, introduce any evidence Prime used the information itself or that it released the information to other competitors. Delcom did not

present evidence showing Prime's actions threatened to harm or disrupt Delcom's business. In fact, Prime employee Johan Thio stated DISD gave Prime the list of products but Prime ultimately did not need to use the list. When asked about a particular product, Thio remarked that Prime did not need to use it because DISD already had laptops in use by DISD that would perform the same function.

When the trial court issued its TRO, Prime returned the documents it received from DISD to Delcom. Shuman testified he gave Prime the list of products and scope of work from Delcom's RFP bid because it was not proprietary. When asked how he knew, Shuman said based on his "years of experience working with school districts." Nevertheless, Shuman "made sure the prices [were] blanked out" on the product list; as a result, Prime only got a list of the products and their parts numbers, both of which Busey conceded were not trade secrets. According to Shuman, the list was basically a "shopping list" of the products from Delcom's RFP bid. Shuman asked Prime to look at it and see if it was the right solution for DISD; Shuman said DISD ended up using products recommended by Prime and not the ones from Delcom's bid. Prime did not incorporate any of Delcom's design for DISD.

To prevail in its application for a temporary injunction, Delcom's burden was to show an award of damages would be inadequate for the harm suffered. Delcom did not present evidence that any of the actions taken by DISD or Prime actually harmed or threatened to harm

Delcom's business or place in the market. Nor did Delcom introduce evidence to show damages could not be calculated or Prime would be unable to pay damages, if any. Under these circumstances, we cannot

conclude the trial court abused its discretion by denying Delcom's application for a temporary injunction against Prime. We affirm the trial court's orders granting DISD's plea to the jurisdiction and denying Delcom's application for temporary injunction.

MOLLY FRANCIS
JUSTICE
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Court of Appeals
Fifth District of Texas at Dallas
JUDGMENT
DELCOM GROUP, LP, Appellant
No. 05-11-01259-CVV.
DALLAS INDEPENDENT SCHOOL DISTRICT AND R.L.S. INTERESTS, INC. d/b/a PRIME SYSTEMS, INC., AppelleesAppeal from the 192nd Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 11- 09674-K).
Opinion delivered by Justice Francis, Justices O'Neill and Murphy participating. In accordance with this Court's opinion of this date, we AFFIRM the trial court's orders granting Dallas Independent School District's plea to the jurisdiction and denying Delcom's application for temporary injunction. We ORDER that Dallas Independent School District and R.L.S. Interests, Inc. d/b/a Prime Systems, Inc. recover their costs of this appeal from Delcom Group, LP.
Judgment entered August 17, 2012.
/Molly Francis/
MOLLY FRANCIS
JUSTICE

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