

INNOVATIVE EMERGENCY
MANAGEMENT, INC.

CASE NO. 056394 **D** IV.

VERSUS

19TH JUDICIAL DISTRICT COURT

THE LOUISIANA STATE
LICENSING BOARD FOR
CONTRACTORS

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

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PETITION FOR DECLARATORY JUDGMENT BY

NOW INTO COURT, through undersigned counsel, comes Petitioner, INNOVATIVE EMERGENCY MANAGEMENT, INC. ("IEM"), a Louisiana corporation authorized to do and doing business in the State of Louisiana, domiciled in East Baton Rouge Parish, Louisiana, who respectfully represents:

1.

Made defendant herein is the LOUISIANA STATE LICENSING BOARD FOR CONTRACTORS, a public board created under La. R.S. 37:2151 (the "LSLBC") and who "may sue and be sued" under La. R.S. 37:2161.

2.

This petition is filed pursuant to Code of Civil Procedure Article 1871 and following as supplemented by other provisions of Louisiana and federal law.

FACTUAL AND PROCEDURAL BACKGROUND

3.

On or about January 20, 2017, the State of Louisiana, through the Division of Administration, Office of Community Development - Disaster Recovery Unit ("OCD"), issued Request for Proposals # 107140-047 seeking program administration and implementation services for its Restore Louisiana Homeowner Assistance Program (the "RFP")¹. The Restore Louisiana Homeowner Assistance Program ("ReLa") is a federally funded disaster recovery program instituted to assist the residents of this State that were affected by the Great Floods of 2016. ReLa is funded with an allocation of Community

EBR4031890

¹ A copy of the RFP can be found at:
<https://www.cfpd.doa.louisiana.gov/OSP/LaPAC/agency/pdf/6456100.pdf>

Development Block Grant (“CDBG”) Funds appropriated by Congress under the Continuing Appropriations Act, 2017 (Public law 114-223).²

4.

IEM and Provident Disaster Resources Management, L.L.C. (“PDRM”) were two of the five proposers who submitted proposals in response to the RFP. The proposals submitted by IEM and PDRM were both accepted by OCD and deemed responsive to the RFP.

5.

After reviewing all of the submitted proposals and hearing oral presentations from IEM and PDRM, the selection committee evaluating the responses scored IEM's proposal the highest. IEM's proposal was approximately \$60 million less than the second place finisher (PDRM) and \$1,000,000.00 less than the third place finisher. As a result, IEM received a Notice of Award Announcement from Mr. Patrick Forbes, Executive Director of OCD.³

6.

Shortly thereafter, on March 5, 2017, PDRM—instead of filing a protest with OCD—filed a complaint with LSLBC (the “Complaint”) alleging that IEM was in violation of the Louisiana laws applicable to licensure of individuals or entities performing contracting activities in this State as prescribed by La. R.S. 37:2150 *et seq.* and the rules promulgated thereunder (the “Louisiana Contractor Licensing Laws”).⁴ Specifically, PDRM alleges that IEM violated the Louisiana Contractors Licensing Laws by submitting its proposal in response to the RFP without holding an active contractor's license at the time the proposal was submitted.⁵

7.

PDRM's claim that a contractor's license was needed at the time of submittal of the proposal is based on a portion of the scope of services presented in the RFP that call for

² See Exhibit A.

³ Exhibit B – OCD's Award Announcement dated March 3, 2017.

⁴ Exhibit C – PDRM's Complaint to LSLBC dated March 5, 2017.

⁵ Exhibit C

construction management services.⁶

8.

In fact, the Road Home Program did not contain sufficient protections to insure that once the grant money had been paid over to the homeowners--that the homeowner actually conducted the work with the money received. Additionally the Road Home Program did not protect grant recipients from unscrupulous contractors. As such, the ReLa program did not contain an option for the homeowner to use preapproved contractors to do the work. Under this option, the State steps into the shoes of the homeowner and contracts with contractor. The State does not manage, supervise or perform repairs; rather, the State acts as the homeowner representative. The State performs the same functions that a homeowner would perform under similar circumstances and clearly a homeowner is not a contractor and therefore the program manager is not a contractor.

9.

In response to the Complaint, IEM, through counsel, submitted a Preliminary Response (dated March 7, 2017)⁷ and a Final Response (dated March 9, 2017)⁸ asserting sound reasons that no contractor's license was needed by IEM at the time of submittal of its proposal in response to the RFP.⁹

10.

Within a few hours after receiving IEM's Final Response to the Complaint, Larry Bankston as counsel for the LSLBC, on March 9, 2017, issued his opinion letter which concluded that proposers were in need of a *Residential Contractor's License* at the time that proposals were submitted (the "Opinion Letter").¹⁰

11.

On March 15 and March 16, 2017, the LSLBC granted IEM both a residential and commercial license.¹¹ PDRM, who filed the Complaint with the LSLBC, also did not hold a

⁶ The phrase "construction management services" has a meaning which is entirely and different from the meaning to which the contractor's board gives that phrase. See ¶ 28-32.

⁷ Exhibit D – IEM's Preliminary Response to Complaint dated March 7, 2017.

⁸ Exhibit E – IEM's Final Response to Complaint dated March 9, 2017.

⁹ Exhibits D – E.

¹⁰ Exhibit F – Bankston Opinion Letter dated March 9, 2017.

¹¹ Exhibit F – Bankston Opinion Letter dated March 9, 2017.

residential license at the time it submitted its proposal. But unlike IEM, who applied for a residential license prior to submitting its proposal and now holds a residential license, PDRM has no residential license and, upon information and belief, has not applied for a residential license with the LSLBC.

12.

At its Board Meeting on March 16, 2017, the LSLBC entertained a motion to adopt the Opinion Letter issued by Mr. Bankston.

13.

Despite the arguments by IEM's counsel and others at the Board Meeting, the LSLBC voted to adopt the Opinion Letter, but explicitly stated that the adoption of the Opinion Letter was not intended to have any effect on either OCD's selection of the winning proposer or on OCD's ability to move forward with the ReLa Program.

14.

However, on March 17, 2017—one day after the LSLBC adopted the Opinion Letter—OCD advised that it will re-solicit the selection of the ReLa Program administrator and project manager.

15.

There is uncertainty and insecurity with respect to rights, status, and other legal relations between private proposers, the public bodies issuing procurements, and the LSLBC in solicitations which specifically seek disaster program management and administration services on a federally funded project, such as the ReLa Program RFP issued by OCD.

16.

Upon information and belief, the ReLa Program is not the first disaster program management and administration services procurement that have involved issues relating to whether a contractor's license was required in order to submit a proposal or perform the disaster program management and administration services on a federally funded project.

17.

Accordingly, in order to settle and afford relief from uncertainty and insecurity with respect to the rights, status, and other legal relations, IEM seeks a declaratory judgment

from this Court on the following:

1. Whether IEM was required to have a residential or commercial license at the time it submitted its proposal for a federally funded project to the State;
2. An interpretation of the LSLBC's authority over requests for proposals on federally funded projects that are governed by the Louisiana Procurement Code.
3. That those provisions within the Louisiana Contractor Licensing Laws concerning licensing requirements at the time a proposal is submitted are *inapplicable* to the submission of a proposal in response to an RFP which sought one entity to provide a vast scope of administration services on a project paid for by federal CDBG funds and which is governed by the Louisiana Procurement Law.

CLAIM FOR RELIEF

Under Federal and Louisiana Law, Louisiana Procurement Law applies to the RFP.

18.

As mentioned above, the ReLa program and the procurement of services sought by the RFP are both funded by CDBG funds. Accordingly, under federal law and Louisiana law, Louisiana Procurement law is applicable to this RFP.

19.

Federal law mandates states to follow its procurement policies and procedures when procuring property or services to be paid with CDBG funds. Specifically, 24 CFR 570.489(g) provides as follows: "When procuring property or services to be *paid in whole or in part with CDBG funds, the state shall follow its procurement policies and procedures*. The State *shall* establish requirements for procurement policies and procedures for units of general local government, *based on full and open competition.*"¹²

20.

To ensure compliance with 24 CFR 570.489(g), Louisiana law establishes the applicability of the Louisiana Procurement Code to any procurement of services to be paid with CDBG funds, such as the subject RFP. Specifically, La. R.S. 39:1554.1—entitled Federal block grants—instructs that the Louisiana Procurement Code "*shall* be applicable to any goods or *services procured with funds pursuant to the federally enacted* community services

¹² Emphasis added.

block grant or *community development block grant*.”¹³

21.

Following the directives of 24 CFR 570.489(g) and La. R.S. 39:1554.1, the RFP also provides that: “All Proposals and contracts submitted are subject to provisions of the laws of the State of Louisiana including but not limited to *La. R.S. 39:1551-1736 (Louisiana Procurement Code)*” and “*purchasing rules and regulations*”.¹⁴

22.

There is a clear conflict between the Louisiana Procurement Law as found in La. R.S. 39:1551 *et seq.* and the statutory authorities cited by PDRM in support of its Complaint and by Mr. Bankston in his Opinion Letter, which has been adopted by LSLBC.

23.

LSLBC now largely relies on La. R.S. 37:2163 and §119 of Title 46, pt. XXIX of the Louisiana Administrative Code for its position that IEM was required to have a contractor’s license at the time of submittal of its proposal.¹⁵ Although IEM disagrees with that conclusion, even if we assume it to be true, the citations that support the conclusion are in clear contradiction with the rules and regulations promulgated in the Louisiana Procurement Code.

24.

The applicable regulations governing procurements of this type in the State of Louisiana are cited in Title 34 of the Louisiana Administrative Code. The relevant sections are provided below and are in clear conflict with the conclusion that a proposer must have its contractor’s license at the time of submission of its proposal:

34 LA ADC pt. V § 1501

Responsible Bidder or Offeror—a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance. See R.S. 39:1591(7) and R.S. 39:1601 of the Louisiana Procurement Code. For the purpose of these regulations, “capability” as used in this definition means **capability at the time of award of the contract**, unless otherwise specified in the invitation for bid. (Emphasis added).

¹³ Emphasis added.

¹⁴ See RFP, Section 3.23, p. 18.

¹⁵ See **Exhibit C** and **Exhibit F**.

34 LA ADC pt. V § 1507(2) & (3)

A. The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

1. evidence that such contractor possesses such necessary items;
2. **acceptable plans to subcontract for such necessary items; or**
3. **a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.** (emphasis added).

34 LA ADC pt. V § 2536 (which applies specifically to this contract type)

A. In order to qualify as responsible, an offerer must meet the following standards as they relate to the particular procurement under consideration:

1. has adequate financial resources for performance, or has the ability to obtain such resources as required during performance;
2. has the necessary experience, organizations, technical qualifications, skills, and facilities, or has the ability to obtain them (**including probable subcontractor arrangements**). (emphasis added).

25.

According to the above cited provisions of the rules and regulations governing procurements in the State, it is expressly allowable for a proposer to meet any technical requirement presented in an RFP either at the time of award of the contract or through arrangements with qualified sub-contractors. This is in direct conflict with the conclusions rendered by Mr. Bankston in his Opinion Letter and adopted by LSLBC.

26.

Since the ReLa program and the procurement of services sought by the RFP are funded by CDBG funds, the Board must defer to 24 CFR 570.489(g) and La. R.S. 39:1554.1 to resolve the apparent conflict between the Louisiana Contractor's Licensing Laws and Louisiana Procurement Law. And as previously stated, those statutes, as well as the RFP, require compliance with Louisiana Procurement Law and the rules and regulations promulgated thereunder.

27.

IEM has included licensed contractors as part of the team it presented in its proposal and it has, out of an abundance of caution, applied for its Contractor's License, which it now has obtained both a commercial and residential contractor's license. In either event, it is in compliance with the State's procurement rules. Therefore, because 24 CFR 570.489(g),

La. R.S. 39:1554.1, and the RFP mandate compliance with Louisiana procurement rules—and those procurement rules do not require an active contractor's license at the time of submission—IEM has complied with Louisiana's procurement rules and its proposal submittal was lawful in spite of any mandates of the Louisiana Contractor's Licensing Laws.

IEM DID NOT SUBMIT A PROPOSAL TO ACT AS A CONTRACTOR ON A CONSTRUCTION JOB, PROJECT OR UNDERTAKING; RATHER ITS SUBMITTAL WAS FOR THE PROVISION OF CDBG PROGRAM MANAGEMENT AND IMPLEMENTATION SERVICES. AS SUCH, IT DOES NOT NEED A CONTRACTOR'S LICENSE.

28.

The statutory framework and related jurisprudence governing contractor licensure consistently contemplates certain definitive elements. They are: (i) an actual existing and imminent construction project of some type, (ii) an owner for whom the contractor's services rendered and (iii) a specific dollar amount for a specific job.¹⁶

29.

A review of the scope of services sought by the RFP establish that it is not soliciting bids or proposals for a construction job to be performed for an owner for a price. In fact, as this Petition is being reviewed by the Board, there is no particular construction job identified or in existence, there are no identified owners for whom a contractor's services will be required and there is no job, plans, specifications or anything else from which a dollar amount of a job can be determined. Thus, it is impossible to conclude that the RFP solicited proposals for a construction job which would require that the selected proposer hold an active contractor's license.

30.

The RFP is seeking program administrative and implementation services. These services include: applicant intake, eligibility determination, grant calculation, etc. Although the RFP seeks "construction management" services, it is seeking construction management

¹⁶ For example, see La. R.S. 37:2150.1(3) which defines a contract as: "the entire cost of the construction undertaking, including labor, material, rentals and all direct and indirect project expenses;" see also La. Admin Code, Title 46, pt. XXIX, § 119 which contemplates an owner and a dollar amount; see also *J.R. Hagberg v. John Bailey Contractor, et al*, 435 So.2d 580, 583 (La. App. 3rd Cir. 06/29/1983); *Messina v. Koch Industries, Inc.*, 283 So.2d 204, 206 (La. Sup. Ct. 09/24/1973).

services on behalf of the State in the context of program compliance with the State's approved Action Plan and other applicable CDBG rules and regulations. These are not the "construction management" services defined, and contemplated by, the Louisiana Contractor's Licensing Laws.

31.

IEM will never have privity of contract with homeowners under the ReLa Program. Its oversight of the actual contractors performing the work contemplated by the ReLa Program will be on behalf of the State to make sure program objectives are met, not on behalf of the homeowner. PDRM cannot establish that a license is needed because there is no job to extrapolate a total cost from. Fundamental to proving the need for a license is the dollar amount of a job. There are no existing jobs, no owners or project dollar amounts at this time; thus, a contractor's license cannot be needed. IEM as the Prime Contractor for the administration and implementation of the ReLa program is not acting in a traditional Contractor or Residential Building Contractor role as defined by the statutes. To the contrary IEM has been awarded a contract for program administration and implantation services and as such it does not need a contractor's license.

32.

Pursuant to the authorities cited in paragraph 2 above, and on the basis outlined in the above stated Claims for Relief, the Petitioner respectfully requests that this Honorable Board issue a declaratory judgment in favor of Petitioner and declare that it did not need an active Contractor's License to submit its proposal in response to the RFP.

WHEREFORE, Petitioner, Innovative Emergency Management, Inc., prays for:

- 1) A Declaratory Judgment from this Court, declaring that the Louisiana Contractor Licensing Laws concerning licensing requirements at the time a proposal is submitted are **inapplicable** to the submission of a proposal in response to the RFP;
- 2) **IEM was not required** to have a residential or commercial contractor's license at the time it submitted its proposal for the RFP;
- 3) An interpretation of the LSLBC's authority over requests for proposals on federally funded projects that are governed by the Louisiana Procurement Code; and
- 4) All other general and equitable relief appropriate under the circumstances

Respectfully Submitted:

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Please Serve:

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- 04-EXECUTORY PROCESS
- 05-SUIT ON NOTES
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- 07-WORKMENS COMPENSATION
- 08-JUDICIAL REVIEW
- 09-PROPERTY RIGHTS
- 10-RESTITUTION MANDAMUS
- 11-COMM. PROP. PARTITIONS
- 12-PUBLIC SERV. COMM.
- 13-OTHER PARTITIONS
- 14-OTHER
- 15-D.E.Q.
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