Office of Inspector General

City of New Orleans

A Report on French Market Corporation Use of Funds

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Inspector General

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EXECUTIVE SUMMARY

The Office of Inspector General conducted a performance audit of the French Market Corporation's (FMC) policies and procedures regarding the use of funds for the period January 1, 2010 through December 31, 2011. The objective of the performance audit was to evaluate the FMC's internal controls over use of funds and test if these controls were implemented and operating effectively.

This report is issued to offer recommendations and observations concerning the FMC's use of funds in daily operations.

The audit revealed that the FMC made sponsorship payments to other organizations totaling $64,696 in violation of the Louisiana Constitution during the period tested. The FMC also exceeded pre-approved budgeted limits for overtime, as well as annual and weekly overtime limits set by the Civil Service Commission. The FMC also did not obtain advance approval from the Civil Service Commission prior to allowing employees to exceed 8 hours of overtime in a work week.

The auditors observed that the FMC has an excellent opportunity to seek competitive proposals for the lease of Edison Park[1] before the current lease expires in February 2014. As a professional property manager for the City, the FMC should directly manage this valuable property and lease it for no less than its appraised fair market value.

The auditors noted that significant improvements were made to FMC accounting policies and procedures in a follow-up to the OIG's 2011 Report, "A Report on the French Market Corporation's Credit Card and Expense Reimbursement Policies."[2] During the period tested, the FMC also reduced annual overtime expenses from 2010 to 2011.[3] In 2012, the FMC was able to make a contribution of $1 million to the City's general fund for the first time since 2005.[4]

The recommendations in this report, if adopted, should improve the FMC's internal controls over use of funds, reducing the opportunity for fraud, waste and abuse.

All responses by the FMC in the body of this report are direct statements from the FMC and have not been modified.

[1] The FMC leased the park to New Orleans Musical Legends (NOML) for a $1 a year. Per the terms of the exiting lease, NOML was permitted to sublease the park and received all revenue from the sublease.

[2] The follow-up report, issued on January 16, 2013, found that six of the 2011 Report's nine recommendations had been implemented fully, and the remaining three recommendations had been partially implemented.

[3] The FMC's annual overtime expenses significantly exceeded the amount budgeted for the year ended December 31, 2010 (Finding # 2). The FMC's annual overtime expenses were within the budgeted amount for the year ended December 31, 2011.

[4] Per the agreement with the City of New Orleans, the FMC is required to pay the greater of $100,000 or 20% of its net adjusted revenues at the end of each fiscal year. Prior to Hurricane Katrina, it was routine for the FMC to make additional annual contributions to the City's general fund.

I. OBJECTIVES, SCOPE, AND METHODOLOGY

The objective of this performance audit was to determine if the FMC efficiently used its funds in daily operations and in compliance with its internal policies, as well as state and local laws. The audit covered the period January 1, 2010 – December 31, 2011[5] and was prepared in accordance with the *Principles and Standards for Offices of Inspector General* (the Green Book)[6] and *Generally Accepted Governmental Auditing Standards* (GAGAS or the "Yellow Book").

To accomplish the audit objective, the auditors:

1. Conducted interviews with FMC employees;
2. Reviewed the FMC's Accounting Policy and Procedure Manual and Flea Market Policy and Procedure Manual;
3. Compared the FMC's accounting policies and procedures to the City's current policies and other best practices[7];
4. Performed walkthroughs to determine whether policies and procedures had been properly implemented and were operating effectively;
5. Reviewed trial balances, check registers, payroll journals, annual budgets and other reports that documented the use of funds during the period tested; and,
6. Selected transactions to test that FMC funds were expended in accordance with FMC policy and best practices.

A finding indicates a material or significant[8] weakness in controls or compliance that was not detected or corrected by the FMC in the normal course of performing its duties. Findings in a performance audit can be any one or a combination of the following:[9]

1. Significant deficiencies in internal control,
2. Fraud and illegal acts,
3. Violations of contract and grant agreements, and/or
4. Abuse.

This audit includes findings, observations, recommendations, and conclusions relating to the controls in place over the FMC's use of funds.

[5] The auditors encountered delays in completing the audit due to turnover in Executive Director and department head positions during the course of fieldwork.
[6] Association of Inspectors General (May 2004 Revision).
[7] Best practices included Civil Service Commission rules, Louisiana Attorney General Opinions, the Louisiana Legislative Auditor's website (http://www.lla.state.la.us/localgovernment/bestpractices/) and professional experience and judgment.
[8] Significance is a "judgment call" by the auditor and is usually based upon the frequency and magnitude of the deficiency.
[9] General Accounting Office (July 2007 Revision). Government Auditing Standards United States Government Accountability Office by the Comptroller General of the United States. The December 2011 revision was not in effect during the period under audit. The effective period for the 2011 revision was for periods ending on or after December 15, 2012.

Computer-processed data was provided and relied on, which provided information on the French Market Corporation for the period of the performance audit. A formal reliability assessment of the computer-processed data was not performed, and the auditors determined that hard copy documents reviewed were reasonable and agreed with the information contained in the computer-processed data.

No errors were found that would preclude the auditors from using the computer-processed data to meet the performance audit objectives or that would change the conclusions in this report.

II. INTRODUCTION

The French Market Corporation is a non-profit corporation controlled by the City of New Orleans (the City) and administered by a twelve member Board of Directors appointed by the Mayor. FMC employees are Civil Service workers of the City of New Orleans and are paid by checks disbursed by the City.

During the period covered by the audit, the FMC had two Executive Directors (See table below). Executive Director # 1 resigned in July 2010 after his activity on FMC credit cards[10] was questioned by the Board. Executive Director # 2 was appointed in January 2011 and held that position for the remainder of the period covered by the audit. On December 3, 2012, Executive Director # 2 submitted his resignation effective December 31, 2012. The Deputy Director served as Interim Director from January 1, 2013 until a new Executive Director was selected on September 24, 2013 and assumed office effective October 1, 2013.

FMC Executive Director Position for Audit Period January 1, 2010 – December 31, 2011

FMC Employee	Period of Service at FMC	Summary of Service
Executive Director # 1	May 2007 - July 2010	• Named Executive Director effective May 31, 2007. • Resigned effective July 29, 2010.
Interim Director	July 2010 – January 2011	• The FMC Deputy Director served as the Interim Executive Director during this period.
Executive Director # 2	January 2011 - December 2012	• Named Executive Director effective January 12, 2011. • Resigned effective December 31, 2012.

[10] The OIG released "A Report on the French Market Corporation's Credit Card and Expense Reimbursement Policies" on June 8, 2011. The report contained nine Findings and Recommendations concerning credit card usage by FMC employees.

III. FINDINGS AND RECOMMENDATIONS

Finding # 1:

Background: The Constitution of the State of Louisiana prohibited the donation of public funds or assets except when there was a public purpose.[11] The public purpose must be explicit in a written cooperative endeavor agreement.

Condition: The FMC made payments to sponsor local events held by other organizations. These sponsorships lacked the required cooperative endeavor agreement (CEA) or other written agreement, and for this reason were in violation[12] of the Louisiana Constitution's ban on donations of public funds. The payments totaled $64,696 during the period tested (refer to Table 1).

Table 1: Sponsorships Lacking Written Agreements

Check Date	Vendor	Total
05/26/2010	French Quarter Festivals, Inc	$ 10,000
09/27/2010	French Quarter Festivals, Inc.	$ 100
12/16/2010	French Quarter Festivals, Inc.	$ 2,753
02/07/2011	French Quarter Festivals, Inc.	$ 3,693
03/22/2011	French Quarter Festivals, Inc.	$ 10,000
06/22/2011	French Quarter Festivals, Inc.	$ 5,000
	Total French Quarter Festivals, Inc	**$ 31,546**
02/18/2010	Crescent City Countdown Club	$ 1,000
04/27/2011	Crescent City Countdown Club	$ 10,000
12/13/2011	Crescent City Countdown Club	$ 1,000
	Total Crescent City Countdown Club	**$ 12,000**
08/05/2010	Louisiana Municipal Association	$ 10,000
11/10/2011	New Orleans Convention Company	$ 10,000
07/12/2011	Metro Bicycle Coalition	$ 1,150
	Total Sponsorships	**$ 64,696**

Criteria: The Constitution required a written agreement which clearly stated the public purpose for the agreement as well as the benefit which the public entity would receive.[13]

[11] *La. Const. Art. VII, §14*.
[12] Although the FMC may have received a benefit equivalent to the public funds expended, the sponsorships were in violation of the Louisiana Constitution because each lacked a written agreement clearly stating the public purpose of the expenditure as well as the benefit which the FMC would receive.
[13] See Board Of Directors of Indus. Development Bd. of City of Gonzales, Louisiana, Inc. V. All Taxpayers, Property Owners, Citizens of City of Gonzales, 938 So.2d 11, 14 (La.1996) (holding that an alienation of public property is not gratuitous when it serves a public purpose); *see also* Louisiana Legislative Auditor, *Memo Analyzing the Impact of the Supreme Court's Cabela's Decision on Article VII, §14 and the Attorney General's Three-Prong Test*, August 2007: http://www.lla.state.la.us/userfiles/file/Cabela%20Memo.pdf.

Cause: The FMC believes that the Louisiana Constitution's ban on donations of public funds did not apply to it, and cooperative endeavor agreements or other written agreements were not necessary for sponsorships.

Effect: FMC sponsorships and other cooperative endeavors lacked written agreements and were in violation of the Louisiana Constitution's ban on donations of public funds.

Recommendation: The FMC should require written agreements for all sponsorships and other cooperative endeavors. At a minimum, each written agreement should:

1. Clearly identify the public purpose for the expenditure or transfer;
2. Describe how the benefit offered to the French Market Corporation was at least equivalent to the public funds or property used; and,
3. Outline the reciprocal obligations between the parties.

FMC Comment: *"See French Market Corporation's (FMC) Legal Counsel Henry Julien's attached letters dated November 5 and 14, 2012 previously provided to your office.*

In October 2012 the FMC Board of Directors revised its by-laws adopting a policy for the receipt and consideration of sponsorship requests that states, 'Sponsorship requests will only be considered in furtherance of a public interest that brings value back to the French Market.' "

OIG Comment: Although the attached letters from the FMC's Legal Counsel contradict the finding, and assert that the FMC is not subject to the Louisiana Constitution ("The FMC and UPBRC are not part of the state or political subdivisions as defined by law and, therefore, the prohibitions in the La Const. do not apply."),[14] the FMC subsequently adopted by-laws which comply with the second item in the recommendation. Despite the suggestion by FMC's Legal Counsel that the FMC is not subject to the Constitution, the OIG disagrees. The FMC is a public benefit corporation incorporated by the Mayor of the City of New Orleans as authorized by the City Council.[15] It has only one purpose, which is to operate and maintain property owned by the City of New Orleans. The suggestion that they are not subject to the Constitution does not comport with the law.[16]

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[14] Letter of November 5, 2012 from FMC's legal counsel, attached hereto as part of FMC's response.

[15] *See* Articles of Incorporation, French Market Corporation, dated March 5, 1972; and City of New Orleans Ordinances M.C.S. 4745, 5175, 5061, 14626.

[16] *See* La. Atty. Gen. Op. No. 10-0244 which conducts a similar analysis of the Municipal Yacht Harbor, an entity identical in form to the FMC. "The MYHMC is a non-profit, public benefit corporation incorporated by the Mayor of the City of New Orleans as authorized by the City of New Orleans. The Board of Directors for the MYHMC may not receive payment or compensation of any kind under any circumstances. The sole and exclusive purpose of the MYHMC is a governmental function: to operate and maintain particular property and ventures owned by the City of New Orleans. These factors suggest that the MYHMC is a "political subdivision" as anticipated by La. R.S. 13:4521(A)(5) ("...and any other public ... body of any kind...") and La. Const. art. VI, §44(2) ("...unit of local government...authorized by law to perform governmental functions."). *See also* Parker v. French Mkt. Corp., 615 So. 2d 1347,(4th Cir. 3/19/1993) writ not considered, 617 So. 2d 920 (La. 1993), which states, "Although French Market was incorporated as a private, nonprofit corporation, the City's total involvement is clear. The City owned the French Market and leased it to the French Market Corporation. According to its articles of incorporation French Market's profits are payable to the City. Its only share of stock belongs to the Mayor and all corporate assets upon dissolution go to the City. The contacts between the French Market Corporation and the City are clear in the articles of incorporation and in administration of

Background for Findings # 2, 3, 4 (FMC Overtime Expenses):

FMC employees are employees of the City of New Orleans and subject to the Rules of the Civil Service Commission for the City of New Orleans. "Employees of the FMC, as Civil Service workers of the City of New Orleans, are paid via checks disbursed by the CNO."[17] The FMC's overtime[18] expenses for the years ended December 31, 2010 and 2011 were tested for the following three attributes:

1. Did the FMC's total overtime expenses exceed the amount in the annual budget approved by the City Council of New Orleans[19] (Finding # 2);
2. Did FMC employees exceed the annual 416 hour overtime limit set by Civil Service Commission Rules[20] (Finding # 3); and
3. Was advance approval obtained from the Civil Service Commission for FMC employees who exceeded 8 hours of overtime in a work week (Finding # 4)? [21]

Finding # 2:

Condition: For the year ended December 31, 2010, FMC employees worked overtime hours that exceeded the amount approved in the annual budget by $74,263 or 42% (Refer to Table 2).

Table 2: Analysis of Budgeted Overtime vs. Actual Overtime Expenses

Year Ended December 31,	Overtime Per Approved Budget (A)	Actual Overtime Expense[22] (B)	Actual Overtime Exceeding Budgeted Overtime (B) - (A)	% Overtime Expenses in Excess of Budgeted Amount [(B)-(A)]/(A)
2010	$ 175,000	$ 249,263	$ 74,263	42%

Criteria: The FMC's Employee Handbook stated that "division heads are responsible for limiting staff under their direction to work only scheduled hours as determined by the Budget."

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the corporate activities. We conclude that French Market is sufficiently tied to the City to trigger the due process safeguards under the Louisiana and U.S. constitutions."

[17] Per the FMC Accounting Policy and Procedure Manual.

[18] FMC administrative staff was scheduled to work 35 hours and FMC maintenance staff were scheduled to work 40 hours in a work week. Any hours that FMC employees worked in excess of their scheduled hours were overtime hours. Hours on paid leave or paid holidays counted toward the FMC employees' scheduled hours, and any hours exceeding these scheduled hours were entered as overtime. FMC employees were paid at a time and a half rate for any hours worked in excess of forty hours in a work week.

[19] The FMC's proposed budget must be approved by the City Council of the City of New Orleans.

[20] Civil Service Rule IV, Section 9.10.

[21] Civil Service Rule IV, Section 9.7(a).

[22] Actual overtime expenses were taken from the FMC trial balance for years ended December 31, 2010 and December 31, 2011.

Cause: Division heads allowed FMC employees to exceed budgeted, pre-approved overtime limits.

Effect: The FMC's overtime expenses significantly exceeded the amount budgeted in 2010.

Recommendation: The FMC should monitor overtime by taking into account the amount of overtime budgeted for each division to fulfill the mission of the FMC and the overtime hour limits set by the Civil Service Commission.[23]

FMC Comment: *"The 2010 Salaries Budget (excluding fringes) was $1,099,061. 2010 Actual Salaries were under budget by $74,417, while the actual overtime was over budget by $74,263. The excess overtime was a result of the FMC utilization of overtime personnel in lieu of hiring additional personnel to fill staffing shortages.*

The FMC has added additional Staff to fill staffing shortages."

OIG Comment: The FMC should amend the budget when necessary to prevent overages and/or shortages in line items. Findings # 3 and # 4 further highlight the FMC's disregard or noncompliance with Civil Service rules governing overtime.

[23] Refer to Findings # 3 and # 4 concerning Civil Service Commission rules for overtime.

Finding # 3:

Condition: The FMC allowed employees to exceed the Civil Service Commission rule on the annual overtime limit of 416 hours in the calendar years ended December 31, 2010 and 2011. Nine of twenty-nine employees exceeded the limit in the calendar year ended December 31, 2010 and three of thirty-one employees exceeded the limit in calendar year ended December 31, 2011. Total overtime hours in excess of the 416 hour limit for individual employees was 2,418 hours and total overtime wages earned by these employees was $179,565[24] for the calendar years ended December 31, 2010 and December 31, 2011 (refer to Table 3).

Table 3: FMC Employee Annual Overtime Hours in Excess of Civil Service Commission Limit

Employee (Department)	Total Overtime Hours	Total Overtime Wages	Overtime Hours Exceeding 416 Hour Annual Limit
2010 Overtime:			
Employee # 1 (Flea Market)	775	$22,843	359
Employee # 2 (Maintenance)	728	$18,218	312
Employee # 3 (Security)	700	$22,076	284
Employee # 4 (Flea Market)	685	$15,116	269
Employee # 5 (Security)	656	$17,153	240
Employee # 6 (Flea Market)	619	$12,455	203
Employee # 7 (Upper Pontalba)	611	$7,950	195
Employee # 8 (Security)	583	$14,889	167
Employee # 9 (Upper Pontalba)	551	$13,673	135
2010 Totals	**5,908**	**$144,373**	**2,164**
2011 Overtime:			
Employee # 6 (Flea Market)	576	$11,506	160
Employee # 1 (Flea Market)	480	$13,768	64
Employee # 4 (Flea Market)	447	$9,918	31
2011 Totals	**1,503**	**$35,192**	**254**
2010 - 2011 Totals	**7,411**	**$179,565**	**2,418**

Criteria: Civil Service Commission Rule IV, Section 9.10 stated "under no circumstances shall an employee be permitted to work…in excess of 416 hours of overtime in any calendar year."[25]

[24] Overtime wages for hours exceeding the 416 overtime hour limit were included in this total. The amount of total overtime wages resulting from hours worked in excess of the 416 hour limit could not be determined because the City's payroll system was not designed to segregate the total overtime hours from the amounts in excess of 416 hours. FMC employees were paid at a regular rate for hours worked in excess of 35 hours in a work week and at a time and a half rate for any hours worked in excess of forty hours.

[25] Civil Service Rule IV, Section 9.10.

Cause: The French Market Corporation did not enforce the Civil Service Commission rule that an employee could not exceed more than 416 hours of overtime work in any calendar year.

Effect: FMC employees exceeded the Civil Service Commission rule of a maximum limit of 416 overtime hours worked in a calendar year.

Recommendation: FMC division heads and its Human Resources department should monitor overtime hours to ensure that no employee is working in excess of the 416 hour annual limit set by the Civil Service Commission.

FMC Comment: *"FMC will comply with the Civil Service Commission Rule IV, Section 9.10 that states that "under no circumstances shall an employee be permitted to work in excess of 416 hours of overtime in any calendar year."*

Finding # 4:

Condition: The FMC did not obtain "advance approval" from the Civil Service Commission prior to allowing employees to work overtime in excess of 8 hours in a work week. Nine FMC employees averaged more than 8 hours of overtime per work week in the calendar year ended December 31, 2010. Three FMC employees exceeded the 8 hour weekly overtime Civil Service limit in the calendar year ended December 31, 2011 (refer to Table 4).

Table 4: FMC Employee Weekly Overtime Hours in Excess of Civil Service Commission Limit

Employee (Department)	Total Overtime Hours	Average Overtime Hours Per Week[26]	Total Overtime Wages
2010 Overtime:			
Employee # 1 (Flea Market)	775	15	$22,843
Employee # 2 (Maintenance)	728	14	$18,218
Employee # 3 (Security)	700	13	$22,076
Employee # 4 (Flea Market)	685	13	$15,116
Employee # 5 (Security)	656	13	$17,153
Employee # 6 (Flea Market)	619	12	$12,455
Employee # 7 (Upper Pontalba)	611	12	$7,950
Employee # 8 (Security)	583	11	$14,889
Employee # 9 (Upper Pontalba)	551	11	$13,673
2010 Totals	**5,908**		**$144,373**
2011 Overtime:			
Employee # 6 (Flea Market)	576	11	$11,506
Employee # 1 (Flea Market)	480	9	$13,768
Employee # 4 (Flea Market)	447	9	$9,918
2011 Totals	**1,503**		**$35,192**

[26] Average Overtime Hours Per Week = Total Overtime Hours/52 Weeks

Criteria: Civil Service Commission Rule, Section IV 9.7(a) stated "advance approval must be obtained from the Civil Service Department if an employee is expected to exceed 8 hours of overtime in a work week, whether regularly scheduled or otherwise."[27]

Cause: FMC did not monitor weekly overtime hours worked by employees for compliance with the 8 hour limit set by the Civil Service Commission.

Effect: The FMC violated Civil Service Commission rules.

Recommendation: The FMC should comply with the Civil Service Commission rule and obtain advance approval for employees expected to exceed eight hours of overtime in a work week.

FMC Comment: *"The FMC will seek advance Civil Service Commission approval for weekly overtime to cover special events and fill staff shortages due to employee leave and temporary vacancies."*

<u>Finding # 5:</u>

Background: During testing of cash disbursements, the auditors noted the FMC did not use a Receiving Report when receiving merchandise as required in the FMC Accounting Policy and Procedures Manual. Alternatively, the staff followed an unwritten procedure of stamping the original purchase order "Merchandise Received". The ordering party was required to sign the stamp, attesting that items had been received in the correct quantity and condition. The unwritten policy compensated for the required policy in the Accounting Policy and Procedures Manual.

Condition: The FMC did not use or sign a receiving report "upon pick-up" by the originating department as require by the FMC's Accounting Policy and Procedures Manual.

Criteria: The receiving policy in the FMC's Accounting Policy and Procedures Manual stated that "upon pick-up, the originating department must inspect their goods, and sign a Receiving Report attesting to the quantity and condition."

Cause: The FMC policy for receiving goods was not in compliance with the existing policy.

Effect: Merchandise was received without the originating department signing a Receiving Report attesting to its quantity and condition.

Recommendation: FMC should enforce the receiving policy requiring the ordering party to sign a Receiving Report upon receiving merchandise or change the policy to reflect actual practices.

FMC Comment: *"There are currently operational procedures in place for documenting receipt of merchandise. The FMC will update its accounting policy to reflect the current operating procedures."*

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[27] Civil Service Rule IV, Section 9.7(a).

Finding # 6:

Condition: The FMC did not post public notice of "Whistleblower Protection for Employees"[28] in accordance with Louisiana State Law.

Criteria: "Pursuant to L.A.R.S. 42:1169(F), this notice must be posted in a conspicuous place in each building where more than ten public employees are employed."

Cause: The FMC was unaware of the State law requiring the notice be posted.

Effect: FMC employees were not informed of their freedom from reprisal if improper acts were reported.

Recommendation: The FMC should comply with state law by posting the "Whistleblower Protection for Public Employees" notice in all work areas with more than ten public employees.

FMC Comment: *"The FMC has a non-retaliation policy in effect and is included in the FMC Employee Handbook. The FMC has posted the public notice of whistleblower protection in accordance with state law."*

[28] "Whistleblower Protection for Public Employees": http://www.ethics.state.la.us/Pub/Laws/1169.pdf.

IV. OBSERVATIONS

Observation # 1:

Background: In March 2002, the FMC entered into a contract with New Orleans Musical Legends (NOML), which allowed NOML to lease Edison Park[29] from the FMC for a $1 a year. The NOML was responsible for making the dilapidated Edison Park compatible with other properties in and around the French Market and maintaining the property under the same management standards as the French Market. The lease permitted NOML to sublease the park subject to the approval of the FMC. In January 2004, the FMC approved the sublease of Edison Park by NOML to Café Beignet. As of the most recent sublease agreement, Café Beignet agreed to pay NOML the greater of 7% of gross sales or $75,000 annually. During the two year period audited, NOML was entitled to receive approximately $229,513 through the sublease agreement (refer to table 5). The FMC received none of the funds from the sublease between NOML and Café Beignet in accordance with the terms of the 2002 original $1 a year lease agreement with NOML.

Table 5: NOML Revenue from Sublease for the Period Audited

Year Ended December 31,	Café Beignet Gross Sales[30]	% Gross Sales Due to NOML Per Lease Agreement	Rent Due to NOML[31] (A)	Number of Months (B)	Average Monthly Rent Paid by Café Beignet (A)/(B)
2010	$ 1,474,138	7%	$ 103,190	12	$ 8,599
2011	$ 1,804,614	7%	$ 126,323	12	$ 10,527
Totals	$ 3,278,752		$ 229,513	24	$ 9,563

Both the FMC lease with NOML and the NOML sublease with Café Beignet expire at the end of February 2014. It is difficult at best to understand the reason that the FMC needs a third party intermediary to continue to manage the lease with Café Beignet, because the FMC is in the business of managing the City's property in the French Quarter. As a property manager for the City, the FMC is responsible for getting the best value for the City by leasing the City's property directly.

As required by its Expiring Leases Policy[32], the FMC has an obligation to the City and its citizens to seek competitive proposals for the commercial space in Edison Park before the current lease on this valuable Bourbon Street property expires. Edison Park should be leased for no less than its appraised fair market value.

[29] The park, located at 311 Bourbon Street, was renamed New Orleans Musical Legends Park.

[30] The auditors obtained gross sales figures from those reported by Café Beignet to the City of New Orleans Bureau of Revenue.

[31] Annual rent due from Café Beignet was 7% of gross sales for the years ended December 31, 2011 and December 31, 2010 since 7% of gross sales exceeded the $75,000 minimum annual payment.

[32] The FMC Expiring Leases Policy stated "The French Market Corporation will seek competitive proposals for its commercial spaces at the end of the lease term."

FMC Comment: *"The FMC has engaged the services of an appraiser to assess the fair market rental value of the Edison Park premises. In accordance with the FMC Expired Leases Policy the current tenant can request for consideration a new lease, conditioned upon the submission of the request prior to the expiration of the lease. The current tenant has requested such consideration. Upon receipt of the appraisal Staff will submit tenant's request to the Board of Directors."*

OIG Comment: The FMC Expiring Leases Policy states that "The French Market Corporation will ONLY consider a request to negotiate a new lease from Tenants that have exceeded their minimum annual gross sales for the previous twelve months prior to the end of the lease." The majority of the current tenant's (NOML) annual revenues are from its sublease agreement with Café Beignet[33] and not from sales. The current tenant does not meet the FMC Expiring Leases Policy criteria for negotiating a new lease and therefore the FMC Board should seek competitive proposals[34] for Edison Park before the end of the lease term in accordance with policy.

We reiterate that there is no reason the FMC needs a third party intermediary to continue to manage the lease of Edison Park. Edison Park should be directly leased by the FMC after seeking competitive proposals for no less than its appraised fair market value. A lease agreement for less than the appraised fair market value would be in violation of the Louisiana Constitution's prohibition of the donation of public funds.[35]

Observation # 2:

Background: The FMC's Flea Market Policy & Procedures Manual stated "a Vendor may be absent from the Market on general leave for a total of 30 days each year….vendor will receive a credit for any rent pre-paid for the period of leave provided that the Community Flea Market Office is notified in writing by vendor within 72 hours." Credits were used by vendors toward the purchase of subsequent stall rentals.

The practice of issuing general leave credits to vendors enabled tenured[36] vendors to rent the most desirable stalls in the Flea Market for the entire month, even if they only planned to sell their items a few days out of the period. General leave credits issued to vendors totaled $52,302 in the year ended December 31, 2010 and $75,704 in the year ended December 31, 2011. In most instances the FMC was able to re-rent the stalls where general leave credits were issued; however, the additional work for the Flea Market staff was an inefficient use of the staff's time.

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[33] Per the NOML financial statements provided by the FMC, 100% of NOML's total revenues were from rental receipts for the year ended December 31, 2012. Rental receipts were approximately 95% of NOML's total revenue for the year ended December 31, 2011 and 83% of total revenue for the year ended December 31, 2010. The remainder of NOML's revenue for those years came from special event receipts.

[34] The FMC Expiring Leases Policy states "qualified incumbent tenants will be allowed to compete with others vying for the future rental of the space." In accordance with this policy, NOML is permitted to submit a proposal when the FMC seeks competitive proposals at the end of the lease term.

[35] *See* La. Const. Art. VII, §14 and La. Atty. Gen. Op. No. 05-0346.

[36] The FMC Flea Market Policy & Procedures Manual defined a vendor's tenure as the "rank order among all vendors and is expressed formally as a date and, in the case of those arriving on the same date, in order of appearance."

As promulgated by the Board and the previous Executive Director, the FMC revised the Flea Market Policy & Procedures Manual to cease the issuance of general leave credits to vendors effective March 1, 2012[37]. If the policy of issuing credits to Flea Market vendors is revisited by the FMC Board, the revised policy forbidding the issuance of general leave credits to Flea Market vendors should remain unchanged.

FMC Comment: *"The current policy restricting the issuance of credits will remain unchanged."*

Observation # 3:

Background: The FMC's Accounting Policy and Procedures Manual stated "the Executive Director or the Accounting Department will formally solicit at least three written bids" for contractual services in excess of $5,000.

During the auditors' testing of expenditures, the FMC could not locate support for one of the three required bids for a contract that exceeded $5,000. The support for each written bid should remain on file for all applicable contracts over $5,000.

FMC Comment: *"The FMC will ensure that all supporting documentation for contracts is properly filed."*

Observation # 4:

Before an invoice was paid, purchase orders were often stamped "Work Completed" and signed by a department head or other approving authority to document completion of work on a project. The FMC did not have a written policy concerning the signing off on "Work Completed" in the Accounting Policy and Procedures Manual and the unwritten policy was not consistently followed by an approving authority.

The FMC should update its Accounting Policy and Procedures Manual to include that applicable invoices be stamped "Work Completed" and signed by the approving authority before an invoice is paid.

FMC Comment: *"See response to Finding #5."*

[37] The 30 days of general leave per year was replaced with an accrued sick leave policy that did not carry over from year to year.

<u>Observation # 5:</u>

Background: All cash and checks received by the Flea Market staff during business hours were secured in a safe. FMC policy required an end of the day cash count performed by Flea Market staff under the observation of a Security Officer. Two keys, one under the control of Flea Market staff and the other under control of Security, were required to gain entrance to the safe during the end of the day closeout. The FMC Accounting Policy and Procedures Manual stated that "throughout the entire process, the cash count is observed by the Security Officer…under no circumstance should any one individual be in possession of both keys at any given time." OIG auditors observed the closeout process on September 13, 2012 and noted it was performed in accordance with policy.

However, during interviews with FMC Flea Market staff, it was asserted by Flea Market staff that a Security Officer did not consistently participate in the daily cash count process at closeout; instead the Security copy of the key to the safe was left with the Flea Market staff during closeout. The FMC should enforce the Flea Market policy that the Flea Market staff never has access to both keys to the safe and that the daily close-out process does not take place without being observed by the designated official with access to the second key.

FMC Comment: *"The FMC will ensure that all Flea Market operating procedures are followed."*

V. CONCLUSION

The report on French Market Corporation use of funds resulted in six findings and five observations. The six recommendations to the findings are intended to improve and clarify the FMC's internal controls and accounting policies and procedures in order to decrease the opportunity for fraud, waste, and abuse.

The audit revealed that FMC sponsorships lacked written agreements and were therefore in violation of the Louisiana Constitution's ban on donations of public funds. The FMC's annual overtime expenses exceeded the amount in the annual budget approved by the City Council. Additionally, FMC employees exceeded annual and weekly overtime limits set by the Civil Service Commission.

The FMC should update its Accounting Policy and Procedure Manual to require written agreements for all sponsorships and other cooperative endeavors. The FMC should also budget overtime by taking into account the amount of overtime needed for each division to fulfill the mission of the FMC and the overtime hour limits set by the Civil Service Commission. The FMC department heads should monitor employee overtime to ensure that it is necessary and in compliance with Civil Service Commission rules and the City Council-approved budget.

Additionally, the FMC has an obligation to the City and its citizens to seek competitive proposals for the lease of Edison Park before the current lease expires in February 2014. As a professional property manager, the FMC should be in charge of leasing this valuable property at market rates and collecting all revenue from the lease.

The recommendations in this report, if adopted, should help reduce the opportunity for fraud, waste, and abuse in the areas cited. This should increase the amount of the FMC's available funds which can be used to contribute to the City's general fund (See footnote # 4).

In the FMC's response to this report, all findings were fully or partially adopted and accepted into the FMC's written policies and procedures.

A follow-up review to determine the status of the FMC comments in this report will be conducted in 2015.

VI. OFFICIAL COMMENTS FROM THE FMC

City Code Ordinance 2-1120 section (8)(b) "Reporting the results of inspector general findings" provided that a person or entity that was the subject of a report "shall have 30 days from the transmittal date of the report to submit a written explanation or rebuttal to the findings before the report is finalized, and such timely submitted written explanation or rebuttal shall be attached to the finalized report or recommendation."

An Internal Review Copy of this report was distributed to the FMC on August 29, 2013, to provide an opportunity to comment on the report prior to the public release of the Final Report. The FMC's comments were due and received by September 27, 2013. The FMC's comments are included in the body of this report behind each finding and observation, and in their entirety behind this Section.

September 17, 2013

Mr. E. R. Quatrevaux
Inspector General
Office of Inspector General
525 St. Charles Avenue
New Orleans, LA 70130

RE: Response to the Report on French Market Corporation Use of Funds

Dear Mr. Quatrevaux:

The following is the French Market Corporation's (FMC) response to the Office of Inspector General's findings and observations of the French Market Corporation Use of Funds.

Finding #1: The FMC made sponsorship payments to other organizations in violation of the Louisiana Constitution.

See French Market Corporation's (FMC) Legal Counsel Henry Julien's attached letters dated November 5 and 14, 2012 previously provided to your office.

In October 2012 the FMC Board of Directors revised its by-laws adopting a policy for the receipt and consideration of sponsorship requests that states, "Sponsorship requests will only be considered in furtherance of a public interest that brings value back to the French Market."

Finding #2: FMC employees worked overtime hours that exceeded the amount approved in the annual budget.

The 2010 Salaries Budget (excluding fringes) was $1,099,061. 2010 Actual Salaries were under budget by $74,417, while the actual overtime was over budget by $74,263. The excess overtime was a result of the FMC utilization of overtime personnel in lieu of hiring additional personnel to fill staffing shortages.

The FMC has added additional Staff to fill staffing shortages.

Finding #3: FMC employees were allowed to exceed the Civil Service Commission annual limit on overtime hours.

FMC will comply with the Civil Service Commission Rule IV, Section 9.10 that states that "under no circumstances shall an employee be permitted to work in excess of 416 hours of overtime in any calendar year.

Finding #4: FMC employees were allowed to exceed the Civil Service Commission weekly overtime limit without obtaining advance approval from the Civil Service Commission.

The FMC will seek advance Civil Service Commission approval for weekly overtime to cover special events and fill staff shortages due to employee leave and temporary vacancies.

Finding #5: The FMC did not complete receiving reports in accordance with policy.

There are currently operational procedures in place for documenting receipt of merchandise. The FMC will update its accounting policy to reflect the current operating procedures.

Finding #6: The FMC did not post public notice of whistleblower protection for employees in accordance with state law.

The FMC has a non-retaliation policy in effect and is included in the FMC Employee Handbook. The FMC has posted the public notice of whistleblower protection in accordance with state law.

Observation #1: The FMC should directly manage the Edison Park property and seek competitive proposals for the commercial space before the current lease expires in February 2014.

The FMC has engaged the services of an appraiser to assess the fair market rental value of the Edison Park premises. In accordance with the FMC Expired Leases Policy the current tenant can request for consideration a new lease, conditioned upon the submission of the request prior to the expiration of the lease. The current tenant has requested such consideration. Upon receipt of the appraisal Staff will submit tenant's request to the Board of Directors.

Observation #2: The practice of issuing credits to Flea Market vendors was an inefficient use of Flea Market staff time.

The current policy restricting the issuance of credits will remain unchanged.

Observation # 3: The FMC could not locate supporting documentation for a contract bid.

The FMC will ensure that all supporting documentation for contracts is properly filed.

Observation # 4: The FMC did not have a written policy for approval of work completed before payment of applicable invoices.

See response to Finding #5.

Observation # 5: The FMC did not consistently enforce the Flea Market end of day closeout policy for counting cash.

The FMC will ensure that all Flea Market operating procedures are followed.

If you have any questions or need additional information, please feel free to contact me at (504) 522-2621.

Sincerely,

Patricia P. Henry
Interim Executive Director

PPH:Pph

Attachments:
The Kullman Firms' letters dated November 5 and 14, 2012

cc: French Market Corporation Board of Directors
Attorney Henry Julien

THE KULLMAN FIRM

A PROFESSIONAL LAW CORPORATION

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Henry P. Julien, Jr.
Direct Line: (504) 596-4181

November 5, 2012

Via E-Mail
Mr. Frank Pizzolato
French Market Corporation
1008 North Peters Street
New Orleans, LA 70116

Re: Public Benefit Corporations

Dear Frank:

La. Const. Art. 7, Sec. 14 prohibits the donation, loan or pledge of Public Credit. Specifically, the Constitution states "Except as otherwise provided by this Constitution, the funds, credit, property, or other things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private." The IG believes this prohibits the FMC from providing funding for certain projects which enhance the Market. This interpretation is erroneous. La. R.S. 39:1051 the Public Entity Facilities Financing Act provides for public benefit corporations such as the FMC and UPBRC. Sec. F. of this provision specifically states: "A public benefit corporation created pursuant to this part shall not be a political subdivision of the state but shall be a nonprofit corporation," etc.

The FMC and UPBRC are not part of the state or political subdivisions as defined by law and, therefore, the prohibitions in the La Const. do not apply. I have revised the mission statement and the bylaws of the French Market Corporation and the revised provisions comply with the law and allow for the transactions which the FMC is proposing. My last conversation with the City Attorney's office indicated that they were in agreement with this interpretation.

Sincerely,

Henry P. Julien, Jr.

HPJ:jak
cc: Ms. Patricia Henry

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November 14, 2012

Via E-Mail
Mr. Frank Pizzolato
French Market Corporation
1008 North Peters Street
New Orleans, LA 70116

Re: Public Benefit Corporations

Dear Mr. Pizzolato:

This letter is in response to the letter you received from Attorney Suzanne Lacey Wisdom, General Counsel of the Office of Inspector General.

I have reviewed her letter and again reviewed the various laws that apply to the French Market Corporation and the Upper Pontalba Building Restoration Corporation.

My opinion has not changed after this review. Contrary to Ms. Wilson's conclusion that La. R.S. 39:1051 does not apply to the FMC, there is nothing in that statute that states that it does not apply to all public benefit corporations. If it did have such language, it would be unconstitutional on its face as Louisiana does not allow statutes that only apply to a particular entity. Also, contrary to Ms Wisdom's statement that the French Market Corporation "is a political subdivision of the City," the French Market Corporation is not a political subdivision of the City. That theory has been rejected by the courts as recently as this year in a lawsuit brought by flea market vendors against the FMC. See CDC Case No. 12-2518(A).

In this case, the FMC and the City of New Orleans argued successfully that the FMC is not listed as an agency of the City of New Orleans in the Charter but is a separate legal entity as a public benefit corporation and derives its authority from those provisions of law not the Charter. See attached pages from the brief filed by the City Attorney's office in that case.

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Let me also point out that even if La. R.S. 39:1051 did not apply to the FMC and I believe that it does, it would not change the fact that as a public benefit corporation, the FMC is not bound by the prohibition in the state constitution.

While I can appreciate the reasons for the Inspector General's counsel's opinion, I believe that I am correct in my interpretation. That interpretation, which was also the position of the City Attorney, was accepted by the court in the lawsuit cited above (see reasons for judgment attached), as well as the lawsuit filed on behalf of tenants in the Upper Pontalba Building Restoration Corporation case filed by the same attorney.

If the Inspector General can point to any case law by the Fourth Circuit Court of Appeals or the Louisiana Supreme Court, then I may change my opinion. Absent such judicial determination, I believe my interpretation of the applicable laws is correct.

Sincerely,

Henry P. Julien, Jr.

HPJ:jak
cc: Ms. Patricia Henry

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2012-2518 DIVISION "A"

FRENCH MARKET VENDORS ASSOCIATION, INC.

VERSUS

THE FRENCH MARKET CORPORATION AND THE CITY OF NEW ORLEANS

REASONS FOR JUDGMENT in the above-captioned matter, taken in Open Court before the **HONORABLE TIFFANY GAUTIER CHASE**, Judge presiding, on March 19, 2012.

APPEARANCES:

ATTORNEY FOR THE PLAINTIFF:
MICHAEL W. TIFFT, ESQ.

ATTORNEY FOR THE FRENCH MARKET CORPORATION:
HENRY P. JULIEN, JR., ESQ.
CLAIRE H. McDANIEL, ESQ.

ATTORNEY FOR THE CITY OF NEW ORLEANS:
NOLAN P. LAMBERT, ESQ.

Reported by:
PATRICIA O'BRIEN
Certified Court Reporter

P R O C E E D I N G S

THE COURT:

The Court has reviewed the pleadings, including the affidavits submitted, the City Charter Ordinance and other applicable law. Section 4-109 defines Public Benefits Corporations and sets forth the Mayor and City Council's authority to establish such entities. The French Market Corporation is a Public Benefits Corporation.

Plaintiff alleges that the French Market Corporation's actions on February 28, 2012, was illegal and violated certain provisions of the Home Rule Charter.

The Section 4-107.3 defines the powers and duties of officers and department heads. French Market Corporation does not fall under this provision. The question then becomes whether the French Market Corporation must adhere to the requirements of the Home Rule Charter Section 2-1000 and sets forth procedures for adopting, promulgating or amending regulations. Regulations are also defined in this section.

This Court is then guided to an ordinance adopted by the City Council on December the 8th, 1971, and approved by Mayor Moon Landrieu on December the 9th, 1971. This ordinance deals specifically with the scope and authority of the French Market Corporation. Specifically, it provides that the lessee shall adopt rules and regulations for the operation, maintenance and governing of the French Market Properties, as they deem necessary.

Reading the ordinance and the Home Rule Charter in parametri, this Court denies the plaintiff's request for the issuance of a preliminary and permanent injunction and heretofore dissolves the TRO issue on March 13th, 2012.

And I am going to ask that you prepare a judgment to that effect.

MR. JULIEN:

Thank you, Your Honor.

MR. LAMBERT:

Thank you, Your Honor.

CERTIFICATE

I, PATRICIA O'BRIEN, Certified Court Reporter in and for the State of Louisiana, as the officer before whom this testimony was taken, do hereby certify this proceeding was reported by me in the stenotype reporting method, was prepared and transcribed by me or under my personal direction and supervision, and is a true and correct transcript, to the best of my ability and understanding;

That I am not of counsel, nor related to any of the parties to this cause, nor in the employ of any of them, and that I am in no way interested in the result of said cause.

OFFICIAL SEAL
PATRICIA O'BRIEN
Certified Court Reporter
In and for the State of Louisiana
Certificate Number 83035
Certificate expires [illegible]

PATRICIA O'BRIEN
CERTIFIED COURT REPORTER
(LOUISIANA CCR No. 83035)

Section 4-107(3) of the Home Rule Charter actually further reinforces the City's position that the City has and continues to be in compliance as evidenced by ordinance Thus, plaintiff cannot clearly and convincingly prove any of the elements required to obtain a preliminary injunction.

I. IRREPARABLE HARM

First and foremost, Plaintiff concedes in its Petition that it cannot show irreparable harm. Plaintiff instead alleges that it need not satisfy this element because it is seeking to enjoin the FMC from acting illegally. As will be shown below, this is false. This should end this Court's inquiry. Further, however, and out of an abundance of caution, Defendant submits that Plaintiff is otherwise unable to satisfy this element.

A. FMC'S ACTIONS ARE NOT ILLEGAL

Plaintiff seeks to avail itself of a narrow exception to the irreparable harm requirement. The judicially created exception to Louisiana Code of Civil Procedure article 3601 allows the issuance of an injunction without the required showing of irreparable injury when the action sought to be enjoined is expressly forbidden by law. *Hobbs v. Gorman*, 595 So.2d 1264 (La. App. 3 Cir. 1992). *See also New Orleans Public Service Inc. v. Council of the City of New Orleans*, 539 So.2d 891, 893 (La. App. 4 Cir. 1989); In *New Orleans Public Service Inc. v. City Council*, the Court stated that the term "action forbidden by law" suggests conduct that goes against express law. Cases wherein the courts found that this prerequisite had been satisfied were cases that demonstrated clear violations of express law, not cases of arguable violations of the law. *Hobbs v. Gorman*, 595 So.2d 1264 (La. App. 3 Cir. 1992), citing *New Orleans Public Service Inc. v. Council of the City of New Orleans*, 539 So.2d 891, 893 (La. App. 4 Cir. 1989).

Plaintiff, in asserting that it is seeking to enjoin the FMC from acting illegally, relies solely on the misplaced notion that (1) the Vendor Policy Manual at issue contains "regulations,"[1] and, as such (2) the FMC was required, pursuant to Article IV., Chapter 1, Section 4-107, of the Home Rule Charter, to publish the Vendor Policy Manual in the Official Journal, submit same to the CAO, and have same considered by the City Council. The fundamental problem with Plaintiff's premise, however, is both obvious and fatal.

Indeed, the basis for Plaintiff's argument, found at Paragraph 14 of Plaintiff's Petition, is that the FMC is governed by Home Rule Charter Article IV, Chapter 1, Section 4-107(3),

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[1] Defendant is by no means conceding that the Vendor Policy Manual contains what are tantamount to "regulations." To the contrary, Defendant would submit that it does not. However, Defendant submits that the Court need not reach this issue for purposes of ruling on the dispositive issue. If the Court would like additional briefing, however, Defendant would be pleased to oblige the Court.

entitled "Powers and Duties of Officers and Department Heads." However, the FMC is ***NOT*** an "Officer" or "Department Head" governed by Article IV., Chapter 1, Section 4-107, of the Home Rule Charter. To the contrary, the FMC is a "Public Benefit Corporation" governed by Article IV., Chapter 1, Section 4-109. Section 4-109 provides:

> (1) If authorized by the Mayor and approved by the Council by ordinance, the City may establish public benefit corporations, development corporations, public trusts, and other entities authorized by state law for public purposes, including development, management, and promotion of assets of the City, subject to such budgetary, personnel or other requirements as may be established by ordinance.
>
> (2) Public benefit corporations, development corporations, public trusts, and other entities authorized by state law and established prior to January 1, 1996, the effective date of this amendment to this Charter, are hereby recognized. Such entities may be continued, modified or abolished in accordance with the terms of applicable enabling statutes, ordinances, articles of incorporation, by-laws, or trust indentures in effect prior to January 1, 1996 or as thereafter revised.

The relevant "terms of applicable...ordinances" for purposes of this Court's determination of the issue here is found in Exhibit 1, the November 4, 1971, Ordinance of the City of New Orleans, at Section 1, Subparagraph F, which provides that "[t]he Lessee [FMC] ***shall adopt rules and regulations*** for the operation, maintenance and governing of the French Market Properties, ***as they deem necessary***." *See* Exhibit 1 (emphasis added). As can be seen, the FMC is statutorily authorized to ***adopt rules and regulations as it sees fit.*** Therefore, the FMC, in adopting the Vendor Policy Manual at issue, is acting legally and pursuant to black letter law.

This ought to end the Court's inquiry into this matter and the Plaintiff's Petition for Injunctive Relief ought to be DENIED.

B. Plaintiff Otherwise Fails to Prove Irreparable Harm

Again, Plaintiff, *prima facie*, cannot show that irreparable harm has occurred, is occurring, or will occur as a result of the February 28, 2012 update of the Vendor Policy Manual by the FMC. First, as above, the original lease ***requires*** the FMC to adopt rules and regulations concerning the management of the property. How is the Plaintiff irreparably harmed by these rules? Second, the petition seeks monetary damages.

As stated above, irreparable harm cannot be shown when the complainant can be adequately compensated in money damages for its injuries or when said injuries cannot be measured by pecuniary standards. *Licfro, Inc. v. State, ex rel Dept. of Revenue, Office of Alcohol and Tobacco Control*, 03-0737 (La. App. 4 Cir. 10/1/03), 859 So.2d 739; *National Pac. Corp. v.*