

We Care About  
The Square



January 25, 2016

Troy City Council Members  
433 River Street.  
Troy, NY 12180

**RE: 1 Monument Square Redevelopment**

Council Members:

Attached is an opinion memorandum from Javid Afzai of Whiteman Osterman & Hanna LLP

Sincerely,

We Care About The Square

[www.wecareaboutthesquare.com](http://www.wecareaboutthesquare.com)

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**MEMORANDUM**

TO: Russell Brooks  
FROM: Javid Afzali  
DATE: January 24, 2016  
RE: Monument Square Project- Project Analysis

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**INTRODUCTION**

City of Troy (“City”) selected Monument Square LLC (“Developer”) as its preferred developer under a competitive bidding process in September 2013. Under the 2013 Request for Qualifications with Proposal (“RFQ/P”) the City sought the redevelopment of Monument Square and required certain project components, including public access to the river and park, and public and private parking.

In response to the 2013 RFP/Q, Developer proposed a Project that included the following components:

- 150K ft<sup>2</sup> of mixed use space comprised of two buildings;
- A multi-level underground parking lot with 170 revenue-generating parking spaces for both private and public use;
- 80 Parking spaces for general public use and 90 spaces allocated to the residential units and to City hall;
- 45-60 residential units;
- 20K ft<sup>2</sup> of its mixed use space was to be dedicated to the Troy Waterfront Farmers’ Market;

City awarded the 2013 RFP/Q contract (known as the Land Development Agreement or “LDA”) to the Developer on the basis its 2013 proposal. It should be noted that the public parking component and other public amenities proposed by the Developer were required under

the 2013 RFQ/P and under some of the underlying public grants<sup>1</sup> that Developer seeks as part of its project financing.

In 2015, citing unknown or unforeseen site conditions, Developer scaled back its proposal and removed some of the public amenities, including the public parking component, but still sought access to the public grant money earmarked for the development of public parking. Developer's 2015 Modified Project now includes:

- 90K ft<sup>2</sup> of mixed use space and not 150K ft<sup>2</sup>;
- 1 building instead of 2 buildings;
- About 87 private parking spaces and not the 170 spaces publically accessible spaces promised under the 2013 proposal;
- 78 residential units and not the 45-60;
- Less than 10K ft<sup>2</sup> of space for the Troy's Farmers' Market and not 20K ft<sup>2</sup>.

Developer's Modified Project is currently before the City Planning Commission for site plan approval.<sup>2</sup> The Planning Commission has designated itself as lead agency under the State Environmental Quality Review Act ("SEQRA") and has determined the project to be an unlisted action under the relevant SEQRA regulations. The Planning Commission continues to review the Developer's Modified Project under both SEQRA and City regulations for site plan review, but has not yet made a SEQRA determination. In addition, the City Industrial Development Agency will review Developer's Modified Project for additional funding or tax breaks once the Planning Commission completes its SEQRA review.

We Care about the Square ("WCATS"), an unincorporated association of concerned residents, taxpayers and business owners seeks review of Developer's Modified Project in order to determine whether the scaled back 2015 Modified Project comports with applicable law, regulations, and contractual obligations.

## DISCUSSION

### **Approval of the 2015 Modified Project may violate the General Municipal Law**

The underlying public grants, which funded the City's 2013 RFQ/P, required that proposals under the RFQ/P be publically bid under General Municipal Law ("GML") § 103. Two central purposes of competitive bidding statutes, both falling under the rubric of promoting public interest, are: (1) protection of public fisc by obtaining best work at lowest possible price; and (2) prevention of favoritism, improvidence, fraud, and corruption in awarding of public contracts.<sup>3</sup> A successful bidder on municipal contract may not modify its original bid and

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<sup>1</sup> The public grants include the Troy City Hall grant valued at approximately \$3.2 million dollars.

<sup>2</sup> The Troy Farmers' Marker will not occupy space at the Project Site, in part, because of the reduction in space.

<sup>3</sup> New York State Chapter, Inc. v. New York State Thruway Auth., 88 N.Y.2d 56, 68, 666 N.E.2d 185, 190 (1996).

negotiate a *materially* different agreement after it has already secured a public works contract.<sup>4</sup> A variance from the bid specifications is material when it gives the bidder a substantial advantage not enjoyed by the other bidders.<sup>5</sup>

Here, the 2015 Modified Project appears to materially deviate from the Developer's 2013 Proposal to the City RFQ/P and amount to a completely different project. As discussed above, the 2015 Modified Project scales the proposal back by 60K ft<sup>2</sup>, removes all of the public parking, increases the number of private residential units, and will no longer house the Troy Farmers' Market. As such, under the GML and well-established case law, these material deviations annul the underlying contacts between the City and the Developer as a matter of law and the City must not approve the Modified Project.<sup>6</sup>

Developer's justification for project modification is unavailing and contrary to representations made in the LDA. The Developer states that project modifications were necessary as a result of unknown / unforeseen land conditions. In the LDA, however, the Company represented and warranted that it was aware of the existing land conditions and would accept land "as is". As such, the Developer's excuse for its modifications is inadequate and legally insufficient to allow such a material deviation from the original proposal.

### **The City may Refuse to Extend the LDA in May 2016**

The City and Developer entered into the LDA after the Developer was selected under the 2013 RFQ/P. By its terms, the LDA was to expire on November 2015. However, the Developer has the option to extend the term for two additional 6-month periods. The Developer sought to exercise its option to extend the LDA and was granted its first of two 6-month extensions. Under this first extension, the LDA is to expire in May 2016, unless Developer gives notice of its intent to extend for the remaining 6-month term by March 2016.

Under the LDA, the City has the right to deny the extension where any "Company Express Contingencies" (as defined in the LDA) remain unsatisfied. Company Express Contingencies require developer to: (A) complete all engineering and design activities necessary to Construct Project, including Parking Improvements and Infrastructure Improvements; (B) secure all necessary Governmental Approvals (e.g. zoning and site plan approvals); (C) SEQRA review prior to TIDA adoption of final authorizing resolutions; (D) secure firm financing commitments; (E) obtain Title Policy.

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<sup>4</sup> Lake Const. & Dev. Corp. v. City of New York, 211 A.D.2d 514, 515, 621 N.Y.S.2d 337, 338 (1<sup>st</sup> Dep't 1995).

<sup>5</sup> Op.State Compt. 78-612; Lake Const. & Dev. Corp., 211 A.D.2d at, 515.

<sup>6</sup> Case law also supports the notion that the successful bidder may withdraw its proposal if it made a mistake in its bid. Here, the Developer is citing to unknown and unforeseen site conditions for the reason the project modifications were necessary. While the City may be in its rights to force the Developer to continue with the 2013 Proposal, it may also excuse the Developer for its mistake and allow it to simply withdraw its proposal.

To date, the Developer has not (A) completed all engineering and design activities, (B) secured the necessary Governmental Approvals (i.e. Planning Board site plan approval), (C) completed SEQRA Review, or (D) secured firm financing commitments. As such, the City may reasonably deny the Developer's final request to extend the LDA for the last 6-month term.

In addition, the Developer's application and receipt of grant money from the ESD may actually be in breach of the LDA provision that prohibits the Developer from obtaining other sources of grant money.

**Adherence to certain provisions of the LDA will expose City to breach of the Troy City Hall Contract**

The LDA §6.1 requires City to make EPA fund monies awarded as part of Troy City Hall ("TCH") Contract to Developer (approximately \$3.2 M). However, the TCH Contract contemplates construction of parking spaces available to nearby businesses. The 2015 Modified Project removes all public-parking components. As such, if the City follows through with the LDA under the 2015 Modified Project and does not hold back TCH Contract monies, then it would be in breach of the TCH Contract. City's options are to extinguish the LDA (which as discussed above, it may do so due to the material deviation from the original proposal), or alternatively, not provide TCH Contract funds to the Developer.