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MEMORANDUM

TO: Dennis J. Herrera, City Attorney, City and County of San Francisco
 CC: Jesse Smith, Chief Assistant City Attorney
 Therese Stewart, Chief Deputy City Attorney
 Julia M. C. Friedlander, General Counsel, S.F. Municipal Transportation Agency
 FROM: George M. Cothran
 Chief of Investigations
 Peter Keith
 Deputy City Attorney
 DATE: March 2, 2011
 RE: Investigation of Claim No. 11-00068, by Fekre Bekele, Relating to SFMTA Garage Management Contracts

I. INTRODUCTION

On July 9, 2010 Fekre (a.k.a. Fred) Bekele, owner of Convenient Parking LLC, filed a claim against the City and County of San Francisco (the "City"), seeking \$25 million for economic losses (the "Claim"). Mr. Bekele alleged that City employees did not treat him fairly or impartially during a competitive process to select three vendors to manage 14 parking garages owned by the City, under the jurisdiction of the San Francisco Municipal Transportation Agency ("SFMTA").

In coordination with Deputy City Attorney Peter Keith, George M. Cothran, Chief of Investigations for the San Francisco City Attorney (the "Investigator"), conducted an investigation of Mr. Bekele's allegations. The purpose of the investigation was twofold: to determine the accuracy of the serious allegations contained in the Claim, and to ascertain whether any City employees or officials engaged in misconduct related to the request for proposals ("RFP") process for the parking garage contracts. This report contains the findings of the investigation.

II. SUMMARY OF FINDINGS

After reviewing the extensive record of documents, including internal SFMTA email correspondence, and interviewing the key City officials and employees who participated in the competitive RFP process as well as representatives of the key business participants in the competitive process, the Investigator did not find evidence of misconduct on the part of City officials or employees. The RFP process involved a seemingly abrupt rejection of all proposals, several delays and apparent changes in course, all after the selection panel made up of three SFMTA staff members, an airport employee and an employee of the Controller's Office had given the joint venture in which Mr. Bekele's company had an interest the highest score for the largest of three contracts. These events were understandably frustrating to Mr. Bekele and may

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have contributed to a public appearance of unfairness. But key aspects of the Claim are not supported by the evidence revealed through the investigation.

The primary questionable conduct identified in the investigation took place in a meeting on New Year's Eve in 2009 among three businesses vying for the garage contracts. One of those businesses was IMCO, the joint venture in which Mr. Bekele's corporation, Convenient Parking, is a minority partner. At the private meeting, representatives of these three entities agreed to propose to the SFMTA a plan for reallocating the business managing the 14 parking garages amongst themselves. Such an agreement contravenes the principles of open and fair competition for public contracts. But there is no evidence that SFMTA officials or employees planned or participated in this meeting or sanctioned the meeting. The Monday following the Thursday meeting, the meeting participants presented their proposal to SFMTA Chief Executive Officer/Executive Director Nathaniel P. Ford, Sr. and SFMTA staff. Within a day, Executive Director Ford and SFMTA staff rejected the proposal.

At one point in the process described further below, SFMTA staff, led by Executive Director Ford, recommended that the SFMTA Board of Directors proceed to negotiate contracts in accordance with the original competition results – notwithstanding that the staff had previously rejected all proposals. This recommendation would have resulted in Mr. Bekele's joint venture being awarded the largest of three contracts, consistent with selection panel's initial recommendations and with Mr. Bekele's expectation once the panel made its determination. But the SFMTA Board exercised its legislative discretion and voted to reject the staff recommendation. Individual SFMTA Board members have indicated that they acted for various reasons, and one member later considered his vote to be in error because he was not clear on the matter he was voting on. Still, the investigation revealed no evidence that the vote was the product of any surreptitious attempt on the part of any SFMTA staff to influence the SFMTA Board to reject staff's own recommendation, or the product of any undue outside influence.

Indeed, there is no evidence that any competitor or its representatives attempted to privately or secretly influence SFMTA Board members in their vote. Rather, throughout the RFP process, proposers made public comments at public meetings to make their positions known. As to the entire RFP process, according to the Board members who were interviewed, the only attempt by a proposer to privately contact an SFMTA Board member to discuss the RFP process was an attempt by Mr. Bekele to make an inquiry of SFMTA Board member Reverend James McCray. That attempted contact occurred during an official "blackout" period, during which Board policy called for contacts between proposers and the SFMTA Board to be channeled through the Secretary of the Board. Reverend McCray did not respond to Mr. Bekele's attempt to contact him and instead forwarded Mr. Bekele's inquiry to the proper recipient, the Secretary of the SFMTA Board.

At one stage in the RFP process, Executive Director Ford had a private attorney-client relationship with Stephen Kay, a well-connected attorney who also represented one of the disappointed proposers. Mr. Kay represented Mr. Ford in connection with changes to his employment contract with the SFMTA. Based on information provided by Mr. Kay and Mr. Ford, that representation involved two hours of work. During the same period as Mr. Kay represented Mr. Ford in this matter, Mr. Kay represented one of the proposers that competed with Mr. Bekele's company and IMCO in the RFP process and wrote letters to Executive Director Ford challenging the proposed award of the largest contract to IMCO. Mr. Kay also arranged and hosted the December 31, 2009 private meeting among the three proposers where

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they discussed reallocating the contracts in a manner that would have benefitted Mr. Kay's client and been detrimental to IMCO. But, as mentioned above, Executive Director Ford and other SFMTA staff quickly rejected the proposed reallocation and recommended that the SFMTA Board approve returning to the original results of the selection panel, with IMCO being the highest ranked proposer for the largest contract.

On July 15, 2010, after the SFMTA had terminated the original RFP and issued a second RFP, Mr. Ford formally recused himself from further participation in the RFP process, stating that his intent was to avoid any appearance of impropriety. The same interest in avoiding the appearance of impropriety would have been grounds for him to recuse himself much earlier in the process, in December 2009 when Mr. Ford retained Mr. Kay to represent him. Before July 15, 2010, Executive Director Ford did participate in decision-making regarding the RFP while his personal attorney was also representing one of the disappointed proposers, but the investigation did not reveal evidence that he had any illegal conflict of interest or made decisions regarding the RFP based in any way on communications with, or his relationship with, Mr. Kay.

Mr. Kay at one point stated he did not bill or collect payment from Mr. Ford for the representation, which if true would have raised issues regarding the laws governing gifts to public employees and could have presented a conflict of interest issue as well. But, Mr. Ford recalled having paid Mr. Kay for the work and, after reviewing his files at the Investigator's request, Mr. Kay provided an invoice, stamped as having been paid, that indicates he charged Mr. Ford \$800 for two hours of his time. Mr. Ford and Mr. Kay did not provide other evidence to verify payment. Assuming the invoice is correct and that Mr. Ford did pay Mr. Kay in full at his regular rates for work performed, then there would not be an issue as to an unlawful gift or possible conflict of interest. And the investigation did not reveal any other evidence that Executive Director Ford had any illegal conflict of interest or made decisions regarding the RFP based on any undue influence by or improper relationship with the attorney.

In summary, while the RFP process has been controversial and involved significant changes in direction along the way, the Investigator did not find evidence to support the allegations in the Claim of impropriety against the City, including SFMTA officials and employees. Instead, as described further below, the investigation shows substantial evidence that disproves those allegations.

III. BACKGROUND

Currently, most of the 14 parking facilities that SFMTA owns (and that are not leased to a non-profit entity¹) are operated under separate site-specific contracts between SFMTA and a garage management firm. SFMTA has a total of 14 for profit lots and garages, which are managed under 10 to 12 contracts.

Beginning in 2007, SFMTA began considering bundling the contracts into larger master contracts to capture economies of scale and to use more efficient industry standard management practices. SFMTA hired a consultant, Barbara Chance, who reviewed the SFMTA's parking facilities and management plan. Ms. Chance recommended "bundling" garages into one or two groups and managing them under one or two master contracts. Despite the business advantages of a bundling arrangement, this recommendation was controversial. Small, often minority-owned, garage operators (like Mr. Bekele's business, Convenient Parking) were concerned that

¹ SFMTA owns six garages that are operated under lease agreements with non-profit entities.

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adopting Ms. Chance's recommendation would make them unable to compete with larger businesses and would exclude them from receiving any SFMTA garage contracts. In response to these concerns, SFMTA staff decided to adopt a modified version of Ms. Chance's recommendation: the 14 facilities would be "bundled" into three groups, with the third group ("Group C") being on a smaller scale to preserve opportunities for small businesses. In addition, small businesses would have an opportunity to bid as joint venture partners with larger businesses.

Thus, on April 10, 2009, SFMTA issued a Request for Proposals for Operation and Management of Parking Facilities, RFP No. SFMTA2008/09-30, seeking proposals from companies interested in managing garages for the City. The RFP asked for proposals for three contracts covering three groups of garages totalling 14 garages (6647 parking spaces). The contracts and their corresponding garage groups were referred to as Groups A, B, and C. The contract for Group A would include 6 garages (3316 spaces). Group B would include 4 garages (2944 spaces). Group C would include 4 garages (387 spaces). Companies selected through the RFP process would be mainly compensated through a management fee system. The management fees varied from group to group, contract to contract. The monthly fee for Group A was \$6,000, for Group B \$5,000, and for Group C \$2,000. There was also a performance component of compensation, which awarded significant bonuses based on meeting revenue benchmarks.

Proposals in response to RFP No. SFMTA2008/09-30 were due on June 19, 2009. After excluding entities that did not meet the minimum standards set out in the RFP, SFMTA was left with five entities vying for the three contracts: (1) IMCO LLC, a joint venture that is 60 percent owned by Imperial Parking, Inc., and 40 percent owned by Convenient Parking LLC (Mr. Bekele's business); (2) Imperial Parking, Inc. (separate from the joint venture); (3) Convenient Parking LLC (separate from the joint venture); (4) Pacific Park Management Inc. (PPM); and (5) Five Star Parking (Five Star). IMCO, Imperial Parking, PPM, and Five Star made proposals for Groups A and B. PPM, Five Star, and Convenient made proposals for Group C.

The RFP established a three-step selection process. The first step was evaluation by a selection panel. The proposer ranked highest for Group A, the largest of the garage contracts, was automatically excluded from consideration for the two smaller groups. Similarly, the proposer ranked highest for Group B was automatically excluded from consideration for Group C, the smallest of the three groupings. The purpose of these exclusions was to ensure that the agency had three separate firms managing Groups A, B, and C so that the SFMTA and the public would benefit from continued competition for innovative management practices within the garages. The second step was negotiation by SFMTA staff of contracts with the proposers that the selection panel had ranked highest for each of the three groups of garages. The final step was approval of the award of contracts for each group of garages by the SFMTA Board of Directors. Under these rules, a five-member selection panel evaluated proposals for the Group A garages using criteria set forth in the RFP. Consistent with the RFP terms, after being scored highest for Group A, IMCO and its joint venture partners, Imperial Parking and Convenient Parking were excluded from competition for Groups B and C. After being scored highest for Group B, Five Star Parking was excluded from competition for Group C. Pacific Park Management was the only remaining proposer for Group C.

On September 21, 2009, Ashish Patel, Senior Manager for Contracts and Procurement for SFMTA, sent letters announcing the highest ranked eligible proposers for Groups A, B, and C to IMCO, Five Star, and PPM respectively. These letters did not constitute award of any contract.

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Rather, consistent with the three-step RFP selection process as described above, the letter advised proposers with whom SFMTA would commence negotiations for possible contract awards. The letter stated: "The SFMTA Off-Street Parking staff will commence contract negotiations with the highest ranked eligible proposers for each Group of Facilities."

After these letters were distributed, in late September and October 2009, there were internal discussions among SFMTA staff expressing dissatisfaction with the RFP process, including dissatisfaction with the low number of eligible proposals received by SFMTA. Those internal discussions are described in greater detail below (see Section VII.A.).

In late October 2009, PPM protested the results of the selection process in a letter from the attorneys for PPM, Steven Kay of the law firm Kay & Merkle LLP, to Executive Director Ford. The letter is dated October 26, 2009 and was stamped received by the MTA on October 27, 2009.

On November 24, 2009, Bond M. Yee, Director of Sustainable Streets, sent a memorandum to the SFMTA Board of Directors, through Executive Director Ford, stating that notwithstanding the completion of the competitive process "(SFMTA) staff intends to reject all proposals and reissue a revised RFP." Changes envisioned by staff, Mr. Yee wrote, included a change to equal groupings of garages, an elimination of incentive bonus payments as a form of compensation, and an increase in guaranteed management fees. The SFMTA Board had previously (on November 3, 2009) approved a resolution authorizing the Executive Director to undertake certain contracting tasks without SFMTA Board approval, including rejecting all proposals where staff believed that proceeding with a solicitation process no longer served the best interests of SFMTA or the public.

On November 30, 2009, Winnie Xie, Manager of Contract Services for SFMTA, informed the three highest-ranked eligible proposers – IMCO, PPM and Five Star – that all proposals in response to RFP SFMTA2008/09-30 had been rejected. "Based on ... extensive evaluation," Ms. Xie wrote in the email, "SFMTA believes that reissuance of an RFP may help generating [*sic*] more interest from the private operators and resulting in a higher number of responses in the proposal pool."

By mid-December 2009, SFMTA staff had developed a draft of a new RFP that incorporated the changes summarized in Mr. Yee's November 24 memorandum.

Sometime between December 15, 2009 and December 18, 2009, Executive Director Ford received proposed contract language for the third amendment to his employment contract with SFMTA, and by December 21, 2009 Executive Director Ford, after consulting with former mayor Willie L. Brown, Jr., retained the legal services of Steven Kay of Kay & Merkle LLP.

On December 22, 2009, Mr. Bekele filed a complaint with the San Francisco Human Rights Commission. In the complaint, Mr. Bekele stated that he also sought the assistance of Supervisor David Chiu and that Supervisor Chiu requested an explanation from SFMTA.

On Thursday, December 31, 2009, IMCO, PPM, and Five Star – the three highest-ranked eligible proposers in the discontinued RFP – had a private meeting at the offices of Kay & Merkle LLP at 100 Embarcadero. At the meeting, representatives of these three entities discussed presenting the SFMTA with a consensus agreement among the three entities that would apportion the garage contracts differently from the Group A, Group B, and Group C under the initial RFP. According to meeting participants Steven Kay, attorney for PPM, and D. Scott

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Hutchison of Five Star, the purpose of the meeting was to avert another lengthy competitive process and to ensure that these three entities would still obtain some garage contracts.

IMCO (led by its majority partner, Imperial Parking), PPM and Five Star reached an agreement at the Thursday meeting for how to reallocate the garages and agreed to present it to SFMTA for its consideration the following Monday morning, January 4, 2010. The only participant in the meeting who did not agree with the idea of reallocating the garages was Mr. Bekele, but he did not express his objections to anyone but his majority joint venture partner, Imperial Parking, and did so only after the meeting.

While the proposers were not at the time aware of this fact, SFMTA staff and Executive Director Ford had, shortly before January 4, 2010, decided to recommend to the SFMTA Board that the agency return to the original competition results of September 21, 2009 and negotiate and award the three contracts accordingly. These internal discussions are described in greater detail below (see Section VII.C).

On January 4, 2010, representatives from PPM and IMCO, including Mr. Bekele, met with Executive Director Ford and presented the proposers' agreed-upon proposal to him. (Five Star was not present that day.) Mr. Ford did not agree to implement the proposal but agreed to ask SFMTA staff and the City Attorney's Office to evaluate it.

Per Mr. Ford's instructions, SFMTA staff reviewed the proposal and consulted with the City Attorney's Office. On January 5, SFMTA staff met with representatives of the three parking management companies and informed them that accepting the proposal would most likely be illegal and the SFMTA could not proceed with it. That afternoon, SFMTA staff and Executive Director Ford informed the SFMTA Board of Directors in open session that they had received new information from the garage management firms and wanted time to evaluate the information with legal counsel as well as address other issues such as insufficient competition for Group C. Further action was tabled until the February 2, 2010 SFMTA Board meeting. (The February 2, 2010 meeting was subsequently rescheduled to January 29, 2010.)

On January 12, 2010, Controller Ben Rosenfield sent a letter to Executive Director Ford asking that Mr. Ford suspend the process of awarding the garage management contracts for four months, to allow the Controller's Office to study the feasibility of entering into long-term concessions/leases for the operation of SFMTA parking facilities.

On January 13, 2010, Steven Kay and SFMTA General Counsel, Julia Friedlander, conferred regarding the third amendment to Executive Director Ford's employment contract. The discussion did not constitute a negotiation. Kay merely sought confirmation from Ms. Friedlander about his interpretation of the contract language.

On January 19, 2010, the SFMTA Board of Directors approved the contract amendment at its regular meeting.

On January 29, 2010, Executive Director Ford informed the SFMTA Board of Directors in open session that the Controller and the Mayor had asked for the four-month suspension. At that meeting, then-SFMTA Director Rev. James McCray said that he did not see a reason for suspending the award of the contracts while the Controller explored the option of long-term concessions/leases.

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Executive Director Ford and SFMTA staff prepared an agenda item for the March 2, 2010 SFMTA Board meeting, recommending to the Board that staff enter negotiations with the highest ranked proposers from the original September 2009 RFP results: with IMCO for Group A, Five Star for Group B, and PPM for Group C. In response to this recommendation, Mr. Kay wrote a second protest letter to Mr. Ford dated March 1, 2010.

At the March 2, 2010 SFMTA Board meeting, the MTA Board considered the agenda item. Of the seven members on the SFMTA Board, five participated in the meeting. Board President Tom Nolan was absent; the remaining directors present were Jerry Lee, Malcolm Heinicke, Shirley Breyer Black, Cameron Beach, Bruce Oka and Rev. McCray. Mr. Heinicke, an attorney, recused himself due to his representation of Five Star on matters unrelated to SFMTA garage contracts. The five remaining directors voted, three to two, to reject the staff recommendation. Mr. Beach, Mr. Oka and Mr. Lee voted against the staff recommendation.

Following the SFMTA Board's rejection of staff's proposal to award the contracts in line with the September 2009 RFP results, SFMTA issued a new RFP for the parking garage management contracts on April 23, 2010. The new RFP still had three bundles of garages, but Group C was no longer markedly smaller than Group A and Group B; rather, the three contracts were proposed to be similar in size. The new RFP also eliminated an incentive pay system, and recalibrated the management fees to reflect the elimination of incentive pay and the different groupings of garages.

The new RFP is still open, though the SFMTA has temporarily suspended the date for receipt of the proposals. Proposals were not yet due at the time of this suspension, and no proposals had yet been received by SFMTA.

While not specifically raised in the Claim, an issue raised in press coverage about this matter that has contributed to suspicion about the propriety of the RFP process is the attorney-client relationship between Mr. Ford and Steven Kay, who shares office space with Willie L. Brown, Jr., the former mayor of San Francisco. Mr. Kay provided legal advice to Mr. Ford for what appears to have been a brief time in December 2009 and January 2010, when Mr. Ford's employment contract with SFMTA was being amended for the third time. Consequently, Kay represented Executive Director Ford and PPM concurrently – though on entirely separate matters – for a brief period of time when key events and decisions pertaining to the garage RFP were taking place. Mr. Ford asked Mr. Kay for legal advice regarding the proposed language in his employment contract, and Mr. Kay reviewed the contract and conferred with the City Attorney's Office regarding the language. According to Mr. Kay and Mr. Ford, Mr. Kay's representation of Mr. Ford at that time was brief.

On July 15, 2010 Executive Director Ford advised SFMTA Board Chair Tom Nolan that while he had no conflict of interest prohibiting his participation in SFMTA's review of proposals for the garage management contracts, he was recusing himself in order to avoid any potential appearance of impropriety arising from his attorney-client relationship with Steven Kay.

IV. THE CLAIM

The Claim was filed by Fekre Bekele, owner of Convenient Parking LLC. The Claim itself does not directly allege wrongdoing by SFMTA officials or any other City employee or official. Instead, the Claim alleges improper conduct by private individuals and by inference ties SFMTA officials to this improper conduct. Specifically, the Claim states that Executive Director

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Ford, SFMTA staff, and the SFMTA Board of Directors made decisions detrimental to the interests of Mr. Bekele under the influence of his competitors, and that Executive Director Ford authorized the improper actions of private individuals.

The Claim states correctly that IMCO was deemed to be the highest ranked eligible proposer for Group A in September 2009, and also states correctly that Mr. Kay sent a letter protesting the results (under which he stated that PPM would have lost close to 90 percent of its SFMTA business) on or about October 26, 2009. The Claim then states correctly that subsequent to receiving Mr. Kay's letter, Executive Director Ford and SFMTA staff rejected all proposals in November 2009 and planned on issuing a new RFP. The Claim suggests (but does not state) that Mr. Kay's letter prompted the decision to reject the proposals.

The Claim then alleges that Mr. Bekele attended a meeting on December 31, 2009 at the law offices of PPM attorney Steven Kay, where Mr. D. Scott Hutchison of Five Star "informed (IMCO representatives) that if they did not reach an agreement to give up some of the parking garages IMCO had won in the contracts, that 'they' had 'so much juice in the City' that they could stall the award process, or get IMCO's contract rejected entirely." The Claim alleges that "Mr. Kay also informed us that he was given approval to mediate the meeting by Mr. Ford."

The Claim states Mr. Bekele met with Executive Director Ford on January 4, 2010 and "During that meeting Mr. Ford confirmed knowledge of the meeting at Mr. Kay's office." (Though it is not explicitly stated, the Investigator understands this assertion in the Claim to be meant to corroborate Mr. Kay's alleged representation that he had Mr. Ford's approval to mediate the December 31, 2009 meeting.)

The Claim also states that on January 5, 2010, Mr. Bekele and the other proposers were informed by SFMTA staff "that it is in the best interest of the city to recommend to the SFMTA Board to award the contract as is." The Investigator understands this aspect of the Claim to assert that staff had informed proposers on January 5 that SFMTA was returning to the original RFP results where IMCO was found to be the highest ranked eligible proposer for the largest, Group A, contract.

The Claim then states, "IMCO personnel did not agree to the backroom deal proposed at the (December 31) meeting, which would have contravened multiple state and local laws. In retaliation for IMCO's refusal to acquiesce to this deal, Mr. Kay and his clients improperly lobbied SFMTA officials and Board members to reverse the award², in order to allow the project to be awarded to a company connected to powerful interests in the City." The Claim does not specify what about the alleged lobbying (which is not inherently illegal) was improper. Nor does the Claim identify the powerful interests it refers to, or to which company they are connected. (Mr. Bekele and his attorneys later admitted to the Investigator they had no evidence of improper lobbying and that this aspect of the Claim is based on speculation.)

Later the Claim states that the "retaliation ultimately paid off" in that the SFMTA Board "cancelled the contract, and, without explanation, issued another RFP." This allegation apparently refers to the public March 2, 2010 meeting of the SFMTA Board, when the Board

² Since, as the Claim points out, SFMTA had in November 2009 rejected the RFP results, the Investigator understands this reference to an "award" to be the alleged representation by staff on January 5, 2010 that it was returning to the original RFP results, which ranked IMCO as the highest eligible proposer for the largest group of garages, Group A.

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rejected a recommendation from SFMTA staff and Executive Director Ford to return to the original RFP results of September 2009. That vote led staff to issue a new RFP on April 23, 2010. This aspect of the Claim is inaccurate in stating that a “contract” was “cancelled.” No contract was ever entered into between SFMTA and IMCO. IMCO was found to be the highest ranked proposer for one of the three parking management contracts by a selection committee made up of three SFMTA staff members, an airport employee and an employee of the Controller's Office. That ranking allowed the SFMTA to enter into contract negotiations with IMCO for the Group A garages, subject to approval by the SFMTA Board of Directors in its discretion. The selection panel's rankings and the SFMTA staff letter did not constitute the award of a contract. For reasons discussed in this report, the SFMTA never proceeded to enter into contract negotiations with any of the selected proposers.

Finally, in the Claim Mr. Bekele alleges that SFMTA increased pre-qualification financial requirements in the new RFP issued in April 2010, which made it more difficult for IMCO as a joint venture and Convenient as a prime to compete for the garage contracts.

V. INVESTIGATIVE SCOPE

The investigation addressed four areas of alleged misconduct by City officials:

ALLEGATION NO. 1

Executive Director Ford was improperly influenced to reject RFP results favorable to Mr. Bekele as a result of the protest letter from Mr. Kay.

ALLEGATION NO. 2

At a private meeting on December 31, 2009, representatives of IMCO, including Mr. Bekele, were threatened by rival proposers, specifically D. Scott Hutchison of Five Star Parking, with a delay of the public contracting process if IMCO refused to give up some of the garages it was allotted in the RFP results of September 2009, and told that Executive Director Ford had approved of Mr. Kay acting as mediator at the meeting. Also, IMCO did not agree to the reallocation of the garages proposed at the December 31 meeting.

ALLEGATION NO. 3

SFMTA staff and the SFMTA Board of Directors were improperly lobbied by Mr. Kay and his clients, PPM, to take action detrimental to Mr. Bekele's interests, and a specific vote at the SFMTA Board of Directors on March 2, 2010 was the result of this improper lobbying.

ALLEGATION NO. 4

The RFP issued in April 2010, which contains more exacting pre-qualification financial requirements, has made it more difficult for IMCO to participate as a joint venture, and for Convenient Parking to submit a proposal as a prime contractor for the garage management contracts.

To determine the merits of these allegations, the Investigator focused fact finding on the following five areas:

- The decision announced in November 2009 to reject the RFP results.

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- The December 31, 2009 meeting at Kay & Merkle LLP.
- The manner in which SFMTA received, reviewed and ruled on the proposal developed at the December 31, 2009 meeting.
- The March 2, 2010 vote by the SFMTA Board of Directors to reject the staff recommendation to negotiate parking garage contracts per the September 2009 RFP results.
- The decision to change the terms and conditions from those contained in the old April 2009 RFP, to those contained in the new April 2010 RFP.

In connection with these events, the Investigator considered the timing and potential effect on the process of Mr. Ford's attorney-client relationship with Mr. Kay in connection with the amendment of Mr. Ford's employment contract with the SFMTA.

VI. INVESTIGATIVE STEPS

In consultation with Deputy City Attorney Keith, the Investigator developed a plan of investigation and a protocol for conducting interviews of key witnesses.

The Investigator reviewed SFMTA documents and correspondence, including emails, relating to the garage management contracting process during the period that is the subject of the Claim.

The Investigator interviewed the following SFMTA staff members: Amit Kothari, Director, Off-Street Parking; Bond Yee, Director Sustainable Streets; and Virginia Harmon, EEO Director. Also, the Investigator interviewed Executive Director Nathaniel P. Ford and the following former and current members of the SFMTA Board of Directors: Rev. James McCray, Tom Nolan, Shirley Breyer Black, Bruce Oka, Cameron Beach, Malcolm Heinicke, and Jerry Lee.

Other individuals interviewed included: Fekre Bekele, claimant and owner, Convenient Parking LLC; Jeff Ogle, General Manager, Imperial Parking, Inc.; Behailu Mekbib, Chief Operating Officer and Managing Director, Pacific Park Management, Inc.; D. Scott Hutchison, former vice president of Five Star Parking; and Steven Kay, Kay & Merkle LLP.

Ward Thomas, Senior Marketing and Operations Director for Imperial Parking at the time of these events, declined to be interviewed. Mr. Thomas, a key participant in the events investigated, is no longer employed by Imperial Parking. He referred all questions to Mr. Ogle.

VII. FINDINGS

Based on interviews and document review, the Investigator reached the following findings:

A. The Initial Decision to Reject the RFP Results.**1. Allegation**

The Claim states that IMCO won the contract to manage the garages in Group A in September 2009, but after a letter from Steven Kay, attorney for PPM, "requesting the RFP results be rejected ... the SFMTA Board was informed that the RFP results were being rejected

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...” The Claim does not expressly state there is a causal link between these two events, but it plainly implies there was such a link.

2. Findings

As a threshold matter, IMCO did not “win” a contract for Group A, as the Claim asserts. The Claim incorrectly describes the effect of both the selection committee’s September ranking of proposals and the November 2009 announcement rejecting all proposals. As noted in Section II, the selection panel determined only that IMCO was the *highest ranked eligible proposer* for Group A. IMCO's ranking as the highest eligible proposer permitted the SFMTA to initiate contract negotiations with IMCO. If the parties reached agreement, a proposed contract would have then been submitted to the SFMTA Board of Directors for approval. If the parties did not reach agreement, SFMTA staff would have been authorized to commence negotiations with the next highest ranked proposer.

The evidence suggests no link between Kay's and Ford's attorney-client relationship and the SFMTA's decision to reject all proposals. It is not noted in the Claim, but it is a matter of public knowledge that Steven Kay, Esq. had an attorney-client relationship with Executive Director Ford in connection with Mr. Ford’s negotiations with SFMTA over an amendment of his employment contract. Executive Director Ford stated during his interview that Mr. Kay represented him for a brief period of time solely in connection with the third amendment to his employment contract with SFMTA. Mr. Ford said former San Francisco Mayor Willie L. Brown, Jr. had referred him to Mr. Kay. He said he did not develop that deep of a relationship with him while Mr. Kay represented him on the contract matter. To Executive Director Ford's recollection, he sent Mr. Kay his proposed contract amendment and identified some language he wanted advice on. Mr. Kay then reviewed the language, discussed it with representatives of the City Attorney's Office, and met with Mr. Ford about it.

Mr. Ford did not have a clear recollection of the specific date when he retained Mr. Kay for this purpose. Initially Mr. Ford suggested it was in early 2009. Mr. Kay was also unable initially to recall exactly when he was retained by Ford. Mr. Kay was clear, however, that the matter on which Ford retained him was the third amendment to Ford's employment contract with the SFMTA. Documents reviewed by the Investigator indicate that the third amendment to the employment contract on which Mr. Kay was retained by Mr. Ford was approved by the SFMTA Board in January, 2010, and that the draft of that amendment was first presented to Mr. Ford in mid-December 2009. After being informed that the draft of the third extension to his contract was provided to Mr. Ford himself in December 2009 and that the final version of that amendment was approved by the SFMTA Board in January 2010, Mr. Ford agreed that he probably retained Mr. Kay in mid-December 2009. Mr. Kay initially did not recall billing or being paid by Ford for this work. However, when asked to review his files for documentation relating to the representation, Mr. Kay produced an invoice indicating that his firm spent a total of two hours on the matter, at least a portion of which was on December 21, 2009.³ This

³ Initially, Mr. Kay stated he did not bill or collect payment from Mr. Ford for the representation, which if true would have raised issues regarding the laws governing gifts to public employees and could have presented a conflict of interest issue as well. However, Mr. Ford recalled having paid Mr. Kay. At the Investigator’s request, Mr. Kay reviewed his files and provided an invoice dated March 15, 2010, stamped as having been paid, that indicates he charged Mr. Ford \$800.00

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refreshed Mr. Kay's recollection and confirmed that Mr. Ford retained him in December 2009. It appears that the attorney-client relationship between Mr. Kay and Mr. Ford thus was first established in mid-December 2009, almost two months after Kay sent his first (October 2009) letter protesting the ranking of proposals and well after the SFMTA staff's November 2009 announcement that it was rejecting all proposals.

Also, there is no evidence of a causal relationship between the October 2009 letter from Steven Kay and the SFMTA's decision to reject all proposals. Immediately after the RFP results were announced in September 2009, SFMTA executive staff were concerned that the process did not serve the best interests of the SFMTA. Their internal discussions in September and October 2009, which ultimately led to rejection of the RFP results, began well before Mr. Kay's letter arrived at SFMTA. An internal SFMTA email from Mr. Amit Kothari dated October 25, 2009 corroborates the existence of these ongoing discussions before Mr. Kay's letter was received. Likewise, the concerns about the RFP results predated the attorney-client relationship between Kay and Executive Director Ford. The investigation revealed no evidence of pressure by superiors at SFMTA on agency staff to take any action under the RFP.

The concern for SFMTA staff and the Executive Director was not the financial impact of the RFP results on PPM (as detailed in Mr. Kay's letter), but the paucity of RFP responses that resulted in a lack of competition for the garage contracts. SFMTA received five responsive proposals for three garage contracts. Under the rules of the RFP selection process, companies, including constituent companies of joint ventures, found to be highest ranked proposer for one group, beginning with Group A, were ineligible for consideration for successive garage groups. Once IMCO was found to be the highest ranked eligible proposer for Group A, Imperial Parking and Convenient Parking were not eligible for Groups B and C. As a result, SFMTA had only two firms, PPM and Five Star, to consider for Group B. (Convenient Parking LLC, Mr. Bekele's firm, did not submit a proposal for Group B.) After Five Star was selected for Group B, SFMTA had only one firm to consider for Group C, PPM.

Both SFMTA staff members and Executive Director Ford were dissatisfied with this level of competition. They wanted to see a greater number of companies making proposals, so they would have a greater array of companies from which to choose. Consequently, staff focused on ways to change the RFP to increase the number of proposals. Staff decided that creating three relatively equal groups, and eliminating the much smaller group, would increase interest. Staff felt that Group C especially, with only four garages and a management fee of only \$2,000 a month, was not attractive to many operators who might have otherwise responded to the RFP. The new RFP would also make compensation more predictable by increasing management fees and eliminating incentive pay based on garage revenues and customer satisfaction – both of which staff hoped would make the RFP more attractive to a greater number of companies. On December 18, 2009, at 9:13 a.m., Mr. Kothari sent an email to various SFMTA staff members and managers informing them that he had completed a draft revised RFP. Mr. Kothari wrote that among the “key changes” were new contract groups that were “fairly equal in size and importance” and increased management fees to \$8,000 for each group.

SFMTA staff were also concerned because the RFP panel's results of September 2009 ranked Five Star as the top eligible proposer for Group B, even though the SFMTA's

for two hours of his time. Mr. Ford and Mr. Kay did not provide other evidence to verify payment.

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history with Five Star included a serious dispute over Five Star's management of the Golden Gateway Garage, which ended with Five Star paying SFMTA a \$4.7 million settlement in 2007. Executive Director Ford recalled Five Star's history as being the earliest factor that prompted him to consider re-issuing the RFP. Staff members also recall Five Star's history forming an early concern after the RFP results were reached in September. Ultimately, SFMTA staff decided that Five Star's history was not a proper basis for excluding Five Star from the RFP process. Concerns about Five Star's history were eclipsed by the concerns about insufficient competition described above.

Executive Director Ford said that he considered PPM's protest along with all of the other factors in addressing the RFP results, but it did not loom large in his decision-making process. Mr. Ford said he viewed PPM's protest as part of a general atmosphere of protest around the contracting process that went back in time to the Chance Report, when small operators like Convenient Parking complained that they would be shut out of the process due to the bundling of the contracts. Mr. Ford noted the contrast between PPM, which had a good track record with SFMTA but would lose out under the new RFP, and Five Star, which he believed had "embezzled" money from SFMTA but would nevertheless gain a greater share of SFMTA contracts. In addition, PPM's protest brought into stark relief his longstanding dissatisfaction with the RFP and how it grouped garages unequally with such a small Group C. Indeed, Executive Director Ford said, his preference all along would have been to have bundled all the garages into one contract for one firm.

Ultimately, Executive Director Ford said he gave the PPM protest no more consideration and accorded it no more weight than any of the other protests and complaints he had heard during the garage contracting process. Asked what effect it had on the ultimate decision to reject the RFP proposals in November 2009, he said, "Not much. I didn't give it that much weight. I didn't know the difference between PPM and Convenient. They were all the same guys to me when they were protesting. I couldn't lock into who was with which group. Steven Kay's letter in hindsight ... at the time I wouldn't have known if it was (from) PPM versus Convenient. It was just another protest. I (was) getting protest after protest after protest on this parking management contract, which is important to what my operation does, but I have a million other things to focus on, and at every other meeting we have someone protesting these garage contracts."

On the morning of October 26, 2009, SFMTA had already decided to reject all proposals, but Mr. Kay's letter did not arrive at the SFMTA until October 27, 2009. An internal City Attorney's Office email sent by Deputy City Attorney David Greenburg on October 26, 2009 at 11:21 a.m. – the day before the arrival of Mr. Kay's letter – informs Deputy City Attorney Julia Friedlander that Mr. Kothari had just called with the information that SFMTA had decided to reject all proposals and re-issue a new RFP. Although Mr. Kay's letter is dated October 26, 2009, the SFMTA copy of the Kay letter is stamped "received October 27, 2009." Thus, Executive Director Ford would have read the letter for the first time no earlier than October 27, 2009, and could have read it even on the following day or later. Accordingly, it appears that SFMTA staff's internal decision to reject the RFP results was made before the Kay letter arrived at SFMTA.

Executive Director Ford does not appear to have spoken with Steven Kay about the parking garage RFP process. Executive Director Ford said he did not speak to Mr. Kay about PPM's protest of the RFP results or any other issue related to the RFP process for the garage

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contracts. "I never spoke to Steven Kay about garages," he said. The investigation did not reveal any evidence to the contrary.

B. December 31, 2009 Meeting at Law Offices of Kay & Merkle LLP**1. Allegation**

The Claim states that PPM invited IMCO representatives to a meeting at the offices of Kay & Merkle LLP on December 31, 2009. During the meeting, the Claim alleges, Mr. D. Scott Hutchison of Five Star said "if the parties did not reach an agreement to give up some of the garages IMCO had won in the contracts, that 'they' had 'so much juice in the City' that they could stall the contract award process, or get IMCO's contract rejected entirely." The Claim goes on to allege, "Mr. Kay informed us that he was given approval to mediate the meeting by Mr. Ford." The Claim also states, "IMCO personnel did not agree to the backdoor deal proposed at the meeting, which would have contravened multiple state and local laws."

In an interview with the Investigator, Mr. Bekele provided further details of his allegations.⁴ Mr. Jeff Ogle and Mr. Ward Thomas of Imperial Parking, Convenient Parking's joint venture partner, were also at the meeting for IMCO, with Mr. Bekele. Craig Martin, Esq., was present as Mr. Bekele's personal attorney. Mr. Behailu Mekbib, Mr. Sam Tadesse, and Mr. Kay attended for PPM. Mr. D. Scott Hutchison attended for Five Star. Mr. Bekele said that PPM and Five Star presented a proposal to IMCO, the main tenets of which were that PPM would keep the St. Mary's Square garage, which it was already managing, and Five Star would keep the Golden Gateway garage, which it was already managing. Aside from those proposals, Mr. Bekele said, the allocation of the rest of the garages was discussed between PPM and Five Star.

Mr. Bekele said these negotiations over reallocating the garages took place between PPM and Five Star, with IMCO merely listening to the proceedings. When asked for a response, Mr. Bekele said IMCO informed the two companies that they were not ready to make a decision. At that point, Mr. Bekele said, Mr. Hutchison grew frustrated and made the threat alleged in the Claim. Mr. Bekele said that he and his partners did not respond to the threat, nor did they engage in negotiations at the meeting. Mr. Bekele said IMCO did not agree to the proposal. Mr. Bekele said the IMCO representatives informed PPM and Five Star that they would get back to them with an answer after the weekend and the meeting broke up shortly after.

Mr. Bekele said that Ward Thomas of Imperial Parking had communications with PPM after the meeting. Asked to describe the communications, Mr. Bekele made reference to a series of emails on which he was copied beginning Sunday, January 3, 2010 between the participants of the meeting. The email exchange, which Mr. Bekele provided to the Investigator, was initiated by Mr. Mekbib and involved Mr. Mekbib memorializing the terms of the reallocation agreement and asking for confirmation of the agreement in advance of a meeting he was scheduling for Monday, January 4, 2010 with Executive Director Ford. The emails show Mr. Thomas making two responses to Mekbib, both on the morning of January 4, 2010, that indicate IMCO was in

⁴ Mr. Bekele was accompanied by his attorney representing him on the Claim, during his interview with the Investigator.

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agreement with the proposal. Mr. Bekele said he did not reply to the email because he opposed the proposal to reallocate the garages.

According to Mr. Mekbib's January 3, 2010 email to the participants of the December 31 meeting, the final proposal agreed to by the proposers at the meeting involved PPM managing four garages (St. Mary's Square, SF General Hospital, Mission & Bartlett, and 7th & Harrison), Five Star managing three garages (Golden Gateway, Moscone Center, and 16th & Hoff) and IMCO managing seven garages (Civic Center, Performing Arts, North Beach, Vallejo, Polk & Bush, 1660 Mission Street, and Lombard Street). Each company would receive a \$6,000 monthly management fee, according to the agreement.

2. Findings

Executive Director Ford and SFMTA staff did not have advance knowledge of, nor did they play any role in, the December 31, 2009 meeting. By December 31, 2009, Ford had retained Kay in connection with his contract amendment. Nonetheless, Executive Director Ford and SFMTA staff have stated they had no advance knowledge the RFP proposers were engaged in discussions aimed at reallocating the garage contracts at the time of the December 31 meeting. The allegation in the Claim that Executive Director Ford pre-approved the meeting and the inference that he was somehow responsible for the proceedings is not supported by the interview statements. Mr. Ford stated he had no knowledge of the meeting. Mr. Kay stated that he never informed Mr. Ford about the meeting, and never stated that he was mediating on behalf of Mr. Ford. Even Mr. Bekele's partner Mr. Ogle said "I don't believe so" when he was asked if anyone in the December 31 meeting represented that SFMTA was aware of the meeting or aware that the proposers were discussing reallocating the garage contracts.⁵

Contrary to the Claim and to Mr. Bekele's statement to the Investigator, Mr. Bekele's company's joint venture partner, Imperial Parking, favored reallocating the contracts and was an active participant in fashioning and provisionally agreeing to the reallocation plan at the December 31 meeting and afterward. The Investigator bases this finding in part on Mr. Thomas' responses to Mekbib's email of January 3, 2010. But Mr. Ogle also said at various points during his interview that he and Mr. Thomas engaged in a negotiating the terms of the reallocated garage groups and by the end of the meeting had provisionally agreed to a final reallocation plan. Mr. Ogle said he was in favor of the reallocation because the November rejection of the RFP results had left IMCO with no potential contracts, and he saw the proposed reallocation plan as a way of gaining contracts with SFMTA. Mr. Ogle said he was willing to see if the influence PPM and Five Star claimed to have at SFMTA would be enough to ensure the approval of contracts in line with the agreement reached by the proposers on December 31.

Despite the role of Mr. Bekele's joint venture partner in creating and supporting the reallocation plan, Mr. Bekele was opposed to the December 31 meeting, its purpose and its outcome, and expressed this to his partners immediately after the meeting. Bekele said in his interview that he did not know the purpose of the December 31 meeting prior to it taking place. He said he remained silent in the meeting and did not express his opposition. However, he said, he expressed his opposition to his partners, Ogle and Thomas, immediately following the

⁵ Mr. Ogle was represented by Mr. Bekele's attorney during his interview with the Investigator. Mr. Bekele's attorney informed the Investigator that he was also representing IMCO.

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meeting. In his interview with the Investigator, Mr. Ogle confirmed that Mr. Bekele expressed his opposition immediately following the meeting. Mr. Ogle said he had a conversation with Mr. Bekele after the December 31 meeting, in which he tried to convince Mr. Bekele that relying on the reported influence of PPM and Five Star and backing the proposed reallocation plan might represent IMCO's best chance of gaining a garage contract. But, Mr. Ogle said, Mr. Bekele remained firm in his opposition.

The investigation produced contradictory evidence about the alleged threat by Mr. Hutchison, but in any event the threat, even if made, did not play any important part in the outcome of the process. Mr. Hutchison is a private individual and in no way represents SFMTA. Mr. Bekele does not allege that the threat was made by or on behalf of SFMTA or any of its employees or officers, and there is no evidence that it was. Accordingly, it was not necessary to reach a finding on this aspect of the Claim.

Interviews with representatives of the three companies made clear the purpose of the December 31, 2009 meeting: to stop SFMTA from issuing a new RFP as the agency had intended. Though the proceedings at the December 31, 2009 meeting do not implicate SFMTA, the conduct of the representatives of the three businesses that were present – IMCO, PPM, and Five Star – still warrants discussion. The new RFP, already in draft form by the time the meeting took place, would have invited a new round of proposals and required IMCO, PPM and Five Star to compete once again with other garage operators. The SFMTA had crafted the new RFP, with its increased management fees and larger garage groups, with the specific intent of generating more proposals from more companies and providing SFMTA with better chances of selecting highly qualified companies. But PPM, Five Star and IMCO sought to prevent that from occurring by coming up with their own plan to reallocate the garage management contracts. This private conduct by representatives of certain garage management firms is anti-competitive and contrary to the principle of fair play and transparency in the public contracting process.

C. SFMTA's Response To The Operators' Agreement

1. Allegation

In the Claim and in his interview with the Investigator, Mr. Bekele claims that Executive Director Ford "confirmed his knowledge of the (December 31) meeting at Mr. Kay's office" in a meeting Executive Director Ford had with Mr. Bekele, Mr. Mekbib and Mr. Thomas on January 4, 2010. The Claim also alleges that SFMTA staff members informed Mr. Bekele at a meeting the following day, January 5, that staff intended to recommend that the SFMTA Board adopt the original RFP results of September 2009. Mr. Bekele said in his interview that he attended the January 5 meeting of the SFMTA Board expecting staff to recommend a return to the original RFP results. Instead, he heard Mr. Yee and Executive Director Ford inform the board that they were evaluating the proposers' proposal. Mr. Bekele alleged that "something happened" between the meeting with SFMTA staff in the morning and the meeting of the SFMTA Board of Directors in the afternoon. His comment suggested that pressure was brought to bear on staff to reverse its decision to move ahead with the original RFP results.

2. Findings

The meeting with Executive Director Ford was not arranged until the morning of Monday January 4, 2010. Mr. Mekbib called Executive Director Ford's office on Monday, January 4, 2010 after he had received confirmation from Mr. Thomas and Mr. Hutchison that the

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three companies were in agreement regarding the proposal, developed at the December 31, 2009 meeting, to reallocate the garage contracts among themselves. Mr. Mekbib made an appointment the same day for himself, Mr. Bekele and Mr. Thomas to meet with Executive Director Ford. In his interview, Mr. Ogle said Mr. Thomas informed him that morning that Mr. Mekbib “wants to know if we are on board (with the December 31) so he can call SFMTA and get a meeting. I said sure, okay.” (Mr. Hutchison recalls that he participated in this meeting by phone, but no other participant recalls him doing so. It is likely that Mr. Hutchison is recalling the January 5 meeting, in which he indeed participated by phone.)

During a short January 4, 2010 meeting, the participants presented their reallocation plan to Executive Director Ford. At the meeting with Executive Director Ford, Mr. Mekbib and Mr. Thomas explained that the three companies had agreed to a plan to reallocate the garages. Mr. Thomas made a presentation of how the proposal was allowed under the terms of the RFP, Mr. Mekbib said, adding that Mr. Thomas went as far as to reference specific sections of the RFP which he believed supported his position. According to Executive Director Ford, Mr. Thomas was fully in support of the proposal and represented that he was a principal author of it. Mr. Bekele said nothing in the meeting. Mr. Bekele said he and his joint venture partner agreed that he was to say nothing in the meeting. According to all participants of the meeting who were interviewed, Executive Director Ford received a one-sheet description of the proposal and said he would have his staff review it with legal counsel to determine if it was permissible. The meeting was so short-lived, Executive Director Ford said, he did not even sit down.

On the morning of January 5, 2010, SFMTA communicated to the proposers that SFMTA could only accept garage allocations that arise out of a sanctioned RFP process, not out of a private agreement. Following Executive Director Ford’s January 4 morning meeting with the proposers, he gave the proposal to Mr. Yee and Mr. Kothari at his regular 1:30 p.m. Executive Staff meeting and asked them to consult with the City Attorney’s Office regarding the reallocation plan. After consultation with representatives of the City Attorney’s Office, SFMTA staff called a meeting on January 5, 2010 at 10 a.m. with representatives from IMCO, Five Star and PPM. SFMTA staff informed the company representatives that their proposal was most likely not permissible. Staff said they would continue to review the proposal but the chances of SFMTA acting on the proposal, as Mr. Kothari said in an interview, were “next to nil.” Mr. Hutchison and Mr. Ogle recall staff informing them that the proposal was not permissible. Mr. Mekbib said he had an uncertain recollection that staff said they would continue to review it. Mr. Bekele is the only participant in the meeting who recalls staff informing the company representatives that they were going to recommend the agency return to the original RFP results.

SFMTA staff said they informed the company representatives that the proposal in their view violated the terms of the RFP. Ms. Harmon said they informed the company representatives that SFMTA could only award contracts consistent with the garage groups outlined in the RFP. She said staff made this point by saying that if SFMTA were to award contracts it could only award contracts “as is” meaning, she explained, consistent with the garage group allocations contained in the RFP. Mr. Bekele informed the Investigator that he understood the use of the term “as is” to mean a return to the September RFP results, which found IMCO to be the highest ranked eligible proposer for Group A, the largest and most lucrative group. Participants in the January 5 meeting between staff and the garage operators describe it as a short

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lived and contentious proceeding. After staff informed the operators that their proposal was most likely impermissible, Mr. Mekbib proffered the emails of January 3-4 and stated that the three companies had come to an agreement. At that point, Mr. Bekele became angry and loudly stated that he did not agree to the proposal and that he had been threatened. This led to a shouting match between Mr. Mekbib and Mr. Bekele, at which point SFMTA staff called the meeting to an end.

Shortly after January 5, 2010, SFMTA staff made a final decision to reject the business' plan to reallocate the garages. As the January 5, 2010 SFMTA Board of Directors meeting, Mr. Yee and Executive Director Ford informed the Board that they had received new information from the garage management firms and wanted time to evaluate the information with legal counsel as well as address other issues such as insufficient competition for Group C. Shortly after that meeting, Mr. Ford and his staff made a final decision to reject the reallocation plan developed at the December 31 meeting. Neither Executive Director Ford nor his staff gave the proposal any further consideration.

SFMTA Staff had already concluded, even before the morning of January 4, 2010, that the best course of action for the agency was to return to the original September 2009 RFP results. An email exchange between Mr. Kothari, Mr. Yee and Executive Director Ford on the morning of January 4, before the Executive Director received the garage operators' reallocation proposal, shows that prior even to January 4, Executive Director Ford and his staff had decided to recommend to the SFMTA Board of Directors that staff negotiate with the highest ranked proposers in accordance with the original September 2009 RFP results. The email correspondence begins at 9:06 a.m. with Mr. Yee writing to Executive Director Ford, "Hi Nat. I discussed this with Amit. Now that we are moving forward with the awards, we need a small amount of time to finalize the agreements so that they are part of the calendar item. We are recommending this for the February 2, 2010 Board meeting." (Mr. Yee, Mr. Kothari and Executive Director Ford confirmed that the email demonstrated that staff had decided, before January 4, and most likely the previous week, to recommend returning to the original RFP results.) Mr. Yee copied Mr. Kothari on the email exchange and Mr. Kothari made mention that he and Mr. Yee would discuss the issue at the 1:30 p.m. Executive Staff meeting, where, as noted above, Executive Director Ford transmitted to Mr. Yee and Mr. Kothari the proposal from the garage operators. (Staff said they did not share this with the garage operators in the January 5 meeting but they had indeed made this decision by the time that meeting took place.)

After rejecting the reallocation proposal shortly after January 5, Ford said his next directive to staff – and his final decision on the matter -- was to move ahead with the plan to recommend restoring the original RFP results, including the finding that IMCO was the highest ranked eligible proposer for Group A. The balance of the interview statements and documents reviewed support the conclusion that Executive Director Ford decided during the last week in December to move ahead and recommend awarding contracts under RFP No. SFMTA2008/090-30 in line with results announced on September 21, 2009 where IMCO was found to be highest ranked eligible proposer for Group A – despite whatever effect the October 2009 letter from Mr. Kay had on his decision-making process.

There is no evidence that SFMTA seriously considered adopting the garage operators' proposal. As discussed above, SFMTA staff and Executive Director Ford had no advance knowledge of the December 31 meeting, and while Executive Director Ford may have been aware that the businesses were having discussions among themselves there is no evidence

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that he knew the specifics of those discussions or encouraged or sanctioned any discussion about reallocating the garage management contracts. Once the proposal was presented to Executive Director Ford and his staff on January 4-5, SFMTA staff and Executive Director Ford gave it a brief review before rejecting it.

D. The March 2, 2010 SFMTA Board of Director's Meeting**1. Allegation**

After SFMTA staff recommended returning to the original RFP results at the March 2, 2010 meeting of the SFMTA Board of Directors, Mr. Bekele alleges in his Claim that the Board rejected the staff recommendation due to "improper lobbying" by Mr. Kay and PPM.

2. Findings

The two-month delay between SFMTA staff's late December 2009 decision to recommend awarding the contracts per the September 2009 RFP results, and making that recommendation to the SFMTA Board on March 2, 2010, was due to a request from the Controller's Office, not lobbying. During the months of January and February 2010, SFMTA put the RFP process on hold to study the feasibility of selling and leasing back the garages at the request of the Mayor and the City Controller. City Controller Ben Rosenfield sent a memorandum to Executive Director Ford on January 12, 2010 asking that SFMTA "temporarily suspend the current request for proposals process for garage operations." Executive Director Ford said the request delayed the process for several weeks but that eventually he and his staff decided to recommend moving ahead with the award of the garage contracts in line with the RFP results of September 2009.

Mr. Kay's March 1, 2010 letter had no effect on the SFMTA staff's decision to recommend returning to the original RFP results. Staff's recommendation to award the contracts was calendared for the SFMTA Board of Directors meeting of March 2, 2010. Upon learning of the decision to recommend returning to the original RFP results, Mr. Kay sent a second letter protesting the agency's actions. It is dated and marked received March 1, 2010, which was after staff had already made its recommendation in a written report to the SFMTA Board of Directors that had been distributed the previous week. In his interview, Executive Director Ford could not even recall the second letter from Mr. Kay.

SFMTA Board members had a variety of reasons for voting against the staff recommendation to award the contract, but no reason reflecting improper lobbying or influence. During the SFMTA Board of Director's meeting, Mr. Yee made a presentation asking that the Board approve awarding of the contracts in line with the September 2009 RFP results. At the public meeting, Mr. Mekbib, Mr. Tadesse and others spoke in opposition to the staff recommendation. Director Oka made a motion to adopt the staff recommendation. Directors McCray and Breyer Black voted in support of the motion. Directors Beach, Yee and Mr. Oka voted against the motion, with Mr. Oka voting against his own motion. The motion and the staff recommendation failed. (Director Heinicke recused himself; as an attorney he represented Five Star in employment matters unrelated to SFMTA contracts. Director Nolan was absent due to eye surgery.)

Explaining his vote during an interview, Director Beach said he felt the deficiencies in the RFP process that staff had identified in November were still unresolved, and he wanted to see SFMTA move forward with a clean slate and have what he called "a do over." Explaining his

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vote during an interview, Mr. Lee said he had been offended by the rhetoric of Mr. Bekele and his supporters. Mr. Oka said he was confused and voted no when he meant to vote yes. The Investigator interviewed all the sitting board members at the time of the vote examined here, and none of them reported having been the subject of lobbying, proper or improper, by any of the proposers for the garage contracts or anyone representing their interests – except Mr. Bekele. (Mr. Bekele and his attorney admitted at his interview that the claimant had no evidence of improper lobbying and that that portion of the Claim was speculative.)

Mr. Bekele was the only proposer to privately contact an SFMTA Board member to discuss the parking contract RFP process. Director McCray said Mr. Bekele sought direction and advice from him repeatedly going back in time to when the RFP was being developed within SFMTA. Director McCray said Mr. Bekele, a member of the congregation for which Director McCray served as pastor until 2008, was anxious about the effect “bundling” would have on his chances at remaining competitive for the garage contracts. Director McCray said Mr. Bekele would seek information about the RFP development process and Director McCray's advice about how to respond. Director McCray said he advised Mr. Bekele to get a partner to be competitive.

Director McCray said Mr. Bekele called him one time after the RFP had been issued in September 2009, and due to what Director McCray termed the “blackout period” during which RFP responders are required to channel their communications with SFMTA staff through a designated contact person and/or the Executive Director and during which Board members have agreed to channel any communications through the Board Secretary for distribution to all Board members. Director McCray referred Mr. Bekele's call during the blackout period to the SFMTA Board of Directors’ Secretary, Roberta Boomer.

Finally, Director Beach reported Mr. Bekele inviting him to breakfast at the Huntington Hotel in the summer of 2008 to introduce himself and express his interest in responding to the garage RFP. Neither Director Beach nor any other former or current member of the SFMTA Board reported any other contact from any representative of any garage operator at any point during the RFP process.

As summarized above, interviews with members of the SFMTA Board of Directors do not support the Claim's allegation of improper lobbying affecting the vote of March 2, 2010.

E. The Second Request For Proposals (No. SFMTA2009/10-14)

1. Allegation

The Claim alleges that RFP No. SFMTA2009/10-14 issued on April 23, 2010 asking for proposals for the garage management contracts undermined the ability of IMCO and Convenient Parking to compete. Specifically, the Claim states, “The newly issued RFP increased (the) threshold of the liquid assets requirements to submit a proposal to \$1,000,000 (or the undefined equivalent of 2 months working capital), which advantaged larger entities. Whereas previously IMCO had maintained \$500,000 to meet the liquid assets requirement allowing them to submit a proposal on the Group A contract and Mr. Bekele had been able to submit a proposal on the Group C contract as a prime by amassing \$250,000 in working capital, this new RFP had made it more difficult for IMCO to submit a proposal and impossible for Mr. Bekele to submit a proposal on *any* part of the contract as a prime.”

Memorandum

TO: Dennis J. Herrera, City Attorney, City and County of San Francisco
DATE: March 2, 2011
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The Claim also alleges, "the new RFP received *fewer* bids than the former, directly contradicting the SFMTA's reasoning for cancelling the contracts that they laid out in a November 30, 2009 to the winning proposers."

2. Findings

The new RFP increases financial requirements for Convenient Parking to make a proposal as prime contractor compared to the first RFP. As part of general pre-submission requirements, SFMTA required proposers for the first RFP to provide "a statement from a financial institution verifying the proposer's ability to provide or obtain ... an irrevocable letter of credit, a line of credit, or a qualified loan commitment," in different dollar amounts for the different sized garage groups, "or demonstrate a working capital ratio to cover operating expenses for a 3-month period." The financial requirement for Group A was \$1.5 million, for Group B \$750,000 and for Group C \$250,000. As stated in the RFP, "This financial requirement assures the SFMTA that the Proposer, if selected, will have sufficient funds to pay operating costs, prior to requests for reimbursement, and is otherwise credit-worthy." The second RFP issued in April 2010 carried the same financial solvency requirement, but because the garage groups were more equal in size the requirement for all three groups was the same dollar amount, \$1 million. The working capital ratio requirement was reduced to two months.

But, the new RFP actually reduces the financial requirements for IMCO as a joint venture. A review of two RFPs reveals that the second RFP *reduced* the pre-submission financial requirements on one of the three contracts by \$500,000 from \$1.5 million to \$1 million and *reduced* its working capital ratio requirements to two months rather than three months. Accordingly, the second RFP made it easier for small businesses to compete in one respect and more difficult in another respect. However, under both RFPs small businesses had an opportunity to meet the financial requirements for the largest contracts by entering a joint venture arrangement with a larger business.

The Claim's assertion that the second RFP has resulted in fewer responses than the first is erroneous. The second RFP was put on hold by SFMTA in response to Mr. Bekele's Claim, and no responses have been received by the department, according to Mr. Kothari.

F. Summary

We understand that in the past, even before the RFP process that is the subject of the Claim began, the contracting process for management of SFMTA parking garages was contentious. In particular, it was marked by complaints that SFMTA had not paid sufficient attention to the competing interests of the various stakeholders.

The RFP process examined here took close to one year and was marked by starts, stops, reversals in course and delays. The rejection of the initial RFP results by SFMTA staff and Executive Director Ford in favor of issuing a new RFP was meant to increase competition. But that decision, followed by a staff recommendation to negotiate with the highest ranked proposers in accordance with the original RFP results, understandably raised questions about the SFMTA's reasons for its actions. Having this process conclude with a divided vote at the SFMTA Board of Directors, which involved a director voting against his own motion to accept the original RFP results, would naturally intensify public questions about the integrity of the process, including SFMTA's motives.

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In the first stage of this RFP process, the results were positive for Mr. Bekele. Even though receiving the highest ranking for the joint venture, IMCO, did not constitute the award of a contract or even a guarantee of an SFMTA contract, Mr. Bekele was understandably dissatisfied when in November 2009 the SFMTA decided to reject all proposals, and not continue to the next step – negotiations with IMCO. By the time IMCO, PPM, and Five Star privately met on December 31, 2009, that dissatisfaction apparently turned into suspicion. Whatever proposal came out of that meeting would not have been as favorable to Mr. Bekele's interests as a contract based on the initial September 2009 selection panel results. Mr. Bekele interpreted statements made by private parties at that meeting to mean that SFMTA was condoning an arrangement among private actors to re-distribute public contracts and suppress competition. Mr. Bekele also believed that SFMTA was preferring other operators over Mr. Bekele's company, Convenient Parking LLC. In light of these events, Mr. Kay's representation of Mr. Ford during Mr. Ford's negotiation of his employment contract with SFMTA took on an added sinister light.

But, anxieties and suspicions, as understandable as they may be, do not automatically equate with wrongdoing. The Investigator exhaustively examined Mr. Bekele's serious claims of improper acts by SFMTA officials and board members. As described in more detail above, Mr. Bekele's allegations are not supported by the evidence.

The first letter from Mr. Kay did not have the effect Mr. Bekele believed it did – the rejection of the initial RFP results from September 2009; the agency had numerous other reasons for rejecting the RFP results in November 2009. The evidence supports the conclusion that before Mr. Kay's letter arrived at the SFMTA on October 27, 2009, SFMTA staff had already decided to reject all proposals due to the low level of competition in the first RFP process. And there is no evidence of any earlier contact from Mr. Kay with SFMTA staff that could have influenced staff's decision.

Executive Director Ford does not appear to have played any role in the December 31, 2009 meeting among the garage operators. Contrary to the Claim, the evidence reflects that Imperial Parking, Mr. Bekele's majority partner in the IMCO joint venture, was an active participant in the December 31, 2009 meeting and supported the goal of reallocating the garages by agreement to forestall a second RFP. When the garage operators presented SFMTA staff with their proposal, SFMTA staff promptly rejected it. Executive Director Ford's rejection of their proposal contradicts the claimant's allegations that Mr. Ford condoned it.

Also, any contention that SFMTA staff were biased against Mr. Bekele's business is rebutted by SFMTA staff's ultimate action. The last decision by Executive Director Ford and his staff regarding the garage RFP process was exactly what the claimant wanted: they recommended returning to the original RFP results under which IMCO – Mr. Bekele's joint venture – was found to be the highest ranked eligible proposer for the largest contract. There is no evidence that SFMTA staff or Executive Director Ford tried to secretly scuttle their own recommendation.

The SFMTA Board rejected the recommendation of Executive Director Ford and his staff. The three directors who voted against the recommendation had different reasons for doing so. Most significantly for this investigation and for Mr. Bekele's allegations, there is no evidence that any of them were lobbied or pressured by any public official or private entity to vote as they did.

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If the SFMTA Board decides to resume the new RFP process, Mr. Bekele's company and the joint venture of which it is a part remain free to compete for those contracts and may be successful in doing so. While the new RFP has more exacting financial requirements that may affect Mr. Bekele's company's ability to compete as a prime, it is less demanding in other respects that may prove advantageous to the joint venture of which he is a part owner.

Attachment: Timeline of Events: Consolidated Garage RFP