Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

Public Record Media,

Plaintiff,

v.

Minnesota Department of Employment and Economic Development,

and

Greater MSP,

Defendants.

Court File No. 62-CV-18-4335
Honorable Leonardo Castro

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GREATER MSP'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

INTRODUCTION

This case centers on Greater MSP's bid (the "Bid") in response to Amazon.com's ("Amazon") request for proposals for a second headquarters ("HQ2"), and whether Greater MSP may be subjected to the Minnesota Government Data Practices Act ("MGDPA") and forced to disclose the Bid.

Private entities, like Greater MSP, are not subject to the MGDPA, unless the following two elements are established: (1) a contract exists by and between the private entity and government entity, and (2) said contract requires the private entity to perform a government function. As to the Bid, Greater MSP did not enter into a contract with the Minnesota Department of Employment and Economic Development ("DEED"), or any other government entity. Further, and equally important, Greater MSP did not perform a government function when it responded to Amazon's request for proposals ("RFP") for HQ2. Plaintiff Public Record

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

Media ("PRM") has ignored these facts in bringing this lawsuit against Greater MSP for purportedly violating MGDPA. PRM cannot establish either element, and therefore cannot demonstrate that Greater MSP is subject to the MGDPA. PRM's claims against Greater MSP should be dismissed as a matter of law.

Alternatively, even if PRM could show that Greater MSP and DEED entered into a contract for the performance of a government function, the Bid is protected as trade secret information under Minnesota Statute § 13.37, subd. 1(b). The Bid was a result of Greater MSP's work in selecting and compiling data to draft a unique and competitive proposal in response to Amazon's RFP. To maintain its secrecy, the Bid was saved to a password-protected site. The password-protected access to this site was given only to Amazon and four individuals at Greater MSP. To this day, Greater MSP has allowed only eight hard copies of the Bid to be printed—five of the copies were sent to Amazon, as required by the RFP; two copies are filed securely at Greater MSP's office; and one copy is in the possession of Greater MSP's counsel, Briggs and Morgan, P.A. Although Amazon did not select the Bid, it still retains potential economic value in that it is a blueprint for attracting and retaining business in the region. For these additional reasons, the Bid is protected trade secret information, and PRM's claims against Greater MSP should be dismissed as a matter of law.

ALLEGATIONS IN THE COMPLAINT[1]

On September 7, 2017, Amazon issued a request for proposals ("RFP"), due October 19, 2017, for its second headquarters. (Am. Compl. ¶ 7, Ex. A). The RFP is not addressed to a

[1] Greater MSP does not concede any of the allegations in the Amended Complaint. For purposes of its Motion to Dismiss, however, Greater MSP is treating the allegations of the Complaint as true. Alternatively, if the Court deems it necessary to go beyond the pleadings and consider the Declarations of Michael Langley, Joel Akason and Daniel J. Supalla, the Court may treat this as a motion for summary judgment.

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

specific person or entity—government, private, or otherwise. (Am. Compl. Ex. A). The RFP provides that:

> [HQ2] is expected to create as many as fifty thousand (50,000) new full-time jobs with an average annual compensation exceeding one hundred thousand dollars ($100,000) per employee.
>
> * * *
>
> [HQ2] could be over $5 billion in capital investment . . . , [and] Amazon will continue to invest in its facilities to ensure [it] offer[s] a state-of-the-art workplace for [its] employees. States, provinces and metro economic development organizations should consider this as they suggest potential sites.

(Am. Compl. Ex. A).

Given the expected economic development, this project was of particular interest to Greater MSP, a private, non-profit organization dedicated to promoting economic development in the 16-county Minneapolis-St. Paul Region (the "Region"). (Am. Compl. p. 2 n.5; ¶ 3). Governor Mark Dayton's staff contacted Greater MSP to schedule a meeting on or about September 8, 2017 to discuss the RFP (the "September 8 Meeting"). (Am. Compl. ¶ 8). Representatives of DEED were also present at the September 8 Meeting. (Am. Compl. ¶ 2).

Initial communications following the September 8 Meeting indicated that Greater MSP and DEED would coordinate a response to the RFP (the "Bid"). (Am. Compl. ¶¶ 11–12). Amazon was notified that two co-leads, Jeff Rossate of DEED, and Joel Akason of Greater MSP, would submit a Bid to Amazon.[2] (Am. Compl. ¶ 12). But Greater MSP drafted and submitted the final Bid to Amazon. (Am. Compl. ¶¶ 33, 41, 43, 45; Michael Langley Declaration (hereinafter "Langley Decl.") ¶ 4). As Greater MSP drafted the Bid, it received data from DEED, institutions of higher education and cities within the Region. (Greater Langley Decl. ¶¶ 5–6). DEED supplied data to Greater MSP using a cloud-based service called "Box" (the

[2] DEED and Greater MSP entered into separate non-disclosure agreements with Amazon. (Compl. ¶¶ 13–17, Ex. E; Langley Decl. ¶ 3).

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

"Box"), and institutions of higher education and cities within the Region supplied data to Greater MSP via email. (Am. Compl. ¶¶ 21–23; Langley Decl. ¶¶ 5–6). Greater MSP determined how best to incorporate and compile said data into the final, comprehensive Bid. (Langley Decl. ¶¶ 4–6). The Bid reflects a detailed and specific strategy used to advance economic development in the region. (Langley Decl. ¶ 7).

Although DEED uploaded data, draft versions of the Bid and the final version of the Bid were never stored, maintained, or uploaded to the Box.[3,4] (Am. Compl. ¶¶ 21–23, 43, Ex. Z; Joel Akason Declaration (hereinafter "Akason Decl.") ¶ 2). Greater MSP set up a different password-protected site to upload the site with the Bid. (Akason Decl. ¶ 3). Greater MSP gave only Amazon and four of Greater MSP's employees the password to access the Bid. (Akason Decl. ¶ 4). Indeed, Lee Nelson, DEED's counsel, repeatedly stated that "the final Amazon bid

[3] Thu-Mai Ho-Kim, a Senior Economic Analyst at DEED, wrote in an email to Valerie Vannett at Greater MSP, "Was looking at the Box files, and it looks like you guys have been busy putting together a final package. It looks good!" (Am. Compl. ¶ 27, Ex. P). It is unclear what documents Mr. Ho-Kim was reviewing because the Bid (in draft or final form) was never saved to the Box. (Akason Decl. ¶ 2).

[4] PRM suggests that Kevin McKinnon at DEED provided detailed information about the contents of the Bid. (Am. Compl. ¶ 23, Ex. M). This suggestion misrepresents the information Mr. McKinnon provided, which was limited to a bullet point list of general topics that largely mirrored the list of information requested in the RFP. (Am. Compl. Exs. A at p. 6, M). For example, Mr. McKinnon listed:

> 1. Letter from Mike Langley introducing the sites along with the site detail
> 2. Letter from Commissioner Hardy.
>
> * * *
>
> 5. Labor market data we have, recruiting with a consortium of employers, etc.
> 6. All 200 higher ed institutions information, possibilities and examples of partnerships
>
> * * *
>
> 8. Recreational opportunities, housing information, etc.
>
> * * *
>
> Letters of support (business leaders, higher education etc.)
> Data to back up all of what is said in the proposal.

(Am. Compl. Ex. M).

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

document, as well as draft versions of [the] final bid document, [were] never collected, created, received, maintained, or disseminated by the Department of Employment and Economic Development." (Am. Compl. ¶¶ 43, 45, Ex. Z).

Greater MSP has only allowed only eight hard copies of the Bid to be printed—five of the copies were sent to Amazon, as required by the RFP; two copies are kept securely at Greater MSP's office; and one copy is kept securely at the office of Briggs and Morgan, Greater MSP's counsel. (Am. Compl. Ex. A; Langley Decl. ¶¶ 8–9; Akason Decl. ¶ 5; Supalla Decl. ¶¶ 3–5)

At no point did Greater MSP and DEED form any agreement—written, oral, or otherwise—concerning the Bid. (*See generally* Am. Compl.; Langley Decl. ¶ 10). Moreover, Greater MSP did not receive any monetary compensation from DEED or any other government entity for drafting and submitting the Bid. (Langley Decl. ¶ 11). Likewise, DEED did not receive any monetary compensation from Greater MSP for any data it provided via the Box. (Langley Decl. ¶ 12).

The Bid, due October 19, 2017, was submitted solely by Greater MSP. (Am. Compl. ¶ 43, Ex. Z; ¶ 45; Langley Decl. ¶ 4). Amazon did not select the Bid to be one of the finalists for HQ2's site. (Am. Compl. p. 2).

On the same day that bids were due to Amazon, PRM, citing the MGDPA, sent a letter to DEED demanding DEED produce:

(1) Any and all data submitted by the State of Minnesota to Amazon in response to Amazon's request for proposals (RFP) related to a search for a new corporate headquarters;

(2) Any and all data, including RFPs, submitted by Amazon to the State of Minnesota between January 1, 2017 and October 19, 2017 that relate to Amazon's search for a new corporate headquarters;

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

(3) Any and all correspondence (in written and/or electronic form) between staff of DEED and staff of Greater MSP regarding the State of Minnesota's response to Amazon's RFP related to a search for a new corporate headquarters.

(Am. Compl. ¶ 29, Ex. R (the "October 19 Demand")).

On December 7, 2017, Shane Delaney of DEED produced responsive data to Item 1 of the October 19 Demand, which included Governor Dayton and legislative leadership's cover letter to the Bid, and DEED's two-page summary letter of economic incentive information signed by DEED Commissioner Shawntera Hardy. (Am. Compl. ¶ 33, Ex. S). Mr. Delaney stated that the two documents produced "are the only documents DEED possesses that are responsive to [PRM's] request. Minnesota's complete proposal to the Amazon HQ2 RFP was submitted by Greater MSP . . . ." (Am. Compl. Ex. S).

On January 1, 2018, Mike Kaszuba, Executive Editor at PRM, emailed to Mr. Delaney, writing: "According to DEED, Greater MSP actually submitted the state's bid to Amazon. But does DEED have a copy of the bid? If so, we would like it. We just want to get clarified whether DEED has/or does not have a copy of the bid." (Am. Compl. Ex. S).

Mr. Delaney responded to Mr. Kaszuba the following day and verified that Mr. Kaszuba's "understanding as stated [in Mr. Kaszuba's previous email] [was] correct. Greater MSP submitted Minnesota's proposal to Amazon." (Am. Compl. Ex. S). Mr. Delaney also clarified that the "two documents [he] sent [to Mr. Kaszuba] last month are the only documents DEED possesses that were part of the bid." (Am. Compl. Ex. S).

On March 12, 2018, DEED produced three boxes of documents responsive to Items 2 and 3 of the October 19 Demand. (Am. Compl. ¶ 36). PRM remained unsatisfied and insisted that DEED had access to the Bid despite being told "no" on many occasions. (Am. Compl. ¶¶ 36–39). As a result, on May 8, 2018, PRM yet again sought to obtain the Bid and submitted a

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

second demand for data to DEED. (Am. Compl. ¶¶ 36–39, Ex. V ("May 8 Demand")). The May 8 Demand sought from DEED:

(1) The bid submitted to Amazon on behalf of the State of Minnesota in response to Amazon's request for proposals related to a second corporate headquarters; and

(2) Any and all draft versions of the bid described in Item 1 -- including portions thereof -- collected, created, received, maintained, or disseminated between October 10, 2017 and October 19, 2017.

(Am. Compl ¶ 37, Ex. V). Accompanying the May 8 Demand was a letter from PRM's legal counsel claiming that DEED had access to the Bid, and thus, the Bid was "government data" under the MGDPA. (Am. Compl. ¶¶ 37–38, Ex. W).

On May 31, 2018, Mr. Delaney responded to PRM's May 8 Demand, notifying PRM that responsive documents were ready for review. (Am. Compl. ¶ 41, Ex. X). Yet again, Mr. Delaney told PRM that "DEED does not possess a copy of the proposal submitted to Amazon." (Am. Compl. ¶ 41, Ex. X). PRM continued to press DEED, demanding a response to the letter accompanying the May 8 Demand which argued that DEED "has joint access to that data and is therefore obligated to provide it." (Am. Compl. ¶ 42, Ex. Y).

Responding to PRM on June 8, 2018, DEED yet again, through its counsel, Lee Nelson, stated that "the final Amazon bid document, as well as draft versions of [the] final bid document, [were] never collected, created, received, maintained, or disseminated by [DEED]." (Am. Compl. ¶ 43, Ex. Z). Frustrated by reality, PRM responded to Mr. Nelson on June 8, 2018, writing: "As I understand it, DEED's current position is that 'access' to data does not necessarily mean that such data is government data under the DPA. Our position is that it does mean that." (Am. Compl. ¶ 44, Ex. AA).

On June 15, 2018, Mr. Nelson, responded to PRM, confirming that PRM "has been provided copies of all government data responsive to [PRM's] multiple requests . . . ." (Am.

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

Compl. ¶ 45, Ex. BB). Mr. Nelson stated that the documents DEED produced include "any documents which DEED staff either uploaded or downloaded from the 'box' . . . ." (Am. Compl. Ex. BB). Further, Mr. Nelson wrote, "DEED does not have any control over this 'box' . . . ." (Am. Compl. Ex. BB)

PRM also demanded that Greater MSP produce the Bid. (Am. Compl. ¶ 48). On or about December 15, 2017, Mr. Kaszuba of PRM sent an email to Greater MSP demanding access to the Bid. (Am. Compl. ¶ 48). Greater MSP declined to produce the Bid. (Am. Compl. ¶ 49).

On February 6, 2018, PRM made a second demand that Greater MSP produce the Bid (the "February 6 Demand"). (Am. Compl. ¶ 50). PRM demanded that Greater MSP produce "any and all data submitted by Greater MSP to [Amazon] in response to the request for proposals issued in connection with Amazon's search for a second corporate headquarters." (Am. Compl. ¶ 50). Further, PRM demanded that Greater MSP indefinitely retain the requested data pending resolution. (Am. Compl. ¶ 50). Greater MSP explained once more that it is not subject to the MGDPA, that "there is no contract between Greater MSP and DEED as to the subject of [PRM's] request," and declined to produce the Bid. (Am. Compl. ¶ 51).

PRM, ignoring the law, facts, and responses it received from DEED and Greater MSP, brought this lawsuit to obtain the unsuccessful Bid submitted to Amazon. PRM's Amended Complaint asserts four counts under the MGDPA against DEED and Greater MSP (together, "Defendants"):

- Count I (Declaratory Relief): PRM seeks a declaration that Defendants' conduct violates the MGDPA by failing to produce public, government data in response to proper requests, and by failing to provide written certification and statutory citation for denials of access. (Am. Compl. ¶¶ 58–60).

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

- Count II (Action to Compel Compliance, Minn. Stat. § 13.08, subd. 4): PRM alleges that Greater MSP performed a government function and violated the MGDPA by stating that is not covered by the MGDPA. (Am. Compl. ¶¶ 61–65). PRM seeks to compel DEED's production, or alternatively Greater MSP's, of the data responsive to PRM's requests, and an award of costs, disbursements, attorney's fees and a civil penalty. (Am. Compl. ¶¶ 61–65)
- Count III (Action for Damages – Minn. Stat. § 13.08, subd. 1): PRM claims Defendants violated the MGDPA by failing to produce government data in response to proper requests, and by failing to provide written certification for denials of access. (Am. Compl. ¶¶ 66–70). Further, PRM argues that Greater MSP willfully violated the MGDPA by claiming that it is not covered by the MGDPA when it allegedly performed a government function. (Am. Compl. ¶¶ 66–70).
- Count IV (Injunction – Minn. Stat. § 13.08, subd. 2): P RM seeks an order to enjoin Defendants from their alleged position that the Bid is not subject to the MGDPA. (Am. Compl. ¶¶ 71–74).

All four counts against Greater MSP should be dismissed because PRM cannot establish that Greater MSP is subject to the MGDPA.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a motion to dismiss under Minnesota Rule of Civil Procedure 12.02(e), the court must determine whether the complaint sets forth a legally sufficient claim for relief. *See Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). Where a complaint fails

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *See Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000). In determining whether the complaint states a claim, all facts alleged in the complaint are accepted as true, and reasonable inferences may be drawn in favor of the non-moving party. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Notably, the court is "not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim." *Herbert*, 744 N.W.2d at 235. Thus, "[a] plaintiff must provide more than labels and conclusions." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Although it may not generally consider matters outside the pleadings in ruling on a motion to dismiss, the court may nevertheless consider documents that are central to a plaintiff's claims, including those referenced in and attached to the complaint. *See, e.g.*, *N. States Power Co.*, 684 N.W.2d 485, 490–91 (Minn. 2004) ("a court may consider documents referenced in a *complaint* without converting the motion to dismiss to one for summary judgment" (italics in original)).

Alternatively, if the Court deems it necessary to go beyond the pleadings and consider the Declarations of Michael Langley, Joel Akason and Daniel J. Supalla, it may treat this as a motion for summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) ("When matters outside the pleadings are presented to a court considering a motion to dismiss, and those external matters are not excluded by the court when it makes its determination, the motion to dismiss shall be treated as one for summary judgment."). Summary judgment is properly granted if the record demonstrates that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. The moving party bears the

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

initial burden of establishing the non-existence of material fact. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). Once it meets that burden, the nonmoving party "may not rest upon the mere averments or denials of [its] pleading [b]ut must present specific facts showing that there is a genuine issue for trial." *Rice v. Forby*, 304 Minn. 23, 27–28, 228 N.W.2d 581, 584 (1975).

PRM does not, and cannot show that Greater MSP is subject to the MGDPA, and therefore, its MGDPA claims against Greater MSP must be dismissed as a matter of law.

II. PRM'S CLAIMS FAIL AS A MATTER OF LAW

A. Greater MSP Is Not Subject To The MGDPA

1. Greater MSP, a private entity, did *not* enter into contract with a government entity as to the Amazon Bid, and thus, Greater MSP is *not* subject to the MGDPA

A private entity is only subject to the MGDPA when it enters into a contract with a government entity to perform a government function. The privatization provision of the MGDPA provides:

> If a government entity *enters into a contract* with a private person to perform any of its functions, all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and the private person must comply with those requirements as if it were a government entity.

Minn. Stat. § 13.05, subd. 11(a) (emphasis added).

PRM's Amended Complaint contains zero allegations that DEED had a contract with Greater MSP as to the Amazon Bid. No contract exists. *See generally* Am. Compl.; Langley Decl. ¶ 10. In fact, PRM makes no attempt to refute Greater MSP's statement in its response to PRM's February 6 Demand that "there is no contract between Greater MSP and DEED as to the [Bid]." *See* Am. Compl. ¶¶ 53–54. Instead, PRM latches onto its unsupported contention that Greater MSP performed a "government function," and, in doing so, PRM altogether ignores the requirement that the supposed "government function" must be performed *pursuant to a contract*.

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

Am. Compl. ¶¶ 53, 63, 69. PRM's references to a Greater MSP/DEED "collaboration" also fall short, as any alleged "collaboration," without more, fails to establish the elements necessary to form a contract.

Formation of a contract requires "communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008) (citation and internal quotation marks omitted). A contract does not exist unless there is mutual assent among the parties to the contract as to the contract's essential terms. *SCI Minn. Funeral Servs., Inc. v. Washburn–McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011). Here, PRM—a third party—cannot establish the elements necessary for contract formation between Greater MSP and Deed.

PRM has not shown, and cannot show, that DEED or Greater MSP received or gave any form of consideration related to work on the Bid. "One of the essential features of contract formation is consideration . . . ." *Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Avera Marshall*, 857 N.W.2d 695, 706 (Minn. 2014) (Anderson, J., dissenting) (citation omitted). "Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party." *Kielley v. Kielley*, 674 N.W.2d 770, 777 (Minn. App. 2004) (quotation omitted). Greater MSP received no benefit from DEED in exchange for drafting and submitting the Bid. (Langley Decl. ¶¶ 11–12). Further, DEED suffered no detriment as a result of Greater MSP drafting and submitting the Bid to Amazon. *See generally* Am. Compl.

Even if consideration existed, there is still no formation of contract between DEED and Greater MSP because there was no mutual assent. A "contract does not exist unless the parties have agreed with reasonable certainty about the same thing and on the same terms." *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 914 (Minn. App. 1988) (citation and internal

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

quotation marks omitted). Further, mutual assent cannot be established when essential terms of a contract are vague. *Druar v. Ellerbe & Co.*, 222 Minn. 383, 395, 24 N.W.2d 820, 826 (1946). Whether mutual assent exists is "tested under an objective standard." *SCI Minn. Funeral Servs.*, 795 N.W.2d at 864.

The Minnesota Supreme Court explained mutual assent in *Druar v. Ellerbe & Co.* 222 Minn. 383, 24 N.W.2d 820 (1946). *Druar* involved conversations between the plaintiffs and defendants regarding securing and performing contracts with the federal government for architectural and engineering services. *Id.* The plaintiffs provided engineering services, while the defendants provided architectural services. *Id.* The plaintiffs claimed that they pooled their resources with the defendants to secure a contract with the government. *Id.* According to the plaintiffs, the parties agreed that if they were awarded any contract, the work would be done "by all of them and all the monies and profits received [would] be immediately divided equally." *Id.* at 820–21. The plaintiffs claimed that the contract was formed through oral conversations during three meetings between the parties. *Id.* During the first meeting, the parties discussed working together for the purpose of soliciting work from the government, with the performance of that work being the subject of the conversation. *Id.* At that same meeting, the parties agreed to split the fees evenly. *Id.* at 821–22. The parties' conversations, however, did not cover the division of work as to any contract obtained. *Id.* at 825. The Court found that:

> because of their incompleteness, indefiniteness, and uncertainty as to essential terms the conversations testified to were insufficient to constitute a valid contract . . . . There was nothing in the conversations as to division of work. The three firms had previously engaged in different fields of work. There was nothing in the conversations as to what would be done if the work was unsuitable to one or more of the firms, nothing as to how the projects were to be financed, and nothing as to how to divide the fees in accordance with the work. The omissions are so material that the court cannot say what the obligations between these parties are.

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

Id. at 826. The Court explained that the conversations were "fatally incomplete and indefinite as to substantial and necessary terms . . . ." *Id.* (citation omitted). For these reasons, the Court determined there was a lack of mutual assent, and thus, held no contract was formed. *Id.*

Much like in *Druar*, DEED and Greater MSP never discussed or settled on terms essential to a contract regarding the Bid, and thus, the requisite mutual assent is not, and cannot be shown. PRM alleged that a DEED employee offered to walk through the final Bid, showing that DEED believed it would have access to the final Bid. *See* Am. Compl. ¶ 26. But later communications confirm that DEED never possessed or received the final Bid. *See id.* ¶ 43, Ex. Z ("the final Amazon bid document, as well as draft versions of [the] final bid document, [were] never collected, created, received, maintained or disseminated by [DEED]"). If Greater MSP and DEED were working the Bid up together, then access to (or possession of) the final Bid would have been an essential term in any contract concerning the Bid. And there are no facts showing that there was a clear division of the work. DEED thought it would serve as a co-lead, with Greater MSP in drafting and submitting the Bid. (Am. Compl. ¶ 12, Ex. E). Greater MSP, however, understood that it would draft and submit the final Bid alone. (Langley Decl. ¶ 4). Again, if a contract existed between DEED and Greater MSP concerning the Bid, the contract would explain the parties' tasks, roles, and obligations, *i.e.,* who would draft and submit the Bid. DEED's and Greater MSP's different assumptions regarding these essential terms demonstrate the absence of the requisite mutual assent. PRM cannot show that a contract was formed by and between DEED and Greater MSP.

The MGDPA is clear that only when a government entity enters into a contract with a private person to perform a government function will the data "created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions" be

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

subject to the MGDPA. Minn. Stat. § 13.05, subd. 11(a). Even accepting all allegations in the Amended Complaint as true and drawing all inferences in favor of PRM, PRM still does not, and cannot show, that DEED and Greater MSP entered into a contract concerning the Bid. The absence of said contract is fatal to PRM's MGDPA claims against Greater MSP. Therefore, PRM's claims against Greater MSP must be dismissed as a matter of law.

2. Greater MSP, a private entity, did *not* perform a government function, and thus, Greater MSP is *not* subject to the MGDPA

PRM's MGDPA claims against Greater MSP also fail because Greater MSP did not perform a government function as required by the privatization provision of the MGDPA. *See* Minn. Stat. § 13.05, subd. 11(a) (the MGDPA applies to a private person when said person enters into a contract with a government entity to perform a government function).

Examples from Minnesota case law are instructive when considering activities that constitute a government function under the MGDPA. In *WDSI, Inc. v. Cty. of Steele*, the court of appeals held that "[t]he construction of a jail to isolate from the public persons who arguably pose a threat to society serves the common good and is a clear governmental function." 672 N.W.2d 617, 621 (Minn. App. 2003). "[C]onstructing a jail and developing qualifications and requirements for the bidding process are governmental functions because they are conferred by statute upon local agencies and promote general public welfare." *Id.*

In *Heitman v. Lake City*, building and operating a boat harbor was not a governmental function because it would primarily serve "those inhabitants who owned boats and elected to moor them in [the at-issue] port for convenience and safety," unlike a public park which serves "the public as a whole." 225 Minn. 117, 120, 30 N.W.2d 18, 21 (1947). And, in *Brantman v. City of Canby*, the Minnesota Supreme Court held that when a city maintains a municipal

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

lighting plant to light its streets *and also to furnish gas to private consumers*, it is *not* exercising a government function. 119 Minn. 396, 398–99, 138 N.W. 671, 672 (1912).

Like the operation of the boat harbor in *Heitman*, and like the maintenance of a lighting plant, in part, to provide gas to private persons in *Brantman*, drafting and submitting a Bid for Amazon's HQ2 is not a governmental function. As with the boat harbor, HQ2 would not serve the public as a whole, but rather, it would serve only certain individuals who were hired to work with or for HQ2. And, similar to the lighting plant in *Brantman*, HQ2 would, in part, require service to Amazon, in the form of designating a site for HQ2, building HQ2, among others. Said services are not for the public as a whole, but rather, serve a for-profit, non-governmental entity: Amazon.

Although Minnesota has not considered whether bid submissions to promote economic development constitutes a "government function" under the MGDPA, caselaw from other jurisdictions provide guidance. In *In re Right to Know Law Request Served on Venango Cty.'s Tourism Promotion Agency, Lead Econ. Dev. Agency* (hereinafter "*In re RTKL*") the Commonwealth of Pennsylvania held that a private non-profit corporation whose purpose was to promote economic development, recreation and tourism was not subject to Pennsylvania's Right-to-Know Law (the "RTKL"))—Pennsylvania's counterpart to the MGDPA. 83 A.3d 1101, 1103 (Pa. Commw. Ct. 2014). In reaching this holding, the court considered whether economic development qualified as a government function under the RTKL, and ultimately found that a mission to stimulate a local economy is not a substantially governmental purpose. *Id.* at 1107. Indeed, promoting economic development "is a function that may be ascribed to any profitable private business that provides employment in certain locality." *Id.* Similar to the private non-profit's promotion of economic development in *In re RTKL*, Greater MSP's efforts in submitting

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

the Bid for HQ2 do not reflect a governmental function, but rather, a function that could be ascribed to any private entity in the business of promoting economic development.

PRM's inability to show a "government function" is evident through its Amended Complaint which merely labels the drafting and submission of a bid as a "government function" without any facts demonstrating the same. *See* Am. Compl. ¶¶ 51–53 ("Greater MSP performed a government function for DEED through its joint maintenance of Amazon Bid data in the Box, and via other duties related to the Bid . . . . PRM counsel . . . notif[ied] Greater MSP of its statutory responsibilities under the DPA in light of its performance of a government function for DEED."); *see also Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (to survive a Rule 12.02(e) motion, a "plaintiff must provide more than labels and conclusions.")).

PRM cannot show that drafting and submitting a bid to Amazon is a government function. Consequently, even if DEED and Greater MSP entered into a contract as to the Bid (they did not), the MGDPA would be inapplicable to Greater MSP because it was not performing a government function. Therefore, as a matter of law, PRM's claims against Greater MSP must be dismissed.

B. PRM Has Already Received All Responsive Government Data Under The MGDPA

PRM's MGDPA claims against Greater MSP also fail as a matter of law because it misunderstands the MGDPA's definition of "government data." Throughout the Amended Complaint, PRM argues, incorrectly, that DEED had access to the Bid, therefore making the Bid "government data" subject to the MGDPA. *See, e.g.*, Am. Compl. ¶ 44, Ex. AA (PRM counsel stating that PRM's position is that DEED's access to data means that said data constitutes

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

government data under the MGDPA).[5] For purposes of this motion, even if the Court accepted as true PRM's assumption that DEED had access to the Bid, the Bid would still not qualify as "government data" under the MGDPA because a government entity's mere access to data does not transform that data into "government data".

The MGDPA makes plain that government data is "data collected, created, received, maintained or disseminated by any government entity regardless of physical form, storage media or conditions of use." Minn. Stat. § 13.02, subd. 7 (emphasis added). Missing from the definition for "government data" is data "accessed" by a government entity. If the Legislature wanted to include data that the government accessed in the definition of "government data", it would have done so. *See Goodman v. Best Buy, Inc.*, 777 N.W.2d 755, 758 (Minn. 2010) ("We must "presume that the legislature says in a statute what it means and means in a statute what it says there." (citation and internal alteration and quotation marks omitted)). Moreover, the rules of statutory construction prohibit adding "access" to the definition of "government data." *See In re Annexation of Certain Real Prop. to City of Proctor From Midway Twp.*, 910 N.W.2d 460, 463 (Minn. App. 2018) ("this Court cannot add words to a statute that the legislature did not include"); *see also Genin v. 1996 Mercury Marquis, VIN No. 2MEBP95F9CX644211, License No. MN 225 NSG*, 622 N.W.2d 114, 119 (Minn. 2001) (rules governing statutory construction forbid courts from adding words to statutory provisions). As a result, if DEED somehow accessed the Bid, PRM's motion must still be dismissed because mere government access to the Bid does not make the Bid "government data." Moreover, adding "access" to the definition of "government data" would lead to an absurd result, making any data the government simply viewed or accessed freely available upon request.

[5] As explained multiple times to PRM, the final Bid was never uploaded, saved or accessed in the Box. *See* Am. Compl. Exs. X, Z, BB.

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

As PRM acknowledges, in response to PRM's requests to DEED, it received three boxes of documents from DEED, which DEED estimated included at least 1,000 pages of data. *See* Am. Compl. ¶ 36; Ex. X. DEED represented that the data it produced to PRM included documents which DEED staff either uploaded to or downloaded from the Box. *See id.* at ¶ 44, Ex. BB. Thus, the documents DEED produced were inclusive of the documents that DEED disseminated by uploading to the Box, and received by downloading from the Box. Therefore, PRM has received all "government data" responsive to its requests.

As a matter of law, PRM cannot show that the Bid constitutes "government data" as defined by the MGDPA because the Bid was never collected, created, received, maintained or disseminated by any government entity, including DEED. Moreover, PRM cannot show that the Bid constitutes government data by adding the word "access" to the MGDPA's definition of "government data." PRM has already received all "government data" responsive to its requests. Consequently, PRM's claims against Greater MSP must be dismissed as a matter of law.

C. The Bid Is Protected Trade Secret Information Under The MGDPA

Even if PRM were to somehow satisfy the requirements under the MGDPA's privatization provision (*i.e.*, Minn. Stat. § 13.05, subd. 11(a)), its claims against Greater MSP still fail because the Bid is protected trade secret information under the MGDPA. Trade secret information is:

> government data, including a formula, pattern, compilation, program, device, method, technique or process (1) that was supplied by the affected individual or organization, (2) that is the subject of efforts by the individual or organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

Minn. Stat. § 13.37, subd. 1(b).

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

Here, to draft the Bid, Greater MSP, using its extensive experience in the economic development of the Region, selected and compiled data it received in order to create a unique and competitive proposal in response to Amazon's RFP. (Langley Decl. ¶ 7). Throughout and after this process, Greater MSP has taken measures to maintain the secrecy of the Bid. (Langley Decl. ¶¶ 8–9; Akason Decl. ¶ 5). The Bid is comprised of a specific and innovative strategy used to advance economic development in the Region. (Langley Decl. ¶ 7). The Bid's detailed outline of this strategy derives independent economic value by not being readily ascertainable by other persons. If the Bid's outlined strategy is disclosed, competitors would be able to potentially win future projects by submitting a slightly more attractive proposal than Greater MSP.

The protected trade secret information contained within the Bid is comparable to the materials that were at issue in *Uhr v. University of Minnesota* and the materials discussed in the Minnesota Department of Administration's Advisory Opinion 03-009 (Apr. 15, 2003). In *Uhr*, investigators working for the University of Minnesota (the "University") studied a program termed the Enhanced Alcohol Risk Management Program ("eARM") and evaluated its effect on illegal alcohol sales to intoxicated patrons. A17-0337, 2018 WL 414296, at *1 (Minn. App. Jan. 16, 2018). The appellant, Steven Uhr, made several requests under the MGDPA for data about eARM. *Id.* Just like the boxes of data DEED gave to PRM, the University gave Uhr the opportunity to inspect and copy thousands of pages of documents. *Id.* at *1–2. The University, however, withheld eARM training materials, and advised that said materials were protected trade secret information. *Id.* at *2. The University explained that:

> [t]he [training materials are] . . . considered by the University to be trade secret because it is a program, method or process being developed using research methodologies, using security processes to protect the secrecy of the materials by only allowing access to study participants, and that derives independent economic

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

> value, including through potential commercial licensing, by not being generally known. In addition, . . . there is potential for future academic publications based on the [research] results.

Id.

Based on that record, the court affirmed that the materials in question constituted protected trade secret information under Minn. Stat. § 13.37. *Id.* at *7–8. The court reasoned that the first two prongs of the trade secret definition were satisfied because the "e-ARM data were created and, therefore, supplied by investigators working for the university, and the university is the organization that would be affected by releasing the data." *Id.* at *7. The materials did not have actual independent economic value, but they had potential economic value. *Id.* at *8. Under the statute, "independent economic value, actual *or potential*" satisfies the final prong. *Id.* Thus, the court affirmed dismissal of Uhr's claims against the University. *Id.*

Likewise, in Advisory Opinion 03-009, the Commissioner of Administration (the "Commissioner") found that the data contained within a management services agreement (the "MSA") entered into by Minnesota Oncology Hematology, P.A. ("MOHPA") and PET Center, LLC, qualified as protected trade secret information. Minn. Dep't Admin. Advisory Op. 03-009 (Apr. 15, 2003). By way of background, MOHPA, in response to a request, submitted data to the Minnesota Department of Health (the "MDH"). *Id.* MOHPA included the MSA in this submission, accompanied by a trade secret claim. *Id.* Later, an individual named Todd Freeman requested the MDH produce the MSA pursuant to the MGDPA. *Id.*

Reviewing the facts provided, the Commissioner determined that the MSA satisfied the first requirement of section 13.37 because "the data in the agreement clearly are a collection of information that MOHPA supplied to the MDH." *Id.* The second requirement was satisfied because MOHPA made reasonable efforts to maintain the secrecy of the data by allowing only a

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

"limited number of people in the involved organizations [to] see[ ] the agreement and [by making efforts] to keep copies of the document in secure locations." *Id.* As to the third and final requirement, the Commissioner was persuaded by MOHPA's explanation that:

> [t]he [d]ata fundamentally comprise the method of MOHPA and [Minneapolis PET Center, LLC] for the development and operation of a PET facility in Minnesota. The parties believe that their proposed arrangement, intertwining an oncology and medical imaging practice and a practice management group in a specific manner, is innovative and not generally known in the medical community.

Id.

Just like the data contained within the MSA, the strategy described in the Bid is a compilation of data that DEED, institutions of higher education and cities within the Region supplied to Greater MSP. (Langley Decl. ¶¶ 5–6). Thus, the first requirement of section 13.37 is satisfied. As to the second requirement, Greater MSP has made a greater effort to maintain secrecy than the University in *Uhr* and MOHPA in the Advisory Opinion. In addition to giving select few employees and Amazon access to the Bid, Greater MSP allowed only eight hard copies of the Bid to be printed—five of the copies were sent to Amazon, as required by the RFP; two copies are kept securely at Greater MSP's office; and one copy is securely stored at Briggs and Morgan's office, Greater MSP's counsel. in the possession of Greater MSP's counsel, Briggs and Morgan. (Langley Decl. ¶¶ 8–9; Akason Decl. ¶ 5; Supalla Decl. ¶¶ 3–5). Finally, as to the third requirement, much like the data in MOHPA's MSA, the strategy detailed in the Bid provides a method for economic development of the Region through integration of data in a unique and innovative manner. (Langley Decl. ¶ 7). And, just like the materials in *Uhr*, the potential economic value of the Bid's outlined strategy for use in future proposals satisfies the third prong of section 13.37. Therefore, the strategy comprised in the Bid qualifies as protected

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

trade secret information under the MGDPA, and thus, PRM's claims against Greater MSP must be dismissed as a matter of law.

CONCLUSION

PRM fails on all fronts to provide facts that would subject the Bid to the MGDPA. Not only is PRM unable to show that a contract existed by and between DEED and Greater MSP, it also cannot establish that Greater MSP's drafting of the Bid submitted to Amazon qualifies as a government function. PRM cannot proceed on its MGDPA claims against Greater MSP without presenting facts to establish these two critical elements. Further, PRM acknowledges that it has received three boxes of data from DEED, which contain all data that DEED received or disseminated in relation to the Bid. PRM's erroneous assumption that DEED had access to the Bid, even if accepted as true, would not make the Bid "government data" under the MGDPA. Further, even if PRM could somehow satisfy the requirements of the MGDPA's privatization provision, the Bid is protected trade secret information under section 13.37, subdivision 1(b). For these reasons, PRM's claims against Greater MSP must be dismissed as a matter of law.

Filed in District Court
State of Minnesota
10/23/2018 4:03 PM

Dated: October 23, 2018

BRIGGS AND MORGAN, P.A.

By: /s/ Daniel J. Supalla
David A. Schooler (#0225782)
Ellen A. Brinkman (#0386578)
Daniel J. Supalla (#0387064)
Erin A. Altman (#0397362)

2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
Telephone: (612) 977-8400
Fax: (612) 977-8650
Email: dschooler@briggs.com
ebrinkman@briggs.com
dsupalla@briggs.com
ealtman@briggs.com

ATTORNEYS FOR DEFENDANT GREATER MSP

ACKNOWLEDGMENT

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211, subd. 3.

/s/ Daniel J. Supalla