

EXECUTIVE SUMMARY

THE CORPORATION OF THE CITY OF BRAMPTON

FINAL REPORT OF THE (INTERIM) AUDITOR GENERAL

ON: THE CITY OF BRAMPTON'S SOUTHWEST QUADRANT RENEWAL PLAN

By George Rust-D'Eye, (Interim) Auditor General for the City of Brampton

April 27, 2015

At its meeting held on September 10, 2014, the City Council appointed me as its (Interim) Auditor General "for the purpose to investigate the process and administration on the Southwest Quadrant (SWQ) project...", through which the City decided to deliver a mixed-use revitalization plan for its south-west downtown area, particularly to erect a new West Tower and northerly addition to its current (1991) City Hall, and to select a private-sector partner/builder for the project.

For this purpose, the Council, on June 24, 2009, decided to issue a Request for Proposals (RFP), including the requirement that Respondents meet Council's Guiding Principles, and other directions laid down by the Council at that time. There followed, in accordance with Council's decision, the issuance of the RFP, commencing a project in which Respondents to the RFP would be asked to engage in a process of Competitive Dialogue, to be followed by submission of their Best and Final Offers, ('BAFO'), from which the preferred Respondent would be chosen, with Evaluations throughout.

Three Responses were received, from corporations referred to as Dominus, Inzola and Morguard. Inzola's bid was disqualified, and has sued the City. The SWQRP process, under the rules set by Council and City staff, and with the assistance of outside expert consultants, culminated in the decision by Council, on March 28, 2011, to award the Phase 1 contract to Dominus, which built the project on City-owned land, at a cost to the City of \$8.2 million per year in lease-to-own payments for 25 years, following which the City owns the building. The building is nearing completion. A Construction Completion Agreement was signed by the City and Dominus, in July, 2014.

The process of procurement, and aspects of the SWQRP and decisions and actions involved in it, led to concerns being expressed, by one or more Members of Council, by the public and in the press, involving such issues as: the decision by the City to lease-to-own, rather than build the project itself; the utilization of the Competitive Dialogue approach; the fairness of the procurement process; perceived secrecy throughout the SWQRP; and the respective roles played in the process by Council and staff. These concerns led the Council to appoint me as its (Interim) Auditor General to conduct an investigation into the process.

During the course of my investigation, I delivered to the Council an Interim Report, dated October 8, 2014, and a Second Interim Report, sent on December 9, 2014, marked as APPENDIX 'A' and 'B' respectively to this Report. In January, the then-Chief Administrative Officer retained financial and procurement experts to assist me in the

completion of my Final Report, which includes quotations from their Reports to me, both of April 2, 2015.

SUMMARY OF MY PRINCIPAL CONCLUSIONS

- 1. THE CITY WAS WELL-SERVED BY ITS STAFF:** This very substantial City project was handled administratively for the most part by senior and other staff of the City, who documented thoroughly every stage of the process of decision-making, presentations and recommendations to Council, processing of the RFP, Competitive Dialogue, Negotiations, BAFO and the systematic, complex and fair evaluation process, all of which contributed substantially to the success of the project, and achieving, in an impressive building designed by a distinguished architectural firm, the City's needed administrative space at a price reached through an appropriate competitive procurement process. While it may be premature to assess whether the Guiding Principles were completely attained, certainly the work of those involved on behalf of the City was in all respects consistent with Council's intent.
- 2. THE COMPETITIVE DIALOGUE /NEGOTIATED RFP/BAFO APPROACH TO PROCUREMENT WAS APPROPRIATE, AND IMPLEMENTED WELL ON BEHALF OF THE CITY:** In a situation in which the City knew how much space it needed, but was not in a position to define or design in advance the form in which its needs and objectives were to be met, City Council and staff utilized a novel approach properly suited to the situation, and retained specialized consultants to assist in its administration, resulting in a fair and effective competition and evaluation process
- 3. CITY COUNCIL PLAYED ITS APPROPRIATE AND LEGALLY MANDATED ROLE IN THE DECISION-MAKING PROCESS, WHILE ITS MEMBERS ACKNOWLEDGED AND COMPLIED WITH THEIR PROPER ARM'S LENGTH ROLES, THUS MAINTAINING THE INTEGRITY OF THE PROCESS:** The governing principle, as stated in the Bellamy Report, is that: "Councillors should separate themselves from the procurement process. They should have no involvement whatsoever in specific procurements. They have the strongest ethical obligation to refrain from seeking to be involved in any way."
- 4. THE PRINCIPLES OF CONFIDENTIALITY OF INFORMATION, MANDATED BY THE COUNCIL'S ADOPTION OF ITS FORM OF RFP, SUPPORTED BY APPLICABLE LAW, ARE NORMAL AND ESSENTIAL REQUIREMENTS OF AN RFP PROCUREMENT PROCESS, FOR THE PURPOSES OF MAINTAINING A FAIR COMPETITION AND PROTECTING THE COMMERCIAL CONFIDENTIALITY OF INFORMATION PROVIDED BY RESPONDENTS.** Adherence to these principles by Council and City staff involved in the SWQRP, contributed to the maintaining of the actual and perceived integrity of the project.

In this, my Final Report, I have also addressed the other concerns and issues referred to in the documentation which gave rise to Council's decision to have this matter investigated, and those raised during the course of the investigation itself.

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INTRODUCTION

The Flower City needs space to grow.

The City has, since early in this century, recognized the increasing need, caused by rapid City growth, for more administrative space to house additional staff and facilities best to serve the public interest.

*"The 9th largest city in Canada, Brampton has a successful, well-diversified economy and is home to more than 8,000 businesses. The City continues to retain a Triple 'A' credit rating by Standard & Poor's, reflecting its successful economy and debt-free position. Brampton celebrates its diverse population that represents people from more than 175 distinct ethnic backgrounds who speak more than 70 different languages. Offering more than 6,000 acres of parkland, Brampton takes pride in being known as the Flower City of Canada. Brampton has been designated since 2007 as an International Safe Community by the World Health Organization."*¹

In addition to its ranking as the 9th largest City in Canada, the City of Brampton is the 4th largest in Ontario and the 3rd largest in the Greater Toronto Area. Its importance is also recognized in its status as the seat of Regional government.

*"Brampton has boomed over the past two decades, more than doubling from 234,445 residents in 1991 to 521,315 in 2011."*²

Brampton's increase in population during this period represented a census period growth rate of 20.8% between 2006 and 2011, compared to 5.6% for the Province as a whole. Current City population has been estimated as approaching 600,000, projected on the basis of a recorded current annual growth rate of 4.16% for the period referred to above.³

Population density in the City's total land area of 266.71 square kilometres, is now estimated at 1,967.11 persons per sq.km..

¹ City of Brampton media release, June 7, 2013.

² Toronto Star, article by San Grewal, May 24, 2013: "Brampton suffers identity crisis as newcomers swell city's population".

³ Brampton at a Glance, City of Brampton, 2014.

In 2013, Brampton was the 8th largest construction market in Canada, and the 2nd largest in the Greater Toronto Area.

In this context, it is not surprising that the concomitant necessary growth in the City's administrative services and support staff, quickly outgrew the space provided by its 1991 City Hall and the various leasehold spaces acquired for that purpose over the intervening years.

Since the early 2000's, the City government has been planning and working to secure additional central and connected administrative space in the downtown area, culminating to date in the buildings and facilities produced by Council's adoption and implementation of its South-West Quadrant Renewal Plan⁴, (referred to herein as the "SWQRP"), which is the subject-matter of this Report.

COUNCIL'S GUIDING PRINCIPLES AND A SUMMARY OF THE SUBJECT-MATTER OF THIS INVESTIGATION

Later in this Report, I will outline the course and chronology of the various initiatives, decisions and reports, made or produced during the period from **2001**, when it was acknowledged that the City administration was outgrowing the capacity of City Hall and other City facilities in use at the time, up until **June 24, 2009**, when City Council directed its staff to proceed with a Proposal Call, ("RFP", or "Request for Proposals"), to solicit responses from the market for a unique and creative way to deliver a mixed-use revitalization, or Renewal Plan ("SWQRP"), in the South-West Quadrant of the "Four Corners" (the central key intersection of Queen and Main Streets, in the centre of Brampton's downtown), (significant dates highlighted).

I will then go on to describe the terms of the SWQRP, the RFP Process, the evaluation of Responses received, the Council decision to accept the Proposal of Dominus as the preferred Respondent, and the results of the process to date.

In late January of this year, pursuant to specific authority conferred by the Council in its decision appointing me as its Auditor General, the CAO Office decided to retain expert consultants with specialized expertise in procurement and financial matters, respectively, to assist me in the production of this Final Report to City Council. Accordingly, I wish to express my great appreciation for the reports, each dated April 2, 2015, which I recently received from **The Procurement Office, (Paul Emanuelli, Procurement Law Office)**, referred to in this Report as "**Emanuelli**", and **Booker & Associates, (Fay Booker)**, referred to in this Report as "**Booker**". This Report draws heavily upon the impressive procurement and financial knowledge and expertise, respectively, of each of them, and contains numerous quotations from their reports.

At the outset, I will outline a summary description of the general nature of that process, and the course of events which led up to Council's decision to appoint me as its (Interim) Auditor General, and direct me to investigate the process and administration of the SWQ project, which included the construction and

⁴ While the official document employs the spelling "Southwest", that and the spelling including the hyphen, are used interchangeably throughout the massive documentation upon which this Report is based.

acquisition by the City of the West Tower and West Tower Parking Garage, at 41 George Street, (formerly referred to as the “City Hall Annex”), the Conservatory, Daily Times Square, (at the former address, at 33 Queen Street West, of the *Daily Times and Conservator*), and Heritage Way, (linking the West Tower with the existing City Hall building), all of which components of the SWQRP are in latter or final stages of construction.

The RFP was duly issued by City staff, on **October 30, 2009**, in accordance with the decision of the Council made on **June 24, 2009**, referred to above, in which the Council specified that the RFP include the requirement that Respondents meet the following **Guiding Principles**, endorsed specifically by the Council at that meeting:

- increase office adjacencies/reduce fragmentation of departments;**
- anticipate and accommodate future growth of the administration;**
- control space costs and ensure value for money to taxpayers;**
- centralize civic employees in Brampton’s historic downtown;**
- contribute to the revitalization of the downtown;**
- ensure the City of Brampton is recognized as an employer of choice;**
- ensure an appropriate balance between public and private sector risk.**

In its direction to staff to proceed with the RFP, Council also required that **the administrative space be delivered by no later than 2014; maximize private investment; satisfy the City’s economic and functional requirements; and recognize the City’s desire to achieve a nominal or no additional impact to the property taxpayer.**

The Council also directed that the RFP include alternatives to a City owned and operated building such as, but not limited to, a lease-leaseback arrangement; a lease of the property with an option to buy; a build-to-suit arrangement, or a lease for a portion of the project for a fixed term.

In its decision at that time, the Council also decided to put a final end to its previous consideration of a “City-led and sole financed build-to-own option for City Hall accommodation as a possible development option, including but not limited to, the original project, identified at an order of magnitude estimate of \$204 million”. Instead, the project would proceed by way of private sector involvement, such as through a “public-private partnership”.

In her report to me, as quoted from below, **Booker** has reviewed and analyzed the decision of the City not to self-build the project, and expresses her conclusions as to the merits of this decision.

In the issuance of the RFP, Council **“affirmed the City’s preference to have its needs met by a physical addition to the City Hall, located to the north of the building; however, the City is fully open to consider other development possibilities provided the alternative proposals fall within a**

defined area described in the Urban Design Guidelines, which is generally considered to be within a five-minute walking distance from the existing City Hall”, [shown in Figure 1 to the RFP document].

Following the issuance of the RFP, and the ensuing process described below, which extended over a period of 21 months, and included employment of the procurement process known as “**Competitive Dialogue**”, (also discussed in detail below), the Council, at its meeting held on **March 28, 2011**, decided to accept the selection by its staff, of **Dominus Construction Group, with Zeidler Partnership Architects**, (whose formal name in the ultimate Agreements entered into with the City, is: **DOMINUS/CITYZEN BRAMPTON SWQRP INC.**, referred to in this Report as “**Dominus**”), as the City’s development partner on at least Phase 1 of the SWQRP project, as having “provided a viable solution (in three phases), that meets the City’s administrative requirements and other desired elements of the [SWQRP].”

The **Dominus** bid selected, was “based on lease-to-own payments by the City of not more than \$8.2 million per year for 25 years, commencing with the first monthly payments in 2014, representing an aggregate payment amount of not more than \$205 million, for facilities with an estimated construction cost of \$94 million, to provide about 126,000 sq. ft. of administrative space, and other uses, to the City.”

If all three of the phases as described in the **Dominus** proposal were to be proceeded with, the cost to the City would amount to at least \$540 million in total.

The RFP process had produced three Responses, or bids, the other two, in addition to **Dominus**, being from **Morguard Investments Limited**, (“**Morguard**”), and **Inzola Group Limited**, (“**Inzola**”), which latter company had constructed the present City Hall in 1991, following a design competition.

During the process, **Inzola** was, by letter dated **June 11, 2011** from the City’s Purchasing Supervisor, notified that its bid had been disqualified from the procurement process, with reference made in the letter to the alleged communications to the City, said to be “contrary to the requirements of the RFP”. That decision is currently the subject of litigation, involving the commencement by Inzola of an action against the City, in the Superior Court of Justice, alleging negligence, bias and breach of contract. Those proceedings, which are unlikely to come to trial for a period of years, if at all, will, in all likelihood, address many of the same issues which are the subject-matter of my investigation. Needless to say, I recognize the need to pay particular attention to, and take active steps to avoid, my delivery of this Report having the potential to prejudice the Court proceedings.

Following the decision of the Council, on **March 28, 2011**, to accept **Dominus** as its partner, at least for Phase 1 of the SWQRP project, the parties entered into a lengthy process of negotiations, producing a series of written Agreements, approved by City Council at its meeting held on August 10, 2011, for Phase 1 (41 George St. S.) and 1A, (33 Queen St. W.), as described in the **Dominus** bid, and executed by the parties in **December, 2011**.

The Council action at that time also authorized that “upon closing of the transaction, Dominus Construction Group may commence construction of Phase 1 and 1A development of the Southwest Quadrant Renewal Plan”.

Arising out of the RFP, the SWQRP Project, now completed or in final stages of completion, (without there having been any change orders), is to provide the City with 126,000 sq. ft. of administrative office space, and modifications to public areas, leaving an additional 120,000 sq. ft. anticipated to be needed between 2014 and 2031.

On **June 14, 2014** the Council authorized its officials to execute on behalf of the City, a **Construction Completion Agreement** with **Dominus**, which was duly implemented by a formal document dated **July 30, 2014**, executed by the parties.

THE CONCERNS WHICH LED TO THIS INVESTIGATION

The decision of the Council of the City of Brampton to proceed with the SWQRP, and, particularly, the manner in which it proceeded in the RFP procurement process, have been the subject of a substantial amount of public and press concerns and criticism, and litigation on behalf of Inzola, whose bid, as mentioned above, was disqualified, although I am not aware of any complaint or concerns expressed on behalf of Morguard, the unsuccessful second-place finisher in the process.

The most specific and comprehensive summary of public concerns was articulated by reporter, San Grewal, in his article "Brampton's Downtown Plan", in the Toronto Star, October 24, 2011,⁵ in which he states:

"Among the concerns voiced by critics of the project and the selection process: the cost, supposed secrecy for a bidding process endorsed by councillors, a claimed lack of public input, and an investigation by the City's integrity commissioner into Mayor Susan Fennell's campaign contributions..."

To select a winning bid a procurement process, never used before in Canada, was approved by council in 2009. The so-called competitive dialogue process is popular in Europe. Its main advantage is it guarantees that the private partner and municipality are clear about what the project will deliver and how much it will cost. It is designed to help protect cities against unseen costs overruns and bring in more creative ideas from the private sector by taking the emphasis off acceptance of the lowest bid.

But to protect the competitiveness of participants, who have to display more creativity and openness, there is a closed bidding system, with negotiations often taking place with staff, not elected officials.

In Brampton, the process was questioned when councillors argued, months after initial approval, that they did not realize council would be shut out from the selection process. They learned this year they could not get many details of the winning bid...

None of the four councillors who represent parts of Brampton's downtown support the Dominus plan for the downtown redevelopment.

⁵ quoted with the permission of the author.

They say they worry about the cost and what that will mean for taxpayers, the seeming lack of information on the project's financing and whether the project satisfies the agreed upon goals of the project. They also argue they were promised more transparency when council approved the bidding process...

...councillors have become frustrated with the city manager [then, Deborah Dubenofsky] when their questions about price and financing costs charged by Dominus go unanswered. Dubenofsky has repeatedly stated that "competitive dialogue" does not allow such information to be divulged.

Dubenofsky has also been criticized for appointing the same person she introduced to council to recommend the process, James McKellar, who promotes it worldwide as a consultant, as the fairness adviser in the selection process. That role under the process supplants council's oversight, but council wasn't consulted about appointing McKellar.

Mr. Grewal also refers in his article to concerns expressed by some "influential residents" that the cost per square foot of the Dominus proposal is significantly higher than what they say is the industry average for similar projects.

Based on these, and other, concerns about the SWQRP process,⁶ which continued to persist long after the entry into by the City of the Agreements with **Dominus**, and long after construction of the SWQRP buildings had commenced, the City's then-Chief Administrative Officer, John Corbett, delivered to the Council a report, dated September 9, 2014, recommending that the Council establish the position of Auditor General for the City of Brampton, on an interim basis, "for the purpose to investigate the process and administration on the Southwest Quadrant (SWQ) project with all powers, duties and protections provided under the Municipal Act, effective September 14, 2014..."

The City Council, (now the previous Council), at its meeting held on **September 10, 2014**, adopted this recommendation of its CAO, and confirmed its decision by the enactment of By-law 319-2014, the "Auditor General By-law".

The Council also, on that date, appointed me as the City's Interim Auditor General, with the responsibilities set out above, to conduct the investigation, and to provide separate external legal advice if and when needed during this investigation. This appointment was also confirmed by the Council by By-law.

ISSUES TO BE ADDRESSED IN THIS REPORT

In **my Interim Report of October 8, 2014**, to the Council, attached as **APPENDIX 'A'** to this Final Report, I set out issues which I anticipated to address in my investigation, paraphrased as follows, (with key points highlighted):

⁶ For instance, similar complaints, expressed in somewhat more voluble language, in a letter from Doug Bryden to the Editor of the Brampton Guardian, published on September 27, 2011: "Something smells at city hall."

1. The nature, degree of reasonableness, and implementation, of the **Competitive Dialogue process of procurement**: The City's adoption and use of this procedure, described at the time as never before having been employed in a procurement process by any public agency in Canada, and little understood, is a subject which, I believe, requires close further study and analysis*;

***Emanuelli** describes the **competitive dialogue process** as follows:

"Competitive Dialogue processes, which generally speaking include a phase during which shortlisted proponents engage in private concurrent dialogues with evaluation committee members before submitting a final offer, allow the parties to establish a more thorough understanding of the contract requirements and to explore a range of alternative proposed methods of project performance. This is the type of procurement process that the City of Brampton undertook for the SWQRP project. "

*"... the concurrent negotiation RFP, which was used by the City of Brampton for the SWQRP, allows the purchasing institution to enter into parallel discussions with multiple shortlisted proponents after a preliminary screening process that identifies the finalists. The dialogue stage allows for the development or refinement of potential solutions through direct discussions between the purchaser and each proponent, and may result in a single viable solution or several viable solutions. At the close of the dialogue phase, the public institution invites each shortlisted finalist to submit its **best and final offer, ("BAFO")**. The final ranking is based on those final offers and, in most cases, the award goes to the final top-ranked proponent."*

*"A **Bellamy Report** background paper on good governance in municipal procurement described the Competitive Dialogue/BAFO RFP process in the following manner in December 2003:*

BAFO is essentially a two-stage procurement process, with the focus in the second stage on either the top evaluated bidder or a short list of the top bidders. It provides an opportunity for short-listed suppliers to improve the quality of their proposals in specific identified areas, particularly but not limited to price/cost. Under BAFO, the top-rated bidder or bidders are asked for revised proposals in the specified areas, which then become their best and final offer and the basis for additional evaluation and selection. Any information received in response to the first request document is not disclosed to other bidders as part of the BAFO procurement process."

[The context and significance of the Bellamy Report will be dealt with later in this Report].

2. **The involvement, or lack of involvement, of Council and its Members in the process, and whether or not they, and members of the public, had reasonable and required notice and information, enabling them to have appropriate opportunity for input into the process:** I

have concerns about the extent to which Members of Council were provided with notice, time and useable information to enable them to understand the project fully, and the various terms and conditions proposed by each of the Respondents, particularly in a context in which the Council was told that it was required either to accept entirely the recommendations of staff or cancel the RFP;

3. **The atmosphere of secrecy, and of the pressing need for confidentiality, fear of disclosure, and restrictions on access to information, by Council, members of the public, and staff involved in the process:** There appears to have pervaded an almost obsessive concern about **loss of confidentiality** over business information, and the perceived essential need for a “**quiet – no contact**” period, leading to the requirement of personal undertakings of secrecy, which were interpreted to the point of preventing the Respondents and staff from sharing information even with the Council;
4. **The acquisition of the option over the 20 George Street property**, land which was not required by the City in Phase 1 of the Development, and for which the City paid Dominus \$480,000, apparently without specific Council authority to do so.
5. The facts and issues surrounding **the disqualification of Inzola**, and its impact on the competitive process and the evaluation of Proposals: this serious matter, the subject of a substantial lawsuit against the City, currently before the Courts, is linked to issues of communications to Council and its Members.

In **my Interim Report**, I also identified a number of additional issues and concerns which I believe justify investigative review and scrutiny, some of which are as follows (set out in no particular order):

6. whether there was compliance with the City’s Purchasing By-law, Council policies, the principles of procurement, the Municipal Act, and other rules governing transactions of this nature;
7. the allocation of risk and costs to be borne by the City and Dominus, respectively;
8. the City’s legal obligations assumed to Respondents in the process, including whether or not the City may have any obligation to Dominus following the completion of Phase 1;
9. the issue of what authority did Council delegate to staff, and the manner in which delegated authority and responsibilities were exercised;
10. whether or not there was misconduct, inappropriate or improper actions, or undue influence, brought to bear by, or with respect to, any Member or Members of Council or staff in the course of, or relating to, their involvement in the SWQRP;
11. the extent to which the final result of the SWQRP process is consistent with the seven Guiding Principles, and the directives, of the Council.

In **my Interim Report**, I also referred to additional allegations and issues arising during the course of my investigation, or raised to me by Councillors, (particularly **Regional Councillor Sprovieri**), including the following:

12. that the City showed favouritism in the process, and in its award of the contract to Dominus, which was pre-determined;
13. that staff were alleged to have authorized a variance from the City’s set-back By-law, allowing the building to encroach on the George Street sidewalk, without proper authority from the Council;

14. that the site of the building was known to contain contaminated soil, which should have been found and removed before construction;
15. that the financial component of the Dominus bid was based on a miscalculation of the cost of the development;
16. that the annual fee to be paid by the City to Dominus was based on an inaccurate relationship to interest rates; this point also raises the issue of the Council's decision not to construct the project itself, addressed at length by **Booker**, below;
17. that staff had failed in their duty to advise Council of problems with the process of which they were aware, and intentionally misled the Council;
18. that Dominus had improperly lobbied at least one Member of Council, causing undue influence and bias in the result of Council decision-making, and possible pay-back to the Member;
19. that Council tried improperly to muzzle Inzola, by trying to make its principals sign a very unusual confidentiality agreement; and
20. that the City will be prejudiced if it allows Dominus to transfer its interest to Fengate (Brampton) LP.

MY APPROACH TO THE INVESTIGATION

In accordance with the direction of the Council, I formally commenced my investigation on September 10, 2014, in an office established for me in the office area of the Chief Administrative Officer in City Hall. Over the course of most of the next three months, I worked in that office on a virtually full-time basis, collecting and organizing the massive amount of documentation which recorded, or constituted, the series of transactions involved in the City's pursuance of its SWQRP project. It was also, of course, imperative that I maintain strict confidentiality and secrecy over the contents of the documents in my office, including drafts of my Interim and Final Reports.

At the outset, I wish to express my observations concerning the excellent work of members of City staff throughout the project, their consistent and diligent attention to detail, and the recording of information, which proved to be of considerable assistance to me in the course of my investigation, and in reviewing the various stages of the transactions involved in the SWQRP.

Once again, I also, as I did in **my Interim Report**, wish to recognize, and express my great appreciation for, the particular support, in addition to the hospitality of Mr. Corbett, (now the former CAO), provided by Mr. Matthew Palladina, then-Associate Director, Corp. Development & Strategy, and Ms. Chandra Urquhart, the CAO's Office Co-ordinator, both of whose cheerful and co-operative assistance made my tenure there, and the performance of my responsibilities, that much easier, and more pleasant.

I also wish to express my thanks for the very helpful co-operation and assistance which I received from the City's Solicitors, Roberto Zuech and Denis Squires, who met with me, and provided relevant and valuable information and documentation relating to the subject-matter of my investigation and legal issues arising during the course of the SWQRP, some of it strictly on the basis of the confidential solicitor-client relationship with the City corporation, which we share, and which I intend to protect, to the extent possible, consistent with my duties as Auditor General. I was provided with full access to the Legal files related to the project, including opinion letters from both the City's Solicitors and outside legal counsel, and to all reports and presentations provided to the Council by its staff, as well as those of retained outside consultants and subject-matter experts.

I was also provided with access to the large amount of public Court material prepared by counsel for the parties in the Inzola litigation, including responses to undertakings, exhibits and motion material.

From my discussions and other communications with Messrs. Corbett and Palladina, at the earliest stages of my contact with the City concerning this matter, and on the basis of the initial information and reports to Council which they provided to me, I realized that, in order to fulfill my responsibilities to Council and the City, it would be necessary for me to conduct a full and comprehensive review of all of the stages of the City's search for additional long-term administrative office space for the City, on the basis of criteria embodied in the Guiding Principles quoted above, both before and since, their formal adoption by the Council on June 24, 2009.

In accordance with the instructions of the Council, I submitted my (attached) **Interim Report**, dated October 8, 2014, to City Council, describing the direction and progress of my investigation up to that time, including a chronological summary of the key actions and decisions of the Council and its staff in the course of the development and implementation of the SWQRP project. I also referred to the RFP process which had been pursued by the City, and the key role in the process of evaluation of Proposals and the provision of Recommendations to Council, played by members of the staff Evaluation Steering Committee, and the other bodies involved in the procurement process which culminated in the selection of Dominus as the Preferred Respondent.

In that report, I also listed the names of individuals, both Members of Council and staff, whom I had interviewed in the course of my investigations, and outlined the course of my investigation up to that time, and the list of issues which I had identified, substantially those listed above.

Among my principal objectives in my investigation, was to uncover every document and piece of information that might cast a light upon the process relating to the SWQRP. I was provided at the outset, by Mr. Palladina, with a large number of files and binders, and, as I made my way through them, listed every additional document and issue which I thought might be relevant to the issues, or might serve to corroborate, or cast suspicion upon, the conclusions and opinions rendered by those involved, including all of the relevant Minutes of Council and Committee meetings, and including issues and allegations arising from my interviews with Members of Council, staff and others whom I interviewed during the course of my investigation. In every case, I requested all further information and documentation which I believed to be necessary or useful to me in carrying out the investigation and preparing my Reports to Council, in accordance with my instructions. In no case was I refused such access. To the best of my knowledge there was not at any time failure on the part of staff to comply with my requests. During the course of my inquiry, I have amassed more than 60 binders and files of documentation, most of them of substantial size and volume.

Before and following the decision of the Council, on September 10, 2014, to appoint me as its Auditor General to conduct the investigation, I spent the majority of my working time over a more than three-month period, attending at my office at City Hall, collecting and reviewing documentation, and interviewing staff and Councillors, formally and informally, on the issues raised relating to the SWQRP. For much of the period following that time, I have worked in my office, (to which I have moved the material gathered and referred to above), on my investigation and Final Report.

Since the delivery of my **Interim Report** to the Council, on October 8, 2014, I have not established or found information or records inconsistent with my initial description of facts and chronology, or the preliminary conclusions which I had reached at that time, which would necessitate my amending or qualifying the description of my investigation, or preliminary observations, which I made in that report. At this time, I wish simply to include by reference the contents of that Interim Report, to the Council, (in addition to **my Second Interim Report**, and this one), as a fair and accurate commentary to City Council, and to the public, on the nature and course of my investigation, as conducted up the time of delivery.

In **my Second Interim Report to the Council, delivered on February 11, 2015, attached to this Report as APPENDIX "B"**, I reported on the fact that, on January 25, 2015, I had been advised by the Office of the Chief Administrative Officer of his intention to retain external consultants, in financial and procurement matters respectively, and that that decision of the CAO would add additional time to the completion of my investigation, as well as substantially improving its content and the assistance it would provide to the Council.

THE CONDUCT OF MY RESPONSIBILITIES AS AUDITOR GENERAL

Pursuant to the instructions of Council, and to my statutory role as Auditor General, an accountability officer to the City of Brampton, the following are my responsibilities, as laid down by the Municipal Act, 2001 governing the conduct of my investigation:

As Auditor General, appointed by City Council under the powers conferred upon it by ss.223.19 to 223.23 of the *Municipal Act, 2001*, it is my responsibility to report to, and assist, the Council in holding itself and its administrators accountable for the quality of stewardship of public funds and the achievement of value for money in municipal operations. I am required to perform these responsibilities in an independent manner, and to preserve secrecy with respect to all matters that come to my knowledge in the course of my duties under the *Act*; this duty is subject to my principal responsibility, which is to report to the Council on the outcome of my investigation, taking into account the fact that all or most of my Report will become a matter of public record.

While the Act provides me with enforcement powers to secure production by the City and its staff of whatever information, records, and property, I believe necessary to enable me to perform my duties, I have not found it necessary to exercise those powers to compel the provision of information in the course of my investigation, due to what I believe to have been the full and voluntary co-operation which I have received from City officials and staff from whom I have requested it.

I also have not seen the need in this case, to exercise my powers to compel any person to give evidence under oath, or to conduct a public inquiry under the *Public Inquiries Act*.

The investigation has been very time-consuming and detailed, in view of the fact that the process which it covers extended over the course of almost 15 years, involving many thousands of documents, and a lengthy list of events, reports and decisions by City Council and others, factors made more difficult by the fact that most of the most significant events occurred more than four years ago.

However, these problems have been, to a large extent, offset by the comprehensive and systematic recording of information and transactions regularly pursued by current and past members of City staff, and others, and the fortunate combination of the continued employment by the City of some of the key participants in the transactions, and the excellent memories, and high occupational competence of those members of staff whom I interviewed in the course of my investigation.

In this regard, I make special reference to the very helpful assistance provided to me throughout my investigation, and to the service provided to the City throughout the process which is its subject-matter, by Mr. Julian Patteson, then-Commissioner of Buildings and Property Management, (now Chief of Public Services), leader and key functionary on behalf of the City in the SWQRP, the RFP and the Council and committee decision-making throughout the period covered by this Report. Among other things, Mr. Patteson appears to have authored or co-authored, and participated in, every significant document, action and decision in the RFP and in the evaluation process, reports and presentations to the Council. I accept the truthfulness of the information which he has provided to me, over the course of several interviews, which has also been corroborated by other information which I have received.

I have also been fortunate in receiving the helpful assistance of other key advisers to the City, both within the municipal service, and as expert outside consultants.

I also greatly appreciate the most important contributions of Members of the Council who readily agreed to be interviewed for the purpose of my investigation and to contribute their information, knowledge and experience in assisting me in fulfilling my role as Auditor General to the City.

I hope and trust that my investigation, and Reports to the Council, will serve the purposes sought by Council and concerned staff in establishing the position of (Interim) Auditor General, and mandating my investigation into these matters, mainly to “clear the air” with respect to the concerns raised concerning the transactions in question, and to ensure that no stone has been left unturned in the finding and review of available information and records pertaining to the entire course of events leading to the implementation of the SWQRP, and the degree of attainment of Council’s objectives in so doing.

My investigation and Reports necessarily involve an exercise of hindsight, relating to decisions and judgment calls by the City and its Councillors and staff, and others, based on information known to them and considered at the time. Commitments were made, and binding contracts entered into. The building in question is now standing and in use, and I have not received or been referred to any substantial complaints or concerns relating to the quality of the project as implemented, or the validity of the agreements by which it came about.

Accordingly, in my preparation of this Report, I have tried not to attempt to revisit or second-guess unfairly the discretionary decisions which were made by the Council, and within its jurisdiction to make, in terms of policy issues which it adopted, the political or policy views of its Members, or the technical or financial merits of the advice which it received and relied upon, or to question the expertise, experience, and established reputations, of those who were selected by the City to provide it with such advice.

The SWQRP is a project of massive proportions, as were the decision-making process and transactions which led to its fruition. I have done everything possible, in my investigation and Final report, to stay within the scope of my responsibilities and the mandate imposed upon me by the Council.

In so doing, I recognize and acknowledge that I was not delegated to conduct an exhaustive inquiry into the conduct of individual Members of Council or others, involving matters which could or might have been dealt with at the time by the Council or its head, the Integrity Commissioner, the Closed Meeting Investigator, or other authorities, under legislation available for that purpose, or through litigation, or which may be addressed by the Court in the ongoing **Inzola** proceedings against the City, a rigorous and comprehensive process in which the Court will exercise its jurisdiction on the basis of sworn testimony. I also have not had the time, nor the mandate, to analyze fully every piece of information and speculative allegation which I received, or to suggest ways in which, had particular acts or conduct not occurred, or happened differently, the results of the process might have varied in some way.

Instead, I have concentrated my investigation on ascertaining the facts involved in the process which is the subject-matter of my inquiries, and providing my report on those facts to the Council, together with my evaluation of the propriety and legal basis of the transactions in issue, the specific relevant conduct of Council, its staff and others in the transactions, and the results achieved by the City, in the context of their relationship to the public interest which is the City's responsibility to serve. In addition, I have incorporated into this Report much of the financial and procurement advice provided by consultants **Fay Booker** and **Paul Emanuelli**, referred to above, which I accept as important contributions to this, my Final Report.

[On a technical note, I have adopted in this Report the practice of highlighting in bold print, some of what I regard as the most significant names, dates, events and statements, and of putting most quotations in italics].

MY INDEPENDENCE AND ABSENCE OF CONFLICT OF INTEREST

As stated above, the City Council appointed me, on September 10, 2014, as Auditor General for the City, "for the purpose to investigate the process and administration on the Southwest Quadrant (SWQ) Project...", the procurement process and transactions through which the City retained Dominus Construction Group for the construction of this project, and implemented the SWQRP. I have been involved since that time in conducting that investigation, and am in the final stages in the drafting and delivering of my Final Report to the Council.

At its meeting held on **March 4, 2015**, I appeared before the Council to report on the progress of my Report and the anticipated timing of its delivery to the Council. At that time, Councillor Sprovieri questioned me about my previous membership in the law firm of WeirFoulds LLP, other members of which had previously engaged in dialogue with City staff involving legal issues raised during the course of the SWQRP process, and insinuated that I may have a conflict of interest with respect to my role as Auditor General and investigator into the process on behalf of the City.

In view of the seriousness with which I treat allegations against me in my professional capacity, and the coverage given to these insinuations by the mass media, I am stating the following in my Final Report to the Council, for the purpose of clearing the air and assuring the public, and the City, of my professional integrity, the complete propriety in my pursuance of the investigation, and the

absence of conflict of interest of any kind, or grounds for such conclusion, relating to the performance of my role as Auditor General for the City of Brampton.

I have practised exclusively as a municipal lawyer for the last 40 years. I am the former Metropolitan Solicitor for the Municipality of Metropolitan Toronto, and certified as a specialist in municipal law by the Law Society of Upper Canada. From 1989 to 2013, I was a member of the law firm of Weir & Foulds, now known as WeirFoulds LLP. For a number of years I was a partner in the firm, and co-chair of its municipal and planning law practice group. I have authored or co-authored four books on municipal law.

In view of my experience in this area, my colleagues frequently would drop into my office to discuss informally issues of municipal law principles and practices. Frequently, the discussion would involve general principles, in which I may not have known even the name of the municipality involved or the precise facts and issues relating to the case. My input might, or might not, play any role in the firm's legal opinion to the client.

Following the recent Council meeting referred to above, I have reviewed the City's entire legal file relating to the SWQRP, which includes all of the hundreds of emails, opinion letters and reports provided to the City by lawyers, involving in any way legal advice or commentary with respect to any of the many issues raised during the course of the SWQRP project.

There is no reference to me in any of the correspondence, nor any suggestion of my involvement in any way in any of the matters involving SWQ, nor my signature or initials.

WeirFoulds LLP has since delivered a letter to the City categorically confirming that I was not involved in any way in work by that firm on the SWQRP project, directly or indirectly.

Accordingly, I conclude that I have no conflict or potential for conflict with respect to the performance of my responsibilities as Auditor General to the City, or to the conduct of my investigation.

During the course of my investigation, I carried on my work at all times independently of City staff. I was provided with an office on the 6th floor of City Hall, which I attended regularly, (as well as working on the investigation in my own office), but had minimal contact with Mr. Corbett, the then-CAO. My day-to-day contact with Mr. Palladina, the City's then-Associate Director, Corp. Development & Strategy, was limited to his complying with my requests for additional documentation. Although cordial, and supportive of my work, Mr. Palladina did not at any time become involved in discussion with me involving the subject-matter or substance of my research, and neither he nor other staff in the offices of the CAO, interfered with, or attempted in any way to influence, the course of my investigation.

The enormous amount of documentation, including the substantial number of binders and file folders, which I accumulated in the course of my investigation, were kept in my office at City Hall,

which I locked whenever I left it, and were not available to, or shared with, Mr. Corbett or Mr. Palladina. I recognized, and continue to recognize at all times, my duties of secrecy and confidentiality governing the conduct of my investigation, and have taken all steps possible to maintain throughout my complete independence from the City and its staff and other officials.

THE STATUTORY STRUCTURE AND ROLE OF THE CITY COUNCIL

Brampton was incorporated as a village in 1853, and as a town in 1873. Since 1974, Brampton has been a City municipality and Regional seat of the Regional Municipality of Peel.

Under Provincial legislation, the powers of the City of Brampton, (official name: The Corporation of the City of Brampton", also referred to as the "municipal corporation" or the "City corporation"), are exercised by its elected City Council, composed of eleven Members: the Mayor, five City Councillors, and five Regional Councillors, elected for four-year terms, at regular municipal elections, the last of which was held on October 27, 2014.

During the course of the decision-making and transactions described below, the City of Brampton, its Council and officers exercised powers and functions in a number of different capacities established or authorized by legislation, (statutes and regulations of the Province of Ontario, and by-laws of the Council itself), including:

- government legislator and regulator, through the enactment of by-laws;
- implementer and enforcer of provincial and municipal laws;
- decision-maker, through its Council and, administratively, by its staff;
- taxing authority;
- owner of real property, including City Hall and other properties, and local roads and sidewalks;
- lessor of real property;
- lessee of real property;
- enactor of official plan and zoning regulations;
- applicant for planning approval;
- planning and permit approval authority;
- supervisory planning authority;
- party to various contractual agreements;
- employer of staff involved in the RFP, evaluation, competitive dialogue, decisions and provision of advice;
- retaining contractor of various outside subject-matter experts, and consultants;
- delegator of powers and duties;
- licensor of airspace
- holder of responsibility for the administrative duties of staff and outside experts hired by the City.

Some of these capacities overlap or run concurrently, particularly in view of the fact that the Council is required by its legislative authority to exercise its powers by by-law. While the potential for perceived and actual conflict exists with respect to the fulfillment by Council of some of these roles, such is the product of the legislation, not, in itself, made unlawful by reason of that fact alone, nor does it suggest impropriety or a conflict of interest, in the legal sense, on behalf of the City or any Member of Council or staff.

Land in the downtown area owned or leased by the City, or in which it held an interest, from time to time during the period covered in this Report, include properties at:

- City Hall, 2 Wellington Street West;
- 41 George Street South;
- 57 George St. South;
- 55-57 Queen Street West;
- 41 Main Street;
- 20 George Street North, (the "Option lands");
- 8 Nelson St. West, various units;
- 24 Queen St. East;
- 55 Queen St. East;
- 33 Queen St. West;
- Civic Centre, Bramalea.

It was noted in the **RFP, issued on October 30, 2009**, that the lands at 41 George Street South and 57 Queen Street West were available for redevelopment as part of the development solution, and proposed that the City would "convey the use of those lands under a long-term ground lease arrangement that reflects market value at the time that the agreements are executed. The City will enter into separate lease agreements for each site."

As pointed out by Mr. Patteson in my initial interview with him, **Dominus** used only City-owned properties, 33 Queen Street West, 57 Queen Street West, and 41 George Street South.

CHRONOLOGY OF DECISIONS AND EVENTS LEADING TO THE ISSUANCE OF THE RFP

(1) The period commencing in 2005 - Moving Toward the First RFP [Request for Proposals] or "RFEI" [Request for Expressions of Interest] Process

At its meeting held on **June 8, 2005**, the **Committee of Council received a Report**, dated May 26, 2005, from Glen Gray, City Hall Expansion Program Manager – Planning Design and Development, and Dale Pyne, Asset Manager, Physical Plant and Real Property Services, on the subject: **Administrative Space Strategy – City Hall Program**. Signing and concurring with the Report were: Karl Walsh, Director, Community Design, Parks, Planning and Development, Julian Patteson, Director, Physical Plant & Real Property Services, John Corbett, Commissioner, Planning Design & Development, and John Wright, Commissioner, Management and Administrative services.

The Report commenced as follows:

"The existing City Hall was constructed in 1991 with the intent of providing sufficient administrative space for the next 10 – 15 years. With Brampton's rapid growth over the past few years and its current projection of long term growth, the current City Hall does not have sufficient space to accommodate long-term office expansion within the existing building envelope.

[reference to renovations already approved)...These additions were intended to meet accommodation needs until 2008, however, with the current rate of growth and the growth over the last two years this space may need to be supplemented further.

*In August, 2004, Council approved the commissioning of the firm FMDC to complete a long term review of administrative office space needs, based on Brampton's current growth projections (**Hemson Report**) and to develop a long term Accommodation Strategy for the City.*

Current Situation:

The analysis undertaken by FMDC has projected a requirement of approximately 1243 total staff from 2012 through until 2017 and a total long-term space requirement of 260,100 useable sq. ft. (300,000 sq. ft. gross). The current City Hall space and the consolidation of space that staff are occupying in other buildings such as 24 Queen St., represents 151,380 useable sq. ft. (175,000) sq. ft. gross) of this number with 108,720 useable sq. ft. (125,000 sq. ft. gross) required for new administrative growth.

*[reference is made to the **City of Brampton Space Strategy Plan, 2003**, in which the downtown and central corridor are to be given primary consideration for new municipal government facilities], ... However, the City would like to be more certain of costs in the downtown core and to know that it has explored all possibilities, has selected an option that will contribute to the vibrancy and redevelopment of the downtown core in the most effective way and will provide the best results and value for the City."*

The Report went on to discuss the staff suggestions that it would be appropriate to seek public input through a Town Hall meeting and to issue a Request for Proposals to the development industry, to explore other opportunities that might be presented through a competitive tender process, and consider alternative delivery and funding options that might be available through private sector involvement.

The Report continued:

"The RFP would provide a definitive outline of the City's requirements and preferences but would remain flexible enough to allow the development industry to explore and present options that may be unique, creative and best satisfy the City's economic and functional requirements.

The prime criteria that the city would like to apply [with respect] to [the] option are:

- The downtown area (extension of the existing facility or within a 5 minute walking distance from the present City Hall), as a first priority;*
- Affordability;*
- Efficient administrative space – not an icon building;*
- Leveraging other real estate options – including land already owned by the City;*
- Retail at the street level to encourage economic development and revitalization of the downtown core;*
- Parking would be for staff and City Hall visitors;*
- Development in two phases over time to satisfy the m needs."*

In accordance with the ideas and Recommendations contained in that Report, **City Council decided, at its meeting held on June 13, 2005, to authorize its Staff to issue an RFP** for the development of a City Hall expansion; and that public input be engaged through a Town Hall meeting to be held in either the Fall of 2005 or after the development submissions which would have been received and evaluated by January or February of 2006.

(2) The FMDC and Griffin Reports - 2006

The ***City of Brampton Corporate Accommodation Study, Final Report***, assembled by Griffin & Associates, and dated July 2006, included a ***Preliminary Report Outline***, prepared by FMDC Facility Management, dated **December 1, 2004**, in which it was noted that the “City of Brampton has been experiencing space shortage for the last three years.”⁷

In the Executive Summary of the Report, it was stated:

“It is the desire of City Council to accommodate its administrative staff at a centralized downtown City Hall location. During the past four (4) years, the City has grown at the rate of approximately 5% per year and this growth is expected to continue for the next ten (10) years. As a result of this rapid growth, the office accommodation and parking facilities are experiencing shortfalls much sooner than previous projections and City Hall, in its present form, is no longer able to accommodate all of the administration staff. The City is taking a number of interim actions to help satisfy the immediate administrative space needs.”

It was also noted in that Report that:

“At the time of this study, 2004/5, there are 841 administrative employees who currently work for the City of Brampton. [projected to rise to at least 1445 by 2012]

The administrative staff currently occupies 175,000 gross square feet...in spaces within the 2 Wellington; 24 Queen; 33 Queen; 55 Queen; Civic Centre; Ray Lawson and the Chrysler Drive (By law Enforcement) offices.”

The Report discussed various options which the City could consider for meeting its administrative space needs to the year 2012, and also addressed the need to expand the number of parking spaces required by the City, (in addition to the then-existing 372 at City Hall), at the ratio of 0.70 spaces per staff member.

Based on projections set out in the study, the Report concluded that:

“The projected accommodation requirements are based on 200 sq. ft. [180 useable sq. ft.] per person gross. The forecasted optimal space requirement will be 300,000 gross sq. ft.. Taking into consideration existing space, a shortfall of 166,362 useable gross sq. ft. has been identified as the required space by 2012.”

“The existing number of parking spaces at City Hall is 372. Based on the staffing projections to 2012, there will be a requirement of 650 new parking spaces for administration purposes (assuming all administration Services in the Central Area); and approximately 600 spaces in the long-term for general purpose, public parking.”

⁷ ***City of Brampton Corporate Accommodation*** Study, conducted during **2004** and **2005**, managed by FMDC Facility Management, with the support of Stonewell & Associates and URS. Griffin Associates provided the final assembly of information for the City of Brampton.

(3) The 2005-2007 RFEI Process, and its Cancellation on September 11, 2007

In November, 2005, the City issued a **Request for Expressions of Interest**, to seek expressions of interest from qualified Proponents to provide development proposals, to supplement or expand the current City Hall Administrative Space.

The RFEI was intended to be the first stage of a three-step process that included expressions of interest, a request for proposals (RFP), and negotiations.

At each stage of the proposal call and at the end of the process, negotiations would be pursued to enable the finalization of the terms of final arrangements with the selected Proponent.

The key objectives of the City in issuing the RFEI, involved a search for a Proponent who could demonstrate sufficient experience, financial capacity, and understanding of project requirements, to satisfy the City that the Proponent had the ability to deliver the product sought by the Council.

This latter requirement would include understanding by the Proponent of project requirements, including urban design guidelines, downtown revitalization, a reasonable approach to development and an appropriate procedure for site acquisition.

The City received five responses to the RFEI, and four proponents were short-listed to proceed to the RFP Stage.

However, as discussed in a **presentation to the Council Office Committee**⁸ by City staff⁹, difficulties arose in the administration of the process, and there emerged changed and changing objectives as to the nature of the desired project.

As it turned out, in practice, the form of RFEI was very open-ended, resulting in a broad range of proposals, including options both within, and outside of, the downtown area, and many delivery models, financing approaches, and ownership models. Difficulties arose with respect to quantifying and comparing the various proposals, resulting in what was described as an “apples and oranges” conundrum.

Other issues which arose, and were discussed by the Committee, included matters relating to:

- critical path planning;
- attracting new investment through this project;
- identifying potential partnerships with upper levels of government;
- exploring innovative funding sources;

⁸ At a Closed Session meeting of the Committee held on **June 26, 2007**.

⁹ A number of the most senior City staff, including Mr. Julian Patteson, Acting Commissioner of Management and Administrative Services, and Director of Physical Plant and Real Property Services, and a number of other senior Commissioners and other City officers, several of whom, particularly Mr. Patteson, the key figure throughout that process and the one under consideration in this Report, as mentioned above, have been involved throughout in decision-making and the provision of advice to Council, with respect to various key decisions involved in the planning and implementation of the SWQRP.

- the benefits of opening the process to the marketplace, which included competitive pricing;
- potential impacts of private/public partnerships;
- the need to establish “baseline” costs; and
- the desire to achieve a “signature building”, and its relative costs, as opposed to a “Standard Office Building”.

Advice was sought and received by the Committee, from the City’s internal and external advisors.

The matter was dealt with further at a **Closed Session of Council held on September 11, 2007**. At that time, the Council received a presentation from Mr. Julian Patteson, its key staff advisor and participant throughout the SWQRP process, on the **“City Hall Expansion Project”**.

In the presentation, reference was made to the factors referred to above, together with a number of additional issues and developments, including the following:

- “the long-term accommodation plan of 2004, with “build out and beyond” office requirements estimated at an additional 199,000 square feet, or annual space requirements for about 75 new staff per year;”
 - “blocking and stacking” initiatives at City Hall, completed and continuing to be planned;
 - “the current situation and corporate growth rates indicating the annual staff growth rate at 11% (exceeding 7% original target), and based on target density rate of 200 sq. ft. gross per person, equating to an increased additional office space requirement of 235,000 sq. ft. and 757 parking stalls;”
 - “Bridging Strategy over interim period includes requirement for approx. 60,000 sq. ft. over next 4 years with supply options including recapturing space from external tenants, leasing additional external space, renovating facilities, and/or constructing new facilities outside the downtown core.”
- “Discussion at the Spring Council workshop and Council Office Committee meetings remain valid:
- City Hall expansion in downtown location;
 - Land at 41 George St. and southwest Queen Street West and Main Street (northeast of existing City Hall) to be utilized;
 - Additional space to be better quality than ‘standard’, preferably a “signature” building;
 - Development requirements to include more than municipal office and parking uses;
 - Position development as “downtown revitalization” initiative.”
- reference to another Report, the KPMG review and partnership funding analysis, which had examined four variables – project cost, time, type of development and expected impacts – to evaluate various building types and partnership options, as well as funding options, including debenture financing;
 - three properties for development options were included: Site A (south-west corner of Queen Street West and Main Street), Site B (41 George Street), and a combination of Sites A and B;
 - total project development costs ranged from \$160 to \$243 million, depending on the site location, construction quality and development uses considered;

- the Toronto Region Conservation Authority flood constraints relative to Sites A and B;
- the process options, given the previous RFEI process and possible next steps for the RFP process;
- reference to Reports received with respect to partnership and funding options, legal risk assessment, flood constraints in the area, and finance information re: project costs thresholds and tax impacts.

Council's discussion of this matter addressed a number of issues, including:

- a range of project financing options needed to be explored;
- "Other similar public-building and capital investment projects in the GTA...have concluded that owning the asset is preferred to leasing over the long term".** (highlighting added)
- "issues and options from closing the original [RFEI] process because of changed circumstances and project requirements and proceeding with a new RFP process offered to the broad marketplace";**
- consideration of the following construction and use attributes tied to the project:
 - Building Construction:
 - parking options for Sites A and B;
 - Class "A" office space building finishes;
 - bridge connection between Site A and Site B;
 - meeting the Leadership in Energy and Environmental Design (LEED) Silver (12%) green building rating;
 - upgraded design features in compliance with the City's urban design guidelines;
 - structural upgrades to any ultimate Site B building/structure to allow for future expansion options; and
 - possible building uses.

The Council, at its meeting of September 11, 2007, effectively terminated the RFEI process, and instead directed staff to begin preparing new Request for Proposal (RFP) documentation for the City Hall expansion project based on the primary expansion occurring on Site A, and related uses on site B, e.g. parking, retail, and to include the following project attributes:

- Class "A" office space building finishes;**
- bridge connection between site A and site B uses;**
- project specifications meeting the LEED Silver (12%) green building rating;**
- structural upgrades to the site B building/structure to allow for future expansion on site B;**

and that staff be directed to report back, as part of the 2008 budget process, on funding options for the proposed capital expenditures for the City Hall expansion project, and on the status of the previous Request for Expressions of Interest (RFEI) process and necessary RFEI closure steps in order to proceed with a new process of an RFP released to the broader marketplace.

Much later in the process involving the SWQRP, in the ultimate **key Staff Report of March 21, 2011**, and its presentation to Council on **March 28, 2011**,¹⁰ it was noted that: "...Council cancelled the Process in 2007, before it advanced to the RFP stage, after recognizing the project had changed in the following aspects since the issuance of the [RFEI]:

- Scope and scale of development;
- Desire for "signature" building as opposed to a functional building solution;
- Increased focus on downtown revitalization
- Need for flexibility in the construction delivery approach."¹¹

While an issue was raised by public concerns expressed later about the SWQRP exercise, as to whether or not these were the REAL reasons for the cancellation of the process, my investigation has produced no evidence or reason which might have formed the basis for that suspicion. To the contrary, one of my conclusions in this Report is that the above grounds cited as the basis for the discontinuance by the City of the 2005-7 RFEI process, are accurate. In one of my interviews with Mr. Patteson, he confirmed those reasons, stating also that, at the time of the decision, Council received in closed session, two very detailed reports, a business model analysis from KPMG, and legal advice from an external law firm.

Two of the above grounds would appear to have constituted, to some extent, acknowledgement by the Council of the importance which it attached to the appearance and architecture of the proposed construction, and the context in which the proposed expansion of the then-current City Hall administrative space would take place.

By letters dated October 30, 2007, Proponents were advised of the City's termination of "the RFEI-RFP process for the Provision of Additional Accommodation Space for City Hall Staff".

(4) The Long-Term Administrative Space Strategy, and Decisions Leading to the 2009 RFP

As later recounted in the March 11, 2009 Staff Report to the Council, "Following cancellation of [the] proposal call in 2007, staff was directed by Council to undertake a number of work packages and due-diligence studies..."

One of these involved consideration of possible acquisition by the City of the property at 8 Nelson Street West.

At its **Meeting held on June 25, 2008, Council received a Report from Mr. Patteson**, entitled **Long Term Administrative Space Requirements – Project Scope and Terms of Reference**, which identified the City's need for an additional 235,000 sq. ft. of administrative space and an additional 757 parking stalls

¹⁰ Authored by **Mo Lewis**, Commissioner of Financial and Information Services and City Treasurer; and **Mr. Patteson**, Chair and Vice-Chair, respectively, of the **Evaluation Steering Committee**, as discussed further below.

¹¹ Quote from page 4 of the subsequent Staff Report to Council of March 21, 2011, recommending that Dominus be selected as the Preferred Respondent, adopted by the Council at its meeting held on March 28, 2011.

At its meeting held on **November 12, 2008**, **City Council received a Presentation by Mr. Patteson** on the **Long-Term Administrative Space Strategy**, including matters related to the City Hall expansion, the results of a “lease vs. own” property analysis, and an update on the possible acquisition of 8 Nelson Street West.

The presentation covered the following points:

- The Cushman Wakefield Lepage **Lease vs. Own Property Analysis** conclusion that it is less expensive to own property over the longer term;
- Critical assumptions and risk factors in the financial analysis;
- The financial strategy regarding long-term administrative space options, including order-of-magnitude costs for a City Hall expansion;
- Status of the 8 Nelson Street proposed acquisition and its potential to provide office accommodation growth for 2 to 5 years;
- The potential annual operating cost avoidance and capital cost avoidance anticipated from the acquisition of 8 Nelson Street.”

At a **Meeting held on November 28, 2008**, **Council authorized the acquisition of 8 Nelson Street W.**, subject to a conditional period within which the City could conduct a thorough and exhaustive due diligence review of the building.

The **Mayor delivered a Report, dated December 10, 2008**, entitled: **Long-Term Administrative Space Strategy Update** to the City Council meeting of **December 10, 2008**. In that Report, it was recommended:

- “That the long-term administrative space needs of the City of Brampton be discussed with members of the public during the Strategic Plan process to be undertaken in 2009/10;
- That staff be directed to continue undertaking required financial analyses as outlined in the Report, and to report back to the Council at appropriate intervals.”

The Council was also in receipt of a letter from the Brampton Downtown Development Corporation, recommending against the City’s purchase of the 8 Nelson Street West property.

The Council at that time decided to defer consideration of the Report until a meeting early in 2009, to allow for further discussion with interested stakeholders, including the Brampton Downtown Development Corporation and the Brampton Board of Trade.

The Council dealt with the Mayor’s Report at its meeting held on **February 25, 2009**, after the Mayor had met with those stakeholders, and others, as well as attending a meeting of Canada’s Big-City Mayors’ Caucus with the Federal Finance and Infrastructure Ministers, seeking infrastructure funding for Canada’s municipalities.

In her Report to the Council, and in her dialogue with stakeholders, the Mayor confirmed that:

- “the City’s own employment growth now exceeds available inventory to accommodate our workforce;

-by 2031, the projected need for new administrative space to house all projected city staff, is in excess of 230,000 sq. ft.;

-Council has already approved that the administration of our City will be in our downtown core..."

After debate concerning these issues, and hearing from a large number of delegations, **the Council decided at that meeting** that:

"-in recognition that administrative space is a priority, Council must undertake a process to define the scope of the project, determine the building program, and identify all administrative and public components of the building to meet current and future needs; (to be placed as a priority agenda item at the planned Council Workshop scheduled for April 27, 2009);

-a stakeholder workshop would be held early in May, 2009; where interested parties would be given the opportunity to provide input on the scope of the project;

-a full financial analysis and strategy will be required that addresses:

- a. the availability and advisability of the use of external resources;
- b. the availability and advisability of the use of external debt (i.e. including analysis of debt servicing costs and potential impacts to taxpayers);
- c. the capacity to leverage investments and partnerships with senior levels of government, including a detailed advocacy plan for communicating Brampton's priorities; and
- d. the potential to seek and secure interest from third party investors;..."

and that, "at its meeting of June 24, 2009, Council confirm the scope of the project and the detailed financial analysis and subject to Council deliberation and decision, **direct staff to make every reasonable effort to issue a proposal call to give effect to Council's decision within 90 days.**" (highlighting added)

These decisions were adopted by a unanimous recorded vote of all eleven Members of the Council.

The Council also, at the meeting of **February 25, 2009**, following review of a report, dated February 17, 2009, from the Commissioner, Buildings and Property Management, (Mr. Patteson), decided not to waive the inspection condition, and **thereby let the Agreement for Purchase and Sale for the property known as 8 Nelson Street, expire.**

By Letter of Engagement dated March 17, 2009, signed by Mr. Patteson on behalf of the City of Brampton, (as authorized by City Council), **the City retained McKellar Associates Ltd., ("McKellar")**, represented by Professor James McKellar, Professor and Academic Director in Real Estate and Infrastructure, York University, and an expert in procurement, to serve the City for the period from April 1 to September 1, 2009, through a Consulting Assignment, to provide advice and expertise, participate in Council and stakeholder

Workshops, and do other related work, as might be required to achieve the City's stated objectives for the Long-Term Administrative Space Strategy.

"The Consultant will undertake work on an: "as-needed" basis and as directed by City staff and including advisory services, research and analysis, preparation of documents, attendance at meetings, preparation of written briefs, and various presentations. James McKellar will be the person responsible for delivering the services under this Letter of Engagement."

As in the case of all City staff engaged in the process, as well as consultants contracting with the City for services for this purpose, Prof. McKellar was required to sign Confidentiality and Code of Conduct Declarations.

Among Prof. McKellar's first projects for the City, was to author a substantial and detailed Report, **"Alternative Financing and Procurement Models"**, to be distributed at a scheduled Workshop of the Council.

(5) The Council Workshop held on April 27, 2009, and the Hanscomb Report

[Attached as Appendix "C" to this Report is a timeline of events, from April 27, 2009 to September 5, 2012, prepared on behalf of the City].

On **April 27, 2009**, the City Council attended a **Council Workshop**, (a closed session meeting of the Council to consider a proposed or pending acquisition or disposition of land, permitted by s. 239(2) of the Municipal Act as an exemption from the general requirement that council meetings be open to the public), at the Marriott Hotel, at which each of the Members received a binder of documents assembled by the City Clerk, entitled **"Administrative Space Strategy Reference Materials Related to Chronological Summary of Closed Session Council Directions and Related Open Sessions Council Resolutions"**, as well as a second binder of related documents.

The City Clerk's **Reference Binder, Volume 1**, contained a comprehensive collection of relevant Reports and Council decisions, from the key staff Report of May 26, 2005 onward, up to the date of the Workshop.

The all-day Workshop was attended by all eleven of the Members of Council, and 19 senior members of staff.

Some of the statements by the Mayor in her opening remarks to the Workshop, as summarized in Notes of the meeting, are as follows:

"...topic to-day is administrative space; history goes back to 1991 with decision at that time to stop decay in the downtown; considerable organizational growth since that time – need more space; administrative space is not a luxury but a necessity; we are not acting without a plan, but in the midst of interim strategy plan – working towards 2009 decision to go forward or not..."

Commissioner Mo Lewis, Commissioner of Finance and Treasurer, made a presentation to the Workshop, on the current economic climate and outlook, financial tools and internal sources of funding, City tax rate outlook and possible sources of Federal and Provincial funding, for the project.

Commissioner Patteson, in response to questions from Councillors, advised that the City was paying \$600,000 per year for rent (net) in other buildings in addition to City Hall. He also stated the historical norm for annual increase in the number of administrative staff to be 75.

The afternoon session opened with a presentation by Prof. McKellar entitled “**Defining the Project Scope**, in which he discussed the various models of infrastructure procurement and financing, and the allocation of risk, including the range of approaches, from the traditional model of design-build, in which the higher risk is assumed by the public sector, through to options provided by public-private sector partnerships.

Included in Prof. McKellar’s written material was the example of the **DBFM (Design-Build-Finance-Maintain)** Project for the development of the Durham District Consolidated Courthouse, and the lessons demonstrated by the process followed, and factors considered, in that case, concluding with an analysis of the factors to be taken into account by the City Council in proceeding with its Administrative Space Project.

There ensued a lengthy question-and-answer period and discussion amongst the Councillors and staff on a wide range of relevant issues, including:

- “ -Signature vs. class B building;
- financial considerations – debt, reserves, potential tax impacts, secure partnership with others;
- other catalysts for downtown development;
- securing TRCA approval re. flood plain;
- What is the cost of doing nothing?
- How do we create plan to seek partnerships?
- Priority should be on how we insulate the taxpayers;
- Financial analysis critical;
- Ask City Manager what next steps are in process.”

Arising out of the Workshop, and in preparation for the upcoming June 24, 2009 meeting of City Council, the City obtained from financial consultant, Hanscomb Limited, a review of City budget estimates undertaken by the City regarding the Administrative Space Project.

In the **Hanscomb Report** of May 11, 2009, it was stated as follows:

“The unit rates included in the estimate for both Signature (Class A at \$204.4 million assuming a construction start in early 2011) and Standard (Class B at \$171.9 million assuming a construction start in early 2011) are conservative, appropriate and within industry norms at this very early stage of the project definition. We understand from the City that other Quantity Surveying firms [have] been involved at some stage as well during the evolution of this budget estimate. This lends additional credibility to the budget estimating process that the City is undertaking on this project.

...[This] is a large, exciting and complex project for the City of Brampton and we are impressed with the approach that the City has taken at this early stage of the project."

(6) Meetings Leading to the Decision to Proceed with the RFP

At its **in camera meeting**, (meaning a meeting not open to the public), held on **June 10, 2009**, the City Council received a Presentation from its City Manager, (Ms. Dubenofsky), who introduced the matter, noting that the "presentation advances the consideration of options discussed at previous sessions and that a similar presentation in Open Session is being planned for Committee of Council meeting on June 17, 2009, in advance of the June 24 Council meeting."

Ms. Dubenofsky, Mr. Patteson, Randy Rason, Director of Building Construction, and Don McFarlane, Acting Commissioner of Finance, provided a presentation addressing: recap on potential build options and order-of-magnitude costs; lease options; and financing options. This presentation was followed by lengthy Council and staff discussion of the issues raised in these and previous presentations, reports, decisions and issues referred to above.

The Council decided at that time to direct that "the City Manager report to the Open Session of the June 17, 2009 Committee of Council meeting regarding the **Administrative Space Strategy**."

The Committee of Council, at its meeting held on **June 17, 2009**, received the presentation of a detailed Report from the City Manager, entitled **Administrative Space Project**, together with written presentation material distributed at the meeting, discussing the City's **Administrative Space Strategy**, including the following subject-matters:

- context: economic climate uncertain; City revenues; timing; rent v. own; existing and required administrative space; the Guiding Principles;
- review of work to date; options; order-of-magnitude costs; finding partners;
- alternative build options and business models; City-owned lands; offsetting revenues; possible capital lease (lease-to-own), considered a viable alternative;
- financing implications and options: debt; reserves; re-direct spending;
- assessing the options; emphasis on principles; need for private sector investment;
- areas of agreement: taxpayer interests paramount; shared goal to revitalize historic downtown; private sector interest paramount; valued input of residents and other stakeholders;
- finalizing the Plan – Key questions.

Extended debate ensued among the Members of the Council/Committee, including, particularly, consideration of:

Revitalization of the downtown;

Establishing a funding plan;

Pursuing a public-private partnership;

Lease-to-own Development Options

The Committee received a number of proposals and motions intended to be brought forward to the next meeting of the Council.

The Council at its meeting held June 24, 2009, gave consideration to the above issues, and others in connection with the project, received submissions from a number of delegations and expert opinions and advice, and gave consideration to the many proposals and resolutions which were before it at that time.

Among them was a Notice of Motion, which included a preamble of two full pages of chronological and historical background information describing the important principles adopted by the Council and to be applied in consideration of the factors relevant to the next step in the realization of the City's **Administrative Space Strategy**, including reference to advice provided to the Council by Prof. McKellar and industry and business leaders, that "the cost of construction and interest rate borrowing costs are currently at an all-time low", and concluded with a proposal for consideration of the following Motion submitted to the Council:

1. **"That staff be directed to prepare and issue by no later than October 31, 2009, a Proposal Call, to solicit responses from the market for a unique and creative way to deliver a mixed-use revitalization in the south-west quadrant of the "Four Corners" including 41 George Street, that includes, for example, retail and a new downtown Library; that delivers City Hall administrative space in terms to be specified by Council by no later than 2014; maximizes private investment; satisfies the City's desire to achieve a nominal or no additional impact to the property taxpayer;**
2. **That the Proposal Call include the requirement for respondents to meet the...guiding principles endorsed by Council [the seven Guiding Principles quoted above]; and to include alternatives to a City-owned and operated building such as, but not limited to, a lease-leaseback arrangement; a lease of the property with an option to buy; a build-to-suit arrangement, or a lease for a portion of the Project for a fixed term.**
3. **That Council reaffirm the City's preference to have its needs met by a physical addition to City Hall located to the north of the existing City Hall building; however, the City shall remain fully open to consider other development possibilities provided the alternative proposals fall within a defined area described in the Urban Design Guidelines, which is generally considered to be within a five minute walking distance from City Hall;**
4. **That the Corporation of the City of Brampton immediately review their current and planned Capital program expenditures and assets, with a view to consolidating and evaluating these assets for potential sale to private sector interests and/or consortiums to offset anticipated costs associated with the expansion of the Brampton City Hall while meeting the objectives of the community's Strategic Plan to enhance opportunities for private sector investment, assessment and job creation."**

The Council decided at that time to adopt the four-part motion.

A recorded vote was requested with respect to part 1 of the motion, the results of which were as follows:

...Carried 10 – 1.

Among additional directives of the Council were:

- that the market be encouraged to consider City-owned land in their submissions;**
- that proposals would be entertained for office space which would complement the existing City Hall;**
- that the project satisfy the City's economic and functional requirements and maximize private investment; and**
- that the proposals recognize the City's desire that City objectives be achieved with a nominal, or no, additional impact to the property taxpayer.**

The Council also decided at that time to give consideration, in the 2010 budget deliberations, to the establishment of a financial plan and reserve account to support the City's long-term space needs.

At its meeting held on September 23, 2009, the Council received a presentation and Report, dated September 16, 2009, from Commissioner Patteson, entitled **South-West Quadrant Renewal Plan – Status Update**.

At the meeting, the Council also received clarification from its staff that the City's initial administrative space requirements of 126,000 Square feet in 2014, would remain as the target number and would not include "repatriation" (moving) of Building Division staff, as mentioned in the Appendix to the Report.

The Council decided at that time **to proceed with a single-stage Proposal Call, ("RFP" as it was then, and subsequently, called) as opposed to a two-stage proposal call, which would have started with a Request for Qualifications.**

At that time, Council received advice from Prof. McKellar, which included the importance of the principle that in the Proposal Call, the City must demonstrate the same qualities that it expects of a potential partner.

The Council was also advised by staff that the RFP then under consideration, would include:

- contribution of City-owned lands;
- the City's commitment to help secure other private land-holdings;
- a commitment to lease (or lease-to-own) and occupy 126,000 sq. ft. of administrative space, as an initial requirement; and

-a commitment to introduce an “Enterprise” type of zoning, which would spur creative mixed-use development within the South-West Quadrant.

Staff would report back to the Council, prior to the issuance date, to provide a preview of the RFP.

It is noted that it was in this period that the Council **made a deliberate decision to “re-brand” the project, to change the emphasis of its objectives from simply an administrative space strategy, to revitalization of the downtown, particularly the south-west quadrant.** Mr. Patteson, suggested that Council’s goal may have been based on the expectation that “new construction and a significant investment by the City would demonstrate to the private sector that the downtown area, the downtown core, is one of significance and importance to the City, and they should respond in kind and also invest money in the downtown...”

City Council, at its closed session meeting held on **October 21, 2009**, received an oral briefing and slide and written presentations by Commissioner Patteson, entitled **SOUTHWEST QUADRANT RENEWAL PLAN – STATUS UPDATE**, and **Preview of RFP Document for the SouthWest Quadrant Renewal Plan – Ward 4**”, which latter document, together with the draft RFP attached to it, was marked “Extra CONFIDENTIAL”, and which went on to constitute one of the key defining documents in the process followed by the City in pursuance of its SWQRP project.

Prof. McKellar, who had been designated by the City as its Process and Fairness Advisor, was also present for the item, and provided a comprehensive **Summary of the Competitive Dialogue Approach**, and outlined the circumstances to which it is best-suited, including the factors involved in pursuance of the objectives of the City of Brampton. Prof. McKellar also provided to the Council a lengthy and comprehensive “**Draft for Discussion**”, document dated October 16, 2009, outlining in detail each of the components, timing, and characteristics involved in the RFP process, including analysis of the possible courses of action, and an example of an actual such process with which he was familiar, involving the Durham District Consolidated Courthouse RFP.

In his **Update** Report to the Council, Commissioner Patteson “defined the intent of the process as selecting a partner with whom the City will negotiate a final set of agreement documents to meet the Administrative Space Project needs of the City. It is a single-stage process that is open to the marketplace. The City will evaluate the information received from Respondents and use the results to select Preferred Respondents. One or more Preferred Respondents may be engaged for further consideration and possible contract negotiations.” His Report continued as follows:

“The RFP process is based on the “**Competitive Dialogue**” approach that is new in Canada but has been used successfully in other countries, e.g. United Kingdom. Using this leading edge method, the City will work with proponents to maximize the creativity of the marketplace and to “funnel” ideas into solutions to meet the needs of the City. Competitive Dialogue is achieved through a structured process that maintains competitive integrity and respects commercial confidentiality.

“In Competitive Dialogue Procedure, dialogue takes place between proponents and the City to identify and define solutions to meet the City’s needs. Dialogue may be conducted in successive stages,

with the aim of reducing the number of solutions/bidders. Award is ultimately made on the best and most economically advantageous solution.

The process begins with the issuance of the RFP on October 30, 2009. A recommendation for City Council approval is scheduled for August, 2010, followed by contract signature scheduled for September, 2010. The Competitive Dialogue team will evolve from the current steering committee and be supplemented by external experts as required. Professor James McKellar, York University, will be assigned to the role of Process Advisor.”

In his **Status Update** document, Commissioner Patteson set out further reference to the use of the Competitive Dialogue Procedure (prepared with input from Prof. McKellar):

“ -When to use Competitive Dialogue Procedure:

- when contracts are particularly complex;
- when the contracting authority (in this case the City) is not yet able to fully define the technical means for satisfying its needs;
- when the contracting authority is not yet able to fully specify the legal and/or financial make-up of the project.

-Main Features of Competitive Dialogue Procedures:

- Dialogue takes place between proponents and the City, to identify and define solutions to meet the City’s needs;
- Dialogue may be conducted in successive stages, with the aim of reducing the number of solutions/bidders;
- There are explicit rules to guide the discussions with proponents, to ensure rigour, discipline and confidentiality;
- Award is ultimately made on the best economically advantageous solution.”

-Competitive Dialogue Process Flow:

Issuance of RFP

Proponent Submissions

Invitation to Participate in Dialogue

Dialogue Phase (Number of solutions /bidders can be reduced where set out in Descriptive Document)

Final Submissions (Seek clarification, specification and fine-tuning from Proponents as necessary)

Selection of Preferred Proponent (PP) and notification of PP and other Proponents ...

Contract Signature

* In the case of the City of Brampton:

October 30, 2009

February 11, 2010

March 19, 2010

March 19, 2010 to August 17, 2010

December 9, 2010

March 28, 2011

October 31, 2011

***I have used reference to this list of components of the RFP-Competitive Dialogue Process to set out beside each activity the actual or approximate date at which each of the stages shown, was scheduled, took place or was substantially completed, in the City's actual SWQRP process.**

Council discussion included a number of issues of key significance to the maintenance of the integrity of the RFP process:

- under consideration by the Council, perhaps for the first time, was the procurement approach known as "competitive dialogue", concerning which further discussion is continued below;

- the "project features" of the RFP may be amended following identification in the competitive dialogue process, and the agreement of all Proponents;

- "City will dialogue, rather than negotiate with, Proponents, since the main principle is to maintain equality in the competition";

- "A major advantage of this process is that it allows the timeline to be shorter, in comparison with other multi-stage procurement processes";

- RFP process [will contain] restrictions and proponent disqualification provisions regarding "no contact period" and lobbying."

The **presentation material provided to the Council** at that meeting (October 21, 2009), also included an "**RFP Timetable**", and a draft, dated October 21, 2009, of the **SWQRP RFP**. The draft RFP was presented and distributed to Councillors at the commencement of the meeting, and picked up again at its end. Mr. Patteson stated that: "there was quite a healthy discussion around the different items. So we believe that Council was well-informed..." Council did not, however, vote to adopt the draft form of RFP or any part of it. At the same time, in the words of Mr. Patteson, "...the Minutes of the meeting do not specifically show direction to staff, but likewise do not show any concern with what was presented. And checking with the Clerk, we deemed that as being accepting of what we presented."

As with all of the stages of the Process, City Staff, and expert Consultants retained by the City, in preparation for the RFP Process, and during its implementation, produced a substantial amount of detailed documentation to ensure the proper application of the form of RFP adopted by the City, and the Evaluation of Responses, including the following:

Manuals prepared by Deloitte

- February, 2010 Framework to Evaluate Responses to Request for Proposal;
- March, 2010 Competitive Dialogue Process;
- November, 2009 Competitive Dialogue Process – Addendum, including Timetable;
- April 15, 2010 Invitation to participate in Dialogue;
- December, 2010 Framework to Evaluate Final Offers.

Documents prepared by the City of Brampton

- Undated Guidelines for Evaluation and selection

- April 30, 2009 Dialogue Guidance Document, including Competitive Dialogue Protocol
- July 13, 2010 Dialogue Guidance Document Supplement – Final Offer Submission Requirements and Evaluation Criteria
- October 28, 2009 Request For Proposal Advertisement.

On **October 29, 2009**, the day before the RFP was to formally issue, Mr. Patteson circulated to Members of Council and all involved members of City staff, an email containing key messages for Members of Council and some Questions and Answers (Q & A's) around the procurement process, including explanation of the "no contact" or "quiet period" once the RFP is issued. "As described in Section 4 [of the Q & A], Members of Council can discuss the general objectives of the RFP (what we are trying to accomplish for the City), but not specifics relating to the RFP document or process." (Quoted from the email from Mr. Patteson to Councillors and Staff).

(7) THE RFP ISSUED BY THE CITY OF BRAMPTON, DATED OCTOBER 30, 2009

The RFP, and its supporting documentation, and later Addenda, represented a substantial amount of work, research and preparation by City staff, in which Prof. McKellar also played a role. Information updates about its development and evolution were provided to the Council from time to time.

Documentation constituting and/or containing terms of the City's RFP, or providing background or guidance for its issuance, included:

"Request for Proposal – RFP 2009-072, for the Southwest Quadrant Plan", dated October 30, 2009; (27 pages, containing 69 clauses, from A1, "BACKGROUND", to K13, "JOINT VENTURES");

CD material containing substantial additional information in Appendices, including the following Appendices and Reports:

- **Glossary of Terms Used throughout the RFP Document;**
- **The RFP Process (flow chart);**
- **Central Area – Community Improvement Plan: Development Charges Incentive Program – Implementation Guidelines,** (June, 2009);
- **City of Brampton Central Area Community Improvement Plan,** (November, 2007);
- **Downtown Retail and Service Demand Analysis – Update – City Hall Addition** (Malone Given Parsons Ltd., June, 2009);
- **Downtown Urban Design Background Study – Built Form Controls – Zoning By-law Revision,** (July, 2006);
- **Brampton – Downtown Urban Design Vision Study – "A Vision for Downtown Brampton",** (September, 2005);
- **Submission Checklist: "Southwest Quadrant Renewal Project – RFP Checklist"**
- **"Appendix G – Legal Information Form".**

The City, through its staff, subsequently issued four **Addenda** to the RFP, as follows:

Addendum No. 1, November 27, 2009, (“twenty-one pages”), (provided to those attending the “non-mandatory site meeting” for prospective Respondents to the RFP);

Addendum No. 2, December 18, 2009, (“two pages and one disc”);

Addendum No. 3, January 13, 2010, (“one page”);

Addendum No. 4, January 14, 2010, (two pages”).

The RFP, its four Addenda, and the substantial amount of material contained digitally on accompanying CD inserts and attachments, comprising, when printed, a total of more than 2 ½ inches of material, would appear to have constituted terms and conditions of the RFP, which may also have been interpreted or supplemented by **Invitations to Participate in Dialogue**, a guidance document forwarded to selected Respondents.

(8) THE TERMS AND COMPONENTS OF THE RFP

The RFP was published, in abbreviated form, commencing October 28, 2009 in the Globe & Mail, as “**City of Brampton Request for Proposal – RFP 2009-072**”, dated **October 30, 2009**.

The key points set out or referred to in that documentation, include the following:

- the City of Brampton was seeking a Development Partner for the SWQRP;
- the City required 126,000 square feet of Net Leasable Space for administrative purposes, as measured by BOMA standards, ready for occupancy by January, 2014;
- the City also had a forecasted need for an additional 120,000 sq. ft. in the period 2014-2013;
- reference was made to public amenities which might also sought by the City, including a 1,500 sq. ft. Community Police Station, 130,000 sq. ft. Central Library, 10,000 sq. ft. of multi-purpose meeting space and 2,500 sq. ft. of committee rooms;
- the City also had an interest in achieving an additional 35,000 to 55,000 sq. ft. of new retail and service commercial space in the development area, as part of a broader mixed-use revitalization plan.
- the RFP gave notice of the non-mandatory site meeting, to be held on November 27, 2009 at City Hall, and to supplementary guidance documents to be issued as Addenda to the RFP and made available to interested parties at that time.
- deadline for Proposals was set at February 11, 2010, at 2:00 p.m..
- reference was made to the complete Proposal Documents, available from the Purchasing Division of the City.

The full **SWQRP Request for Proposal RFP 2009-072** is generally in a form common or analogous to many standard forms of RFP procurement documents, and contains features arising from the process and considerations outlined above.

The following are some specific provisions contained or referred to in the main document of the RFP:

- the RFP was stated to be a “nonbinding competitive process”;**
- selection of the Preferred Respondent would be based on a “Final Offer”;**
- the RFP Process begins on the issuance of the RFP and terminates on the date of the execution of the Agreement Documents;**
- there will be a single point of contact for Respondents, the City’s Purchasing Supervisor, [Ms. Diane Oliveira];**
- “Any Respondent found to be in communication with other than the Purchasing Supervisor may result in the City disqualifying the Respondent’s Submission.”**
- disputes will be settled by arbitration as described in the Agreement documents;**
- the City’s objective is to obtain the best value for money by seeking the best Submission, taking into account the City’s Guiding Principles, at a competitive price, and which satisfies the requirements of the RFP;**
- “The RFP Process is based on the “Competitive Dialogue” process. This approach seeks to harness the creativity of the private sector to craft what the best solutions might be to fit the particular needs of the City. The approach is predicated on the assumption that alternative solutions may be possible.”**
- The intent is to enforce the Central Area as the “heart” of the City.**
- the evaluation of Submissions to the RFP Process is based on a two-step process. In the first step, all Submissions will be evaluated against weighted criteria by an Evaluation Committee” comprised of City senior level officials... technical evaluation will result in the identification of two, and perhaps three, Respondents who will be invited to participate in a process of Competitive Dialogue with the City on the basis of their Submissions.**
- the Evaluation Committee will evaluate the Final offers and identify and subsequently recommend the Preferred Respondent to Council for approval.”**
- the City, at its discretion, may ask Respondents as part of the Final offer to include a maximum of three display panels, depicting the design features of their solution, suitable for public display;**
- an Evaluation Table sets out the respective maximum scores to be used in the evaluation of Proposals of Respondents invited to participate in Competitive Dialogue:**

Vision Statement	10%
Proposed Solution	40%
Lead Respondent – Qualifications and Experience	25%
Respondents team – Qualifications and Experience	15%
Design and Sustainability	10%
Financial Strength/Ability to Deliver the Plan	Pass/Fail
TOTAL MAXIMUM SCORE	100%

The RFP set out a Timetable for the intended happening of events in the RFP process, from October 30, 2009, the date of issuance of the RFP, to September, 2010, when the Agreements were anticipated to be executed between the City and the successful party.

The RFP went on to stipulate and require the following:

“-the Respondent agrees and confirms that its Submission to the City of Brampton pursuant to the RFP indicates express acceptance of the following terms required in the RFP;

-CONFIDENTIALITY: Any information received by the Respondent relating to any aspect of the City’s Plan, is to be treated in strict confidence. Respondents must not disclose any details pertaining to their Proposals and the selection process, in whole or in part to anyone not specifically involved in its Submission, unless written consent is secured from the City of Brampton.

-each Respondent is required to file with the City a Conflict of Interest Declaration, and “to sign and submit a confidentiality agreement in a form and substance prescribed by the City (the “Confidentiality Agreement”) prior to the Competitive Dialogue process.”.

The City had not yet adopted a specific form of confidentiality agreement for this purpose, at the time of the issuance of the RFP. A short time later, City staff worked with its Competitive Dialogue Advisor, Deloitte, and legal counsel, to formalize that document and forward it to Respondents.

Mr. Patteson advised me that **the form of Confidentiality Agreement was not submitted to Council for approval**: “It was a working document, like many other working documents within a procurement process, and we didn’t feel it was necessary to go back to Council for that approval.” He also confirmed that the same approach applied to the four post-RFP Addenda.

(9) PREPARING FOR EVALUATION OF THE RESPONSES TO THE RFP

Early during the process of implementation of SWQRP, the City had established a **Steering Committee, composed of Messrs. Mo Lewis, Commissioner of Finance; Dennis Cutajar, Commissioner of**

Economic Development and Communications; John Corbett, Commissioner of Planning, Design and Development; and Julian Patteson, Commissioner of buildings and Property Management.

In accordance with the recommendations of Mr. Patteson contained in an email dated November 2, 2009 to the City Manager, an Evaluation Committee, later referred to **as the Evaluation Steering Committee was formed, having the same membership as the former Steering Committee, plus Messrs Randy Rason, Director, Building Design and Construction, Peter Honeyborne, Director, Treasury Services, and additional Directors, Don McFarlane, Karl Walsh and Don Eastwood. Mr. Lewis was to be Chair, and Mr. Patteson, Vice-Chair.**

Later in the process, **the Evaluation Steering Committees created sub-committees**, to consider completeness, technical and financial aspects, respectively, of the Proposals.

It was felt that there was no need for separate teams for Competitive Dialogue and Evaluation aspects of the process.

Those involved in the Process commenced a series of meetings to discuss and further the SWQRP RFP process. Participants at some of these meetings included Andrew McKaig, of Deloitte Touche, financial consultants retained by the City; Prof. McKellar, as Process and Fairness Advisor; Denis Squires, of the City Solicitor's Office; Ms. Oliveira, the City's Purchasing Supervisor; Jane Fera, Manager of Purchasing; and other City officials from time to time.

At the second of these meetings, held on **November 10, 2009**, members were taken through a "roadmap of the RFP process", and engaged in lengthy discussion of the Competitive Dialogue and proposed Evaluation/Selection, processes and procedures to be followed, as well as the form and particulars of the RFP and its Addendum No. 1.

On **November 27, 2009, a Non-Mandatory Site Meeting** of the Evaluation Committee was held, open to the public, but not including Councillors, (due to the "no contact" period inherent in the RFP), but including subject-matter experts, McKellar and McKaig, Ms. Oliveira, and Staff Co-ordinators, Rason and Pyne¹²), with objectives "to generate excitement around Downtown Brampton and the Southwest Quadrant Renewal Plan", and to review contextual information pertaining to the SWQRP, provide supplementary guidance on RFP 2009-072, and introduce and deliver **Addendum No. 1**, (21 pages), which included: changes to the RFP document, (6 pages); a summary of the Competitive Dialogue Process, (3 pages); Competitive Dialogue completion Timetable, (1 page); and Evaluation and Selection Criteria and Scoring, (7 pages).

Mr. Patteson and Mr McKaig both made presentations to the meeting, that of Mr. Patteson involving mainly a description of the RFP Process and Addendum No. 1; and that of Mr. McKaig in explaining the competitive dialogue process and responding to questions.

Also discussed at the meeting was the **Malone Givens Parsons Report**, which outlined the **Brampton Downtown Study**.

¹² Dale Pyne, Manager, Facility Services, Business Planning Division, Buildings and Property Management Department, City of Brampton.

Commissioner Corbett provided an overview of the **Urban Design Vision for Downtown Brampton**, and discussed the role of the Southwest quadrant in the overall strategic plan; the Four Corners as an anticipated vibrant, mixed use, pedestrian and transit-oriented district; other public-realm initiatives to create further opportunities to attract investment; and incentives to revitalize the Downtown.

Contextual information provided to the Committee included data set out under the subject matters: **Brampton Market and Economic Context; Downtown Economic Opportunity; Urban Design Visioning Study; Administrative Space Requirements and Desired Amenities; Supplementary Guidance Documents; and the Competitive Dialogue Process**”.

(10) EVALUATION OF INITIAL SUBMISSIONS

At its **meeting held on February 24, 2010**, the City Council received a **Report dated February 16, 2010**, from Messrs. Patteson and Lewis, entitled **Southwest Quadrant Renewal Plan – Status Update**, in which it was reported:

“... that the Non-mandatory Site Meeting was well attended by a diverse cross-section of the real estate and development community and interested stakeholders and members of the public”. “Forty-three interested parties picked up copies of the RFP and the following three firms responded with submissions:

- Inzola Group Limited*
- Morguard Investments*
- Dominus Construction Group (Zeidler Partnership Architects)*

“A rigorous process has been established to evaluate the RFP submissions, including oversight by a Process and Fairness Advisor. The Evaluation Committee will now review and evaluate the submissions, based on the criteria in the RFP. The evaluation period runs until March 19, 2010. On March 19, 2010, Selected Respondents will be invited to enter into the next stage of the evaluation process, the Competitive Dialogue stage. The Competitive Dialogue stage occurs from March 19, 2010 to July 9, 2010. Following the dialogue phase, a potentially shorter list of proponents will be asked to make a Final Offer, which will include the detailed price and design for the solution. The deadline for the submission of Final Offers is July 23, 2010.

“The Evaluation Committee will evaluate Final Offers to ensure that they are the most economically advantageous for the City and offer the most value for money. During this phase, the Evaluation Committee may seek clarification, speculation and fine-tuning from the proponents.

“The Evaluation Committee will recommend the Preferred Respondent to City Council for their approval in August, 2010. Following approval by Council, the City will enter into a contract with the Preferred Respondent in September, 2010.

“A “no contact or quiet” period began when the RFP was issued on October 30, 2009, and continues until the Council decision in September, 2010. The “no contact or quiet” period provisions are designed for the protection of both the City and the respondents. For a procurement this complex, proprietary and commercially-confidential information, within the submissions, must be protected. It is extremely

important to adhere to the RFP provisions and not disclose information that could invalidate the process.

“ Unlike other projects in the past, this is not a traditional procurement and delivery process like a design-bid-build, design-build or design competition. There are many variables to consider as the City moves forward with this initiative, as set out in the RFP, and while design is important, it should not take primacy over all other aspects of the project.”

In the documentation which I have reviewed in the preparation of this Report is a binder entitled **“EVALUATIONS”, which includes copies of the actual evaluation scores, criteria and observations of the various functionaries involved in evaluation of the three original Submissions, including:**

- February 2010: Completeness Team Evaluation;
- Undated: Technical Submission Requirements;
- March 8, 2010: Technical Team Evaluation;
- March 8, 2010: Evaluation of Financial Capability by Deloitte;
- March 15, 2010: Financial Team Evaluation;
- March 16, 2010 Steering Committee Evaluation.

At its meeting held on March 24, 2010, the Committee of Council received a Report dated March 19, 2010 from Mr. Patteson and Mr. Lewis reporting that :

“All three Respondents have passed a series of reviews in the Evaluation Period, which ended on March 19, 2010. More specifically, the Respondents have passed the Procurement Process Review (Completeness Review), the Preliminary Financial Review and the Technical Review. [and that]

All three Respondents have now been invited to participate in Competitive Dialogue.”

It was also stated in the Report, that:

“All participants in the Evaluation Stage, including staff, the Process and Fairness Advisor and Competitive Dialogue Advisor, were required to sign Confidentiality and Conflict of Interest Agreements. This was done to err on the side of caution and remove any perception of conflict and to ensure confidentiality throughout the process.”

“Those Respondents remaining [after the Competitive Dialogue process] will continue to dialogue and subsequently be invited to present interim Submissions to the Evaluation Steering Committee based on the dialogue process. At this point, the Evaluation Steering Committee will declare the Competitive Dialogue to be concluded and issue the invitation to submit Final Offers to Respondents.

...the Evaluation Steering Committee will evaluate Final Offer(s) received. In accordance with the Council approved RFP process, the Evaluation Steering Committee will identify and subsequently recommend the Preferred Respondent to Council for approval, [containing] the basis for selecting the Preferred Respondent...”

Among the matters discussed by the Committee of Council were the following:

- “ -Timeline for when the proposals from all three of the Respondents will be made public and the risk(s) of making them public sooner.*
- Committee members raised concerns with respect to the timeline for Council to view the design for each proposal, noting that August 10, 2010 is too late.*
- Previous RFP process which allowed Council to view all proposals early in the process.*

...“In response to questions from Committee with respect to when Council would have the opportunity to view the display panels for each proposal, Mr. Patteson advised that this would take place at the Final Offer Stage of the RFP process...”

...“In response to a question from Committee in regard to what information will be provided to Council at the end of the RFP process, staff advised that a report summarizing the process would be provided to Council, noting that staff would consult with legal counsel and the Fairness Advisor to discuss what information may be shared (with Council and the public) in regard to the proposals to ensure there is no breach of confidentiality. In addition, staff advised that the final recommendation to Council will contain the basis for selecting the Preferred Respondent and the report will contain sufficient information to allow Council to make an informed decision.”

The **City Council, at its meeting held on March 31, 2010**, decided to receive the Report from Staff dated March 19, 2010 to the Committee of Council.

In his interim report, dated **April 5, 2010**, to the City Council, Prof. McKellar, the City’s **Process and Fairness Advisor**, expressed a number of conclusions, and summarized his advice for directions in which the City was to go:

- the process to date has been undertaken in a fair and equitable manner; the Evaluation Steering Committee has adhered to the requirements of the RFP as approved by Council;
- the “no contact” period mandated by the Competitive Dialogue approach in this case has been longer than normally experienced, but this lengthening of time should not be construed as diminishing the requirements for transparency in the process as well as consistent with the rules set out in the RFP document;
- the RFP mandates that Final Offers, in whole or in part, will not be made available to the public, or to competitors, while the Competitive Dialogue process is underway, and until the Council has made its decision;
- according to the RFP, a Preferred Respondent will be recommended to Council on the basis of a Final Offer, which may include design illustrations, but final design is only one component of the Final offer, which is to be judged through a rigorous evaluation process, with the Preferred respondent being the one that meets Council’s objectives, including a building design that satisfies the City’s urban design guidelines;
- under the RFP, Council does not have the option of independently reviewing all Final Offers and substituting a different or unspecified evaluation process to arrive at a decision based on these Offers;
- “Council can accept or reject the recommendation of the Evaluation Committee, but Council does not have the option of reviewing all Final Offers received, selecting elements from the Final Offers, or substituting a different or unspecified evaluation process to arrive at a decision based on these Offers”.

Noteworthy in passing, is Mr. Patteson’s response to the following question which I posed to him in one of our interviews:

Q: “There seems to have been a gradual change in emphasis, whether deliberate or not, between the original description of the project as being a long-term administrative space strategy and then ending up as the SouthWest Quadrant Revitalization Plan. Was that deliberate...?”

A: There was a deliberate effort by Council to re-brand the project, and it came about either at the February 25, 2009 Council meeting or the June 24, 2009 Council meeting. There was an added motion, I believe, from Mayor Fennell at the time to re-brand the project as SouthWest Quadrant Renewal Plan and there was a resolution that came out of that. And Council endorsed that recommendation.”

By letters dated **April 7, 2010**, to Dominus, Inzola and Morguard, the City’s Purchasing Supervisor, Diane Oliveira, invited each of them to participate in the Competitive Dialogue Process.

The City issued a **Dialogue Guidance Document for RFP 2009-072, dated April 30, 2010**, for the Southwest Quadrant Renewal Plan, a 21-page document containing the protocol, information and process that the City required from Respondents during the dialogue phase of the RFP Process. It was stated in that document that it was not intended to amend or revise the RFP in any respect, and that, in the event of any conflict or ambiguity between any of the provisions of the Guidance Document and the RFP, the RFP would prevail.

(11) THE DISQUALIFICATION OF THE BID OF INZOLA

During May and early June, 2010, the principal of **Inzola**, and its solicitors, **Davis Webb LLP**, made repeated attempts, by communications to the City Clerk, and by a letter dated June 1, 2010, from Davis Webb directly to the Mayor and Members of Council, requesting that Inzola, and the other Respondents, be permitted to present a delegation [make oral submissions] to the Committee of Council prior to the commencement of competitive dialogue.

In its two-page letter sent directly to the Members of Council, Davis Webb LLP also requested that, following the end of the competitive dialogue process, and the City’s receipt of Final Offers, each Proponent present their Final Submissions with pricing directly to the Council, “so that the Council could hear an unfiltered presentation by each Proponent and be entitled to ask any and all questions of clarification that Council Members may have about any of the 3 submissions.”

The **Committee of Council, at a closed session meeting held on June 2, 2010**, gave consideration to the request from Inzola to present a delegation to the Committee of Council, and received legal advice with respect to that request. After considering the legal advice, Council, appropriately, declined to receive the delegation, and the motion to receive the delegation was withdrawn.

The Council was advised by its staff of the recommendations adopted by **Justice Bellamy** in 2005 at the conclusion of the **City of Toronto computer procurement inquiry**, which outlined the manner in which municipal councils should conduct themselves with respect to settling procurement policy, and during the procurement process, including:

“-City Council should establish fair, transparent and objective procurement processes. These processes should be structured so that they are, and clearly appear to be, completely free from political influence or interference;

-Councillors should separate themselves from the procurement process. They should have no involvement whatsoever in specific procurements. They have the strongest ethical obligation to refrain from seeking to be involved in any way.

-Members of Council should not see any document or receive any information related to a particular procurement while the procurement process is ongoing.

-Councillors who receive inquiries from vendors related to any specific procurement should tell them to communicate with one or more of the following three people, as is appropriate in the circumstances:
-the contact person in the tender document, in accordance with the tender rules in place;
-the Fairness Commissioner;
-the person in charge of the complaints process, as set out in the tender documents.”

The Council was advised that its Purchasing Agent had concluded that the actions of Inzola required disqualification of its Submission, and, accordingly, that Inzola Group Limited’s Submission therefore would no longer be considered by the Evaluation Committee. The purchasing Agent’s position was supported by the Evaluation Committee, external legal counsel, the City Solicitor and the Process and Fairness Advisor.

The Council also learned that, while Dominus and Morguard had executed the prescribed Confidentiality Agreement by the stipulated date, and were well into the competitive dialogue phase of the RFP process, **Inzola Group Limited had failed to sign the Confidentiality Agreement form which would have permitted it to enter into the competitive dialogue phase of the RFP.**

The Council was also informed that, by letter dated June 11, 2010, signed on behalf of the City by its Purchasing Supervisor, Inzola had been advised that, due to its failure to comply with the requirements of the RFP, by its continued attempts to delegate to City Council, and direct communications to Members of Council, and the City Clerk, its Submission had been disqualified from the RFP process, and was no longer under consideration by the Evaluation Committee.

(12) EVALUATION OF THE PROPOSALS OF THE REMAINING RESPONDENTS, DOMINUS AND MORGUARD

BOOKER SUMMARIZES THE RESPECTIVE PROPOSED OCCUPANCY COSTS

“In its review of occupancy cost, the staff identified that the respondents approached the occupancy costs differently. Dominus proposed an annual occupancy cost at a static amount of \$8.2 million per year for 25 years with no further payment required from the City at the end of 25 years to transfer ownership of the building from Dominus to the City.

The Morguard proposal was for an amount of \$6.8 million per year for the first five years which was then increased by 3% every five years until year 15. After year 15 the annual cost would be based on fair market rent every fifth year of the remaining term, plus a payment to transfer ownership to the City at the end of 25 years to be determined based on market value at that time. “

Although Dominus advised the City in an email of its estimated \$94 million cost to build the project, **Commissioner Patteson confirmed to me his belief that there was no direct relationship between the cost to Dominus in building and financing the project, and the cost to the City to be paid under the Agreement**, other than the fact that the City used their original costing number to test the market value rent that the City was going to pay, in respect of which it received advice, in the financial review by Deloitte and the costing review by Hanscomb.

In any event, as noted later in this Report, Mr. Patteson has confirmed to me that: “The \$94 million figure was always intended to be an indicative cost number, as Dominus was responsible for construction cost (and risk) and the City for the lease-to-own occupancy payment... The Financial Evaluation team checked the elemental cost breakdown and confirmed that the correct number was \$94 million. Dominus was advised.”

The **Dominus** email continued:

*2. “The total occupancy cost as defined for Phase 1 is **\$8,209,170. per annum**. This is the base operational rate for Phase 1 based on construction financing and take out (long term) financing presently available in the market with rates tracking on an “on the run” 25 year Bank of Canada Bond’s effective yield rate plus 150 basis points. The operational rate and associated financial terms are subject to market conditions at the time of financial close.*

3. There are no additional costs anticipated.”

Mr. Patteson described the initiation of the 8.2 M lease-to-own figure in his following statement to me, by email of October 21, 2014:

“To the best of my knowledge, the City would have first seen this number at the time of the final submission, on December 9, 2010 ...more specifically, ... in Section 2.15 of the final submission, under the heading financial submission, and under the heading of Cost Per Square Foot.

Having said that, the City, or its financial consultant Deloitte, would have derived an estimate of the number, at some point during the Competitive Dialogue process. As indicated previously, it is possible to derive an imputed number given the other two inputs to the Direct Capitalization formula: value and capitalization rate. Dominus first signaled its requirement for the 9% capitalization rate in its initial submission of February 11, 2010 under the heading The Solution – Submission Form 3, and under the sub-heading Partnering with the City of Brampton. They restated this investment objective in one of their initial Competitive Dialogue sessions with the City.

As demonstrated in the March 11, 2011 report to the Special Council on March 28, 2011, staff was able to extrapolate cost figures from the earlier cost estimates generated in 2008 and 2009. The City's extrapolation showed a cost estimate of \$97.7 M. With this estimate, and a 9% capitalization rate investment target, we had a pretty good sense of what the net operating income (lease-to-own) payment would be. For example, these estimates produce an imputed net operating income of \$8.7M per year.

Again, the Direct Capitalization Method was just one way of estimating the eventual \$8.2 M lease-to-own payment, and Dominus may have used other methods as well. As previously stated, an imputed number can be derived through the internal rate of return method, with a known IRR, known investment horizon and known value (or in this case cost) figure.

As stated previously, it was Deloitte's role to carry out the financial modeling on behalf of the City, to test the reasonableness of the financial returns to Dominus, and the value for money for the City."

Additional key elements of the Dominus proposal, (including architecture by Zeidler Partnership), are set out below. The Morguard bid, included a team "whose "members have worked together successfully on numerous projects within the City." That team included Petroff Partnership Architects, also an experienced and reputable architectural firm.

The "Morguard Solution", as quoted in the Report of March 21, 2011 from the Evaluation Steering Committee, was as described as follows:

"The Morguard solution is based on the redevelopment of one site that will be used to provide 126,000 sq. ft. of administrative space, retail space, a police reporting station and library space. The Morguard solution does not identify any other city investment on any City-owned sites in downtown within a five-minute walking distance from the existing City hall.

The Morguard plan provides for the City to enter into an operating lease with the payment fixed for a five-year period, with prices made known for the first 15 years of the lease and pricing set based on market rents beginning in the year 16 and subsequent years. After the 25-year term, the City and Morguard could negotiate a price for which the City could pay Morguard to take over ownership of the building.

The Morguard solution also provides options for parking space and requires Council to make a policy decision regarding private land acquisition."

Following the disqualification of Inzola's bid, staff had proceeded with the **Evaluation** of the Final Offers of the remaining Respondents, Dominus and Morguard, as shown by the following detailed and comprehensive evaluation documentation:

December 10, 2010:	Completeness Team Evaluation;
December 21, 2010:	Technical Team Evaluation;
January, 2011:	Financial Team Evaluation;

Undated: Steering Committee Evaluation.

With respect to the Evaluation of each of the initial Submissions and Final Offers of Dominus and Morguard, I have been provided with large binders containing comprehensive, (over three inches of paper in each case), catalogues of the entire documentation of their respective bids, the evaluation process, Competitive Dialogue agendas, records, Minutes and notes relating to that part of the process, together with the detailed results of the evaluation of both the initial Submissions and the Final Offers, and correspondence between the City and the Respondent in each case.

While I have scanned this documentation, I do not believe it necessary to provide an outline and analysis of the documents in detail, other than to the extent to which I address specific documentation referred to in the Chronology of this report.

On **January 26, 2011, City Council held a Closed Session**, to receive legal advice with respect to the role and responsibility of Council in decision-making with respect to the City's RFP 2009-072, and generally, on the procurement process, in anticipation of Council's open session meeting to consider the matter.

The Council also received information at that meeting that the two Respondents remaining in the process, had consented to have their **display panels**, containing illustrations associated with their Proposals, shown "for context only". It was pointed out, however, as recorded in the Minutes of the meeting, that "this project is not a design competition", and that "any pictures that may form part of the Evaluation Steering Committee's report to Council were not scored directly as part of the Respondent evaluations."

With respect to procedure to be followed at the Council meeting when its decision was to be under consideration, it was noted in the Minutes that: "...the Respondents understand that as a condition of this RFP process, **they are not permitted to communicate with Council, and may only communicate with the City through the assigned purchasing agent.**" (highlighting added)

The Minutes continued: "Deborah Dubenofsky, City Manager, compared Council's RFP decision to a typical "green light, red light" procurement award decision, and advised that the decision is to accept or not accept the staff recommendation. The role of Council is not to re-evaluate the submissions and pick one Respondent over another, but to be satisfied that the staff evaluation and recommendation is appropriate.

Council discussion of the matters before it, included the following issues described, with respect to the display panels, as reported in the Minutes:

- The contextual assistance the pictures can provide, and acknowledgement that the design is secondary to the decision on a development partner in this RFP process;
- The need for the public to understand that any conceptual pictures [...are of] secondary importance to the submission and do not factor directly into the selection of development partner;
- Clarification that the pictures are not final, and that any development design associated with a successful Respondent decision may change since considerable discussion would be required to finalize the actual design."

(13) THE DECISION OF THE COUNCIL TO ACCEPT DOMINUS AS THE PREFERRED RESPONDENT

At its **Meeting held on March 28, 2011, City Council** received and adopted the advice contained in a 25-page **Report, dated March 21, 2010 from its Evaluation Steering Committee**, in which it was recommended that, in accordance with RFP 2009-072, **Dominus Construction Group be selected as the Preferred Respondent**, “since the Respondent has provided a viable solution (in three phases) that meets the City’s administrative space requirements and other elements of the Southwest Quadrant Plan (the “Plan”).

The **Report** also “seeks Council’s authorization for City staff to proceed with the negotiation of contractual agreements with Dominus, for Phase 1, (Sites 1 and 1a) as identified in the Final Offer, pursuant to RFP 2009-072. This is based on lease-to-own payments of not more than \$8.2 million per year for 25 years starting in 2014, representing an aggregate amount of not more than \$205 million to occupy facilities with an estimated construction value of \$94 million.”

The **Report** also stated, as the sole alternative: “If it is Council’s desire not to proceed any further with this project, then Council may pass a resolution cancelling RFP 2009-072.”

The **Report of March 21, 2011 by the Evaluation steering Committee is significant**, not only in its conclusions and Recommendations, but in its demonstration of the rigorous process pursued by the City in the evaluation and comparisons of the original Submissions and Final Offers of the Respondents to the RFP, including a detailed description of the role of the various individuals, committees, sub-committees and teams involved in the process, and graphic portrayals of: the “Governance Model” and reporting structure that guided the Evaluation Process; a Comparison of the Respondents’ Solutions; the Technical Team Final Offer Evaluation Scores; the Financial Evaluation Team – Final Offer Evaluation Scores; and the Combined Final Offer Evaluation Scores, among others.

The **Report** also included:

Appendix A: Team composition and responsibilities of participants in the Evaluation Process;

Appendix B: the Final Report of McKellar Associates, Process and Fairness Advisor to the City with respect to the SWQRP RFP, dated March 21, 2011;

Appendix C: excerpt from Final Offer of Dominus: “long-term vision for swqrp”, (11 pages);

Appendix D: letter, dated March 21, 2011 from Deloitte & Touche LLP.

Among the conclusions expressed by **Prof. McKellar, Process and Fairness Advisor**, in his **Final Report**, are the following:

“...I am pleased to report to Council that, as your Advisor, I can confirm that the City has adhered to all of the requirements of the RFP to the highest standards of equity, fairness and transparency. The administration has conducted itself throughout the RFP process consistent with the intent of the Council to fully utilize the creativity of the private sector and in a manner that is fair and equitable to all parties involved. The recommendations received by Council as a result of this RFP meet the

highest standards of professional conduct and are a testament to the calibre of City officials that were assigned to carry out your wishes.”

“ ... Competitive Dialogue is not typical of procurement practices familiar to City officials and is being used by Brampton for the first time in Canada.”

“... Brampton has established itself as a leader in Canada in pioneering a solution that is best suited to its particular needs. Based on the application of Competitive Dialogue for this RFP, Council should be confident that the requirements of the Competitive Dialogue process have been rigorously adhered to, that the results have justified the approach, and that the City has arrived at a solution that represents the creativity of the private sector, and achieves best value-for-money, given the framework of the challenge.”

Prof. McKellar confirmed, and expanded upon the grounds for, the above conclusions in my interview with him during my investigation into this process, all of which, as in the case of all of the interviews which I conducted, has been transcribed and included in the research materials which I gathered and relied upon during my preparation of this Report.

In its letter to the City referred to in **Appendix D to the Report by the Evaluation Steering Committee, Deloitte Touche LLP, financial consultant to the City**, concluded as follows:

“The analysis suggested, that based on a debt to equity ratio of 80% to 20%, the implied Internal Rate of Return (IRR) and Return on Equity (ROE) requirements compared favourably to market indicators for similar projects, where the public sector is a guaranteed occupier.”

In the context of the other information available to me, I would interpret that to mean that it is the conclusion of the City’s financial consultants that in the process and transactions involved, the City of Brampton received reasonable market value returns through the agreements entered into with Dominus.

At the Meeting, the display panels prepared on behalf of each of the two Respondents, were available to be seen by the Members of Council and by the public. These would have been the only graphic illustrations that the City Council would have seen, prior to making its decision. Council did not have before it either the initial Submissions by the Respondents, their Final Offers, or any other material, such as the Negotiation documentation which had been assembled in the meantime. As pointed out by Mr. Patteson, “that’s consistent with all of our procurements. That level of detail is not provided.”

According to a private note of the proceedings, a Councillor was quoted as stating that “I didn’t get to see the pictures until 3 minutes to 6:30 before the meeting started tonight and I didn’t know they were up here. I just come out of a meeting, first time that I got to see those pictures. The only ones in our package here that don’t really say a lot...”

The Mayor then advised: “The members of Council were provided all of the information last Tuesday and pictures were not part of the original proposal call...”

In addition to the lengthy written Report provided to the Council by its Evaluation Steering Committee, and signed by its Chair and Vice-Chair, Commissioners Patteson and Lewis, respectively, as outlined above,

the Council also was provided with a presentation by Commissioners Patteson, Corbett and Lewis, summarized as follows:

Summary of Presentation by Commissioner Patteson:

- Background, including the 2005-7 RFEI process and its cancellation;
- Guiding Principles and the 2009 RFP;
- RFP Deliverables and Process, including Competitive Dialogue;
- the Final Offers from Dominus and Morguard, and their Evaluation.

Summary of Presentation by Commissioner Corbett:

- Technical Evaluation: the **Dominus Solution – Phase 1:**
 - 9 storey building at 41 George Street with 2nd storey link to Phase 1A;
 - 5 levels of parking (446 spaces);
 - Administrative Office space (126,000 sq. ft.);
 - Meeting/committee rooms (1,000 sq. ft.);
 - Police Station (1,496 sq. ft.);
 - Ground Floor Retail (10,150 sq. ft.).
- Summaries of Dominus proposals for **Phase 1A:**
 - 3-storey addition to City Hall;
 - Meeting/committee rooms (1,000 sq. ft.);
 - Retail Space (6,187 sq. ft.);
 - Landscape Courtyard adjacent to Queen Street.
- the Presentation also included the Dominus proposals relating to what it termed Phase 2 and what it termed Phase 3, of the project.
- Technical Evaluation of the **Morguard Solution:**
 - 10 storey building on site including City-owned 41 George Street;
 - Administrative Office Space (126,000 sq. ft.);
 - Library (45,000 sq. ft.);
 - Police Station (3,135 sq. Ft.);
 - Ground Floor Retail (10,000 sq. ft.);
 - Parking Option 1: 133 spaces, at 2 levels;
 - Parking Option 2: 432 spaces, at 6 levels.

BOOKER NOTES that there is a difference in the description of the space in the City staff reports.

“ In the March 21, 2011¹³ report and the March 28, 2011¹⁴ presentation to City Council summarizing the results of the process and the recommendations from the Evaluation Steering

¹³ Staff Report dated March 21, 2011 (file B64) regarding Southwest Quadrant Renewal Plan, Request for proposal, page 11

¹⁴ Presentation to City Council, Special Council Session of March 28, 2011, Final Evaluation Recommendations of Evaluation Steering Committee and Corporate Implications, slide 26

Committee it was shown that the Dominus Solution would provide 126,398 of administrative space plus other designated space and the Morguard Solution would provide 126,000 of administrative space plus other designated space. In the report from the Financial Evaluation Team dated January 17, 2011, the Dominus response was shown as 151,579 of administrative space plus other designated space and the Morguard response was shown as 146,892 of administrative space plus other designated space.¹⁵ Booker has used the varying square footage amounts in this report but indicates which source was used."

Following a Summary of findings and design elements, and a comparison of the Dominus and Morguard proposed Solutions, the Technical Team Final Offer Evaluation Scores, were:

Dominus : 404 out of 500 available points

Morguard : 262 out of 500 available points.

Commissioner Lewis presented the Financial Evaluation of the Proposals, including Key Elements: Occupancy costs per sq. ft.; Quality of the proposed financing plan; property tax revenue generated (retail space); and economic impact.

Financial Evaluation of the Proposals produced the following results:

-both Dominus and Morguard have the financial capacity to carry out the project as proposed;

-Financial Evaluation Categories based on the Key Elements:

Dominus: 480 out of 500 available points;

Morguard: 327 out of 500 available points.

-Combined Evaluation scores – Technical and Financial:

Dominus: 884 out of 1,000 available points;

Morguard: 589 out of available 1,000 points.

-The Evaluation Steering Committee recommended Dominus Construction as the Preferred Respondent.

Listed among grounds for the recommendation:

"-transfer risk to private sector;

-no occupancy payments until January 2014;

-administration space requirements satisfied;

-catalyst for future downtown revitalization;

-ownership by City of buildings at the end of the lease term".

¹⁵ South West Quadrant Renewal Plan Final Offer - Financial Evaluation, January 2011, page 13

Prior to receiving delegations from members of the public by the Council, the City Clerk announced that, “in accordance with the City’s Procedure by-law, that...as a condition of the RFP, Respondents are not permitted to communicate with Council.” “In addition, Council would not hear representations as to the contents of any Submission, at this time”. [quoted from Minutes of the meeting].

Prior to final consideration and debate of the matter, Council posed a substantial number of questions to staff, over a 6-hour period, and identified a number of concerns with respect to the Proposals and the process, with some Members of the Council indicating that “more time should be provided to effectively assess the proposal, ensure all pertinent questions are answered and to further investigate the qualifications of the Preferred respondent.”

Staff provided a substantial amount of information in response to questions from Council, including a list of specific items, as shown in the Minutes of the Meeting.

Some Members indicated that they were very satisfied with the proposal of Dominus, which “would be very beneficial to downtown revitalization and private sector involvement”

“Staff advised that the City has not, at this point, entered into any contracts. The contracts need to be negotiated, then those contracts would come back to Council for approval, then negotiation on subsequent phases, including cost and timelines, would be addressed.”

A motion was moved by a Councillor, who indicated that she would like to put forward a motion of deferral so as to permit additional time for clarification of the proposal, and to allow the Council to gage public input on the project. The Motion was duly made and seconded, but lost.

The Council then gave consideration to the main Motion, which carried, on a vote of 7 Members in favour, 3 opposed, and 1 absent, adopting as the Council’s decision:

-to select Dominus as the Preferred Respondent;

-to authorize City staff “to proceed with the negotiation of the contractual agreements with Dominus for Phase 1 as identified in the Final Offer, based on lease-to-own payments of not more than \$8.2 million per year for 25 years commencing in 2014...”;

“-that although the first lease-to-own payment will not be made by the City until 2014, that, during the 2012 budget process, City staff present options for Council’s consideration on the manner in which this significant investment in Downtown Brampton will be financed in the context of the City’s financial capacity, the long-term Funding Strategy and other Council service priorities ;” and

“-that the Mayor be authorized to share the details of this downtown revitalization plan with the federal and provincial governments to seek their financial support in the delivery of this strategic investment.”

[It is noted in this latter respect, that, as it turned out, the City’s project did not qualify under the funding programmes of the higher levels of government, and no such funding was obtained.]

City Council, by its enactment of By-law 68-2011, on March 28, 2011, confirmed its above decisions.

BOOKER'S ANALYSIS OF INFORMATION PRESENTED TO THE COUNCIL*

***Interspersed throughout the Booker analysis and comments below are comments by Mr. Patteson [in bold] in response to Booker statements.**

"The concept that Dominus could fully meet the City's space needs is a consistent theme in the documents. In the staff report of March 21, 2011 (file B64), there is a statement and recommendation in the overview as follows:

"In accordance with RFP 2009-072, the Evaluation Steering Committee recommends Dominus Construction Group be selected as the Preferred Respondent, since the Respondent has provided a viable solution (in three phases) that meets the City's administrative space requirements and other desired elements of the Southwest Quadrant Renewal Plan (the "Plan").¹⁶

In the presentation to Council in March 2011, the illustration of space provided in the two proposals was in a manner which suggested that the Dominus proposal would meet the City's space needs.¹⁷ However the illustration contained information which was not directly comparable. The illustration also included space solutions which were not part of the financial evaluation. The amount of space proposed in the Dominus proposal was illustrated as fully meeting the City's needs while the Morguard solution was presented as not fully meeting the City's needs. This is presented in exhibit IX. Exhibit X presents a contrasting illustration.

- 1. Mr. Patteson: "The City's RFP called for a fixed amount of space to meet its administrative space needs...as well as entertaining solutions that provided for certain desired public amenities. The Dominus solution met the City's needs and provided a better value for money proposition to the City. Neither solution addressed all of the potential desired amenities."**

¹⁶ Report to City Council, March 21, 2011, (file B64), regarding Southwest Quadrant Renewal Plan, Request for Proposal, page 2

¹⁷ Ibid, page 11

Exhibit IX: Comparison of Respondents' Solutions as Illustrated by City Staff¹⁸

	City Needs	Dominus Solution				Morguard Solution
		Phase I	Phase IA	Phase 2	Phase 3	
Admin space Phase I	126,000	126,398				126,000
Admin space Phase II	120,000				120,000	-
Library	130,000			130,000		45,000
Police Station	1,500	1,496				3,315
Multipurpose meeting rooms	10,000		10,545			-
Committee rooms	2,500		2,507			-
Parking spaces	441	446				432
Retail	35,000	10,150	6,187	4,000		10,000

Exhibit X: Contrasting Illustration

	City Needs	Dominus Solution	Morguard Solution
Admin space Phase I	126,000	126,398	126,000
Admin space Phase II	120,000	0	0
Library	130,000	0	45,000
Police Station	1,500	1,496	3,315
Multipurpose meeting rooms	10,000	10,545	0
Committee rooms	2,500	2,507	0
Retail	35,000	16,337	10,000
Needed/Proposed	425,000	157,283	184,315
Parking spaces	441	446	432

¹⁸ Ibid, page 11

The illustration in exhibit X shows that the Morguard solution proposed a greater amount of space than that proposed by Dominus. The impression in exhibit IX was that Dominus would deliver more space however much of that space was allocated to a phase 2 and 3 which were not part of the financial evaluation for the Southwest Quadrant procurement. For transparency and clarity the illustration should only have included that which was being evaluated.

Mr. Patteson: “Throughout Competitive Dialogue, Morguard proposed a solution to the library amenity that contemplated a partnership, or shared use arrangement, with a complementary retail use, i.e. [a book store]. This would not have been a “bricks and mortar” solution for the City, but a different delivery method with the retailer, to allow for the library/learning centre use. This was deemed to be confidential and proprietary information at the time and could not be disclosed in the public realm.”

Booker reviewed a power point presentation titled Presentation to City Council Special Council Session of March 28, 2011 which was used to highlight results and recommendations of the evaluation steering committee and corporate implications. On slide 15 of the powerpoint, all three phases of the Dominus proposal were presented, although only phase I at \$94 million was subject to the financial evaluation as part of the procurement process. It was not until slide 39 that the full \$251 million capital cost of all phases was presented. This presentation could have created a misunderstanding of what was being approved and what was to be delivered.

Mr. Patteson: “It was clearly communicated by staff, that the indicative construction cost for Phase 1 (Sites 1 and 1A) was \$94 million, and further the indicative construction cost for all 3 phases was \$251 million. Council directed staff to negotiate agreements for Phase 1 only. These negotiations took place and Council approved the agreements on August 10, 2011.

The \$94 million figure was always intended to be an indicative cost number, as Dominus was responsible for construction cost (and risk) and the City for the lease-to-own occupancy payment. At one point, Dominus thought that they had miscalculated the indicative number and advised the City that the number should be \$91 million. The Financial Evaluation Team checked the elemental cost breakdown and confirmed that the correct number was \$94 million. Dominus was advised.”

Throughout the staff report of March 21, 2011 the value of \$94 million for phase I of the Dominus proposal was used although \$91 million had been identified by the respondent as the correct cost. For full disclosure the staff report should have used the respondent's revised amount.

In the March 28, 2011 presentation, it was noted that the Morguard "proposal requires acquisition of additional property."¹⁹ Booker was informed that additional land was purchased through the Dominus relationship but Booker does not see reference to that land acquisition in staff's March 2011 presentation. "

Mr. Patteson: "The Transaction Outline, which was the overarching agreement for the deal, advised that Dominus would acquire the property at 20 George Street North and hold it in trust for the City. Dominus and [the owner] signed an Agreement of Purchase and sale, dated August 10, 2011. On closing, the City entered into a Nominee Agreement and agreed to pay the 3 year option fee for the property. The City had an open and previously approved capital account for City Hall Expansion Land Acquisition and Design, to fund the option. Staff had authority, through the resolutions of the March 28, 2011 Council session, to negotiate the primary and ancillary agreements. There was an Addendum to the RFP that allowed the City to acquire strategic parcels of land on a site specific basis. There is documentation of the City's earlier attempts to acquire this strategic property in 2003 and 2004. The Phase 2 SWQ Option expired and the City subsequently acquired the lands at 20 George Street North, as a strategic site, separate and distinct from the SWQ project. Dominus now has no interest in the site. There was no need to include the option fee in the analysis. The fee paid for a limited interest, under the Nominee Agreement, which held the price firm and prevented anyone else from acquiring the property. Also, the decision for the City to fund the option fee took place after the evaluation process. There was no financial benefit to Dominus through this arrangement. The Morguard proposal included the land parcels at 65 and 69 Queen Street West. These parcels, at the time, were under the control (owned or optioned) by Inzola Group, the respondent of the disqualified proposal."

BOOKER concludes:

There are a number of different financing options which the City could pursue for capital projects and the value for money implications of each should be carefully considered. The financing risk can be separated from the construction and legal risks of a major capital project.

¹⁹ Presentation to City Council, Special Council Session of March 28, 2011, Final Evaluation Recommendations of Evaluation Steering Committee and Corporate Implications, slide 23

Mr. Patteson: “The number of financing options were severely limited by the Council directions for the SWQ project and their long-standing position with respect to external debt. Staff, working with Deloitte, had reasonable estimates for the cost of the risk transfer. Staff and Deloitte could calculate Dominus’ Internal Rate of Return (with full financing and an equity stake). Staff was also able to calculate an estimate for Dominus’ cost of borrowed capital. It was also possible to calculate imputed numbers for capitalization rate and return on equity. These variables were considered by Deloitte and by the City’s Financial Evaluation Sub-Team. Finally, staff demonstrated to Council the difference between the Annual Debt Services cost of an Infrastructure Ontario Loan (OSIFA) and the Lease-to-Own payments under the Dominus P3 scenario. This is shown in the March 21, 2011 report for the Special council Meeting of March 28, 2011.”

The staff had a difficult task of undertaking the financial evaluation of the respondents’ proposals given the difference in the design of the buildings and the lack of certain information. In future the requests for financial information need to be structured to require respondents to provide information in a manner that is conducive to complete the evaluation. In a financial evaluation which should be the least subjective of the evaluation parts, staff need to avoid making assumptions in their analysis and altering an evaluation element in a simplistic manner.

Mr. Patteson: “When the City developed the RFP, it did not know the technical or financial solutions to delivering the project. The Competitive Dialogue Process recognized that there was more than one solution to meeting the City’s needs. During Competitive Dialogue, staff encouraged the respondents to put their best proposals forward, including their preferred business models. It would be staff’s job to include the inputs, adjustments and extrapolations that would allow for the “apples-to-apples” comparison. While the Financial Evaluation Sub-Team and Deloitte had a difficult task of comparing proposals, the process was diligent and consistent.”

BOOKER’S FINANCIAL EVALUATION OF THE COUNCIL’S DECISION TO SELECT THE DOMINUS PROPOSAL OVER THAT OF MORGUARD

As noted above, this issue was addressed in the Report of Booker & Associates. Accordingly, the following analysis is quoted directly from that Report. While I have not addressed the issues dealt with by Booker & Associates, I see nothing in its conclusions which I would consider inconsistent with my findings of fact as set out herein, and therefore accept the conclusions expressed below, as having been established to the satisfaction of financial expert, Booker:

“Financial Evaluation

The following analysis utilizes content from the report dated January 17, 2011, which was signed off by participants of the Financial Evaluation Team including Director Financial Planning & Budgets, Director Treasury Services & Deputy Treasurer, Manager Corporate Budgets.

The report identified the four metrics for the rated criteria and the maximum points available to be awarded.²⁰ Exhibit II presents the four metrics, the maximum available points, and the points awarded to each respondent.²¹

Exhibit II: Financial Evaluation Score

Financial evaluation submission	Maximum points	Dominus	Morguard
Cost per square foot	250	250	212
Quality of proposed financing plan	50	30	10
Property tax impact	100	100	8
Economic impact	100	100	97
Total points	500	480	327

In the financial evaluation the staff awarded 480 out of 500 points to Dominus and 327 out of 500 points to Morguard – this is a difference of 153 point or a 47% difference.

Evaluative Element: Cost Per Square Foot

a. Staff's Assessment of Reasonableness of Costs – Construction Period

The staff undertook an analysis to determine if the costs being put forward by the respondents were reasonable. The analysis compared the construction cost per square foot from each respondent to benchmark costing data from the Altus Group for each type of area to be constructed, e.g. administrative space, space for community police station, multi-purpose meeting rooms, committee rooms, library, retail, and parking. Staff noted in the report that Altus Group is “a leading multi-disciplinary provider of independent real estate consulting and professional advisory services

²⁰ South West Quadrant Renewal Plan Final Offer - Financial Evaluation, January 2011, page 2

²¹ Ibid, page 22

worldwide.”²² Staff further stated that care needed to be taken with interpreting the comparisons to the benchmarks from Altus as the unit rates were based on developments in the Toronto area. Staff noted that “The purpose of the due diligence is primarily to ensure that Respondents are not over-pricing their bid price and that their costs fall within the acceptable range.”²³

The construction cost per square foot for the parking spaces was \$125 for the Dominus proposal and \$84 per square foot by Morguard. The report does not contain any comment from staff to provide reasons for the difference in the cost per square foot for parking although a reader could draw a reasonable conclusion that there would be a range in the cost per square foot for parking given that the Dominus proposal was for 446 underground spaces while Morguard proposed 229 parking spaces above ground and 204 spaces underground. While Dominus was proposing 446 spaces to Morguard’s 433 spaces, Dominus was providing twice as many underground which has a higher cost.

Mr. Patteson: “Morguard had a mixture of underground parking and above ground parking. There is a significant unit cost difference between these two solutions. At the time, underground parking stalls were estimated to cost approximately \$55K to \$60K per stall. The estimated cost for an above ground structure was approximately \$25K to \$30K per stall, so we can understand a wide variance using the cost per square foot unit basis.”

The information presented showed the Dominus construction cost per square foot for administrative space at \$231 and Morguard at \$268 compared to the benchmark for administrative space at \$205 per square foot. There was a considerable spread in the construction cost per square foot for community police station with Dominus at \$176, Morguard at \$411, and the benchmark at \$205.

Staff’s stated purpose for presenting a comparison of costs to benchmarks was to conduct a due diligence of the reasonable of costs. However there is no comment from staff providing a conclusion as a result of undertaking the due diligence. There was no explanation or comment by staff as to the reason for the community police station cost per square foot having a range of \$176 to \$411

²² Ibid, page 9

²³ Ibid, page 9

where Morguard's proposal was more than twice the proposal by Dominus and approximately twice the benchmark rate.

There was no awarding of points for construction costs.

Mr. Patteson: "Dominus was responsible for construction costs, but it was important for the City to test their reasonableness, as part of the value for money analysis. Staff did include a letter from Hanscomb Limited, as Appendix A to the July 29th report (for Council on August 10, 2011), indicating that their Class D estimate for what Dominus was providing was \$95 million to \$100 million. Staff's own estimate of the indicative construction cost was \$97.7 million. Again, Dominus was responsible for the construction cost, whatever it turned out to be."

b. Staff's Assessment of Reasonableness of Costs – Operation Period

Awarded points for this element were:

Financial evaluation submission	Maximum points	Dominus	Morguard
Cost per square foot	250	250	212

Staff provides charts in the report showing the square footage and the year 1 occupancy cost per square foot for each of the respondents. Exhibit III illustrates the square footage and the year 1 occupancy cost contained in the report.²⁴

Exhibit III: Square Footage, Year 1 Occupancy Cost Per Square Foot

Type of facility	Dominus		Morguard	
	Square Footage 433 parking spaces	Year 1 Occupancy	Square Footage 402 parking spaces	Year 1 Occupancy
Admin space 1	151,579	\$29.52	146,892	\$32.52
Police station	1,646	\$24.94	1,387	\$32.52

Multipurpose meeting rooms	24,995	\$26.27	0	\$0
Committee rooms	9,060	\$27.18	0	\$0
Library	0	\$0	49,840	\$32.52
Parking	172,827	\$16.15	211,421	\$32.52
Total space	360,107		409,540	

Note: There are inconsistencies in the report. The staff report shows 433 spaces for Dominus on page 13 but on page 11 it shows 446 spaces for Dominus; on page 13 it shows 402 parking spaces for Morguard but on page 11 it shows 433 parking spaces for Morguard, and on page 14 staff refers to a Morguard option with 432 parking spaces.

Mr. Patteson: “It is acknowledged that there are some inconsistencies in the report.” The correct numbers were 446 parking spaces for Dominus and 433 for Morguard.”

The year 1 occupancy cost has a significant difference in the parking area. The staff report shows a year 1 occupancy (occup) for the underground parking spaces in the Dominus proposal at \$16.15 per square foot (sqfoot) while the combination of above ground and underground spaces in the Morguard proposal was \$32.52 per square foot for occupancy. Staff decided to “take the initial Phase 1 occupancy cost (excluding parking) at face value to run the final comparison.”¹ For evaluation, staff utilized an occupancy cost per square foot of \$27.62 for Dominus and \$32.52 for Morguard, a difference of \$4.90 per square foot.

Mr. Patteson: “The Financial Evaluation Sub-Team calculated square foot occupancy for Council, for demonstrative purposes. In the final analysis, the lower Net Present Value of all income streams and reversionary values was the more relevant analysis. The square foot examples were confusing to the Council and difficult for staff to explain.”

Since the occupancy cost per square foot for Dominus was at various rates based on the nature of the space, Booker undertook a calculation to determine an average occupancy cost per square foot to compare ¹ Ibid, page 13

BOOKER CONTINUES;

Since the occupancy cost per square foot for Dominus was at various rates based on the nature of the space, Booker undertook a calculation to determine an average occupancy cost per square foot to compare to the amount utilized by staff for the evaluation. Utilizing the figures provided in the staff report for the Dominus space, in exhibit IV, Booker has extended and totalled the dollar amounts for the year 1 occupancy to determine the annual occupancy cost and then calculated the average per square foot. The Morguard rate per square foot provided in the staff report was \$32.52 regardless of the nature of the space and exhibit IV provides the Morguard numbers for comparison purposes.

Exhibit IV: Average Occupancy Cost in Year 1 per Square Foot

	Dominus		Morguard	
	Square Footage	Year 1 Occupancy	Square Footage	Year 1 Occupancy
Total square feet and year 1 occup cost with parking	360,107	Extended \$8,209,689	409,540	Extended \$13,318,241
Avg occup cost / sqfoot with parking	\$22.80		\$32.52	
Total sq feet and year 1 occup cost without parking	187,280	\$5,418,533	198,119	\$6,442,830
Avg occup cost / sqfoot without parking	\$28.93		\$32.52	

The Booker calculation shows a slightly higher average occupancy cost per square foot than that used by staff in the evaluation. The lower occupancy cost is still provided by Dominus but the difference per square foot is reduced to \$3.59.

Mr. Patteson: “After the financial analysis was complete, the Financial Analysis Sub-Team found a slight error in their calculations. The error, once corrected had minimal impact on the Dominus occupancy cost number and no impact on the final analysis.”

In the financial evaluation staff utilized the year 1 occupancy cost per square foot excluding parking at \$27.62 for Dominus and \$32.52 for Morguard which resulted in the following award of points:

Financial evaluation submission	Maximum points	Dominus	Morguard
Occupancy cost per square foot	250	250	212

If the scoring was completed using \$28.93 per square foot for the Dominus project rather than the \$27.62 per square foot, the scoring would result in Dominus with 250 points and Morguard with 222 – an additional 10 points for Morguard. “

Mr. Patteson: “An adjustment to the scoring would not affect the outcome.”

BOOKER CONTINUES;

Given the difference in the manner which the annual lease was presented by Dominus and Morguard, staff relied on independent resources (Deloitte and Touche LLP) to prepare estimates for the Morguard scenarios at net present value. Staff refers to a fair market value of \$83 million being identified as the market value for the property at the end of the 25 year lease period under the Morguard proposal. In referring to the appendix to the report, Booker was not able to identify amongst the various scenarios and figures an amount of \$83 million. There is an amount of \$80 million in the appendix and an amount of \$77 million. So it is unclear where the \$83 million is derived from although in relation to the total dollars involved the \$3 million difference is not a material amount. “

Mr. Patteson: “To the best of our knowledge, the Financial Evaluation Sub-Team was not advised of Deloitte’s methodology for calculating the reversion. There are two standard industry approaches. One is to capitalize the final year net operating income before NPV. The other approach is to estimate income escalation in land value, straight-line depreciate the building and then apply the NPV. It may be that both methods were employed and then a reconciliation applied to the different numbers.”

.....

“The information in exhibit V shows that scenario I and II for Morguard provided a lower cost per square foot in year 1. However focusing on year 1 ignores the escalation costs in the Morguard

proposal and the payment in year 25 for the residual value of the building. The estimate of the final payment in January 31, 2035 was \$90 million.

Exhibit V: Year 1 Occupancy Cost per Square Foot

Option	Year 1 Occupancy Cost	Square Feet ²⁵	Computed Cost per Square Foot
Dominus	\$8.2 million	360,107	\$22.80
Morguard I & II	\$6.8 million	409,540	\$16.60
Morguard III	\$10.1 million	409,540	\$24.70

Exhibit VI shows the total of payments over the 25 years and the net present value calculations for each of the options as prepared by staff.²⁶ There will be a higher cost in absolute value for Morguard as the space proposed was larger. There will be a difference in the net present value given the periodic increases which Morguard proposed to the annual occupancy and the payment at the end of the lease. “

Mr. Patteson: “Based on staff’s and Deloitte’s reviews, the Morguard proposal had a higher absolute number and a higher Net Present Value.”

...

“In the January 2011 report staff stated that it was difficult to develop a “level playing field”²⁷ between the two respondents given the fundamental difference in the project elements. This statement does have validity given the difference in spaces proposed, i.e.:

- In total Dominus provided for 49,433 less square feet than Morguard or 12% less; for interior space Dominus provided 10,839 less square feet than Morguard or 5% less*
- The configuration of the interior space was different:*

²⁵ Ibid, total of square footage by respondent presented on page 13

²⁶ Ibid, pages 14 and 15

²⁷ Ibid, page 15

- Dominus provided 34,055 square feet in multi-purpose rooms and committee rooms while Morguard provided none
- Dominus provided no library space while Morguard provided 49,840 square feet
- Dominus proposed 446 parking spaces underground while Morguard provided 433 with approximately half underground and half above ground. “
- There is a statement in the report “However the Team can assume that the financing arrangements of both Respondents are the root cause of the disparity.”²⁸ It is unfortunate that staff would make assumptions with regards to finances. The City should have required the respondents to provide the necessary information to eliminate the need for an assumption to be used in the evaluation process.
-

Mr. Patteson: “While some complex evaluations and analysis were completed, the Financial Evaluation Sub-Team and Deloitte did an excellent job of comparing the [Dominus] and Morguard proposals. Where information was missing by the respondents, staff and Deloitte applied consistent inputs and methodology to carry out a proper comparative analysis.”

...

“ In future staff should utilize more than one perspective with regards to the cost element of a project of this magnitude in the evaluation process and in the rated criteria.

Quality of Proposed Financing Plan

Awarded points for this element:

Financial evaluation submission	Maximum points	Dominus	Morguard
Quality of proposed financing plan	50	30	10

In the evaluation of the quality of the proposed financial plan the staff stated that it was “somewhat subjective.”²⁹ Booker does not see reason for a subjective evaluation of a financial plan. The financial plan should have entailed means of financing, cost of financing, duration of financing, and the provider of the financing. These are items that can be evaluated objectively. The request of the

²⁸ Ibid, page 16

respondents should have been clearly outlined to have the respondents provide the necessary information with sufficient clarity. “

Mr. Patteson: “During Competitive Dialogue, respondents were encouraged to [utilize] their competitive strengths, including their “tried and true” business models. This was reflected in the different proposals that were submitted. This was not viewed as a negative by staff, as staff were instructed to tap into the creativity of the private sector...and find unique ways to deliver a mixed-use revitalization for the SWQ.”

...

Evaluation Summary

In the presentation to the March 28, 2011 Special Council Session, there was a summary of the scoring between the two respondents. Exhibit VIII shows the scores awarded and the gap in scores.

The financial evaluation was difficult due to the differences in the space being presented and the structure of the lease payments. The key item which creates a sizeable gap in the financial evaluation between the two respondents was the occupancy cost per square foot. The analysis in this report shows that there were different approaches to the occupancy cost per square foot and cost for the duration of the lease. It would have been prudent to have additional financial metrics for the rated criteria.

Exhibit VIII: Combined Evaluation Scores and Gap

	Maximum Points	Dominus	Morguard	Gap
Technical	500	404	262	142
Financial	500	480	327	153
Total	1000	884	589	295

BOOKER CONTINUES:

“In the June 17, 2009 presentation to Council, staff reported “Lease payments are a function of the capital cost and the market capitalization rates.”³⁰ Given the respondent’s statement that the capital cost was \$3 million less, there should have been a reduction in the lease payments. Staff should identify how the lower capital cost translated into a reduction in the lease payments. “

Mr. Patteson: *“As indicated previously, the correct number was \$94 million and not \$91 million.”*

BOOKER CONCLUDES: *There are a number of different financing options which the City could pursue for capital projects and the value for money implications of each should be carefully considered. The financing risk can be separated from the construction and legal risks of a major capital project.*

The staff had a difficult task of undertaking the financial evaluation of the respondents’ proposals given the difference in the design of the buildings and the lack of certain information. In future the requests for financial information need to be structured to require respondents to provide information in a manner that is conducive to complete the evaluation. In a financial evaluation which should be the least subjective of the evaluation parts, staff need to avoid making assumptions in their analysis and altering an evaluation element in a simplistic manner.

Mr. Patteson: *“Staff is able to carry out structured and simplistic evaluation for all standard procurement and delivery projects, ie. Design Bid Build (Stipulated Sum), Design Build, Construction Management, etc. In this instance the parameters provided by Council eliminated all standard methods and required the Competitive Dialogue Approach (resulting in significantly different proposals from the respondents).”*

(14) CITY COUNCIL’S ADDRESSING OF PLANNING AND BUILDING ISSUES

Prior to March 28, 2011, City Council had, at its meeting held on February 23, 2011, enacted its By-law 48-2011, “A By-law to Expand the Exemption Area in the Downtown for Public Uses Owned or Leased by the City of Brampton from Certain Provisions in Zoning By-law 270-2004”, to provide that public uses owned or leased by the City on lands shown on Schedule B-6 to By-law, [which includes the

lands covered by the SWQRP], **“are not subject to any provision in the By-law respecting parking, setbacks, heights and outdoor storage,”** and other designated provisions specified in the By-law.

In a sworn **Declaration, dated April 15, 2011, the Deputy City Clerk** declared that due written notice of By-law 48-2011 had been given as required by section 34 of the Planning Act, on March 9, 2011, in the manner and in the form and to the persons and agencies prescribed by that Act; that no notice of appeal was filed under that Act on or before the date for the filing of objections; and that, accordingly, **“Zoning By-law 48-2011 is deemed to have come into effect on the 23rd day of February, 2011, in accordance with Section 34 of the Planning Act...”**

The City Council also, at its meeting held on December 14, 2011, further amended its Zoning By-law 270-2004, by the enactment of By-law 332-2011, to incorporate into the By-law the following provision:

“6.33 Public Use

City of Brampton Public Use

A Public Use, including an accessory use thereto, owned or leased by the Corporation of the City of Brampton is permitted in all zoning categories and is not subject to requirements and restrictions applicable to any zone category.

Prior to its final enactment by the Council, the draft of By-law 332-2011 had been approved as to Content by the City’s Director, Land Development Services, and as to Form by the City’s Law Department.

Once again, there appears to have been no objection, challenge or appeal, with respect to the enactment by the Council of its By-law No. 332-2011.

(15) TRANSACTIONS AND NEGOTIATIONS WITH DOMINUS LEADING TO THE EXECUTION OF THE AGREEMENTS

The decisions of the Council made on March 28, 2011, continued its course toward realization of the City’s vision for a renewed downtown, “to bring together major institutional, cultural, commercial and entertainment uses, while addressing the City’s long-term administrative space requirements,” which “would also include mixed-use forms with a street and public realm to create pedestrian-friendly and transit-supportive neighbourhoods.”³¹

Following those decisions, communications with Dominus proceeded. A **Negotiations Steering Committee** was established by the City to provide oversight and direction to a number of staff teams, as well as subject-matter experts from several technical disciplines, to negotiate with Dominus key terms and conditions for the numerous formal Agreements to give effect to Council’s decision, including the **TRANSACTION OUTLINE**, (referred to in the Report as “the overarching agreement for this project”)**(and Agreement Letter), and the Ground Lease, Space Lease Agreement, Maintenance Agreement, Lender**

³¹ Quoted from the Commissioners’ Report of July 29, 2011, referred to elsewhere on this page.

Direct Agreements, Retail Management Agreement and other necessary Agreements, amendments and documents.

Staff had the benefit of legal advice and assistance provided by external legal counsel during the negotiation process, particularly with respect to the Lender's Direct Agreement.

At least eight **Contract Negotiations Meetings** were held during the period commencing April 21, 2011, and ending on July 12, 2011. As well, there was substantial correspondence and exchange of draft agreements, between the parties during that period.

At its meeting held on August 10, 2011, the City Council received a report, dated July 29, 2011, from Commissioners Patteson and Lewis, recommending, and seeking authority from the Council for, the execution of the negotiated Agreement documents, and the taking of the necessary steps to close the transaction.

The report goes on refer to the circumstances surrounding final negotiations, and to outline some of the **key provisions of the proposed Agreements:**

- the Ground Lease is the predominant agreement, and has primacy over the Space lease. Its purpose is to allow the City to lease the Phase 1 and 1A lands to Dominus for the construction period, plus a term of 25 years;
- Dominus must construct the buildings to the City's specifications;
- The buildings will belong to Dominus, subject to the City's reversionary ownership interest [the land and building to be owned by the City], at the end of the lease term;
- Dominus, as the Tenant on the Ground Lease, will pay all realty taxes, utilities and other costs associated with the lands;
- Dominus, as owner of the building during the lease term, will maintain asset management responsibilities and charge an annual asset management fee, adjusted by the Consumer Price Index and an annual performance adjustment, to protect the City and require Dominus to meet established performance standards;
- Dominus, as the City's business partner, has been able to leverage the City's Triple 'A' Credit Rating, stable income stream commitment and strong lease covenant into a preferred borrowing rate and beneficial terms from the capital markets. To protect the City's interests, in the case of default or non-performance, the City will enter into direct agreements with the construction and term loan lenders;
- with respect to the almost-17,000 sq. ft. of net leasable commercial retail space, during contract negotiations the City succeeded in obtaining a revision to the effect that the retail space would be transferred to the City at the end of the lease term at no additional cost, although the annual base rent payments will remain at \$8.2 million. The City would also receive a 50% share of the retail revenue;
- the City will operate and maintain the new facility at its own cost, funding operating and maintenance costs directly, anticipated in the Report to "achieve significant cost savings given that the City already has assembled a workforce in place to achieve economies of scale, and several preventive and demand maintenance contracts achieved through the competitive tender process";
- the move-in day for the first phase was targeted for January, 2014; delay penalties would be charged at \$5,000. per day.

The Report goes on to discuss the City's financial obligations under the Agreements, and that staff negotiations with Dominus had achieved fulfillment of principal City objectives. Also, by adjusting or re-

allocating existing property tax revenues over a 3-year period commencing in 2012, **“no new property taxes are required to fund the Southwest Quadrant Renewal Plan.”**

The Report is significant, in outlining the terms and ramifications of the negotiations which had taken place with the City’s chosen long-term development partner, and the ways by which the process had achieved the City’s objectives in solving its administration space needs, and furthered the revitalization of Brampton’s downtown.

The Report also recommended that, upon closing of the transaction, Dominus be allowed to commence construction of Phase 1 and 1A development of the Southwest Quadrant Renewal Plan.

The Council also had before it a Report, dated August 5, 2011, from its Process and Fairness Advisor, which concluded:

“I report to Council that the City has adhered to the requirements of the RFP to the highest standards of equity, fairness and transparency. The administration has conducted itself throughout the RFP process consistent with the intent of Council to fully utilize the creativity of the private sector and in a manner that is fair and equitable to both parties involved. The recommendations received by the Council as a result of the RFP meet the highest standards of professional conduct and are a testament to the calibre of City officials that were assigned to carry out their wishes.”

Council also had before it a report, dated July 27, 2011, received from its consultant, Hanscomb Limited, expressing its opinion with respect to the adequacy of the Dominus bid in response to the City’s RFP 2009-072, and concluding, on the basis of assumptions and information received from the City, that “the \$94.385 million, is fair and reasonable.”

The Council, at that meeting, adopted, on a 6-5 vote, the recommendations contained in the Report, as described above.

During the period commencing September 6, 2011, officials and representatives of the City and Dominus participated in a series of weekly meetings to discuss technical and practical matters involved in the steps involved in constructing the project in accordance with the decision of the Council, and the negotiated Agreements between the parties. The meetings continued until at least December 7, 2012 (meeting #53).

In accordance with the instructions of the Council, the Agreements were, on October 31, 2011, executed between the City of Brampton and Dominus, and preparation for demolition of existing buildings and for the construction of the project, commenced.³²

In due course, a number of activities and actions were proceeded with by the City and Dominus, among them: demolition, excavation and shoring permits, and building permits, were applied for and issued; environmental studies were conducted; financing arrangements were put in place; analysis of parking requirements and facilities was undertaken; site plan approval was applied for (Sept. 23, 2011) and a site

³² See: Brampton Guardian, October 31, 2011, headline: **“Dominus deal closes today”**, and article by Pam Douglas,

plan approval process and urban design study (in the context of the City's Downtown Urban Design Visioning Study), were undertaken; a Designated Substance Survey, and geotechnical study, were performed; Dominus and Zeidler Partnership made a presentation to the Senior Management Team, and at the Mayor's Business Breakfast, followed by a public information session; traffic flow and road closure issues were addressed and dealt with; ongoing legal advice was sought and received from external counsel, with respect to various issues, particularly, the Direct Lender, Leasing Management and Asset Management Agreements; communications were exchanged with respect to Phase 2 lands; contacts were made with the Toronto Region Conservation Authority; a presentation was made to the Accessibility Advisory Committee; updates were received from the various evaluation teams; discussions were held with various neighbouring property owners; negotiation of cost-sharing for soil contamination work (estimated to cost \$500,000, as a one-time expense), was carried on; contacts were undertaken for potential tenants for retail space; a ground-breaking ceremony was held (February 8, 2012); tie-back arrangements were negotiated; arrangements were made for removing of contaminated soil; and regular up-dates and briefing notes were provided to City Council from time to time.

At its meeting held on June 27, 2012, City Council adopted the recommendation by its staff that the City, in accordance with its Procurement By-law, enter into direct negotiations with Dominus and the existing design team, as the most efficient and cost-effective approach to deliver the City's portion of the final phase of brick remediation work on the existing City Hall, (including work required on its north façade, as part of the ongoing addition to connect it with the 41 George Street site); and complete the City's portion of the interior fit-out of municipal space.

The Council's decision to sole-source this work to Dominus, took into account advice from its staff that:

"Dominus is in a unique situation to:

- co-ordinate and perform the work concurrently with all other work on site;*
- expedite the fit-up of administration space for occupancy in advance of lease expiry dates;*
- provide design, construction and warranty continuity; and*
- minimize the City's exposure to risk of liability under Ministry of Labour requirements as constructor.*

"Under a Construction Management form of agreement with Dominus, staff proposes to negotiate a 'Construction Management Fee' as a fixed amount based on the \$3.85 million construction portion of the 4.1 million project budget, and a design fee, within industry standards."

On July 31, 2012, the Information and Privacy Commissioner of Ontario overruled a decision by the City not to release to a requester a record of net and gross square footage information provided to the City by Dominus with respect to the SWQRP. The City's refusal had relied upon exemptions provided under the Municipal Freedom of Information and Protection of Privacy Act in respect of "third party information", "valuable government information", disclosure of third party economic and other interests", and "proposed plans, projects or policies of an institution". The City's head of information had concluded that: "I therefore cannot compromise the active and ongoing procurement process that may undermine the competitive position and the economic interests of the City of Brampton or a third party." The Commissioner did not accept that any of these exemptions applied, and ordered the City to produce the documentation, with which Order the City duly complied.

At its meeting held on May 29, 2013, City Council decided to extend the tax-exempt status for the municipal administrative space occupied under the SWQRP, as authorized under the Municipal Act, 2001, and the Assessment Act, by designating the development as a Municipal Capital Facility, thus saving the City the cost of property taxes for the Region and School Board purposes; reflecting the purpose and use of the new City administrative space; and bringing the tax treatment of the buildings in line with all other municipal facilities.

In 2014, the City received a copy of an executed **ASSIGNMENT OF LANDLORD'S INTEREST IN SPACE LEASE**, dated July 30, 2014, by which Dominus, as vendor, sold, transferred and assigned to Fengate (Brampton) LP, a limited partnership, as purchaser, all rights, title and interest of Dominus in the Space Lease, through which Fengate agreed to assume, observe and perform all of the obligations of the Landlord under the Space Lease which do not constitute obligations of the vendor under the Construction Completion Agreement.

THE CURRENT SITUATION

Construction of the development of the SWQRP has proceeded to this day, and is continuing, with occupation of a portion of the West Tower by some City staff, underway.

At its meeting held on June 11, 2014, the Council adopted the following motion:

*"That the Mayor and Clerk be authorized to execute on behalf of the City, a **Construction Completion Agreement** with Dominus Construction Group, and ancillary documents necessary thereto, in substantial accordance with the Term Sheet titled SWQ Phase 1 and 1A Completion Proposal dated June 10, 2014, with content satisfactory to both the Chief Public Services officer and Chief Administrative Officer, in a form satisfactory to the City Solicitor."*

The City and Dominus accordingly executed the Construction Completion Agreement, dated July 30, 2014, and conditional upon refinancing required by Fengate (Brampton) LP, purchaser of the leasehold interest of Dominus.

In the Construction Completion Agreement, it was acknowledged that "the Building is now nearing completion".

The Agreement also made reference, in Section 2.3(f)(iii), to the amount of "Five Hundred and Twenty Thousand (\$520,000.) Dollars...that the Parties have agreed be provided to the City to offset holdover and resolve delay claims involving Force Majeure events and Tenant Delays put forward by Dominus and the City;"

Section 2.5 then provides:

In consideration of the payment received by the City pursuant to Section 2.3(f)(iii) and the Covenants contained herein each of the City and Dominus shall release the other from any claim that may have arisen at any time prior to the date of this Completion Agreement for delay liquidated damages pursuant to the Space Lease.

This, presumably, would have included any delay penalties otherwise payable by Dominus pursuant to the Agreements which it had signed.

As of the date of the initial drafting of this Report, (in January, 2015), the top three floors of the West Tower had been occupied, eight partial occupancy permits had been issued, and more staff were to be moved in in stages, with the final two rounds of staff contemplated to move in during the first two quarters of 2015.

The City continues to make monthly payments under the agreements, now to the new landlord, Fengate Capital.

There have been a number of City inspections of the construction, and, at the time of the initial drafting of this Report, it was anticipated that, following substantial performance being achieved, the turnover of the building would take place between Dominus and Fengate.

The transactions have enabled the City to consolidate its staff and facilities. Prior to the SWQRP process, the amount of land leased by the City in the downtown amounted to about 62,000 sq. ft., in which the City had to provide for its office space on an incremental basis. Currently, with the staff moved into the new building, the City has reduced the amount of leased space down to approximately 17,000 sq. ft., and expects ultimately to reduce that to close to zero.

The new building is expected to satisfy the City's space needs for the next four to six years, based on the current rate of staff growth. It was always contemplated that the administrative space would be brought on in a staged process. Stage 3 of the SWQRP will provide the additional 126,000 sq. ft. of space, which is what the City will need to build-out, estimated to be reached by 2031.

On the issue of the cost comparison between the proposed build-to-own and public-private partnership approaches, the City actually paid a higher amount by going with the latter. As shown in the report to Council, as described by Mr. Patteson, on an annual basis it cost approximately \$1.6. million more to do the private sector P3 model than it would have cost the City to build it itself and seek a government loan through Infrastructure Ontario, but "...that was clearly demonstrated to Council, along with the reasons, that we were transferring construction risk and financing risk to the private sector partner, and that in exchange for that they expected to receive a profit margin and a risk premium."

To summarize the City's source of funding for the project, it came from the City's capital envelope. From the tax-base capital funding envelope an amount was set aside over a 3-year period to build up a base amount of \$8.2 million. Once that amount had been established in the base funding, it will remain in the base for 25 years, at which time there will no longer be a need for that to be established in the base, and it will be allocated for other purposes.

DISCUSSION AND ANALYSIS OF ISSUES RAISED IN THIS REPORT

I have set out above, on pages 6 to 9, under “**ISSUES TO BE ADDRESSED IN THIS REPORT**”, five principal issues, and fifteen additional issues, raised with respect to the process followed by the City Council in the adoption and implementation of its “**Southwest Quadrant Renewal Plan**”.

I will now address each of these issues:

(1) THE NATURE, DEGREE OF REASONABLENESS, AND IMPLEMENTATION, OF THE COMPETITIVE DIALOGUE PROCESS OF PROCUREMENT:

The process known as Competitive Dialogue, understood and practised for some time in Europe by public sector authorities in conducting procurement projects, is an approach used where the contracting authority:

- (1) Is not able to define objectively the technical means capable of satisfying their needs or objectives and/or:
- (2) Is not able to specify objectively the legal and/or financial make-up of the project .

As has been discussed above, the **RFP for the SWQRP, issued by the City on October 30, 2009, included the process of Competitive Dialogue**. A number of the relevant provisions of the RFP and other documents used or referred to in the SWQRP procurement process, are referred to above. Specific to the issue of “Competitive Dialogue”, I refer to relevant provisions of the RFP, which include the following:

Under D.2, Selection Process:

“The Evaluation of all Submissions is based on a two-step process. In the first step, all Submissions will be evaluated against weighted criteria by an ‘Evaluation Committee’ comprised of City senior level officials. The Evaluation Committee, at its discretion, may carry out interviews with some of the Respondents; however, the Evaluation Committee is not obliged to do so.

This technical evaluation will result in the identification of two, and perhaps three Respondents who will be invited to participate in a process of Competitive Dialogue with the City on the basis of their Submissions. The City will be represented in this process by an Evaluation Committee comprised of City senior level officials. The Evaluation committee will evaluate the Final Offers and identify and subsequently recommend the Preferred Respondent to Council for approval....

Under D6, Final Offer:

“Competitive Dialogue will be based on the Respondent’s Submission and after the RFP Closing Date no other Submission is permitted. However, Respondents who are invited to Competitive Dialogue may be asked for additional information in the course of the Dialogue subject to the principles of fairness and equity among all remaining Respondents, and where such requests do not bias the process, nor affect Competition.”

In his discussion of the implementation of the Competitive Dialogue process, EMANUELLI states the following:

“... the concurrent negotiation RFP, which was used by the City of Brampton for the SWQRP, allows the purchasing institution to enter into parallel discussions with multiple shortlisted proponents after a preliminary screening process that identifies the finalists. The dialogue stage allows for the development or refinement of potential solutions through direct discussions between the purchaser and each proponent, and may result in a single viable solution or several viable solutions. At the close of the dialogue phase, the public institution invites each shortlisted finalist to submit its best and final offer (“BAFO”). The final ranking is based on those final offers and, in most cases, the award goes to the final top-ranked proponent. “

Among the documentation included in Addendum No. 1 to the RFP is a 3-page description of the Competitive Dialogue Process, and a Competitive Dialogue Timetable, anticipated to be held over the period From March 19, 2010 (with the Invitation to Selected Respondents to Enter into Competitive Dialogue), through to July 9, 2010, concluding with “Issue letter formally closing dialogue process”.

During the course of the Process, the City, in a note dated May 25, 2010, issued to the Respondents, described the Competitive Dialogue process in the following words:

“As Respondents are aware, the City is using the Competitive Dialogue Procurement Process as a more effective means to determine and secure a long term partner for the South West Quadrant Development Plan. This procurement process allows the City to conduct one-on-one dialogue sessions with Respondents, with the aim of developing one or more suitable alternative solutions to meet its requirements as set out in the RFP. These dialogue sessions are an open forum for discussion between the City and Respondents, so that Respondents may develop, alter and expand on their initial RFP submissions to meet the specific requirements of the City. The City respects the intellectual property surrounding Respondents’ proposed solutions, and as such applies a high degree of confidentiality to those solutions. Similarly, the City requires that Respondents treat the information discussed at the dialogue sessions with a corresponding degree of confidentiality.

The Competitive Dialogue sessions will continue until one or more solutions capable of meeting the City’s requirements are identified. Respondents will be invited to submit Final Offers at the end of the series of dialogue sessions, based on a set of requirements the City will issue shortly. The requirements, both technical and financial, will be accompanied by a set of corresponding Evaluation criteria which will describe how the final submissions will be evaluated. The Preferred Respondent will be scored against these evaluation criteria. At the close of the dialogue sessions, the City will issue an Invitation to Submit Final Offers to Respondents. This Final Offer will confirm each Respondent’s final solution, which has evolved from the initial RFP submission by way of the dialogue sessions. The contract will be awarded to the submission which provides the best overall value to the citizens of Brampton.”

The actual process, involving a concurrent series of bi-weekly meetings, or sessions, conducted during the period from early May, 2010, to the middle of August, 2010, together with extensive correspondence and question-and-answer documentation between each of the parties and the City, was followed by requests to Dominus and Morguard for further clarification during the first week of October of that year.

In accordance with the City's practices throughout the process, written Agendas were prepared for each Competitive Dialogue session, and Minutes were kept and provided to the parties.

At the initial Competitive Dialogue sessions, (May 3, 2010 in the case of Dominus, attended by 11 representatives of Dominus and 16 on behalf of the City, including expert subject-matter advisors in addition to ESC members); and May 4, 2010 in the case of Morguard, attended by 10 representatives of Morguard, and 16 for the City); Mr. Lewis, in outlining the Competitive Dialogue process, stated that: "The City of Brampton wants to be a 'trailblazer' in this objective/initiative and we know how many municipalities/agencies are looking to see how this is going to pan out."³³

The process of Competitive Dialogue:

- was described as never having been used before in Canada in a public sector process of procurement;
- is considered particularly useful when the owner has identified its general needs, (here, 120,000 sq. ft. of administrative space in accordance with the conditions and requirements set out in City decisions referred to above), but is seeking the development of one or more suitable alternative solutions to meet its requirements, with no pre-determined solution to its identified needs;
- has as an advantage in what is stated to be, that "competitive tension is maintained throughout the entire procedure".
- was carried out on behalf of the City, by senior staff and retained consultants, in closed sessions, and, for reasons stated above, did not directly involve any Member of Council.
- was carried on in the context of the lessons learned, and advice provided, by the Bellamy inquiry, which concluded that Council Members should not become directly involved in such a negotiation process.

As Prof. McKellar stated to me in our interview, he supports the manner by which Brampton selected members of the ESC, and would oppose the appointment of one or more Members of Council to the Evaluation Steering Committee, since "I think the perception of the Proponent is that this is a technical review, and Proponents will judge the process on who is doing the evaluation". In his view, this would also pose the problem that, where a Member of Council is at the table with the Proponents, that Member becomes accountable for everything the body does. "If you're there, you're responsible".

³³ Quoted from Minutes of the first Competitive Dialogue session with Dominus, May 3, 2010, and consistent with similar statements made at the first CD session with Morguard, held on May 4, 2010, as reflected in the Minutes of that session

Here, the Competitive Dialogue process was carried on by an Evaluation Steering Committee, composed of senior and experienced officers of the City administration, the sessions were fully recorded and documented, with an Agenda and Minutes prepared for each one, including extensive records and documentation relating to every aspect of the issues discussed, followed by a full evaluation process and extensive reporting to the Council.

In his article: *Using Competitive Dialogue in EU Public Procurement – Early Trends and Future Developments*, cited below) Michael Burnett concludes that:

“Competitive Dialogue aims to make it easier for the public sector to avoid legal challenges in awarding complex infrastructure contracts.”

“Competitive Dialogue is now firmly established in Europe as a means of awarding public contracts...;

“Competitive Dialogue has been applied in several different ways so far, but not all of them are equally effective in achieving value for money;

“If properly applied, Competitive dialogue leads to the detailed planning necessary for effective procurement of infrastructure.”

“In the Competitive Dialogue process, individual Respondents may develop more than one solution; the dialogue may be conducted in successive stages, with the option of reducing the number of solutions, (and therefore Respondents) at each stage.”

Documentation provided by the City of Brampton states that, “On the basis of this dialogue, Respondents are selected by the City and are invited to submit proposals. All Respondents and all potential solutions can be considered for submission, although not if a Respondent or solution has been eliminated at an earlier stage. The Preferred Respondent is selected based on the evaluation criteria set out in the RFP. The contract is awarded on the basis of the best value for money to the citizens of Brampton.” [In this later respect, Mr. Patteson confirmed to me that while “value for money” was the criterion which had primacy over other criteria, such as design and cost, it was not the only element considered.] In Minutes of one of the CD sessions, City officials were quoted as wanting “something sweet” downtown.

In practical terms, the process here consisted of the Evaluation Steering Committee, with the assistance of external advisors with competitive dialogue knowledge and experience, conducting a series of meetings with each of the Respondents, with the objective of identifying and defining the best solution to meet the City’s requirements, based on the information made available to the Respondents in the RFP document, and through the consideration of additional information.

There appear to have been a substantial number of City officials directly engaged in the Competitive Dialogue process. Main speakers on behalf of the City at the meetings, were Mr. Lewis and Mr. Patteson, Chair and Vice-chair, respectively, of the Evaluation Steering Committee.

Among the principles upon which the City acted in the process, were:

“A solution should be a total solution to the City’s requirements, including a technical solution, a commercial solution and a pricing solution.”

“Final Submissions will be based on the solution(s) identified at the conclusion of the dialogue and should meet all the Evaluation Committee’s requirements as defined through the Competitive Dialogue process. There will be an opportunity to “clarify, specify and fine-tune” elements of the final Submission, provided this does not involve changes to the basic features of the Submission. Any such process of fine-tuning, clarification, specification or providing additional information will strictly prohibit any further negotiation. Any activity which leads to changes to a Submission must not change a basic feature of the Submission or distort competition.” [this, and other quotations above, are from the 3-page summary included in Addendum No. 1 to the RFP]

I have assembled and reviewed a substantial amount of useful material and information describing the process of Competitive Dialogue, its advantages and disadvantages, and principles applicable to its use, including Agendas and Minutes relating to the sessions, and correspondence between the parties.

Among research documents which I have reviewed are the following:

- European Commission – Public Procurement Policy – Explanatory Note – Competitive Dialogue – Classic Directive, (2005);**
- Office of Government Commerce/Her Majesty’s Treasury (U.K.): Competitive Dialogue in 2008 – Joint Guidance on Using the Procedure;**
- **New Zealand Government: COMPETITIVE DIALOGUE: How Competitive Dialogue works in New Zealand – A guide for Government Agencies (2013);**
- Using Competitive Dialogue in EU Public Procurement – Early Trends and Future Developments, by Michael Burnett (2009), EIPASCOPE 2009;**
- Leveraging the European competitive dialogue to increase value for money, by Denis Chamberland, Municipal World, December, 2010.**
- Competitive Dialogue Process, by Andrew McKaig, Deloitte & Touche LLP, provided by its author to the City of Brampton;**
- Documentation presented to the City of Brampton on the Competitive Dialogue Process, by Prof. James McKellar;**
- City of Brampton: Dialogue Guidance Document; Dialogue Guidance Supplement - Final Offer Submission Requirements and Evaluation criteria; Competitive Dialogue Meetings, Principles and Protocols; Invitation to Participate in Dialogue;** all of these documents were prepared by or for the City, and published in the course of the SWQRP process.

Among the principles followed are those referred to by staff of the City whom I interviewed, including the following statements by Mr. Patteson:

- “the main difference between Competitive Dialogue (“CD”) and the normal process of negotiations with respect to procurement in an RFP situation, is that in the CD process, “the contracting parties do not know the scope of the project or the financial or technical approach to how they’re going to deliver the project.” I would say that the no contact period or the so-called quiet period is longer because of the length of Competitive Dialogue.”
- “We were very diligent. We did not disclose what was being proposed by the other Respondents or any elements of their Proposal. All the staff involved signed confidentiality agreements, all the staff involved signed conflict of interest agreements, and I strongly believe that we maintained the process

as it was supposed to be carried out and there was no contamination of information between Respondents.”

-“I think probably the biggest evidence of how the process worked was the fact that the two final proposals were so very different in design, in the ownership and operating model, and the location.”

EMANUELLI COMMENTS ON THE ACCEPTABILITY OF “COMPETITIVE DIALOGUE” AS A MEANS OF PROCUREMENT

“The 2004 UN Model Legislative Provisions on Privately Financed Infrastructure provide a set of protocols that complement the UN Model Procurement Law’s long-standing recognition of negotiated RFPs, including concurrent Competitive Dialogue/BAFO RFPs, and provide a detailed set of provisions to create structure when conducting a negotiation process for large P3 infrastructure projects like the SWQRP.”

...

“Negotiated RFPs are increasingly recognized as the format of choice for large infrastructure projects and P3 projects across Canada. Although they require a greater investment of resources at the competition phase of the project, the flexibility of these formats is more conducive to generating the most beneficial solution for the purchasing institution both in terms of value for money and innovation in problem solving.”³⁴

In keeping with the principles established under the UN Model Procurement Law ten years prior, the EU Classical Directive has, since 2004, recommended that member states consider the use of the Competitive Dialogue/BAFO RFP specifically in cases where “particularly complex” projects prevent the use of open or restricted procedures, and defines the term as follows:

For the purpose of recourse to the procedure mentioned in the first subparagraph, a public contract is considered to be ‘particularly complex’ where the contracting authorities:

— are not objectively able to define the technical means in accordance with Article 23(3)(b), (c) or (d), capable of satisfying their needs or objectives, and/or

— are not objectively able to specify the legal and/or financial make up of a project.”³⁵

“The 2011 UN Model Procurement Law articulates the circumstances for the use of Competitive Dialogue/BAFO RFP as including circumstances where “it is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement... and the procuring

³⁴ By way of recent example, see the article T. Kalinowski, “Public-private partnerships key for big projects like Spadina subway: report,” *Toronto Star*, March 31, 2015, which highlights a recent TD Economics analysis that emphasizes that P3 project tend to suffer from less frequent cost overruns and delays since more time is invested in the planning stages. Those planning stages include the use of dialogue-based negotiated RFPs that assist the proper design and planning of a project to avoid the cost overruns and project delays common in many public sector construction contracts, including the TTC’s long delayed and over-budget Spadina Subway project.

³⁵ Classical Directive, *supra*, Article 29, s. 1, and Article 1, s. 11(c).

entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs.”³⁶

One advantage of the Competitive Dialogue/BAFO RFP over the consecutive negotiation “Rank and Run” RFP is the application of competitive tension throughout the entire RFP process. “

...

“Although negotiated RFPs and Competitive Dialogue/BAFO RFPs in particular are a useful and broadly accepted method of tendering for large complex infrastructure projects, the issue of the suitability of the competitive bidding format must be separated from the question of whether the P3 financing model used in many large public infrastructure projects is the most appropriate method to finance the project and obtain value for money for the taxpayer. On the issue of cost-effective financing of the project, the industry remains divided.³⁷ However, the method of paying for the construction project is distinct from the appropriateness of the methods used to run a competitive process to award a major construction contract. The issue of financing models for the awarded contract, and whether private financing or public financing best serves the public interest, is outside of the scope of this opinion.”

Given the above, there is no basis for concluding that the City of Brampton engaged in an inappropriate process by using the Dialogue RFP format.

Further, the specific terms and conditions that governed the City of Brampton’s SWQRP Dialogue RFP process were appropriately drafted to enable an open and transparent competition while mitigating the risks of a lost-profit claim launched by unsuccessful proponents.

Our review of the relevant project documents reveals that City staff retained the advice of Deloitte and Touche LLP to assist with the administration of the SWQRP RFP Dialogue RFP and were provided with a detailed set of protocols and procedures to serve as a framework for the process.

These framework documents included the following:

A 51-page Framework to Evaluate Responses to RFP guidebook that: (a) provided

- A 51-page Framework to Evaluate Responses to RFP guidebook that: (a) provided the evaluators with a process overview; (b) identified the respective roles of the evaluation steering committee, evaluation coordinators, procurement process team, financial evaluation team, technical evaluation team, fairness/process advisor, legal subject matter experts, technical subject matter experts and financial subject matter experts; and (c) set out detailed administrative procedures dealing with confidentiality, conflict of interest, due*

³⁶ UN Model Procurement Law, *supra*, Article 30(2)(a).

³⁷ For an article providing statistics in favour of the use of P3 formats to mitigate against project delays and cost overruns, see L.B. Jatto, “A Legal Perspective on the Case for Procuring Capital-Intensive Infrastructure Services via P3s in Canada”, (2012) 12 *Asper Rev of Int’l Bus and Trade* L5-38. For public audits raising general questions about value for money obtained for the taxpayer through P3 private sector financing, see 2010 Report of the Auditor General of Alberta, “Alberta Schools Alternative Procurement”, p. 13; 2008 Annual Report of the Office of the Auditor General of Ontario, Chapter 3, Section 3.03. “Brampton Civic Hospital Public-Private Partnership Project”, p. 102; and 2014 Annual Report of the Office of the Auditor General of Ontario, “Infrastructure Ontario – Alternative Financing and Procurement”, p. 193.

diligence processes, communications, evaluation protocols and record keeping. This guidebook also included a detailed section on work plan details and required each participant in the evaluation process to sign a confidentiality covenant to protect the integrity of the evaluation process.

- *A nine-page Competitive Dialogue/BAFO Process guidebook and four-page Competitive Dialogue/BAFO Addendum that set out the procedural norms for the process, detailing the schedule, process phases and session dates and procedures for the Competitive Dialogue/BAFO with the shortlisted proponents. More specifically, at section 2.4.2, Competitive Dialogue/BAFO Sessions, this guidebook codified the principles of equal treatment, fair process and confidentiality of commercial bidder information noted above in this opinion.*
- *A 51-page Invitation to Participate in Dialogue guidebook for competing proponents that set out detailed and extensive protocols for participating in the dialogue process, including process norms relating to confidentiality, response submissions, communication protocols, clarification and addenda protocols, anti-lobbying provisions, media blackout protocols, conflict of interest rules, non-collusion protocols, gift and hospitality prohibitions, intellectual property provisions and no claims clauses. This guidebook also set out detailed protocols for conducting the dialogue sessions, including meeting protocols and technical project objectives, and information on submission requirements, including detailed financial submission requirements.*
- *A 15-page Final Offer Submission Requirements and Evaluation Criteria supplement guidebook that provided the shortlisted proponents with detailed instructions for the submission of their final offers and included instructions relating to the detailed content requirements for their BAFOs.*
- *A 58-page Framework to Evaluate Final Offers that provided guidance to the evaluators on the process of evaluating the BAFOs, including a reiteration of many of the principles noted above under the Framework to Evaluate Responses to RFP, along with the identification of specific team members and their respective roles.*

A review of these documents illustrates that the detailed protocols and procedures provided to the project team for the SWQRP RFP Competitive Dialogue/BAFO RFP process included a series of safeguards to protect the integrity of the process, defined respective roles and responsibilities and created checks and balances to mitigate against the ability of any individual staff member or Council member to unduly influence the outcome of the evaluation and proponent selection process. Whether in practice these procedures were followed in all instances is a factual question outside of the scope of this specific opinion. “

EMANUELLI, in the Executive Summary of his conclusions with respect to the Appropriateness of the Competitive Process as practised by the City of Brampton in this case, includes the following comparative analysis of various approaches to Procurement:

1. No Fixed List of Tendering Formats: *There is no fixed list of prescribed*

tendering formats in Canada that would limit Brampton's range of options for conducting an open competitive bidding process. Canadian municipalities are free to determine the tendering format and process that best meets those objectives within the context of their specific project requirements.

2. **Invitation to Tender Not Well Suited for Complex Projects:** For standard construction projects, Canadian municipalities have tended to use the fixed-bid Invitation to Tender format as their default tendering format. However, this "one-shot" low-bid process is not well-suited for more complex construction projects that can benefit from a more direct interchange of information and ideas.
3. **Negotiated RFPs Standard for Complex Construction Projects:** The need for more flexible approaches to competitive bidding within the construction sector has led to the formal recognition of negotiated RFPs as a standard approach for complex public sector construction projects.
4. **Competitive Dialogue RFPs Are a Form of Negotiated RFP:** The format used by the City of Brampton for its SWQRP falls into the broad category of concurrent negotiation RFPs, which are referred to variously as a Dialogue RFPs, Competitive Dialogue RFPs, or BAFO RFPs.
5. **Negotiated RFPs Have a Long History:** Negotiated RFP formats, including the Competitive Dialogue/BAFO RFP, have been recognized within the range of broadly accepted public sector tendering formats under the UN Model Procurement Law since it was first enacted in 1993. The European Union also prescribed the use of the Competitive Dialogue/BAFO for its member states in 2004. Formal international recognition typically occurs after a format has enjoyed widespread practical application across industry.
6. **Competitive Dialogues Enable Tailored Solutions:** Competitive Dialogue/BAFO processes generally speaking include a phase during which shortlisted proponents engage in private concurrent dialogues with evaluation committee members before submitting a best and final offer. This allows the parties to establish a more thorough understanding of the contract requirements and to explore a range of alternative proposed methods of project performance.
7. **Not the First Use in North America, Canada, or even Brampton:** By the time it was adopted by Brampton for the SWQRP RFP, the Competitive Dialogue/BAFO RFP format was far from a new concept. The assertion that it is a format that was never before used in Canada or even North America until the City's SWQRP project – repeated frequently in the media – is simply not accurate. By way of example, a dialogue stage was included in the RFP process for the William Osler Health Centre to procure a P3 solution for the construction and operation of a new 608-bed Brampton Civic Hospital in 2003.
8. **Brampton's Adoption Fell Within Broadly Accepted Norms:** Rather than being

viewed as an example of an unprecedented and untested process, the City of Brampton's use of the Competitive Dialogue/BAFO RFP should be understood as falling within long standing and broadly accepted international norms for complex government procurement projects generally, and within broadly accepted industry norms within the Canadian public sector for large infrastructure projects.

9. ***Brampton's RFP Process Protected Against Lost-Profit Claims:*** *Given the above, there is no basis for concluding that the City of Brampton engaged in an inappropriate process by using the Competitive Dialogue/BAFO RFP format. In fact, the specific terms and conditions adopted for Brampton's Competitive Dialogue/BAFO RFP were drafted such that they enabled an open and transparent competition while mitigating the risks of lost-profit claims launched by unsuccessful proponents.*

10. ***Process Supported by Detailed Protocols to Protect against Bias and Interference:*** *City staff retained the advice of Deloitte and Touche LLP to assist with the administration of the SWQRP RFP Competitive Dialogue/BAFO RFP and were provided a detailed set of protocols and procedures to serve as a framework for the process. These protocols and procedures included a series of safeguards to protect the integrity of the process, define respective roles and responsibilities and create checks-and-balances to mitigate against the ability of any individual staff member or Council member to unduly influence the outcome of the evaluation and proponent selection process. "*

(2) THE INVOLVEMENT, OR LACK OF INVOLVEMENT, OF COUNCIL AND ITS MEMBERS IN THE PROCESS, AND WHETHER OR NOT THEY, AND MEMBERS OF THE PUBLIC, HAD REQUIRED, AND/OR REASONABLE NOTICE AND INFORMATION ENABLING THEM TO HAVE APPROPRIATE OPPORTUNITY FOR INPUT INTO THE PROCESS

During the proceedings leading to the decisions of the Council to award the SWQRP assignment to Dominus, and during the course of my investigation, some Members of the Council, and of the press, expressed concern as to restrictions imposed upon their access to information, and the amount of information provided to the Council, and to the public generally, for instance the admonition that, while the Inzola Statement of Claim was a public document, it should not be considered (or be seen to be considered) by Members of Council. This concern was expressed in a context in which, while Inzola remained a Respondent during the RFP process, its proposal was no longer part part of the RFP and could not be considered by the Council, which approved Dominus as the Preferred Respondent.

EMANUELLI'S DISCUSSION OF THE APPROPRIATE ROLE OF ELECTED COUNCILLORS IN THE PROCUREMENT PROCESS:

The following is a verbatim quote from Mr. Emanuelli's Report to me, containing his legal opinion, with which I agree:

"Council Involvement and the Perceived Atmosphere of Secrecy

Defining Roles to Shield Political Interference: Like other municipalities and public institutions, Brampton must ensure that its contract award decisions are made without inappropriate political interference. To achieve this end, a clear definition of roles is essential to implementing accountability mechanisms and to avoiding the unnecessary confusion and inefficiency caused by the failure to define roles and responsibilities in major projects.

Confidentiality Protocols Should Be Clearly Communicated: City staff were provided with an extensive framework of protocols and procedures for administering the SWQRP Competitive Dialogue/BAFO RFP process to guard against inappropriate influence or interference. However, there appears to have been some lack of understanding of this process and the role of City staff within City Council, highlighting the need to promote broader awareness of the importance of institutional project governance and to better manage the relationship and expectations between City Council and the project teams that are delegated with the responsibility to administer major procurement projects.

Integrity of Process Calls for Objective Criteria and No Lobbying: To maintain the integrity of the bidding process, contract award decisions, like that made in the City of Brampton's SWQRP RFP, need to be based on the objective application of transparent evaluation criteria. The integrity of the process and quality of the outcome can become compromised when decision-making becomes politicized, is open to the influence of lobbying activities or is otherwise based on factors other than the application of predetermined transparent criteria.

Transparency Must Be Balanced with In-Process Confidentiality: When conducting an open tendering process, municipalities like Brampton must balance the need to protect a bidder's confidential information and the integrity of bid evaluations with the need to ensure transparency of the tendering process.

Canadian Law Requires Protection of Bidder Information: Canadian case law requires that public institutions strike a complex balance between the duty to protect confidential bidder information and protect the integrity of the competitive evaluation process, and the need to ensure transparent procurement processes. In order to protect the integrity of the bidding process, the obligations typically tilt in favour of confidentiality during a bidding process, but once a contract is awarded they revert to a more balanced approach between confidentiality and transparency.

In-Process Transparency Typically Not Appropriate: As the courts have recognized, transparency is not an absolute, particularly when complex projects are involved. In such instances, the ultimate duty to ensure transparency in outcome should not be confused with a (non-existent) obligation to conduct an entire process in a public forum subject to direct political oversight.

Rather, public institutions should shield the process from politicization and lobbying.

Confidentiality More Important in Complex Projects: While the duty to protect confidentiality is a core obligation in all competitive bidding processes (except perhaps those involving a low-bid public opening), these core duties are amplified when using a Competitive Dialogue/BAFO RFP since competing proponents in those processes typically invest significant resources during the competitive bidding process in the development of unique project-specific proposals.

Brampton Confidentiality Protocols Were Appropriate and Necessary: The protocols adopted by Brampton to comply with its confidentiality duties during the SWQRP RFP were both appropriate and necessary to protect the integrity of the competitive process and to better ensure both bidder and public confidence in that process.

Brampton Should Formalize This Practice for Future Projects: To avoid future misunderstandings, these confidentiality protocols should be formalized with a clear delegation process from Council to authorize the initiation of such processes and be bolstered with clearly defined report-back obligations to identify the nature of the information that should be reported back to Council to inform their ultimate contract award decisions in major projects. “

...

“Like other municipalities and public institutions in general, the City of Brampton must ensure that its contract award decisions are made without inappropriate political interference. To achieve this end, a clear definition of roles is essential to implementing accountability mechanisms and avoiding the unnecessary confusion and inefficiency caused by role overlap and accountability gaps. In its review of municipal good governance standards, the Bellamy Report noted the importance of proper roles definition in the procurement process:

Experts and practitioners alike agree that a lack of internal clarity with respect to the relative roles and responsibilities of different players in the procurement process poses a high risk for both the integrity of the process and the likelihood of a value-for-money outcome. This includes roles and responsibilities for the central purchasing authority, the buying department, legal counsel, finance/budget staff, etc.

The best practice in this area is relatively straightforward — to identify and describe these roles and responsibilities in clear and unambiguous terms as part of the overall purchasing policy and to embed these descriptions in training, guidelines, handbooks, checklists, case studies, etc. as part of ensuring a clear and consistent understanding across the organization.³⁸”

³⁸ Bellamy Report, *supra*, vol. 2, “Good Government”, Addenda, Toronto Computer Leasing Inquiry Research Paper (December 2003), “Procurement, Volume 1: Common Risk Areas”, p. 75.

“... the Bellamy Report also noted that it is in the self-interest of elected officials on municipal Councils (and at all levels of government for that matter) to avoid direct involvement in specific procurement processes:

Experts suggest that one of the important benefits of a having a highly professionalized procurement function is the ability to insulate and protect politicians from allegations of attempting to influence procurement decisions

...

To the extent that problems with political involvement in the procurement process arise, they tend to be either during or at the back-end of the process, e.g. at the contract award stage or in the handling of debriefings and/or complaints.³⁹”

“To maintain the integrity of the bidding process, contract award decisions like the decision on the selection of a proponent for the award of a contract for Brampton’s SWQRP RFP need to be based on the objective application of transparent evaluation criteria. The integrity of the process and quality of the outcome can become compromised when the decision-making becomes politicized, is open to the influence of lobbying activities or is otherwise based on factors other than the application of predetermined transparent criteria.

In the case of the SWQRP, as we have noted above, City staff were provided with an extensive framework of protocols and procedures for administering the Competitive Dialogue/BAFO RFP process and guarding against inappropriate influence or interference over the process. However, while this framework addressed the mechanics of the process, as the Rust D’Eye Report notes, this did little to address concerns in some quarters over what was seen by some to be an untested and highly secretive process. With the benefit of hindsight, Brampton’s SWQRP RFP should serve as a case study for all Canadian municipalities on the need to promote broader awareness of the importance of institutional project governance and to better manage the relationship and expectations between City Council and the project teams that are delegated with the responsibility to administer major procurement projects.

As Brampton’s SWQRP RFP illustrates, when establishing and defining appropriate roles and responsibilities for major projects, great care should be given to setting up a clearly delineated separation of roles between:

- (1) elected officials;*
- (2) the senior management officials responsible for establishing and enforcing compliance with procurement rules; and*
- (3) the front-line procurement professionals responsible for specific procurement processes.*

Elected officials, senior management, and frontline procurement staff should all have a clear understanding of the scope of the frontline procurement staff’s discretion to make tactical

³⁹ *Ibid* at p. viii.

decisions and their need to be sequestered from inappropriate interference with that decision-making.”

“Confidentiality and Political Interference in the Evaluation and Award Processes

In addition to being necessary to honour the confidentiality duties owed to competing bidders, the confidentiality protocol adopted by Brampton in the SWQRP RFP was also necessary to protect the evaluation and award process from external interference since, in addition to being noted above in the Bellamy Report, it has been repeatedly noted by the courts that the integrity of high-profile projects can be compromised through lobbying and politicization. While it is beyond the scope of this opinion to provide all of the cases on point, by way of summary, the following common law cases have underscored the risk of politicizing the contract award process, particularly in high-profile projects where local contractors are competing against other bidders...”

Given the inherent risks associated with political involvement and lobbying in major government procurement projects, the fact that Brampton City staff responsible for administering the SWQRP RFP process established a confidential competitive process that was arms-length from City Council was both appropriate and necessary in order to protect the integrity of that competitive process and better ensure both bidder and public confidence in that process. While there is no apparent basis for concern with respect to the process undertaken for the SWQRP, the extent to which the nature of the process and the role of City staff were fully understood within City Council is unclear. To avoid misunderstandings and ensure proper communications and administration as between elected and staff roles in the future, this practice should be formalized with a clear delegation process from City Council to authorize the initiation of such processes under similar arms-length protocols. Such protocols should be bolstered with clearly defined report-back obligations to identify the nature of the information that should be reported back to City Council to inform their ultimate contract award decisions in major projects. “

MY CONCLUSIONS WITH RESPECT TO THE ROLE OF COUNCILLORS AND THEIR INVOLVEMENT IN THE SWQRP PROCESS

Without repeating details of the participation and decision-making by City Council and its Members in the process, suffice it to say that I have concluded that both the Council and the public were provided with full and appropriate notice and information relating to the SWQRP project. In this regard, I would note the following:

-in the SWQRP process, which extended over several years, there were numerous occasions and means by which information was made available to Council and to members of the public, including public meetings of Council , workshops and opportunities to provide delegations and other input into the process;

-I am satisfied that those matters which were dealt with, and those decisions which were made, in camera, were done so in accordance the authority and rule of law.

Section 239 of the Municipal Act, 2001 provides exceptions from the normal rule that Council and committee meetings be open to the public, where the subject matter being considered is:

- (a) the security of the property of the municipality...;**
- (b) a proposed or pending acquisition or disposition of land by the municipality...;**
- (e) litigation or potential litigation... affecting the municipality;**
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose.**

Assuming that the above provisions, and the principles which they embody, applied to the City's Evaluation Steering Committee, the essence of the subject-matters in which that Committee was engaged, involved matters in respect of which a Council or Committee may engage in sessions, and correspondence with third parties, not available as of right to the public.

It is also noted that, generally, matters not subject to the above exemptions, were dealt with through communications and reports made available to Members of Council and the public at the time or shortly thereafter.

One exception to that conclusion, involved a decision refusing to disclose to a requester, documentation recording the net and gross square footages proposed by Dominus, which led to the appeal to the Information and Privacy Commissioner, referred to above, in which the Commissioner upheld the appeal, and ordered the City to release the subject records to the public, which was done.

There is no record of the City Council's having received a request that any matter be investigated by the City's closed meeting investigator under s. 239.2 of the Municipal Act, in respect of any of the meetings of the Council or the Evaluation Steering Committee with respect to the SWQRP process.

The Committee of Council, at its meeting held on March 24, 2010, engaged in a lengthy, detailed and specific debate involving the documentation and information which was to be provided to the Council, leading to the Committee's receiving of information provided to it by staff that:

"...a report summarizing the process would be provided to Council, noting that staff would consult with legal counsel and the Fairness Advisor to discuss what information may be shared (with Council and with the public) in regard to the proposals, to ensure that there is no breach of confidentiality. In addition, staff advised that the final recommendation to Council will contain the basis for selecting the Preferred Respondent and the report will include sufficient information to allow the Council to make an informed decision."

At the meeting of the Council held on March 28, 2011, at which meeting the Council decided to accept Dominus as the Preferred Respondent, the Council was provided with a substantial amount of information, and responses by staff to questions from Members. There is no suggestion anywhere in the records of that meeting, or elsewhere in the documentation which I have reviewed, that Council or its Members were unable to obtain sufficient information to enable the making of decisions on the issues which were before them, or that any request for such information was denied, or not complied with.

It must be emphasized that the RFP contained provisions which were interpreted as imposing, strict limitations on the disclosure of confidential information, by way of the following provisions:

- s. I1: Communication Protocol: Respondents to communicate to the City solely through its Purchasing Supervisor;
- s. J7: Respondents are required to sign and submit a confidentiality agreement...
- s. K2: "Any information received by the Respondent relating to the Plan or any aspect of the Plan, gained through this selection process or otherwise, is to be treated in strict confidence;
The Respondent must not disclose any details pertaining to their Proposals and the selection process in whole or in part to anyone not specifically involved in its submission, unless written consent is secured from the City of Brampton prior to such disclosure."

It was the interpretation by the City of provisions such as the foregoing, which led to the disqualification of the submission by Inzola, in respect of its alleged communication, or attempt to communicate, of information to the Council or its Members, and which was related to the admonition by the City Clerk to the Council that, in accordance with the City's Procedure By-law 160-2004, as a condition of the RFP, Respondents were not permitted to communicate with Council.

The Minutes of the meeting show that "Some Members of Council indicated that more time should be provided to effectively assess the proposal, ensure that all pertinent questions are answered and to further investigate the qualifications of the Preferred respondent."

However, a **motion to defer** Council's dealing with the Report of March 21, 2010 to a future Regular Council Meeting not prior to April 27, 2011, **was voted upon by the Council, and lost**, so it was the Council itself which made the implicit conclusion that it was in a position to make the decision in question at that time.

I conclude, with respect to the above issues, that there is no basis for finding that the City Council its Members, or members of the public, were denied information required by law to be provided to them, or that decisions by the Council and/or its committees or other bodies to deal with the subject-matters before them, involved any improper or unlawful exercise of their discretion.

I also conclude that the Council was duly provided, by its staff and external expert consultants, with all of the relevant information and advice which it needed to consider and decide upon the matters before it for consideration.

I conclude that, whether or not it is accepted that the provisions of the RFP were properly interpreted as foreclosing the provision of relevant information to the Council, it was the principal motivating intention

of the Council and its staff, to ensure fairness and equity in the process, and that the ultimate selection of the Preferred Respondent be done strictly in accordance with the words and requirements of the RFP, and the principles applicable to it as adopted by the Council.

In effect, the Council, through its decision-making with respect to the conduct of the RFP process, delegated to its staff the administrative responsibilities to conduct the RFP and carry on the process of competitive dialogue, evaluation, and negotiations, in which, properly, the Council itself, although updated from time to time, was not directly involved. Consistent with Council decisions, the provisions of the RFP, and the nature of the process followed, what was ultimately provided to the Council was a negotiated set of conclusions and recommendations, which it was open to Council to accept, or, as the only alternative, terminate the RFP and start over.

(3) THE ATMOSPHERE OF SECRECY AND THE PRESSING NEED FOR CONFIDENTIALITY, FEAR OF DISCLOSURE, AND RESTRICTIONS ON ACCESS TO INFORMATION, BY COUNCIL, MEMBERS OF THE PUBLIC, AND STAFF INVOLVED IN THE PROCESS:

To some extent, these issues are addressed above, under “access to information by Councillors”, discussed above. However, I believe it appropriate that I also address specifically what I have previously described as “an almost obsessive concern” with secrecy, seen to prevail over the Council process leading to decision-making for the SWQRP.

EMANUELLI CONCLUSIONS:

1. ***Defining Roles to Shield Political Interference:*** Like other municipalities and public institutions, Brampton must ensure that its contract award decisions are made without inappropriate political interference. To achieve this end, a clear definition of roles is essential to implementing accountability mechanisms and to avoiding the unnecessary confusion and inefficiency caused by the failure to define roles and responsibilities in major projects.
2. ***Confidentiality Protocols Should Be Clearly Communicated:*** City staff were provided with an extensive framework of protocols and procedures for administering the SWQRP Competitive Dialogue/BAFO RFP process to guard against inappropriate influence or interference. However, there appears to have been some lack of understanding of this process and the role of City staff within City Council, highlighting the need to promote broader awareness of the importance of institutional project governance and to better manage the relationship and expectations between City Council and the project teams that are delegated with the responsibility to administer major procurement projects.
3. ***Integrity of Process Calls for Objective Criteria and No Lobbying:*** To maintain the integrity of the bidding process, contract award decisions, like that made in the City of Brampton’s SWQRP RFP, need to be based on the objective application of transparent evaluation criteria. The integrity of the process and quality of the outcome can become compromised when decision-making becomes politicized, is open to the influence of lobbying activities or is otherwise based on factors other than the application of predetermined transparent criteria.

4. **Transparency Must Be Balanced with In-Process Confidentiality:** When conducting an open tendering process, municipalities like Brampton must balance the need to protect a bidder's confidential information and the integrity of bid evaluations with the need to ensure transparency of the tendering process.
5. **Canadian Law Requires Protection of Bidder Information:** Canadian case law requires that public institutions strike a complex balance between the duty to protect confidential bidder information and protect the integrity of the competitive evaluation process, and the need to ensure transparent procurement processes. In order to protect the integrity of the bidding process, the obligations typically tilt in favour of confidentiality during a bidding process, but once a contract is awarded they revert to a more balanced approach between confidentiality and transparency.
6. **In-Process Transparency Typically Not Appropriate:** As the courts have recognized, transparency is not an absolute, particularly when complex projects are involved. In such instances, the ultimate duty to ensure transparency in outcome should not be confused with a (non-existent) obligation to conduct an entire process in a public forum subject to direct political oversight. Rather, public institutions should shield the process from politicization and lobbying.
7. **Confidentiality More Important in Complex Projects:** While the duty to protect confidentiality is a core obligation in all competitive bidding processes (except perhaps those involving a low-bid public opening), these core duties are amplified when using a Competitive Dialogue/BAFO RFP since competing proponents in those processes typically invest significant resources during the competitive bidding process in the development of unique project-specific proposals.
8. **Brampton Confidentiality Protocols Were Appropriate and Necessary:** The protocols adopted by Brampton to comply with its confidentiality duties during the SWQRP RFP were both appropriate and necessary to protect the integrity of the competitive process and to better ensure both bidder and public confidence in that process.
9. **Brampton Should Formalize This Practice for Future Projects:** To avoid future misunderstandings, these confidentiality protocols should be formalized with a clear delegation process from Council to authorize the initiation of such processes and be bolstered with clearly defined report-back obligations to identify the nature of the information that should be reported back to Council to inform their ultimate contract award decisions in major projects. "

...

"Unfortunately, unlike their counterparts in other jurisdictions, senior governments in Canada have to date generally failed to clearly codify the common law confidentiality duties that apply to a public sector competitive bidding process, leaving it to public institutions like Brampton to adopt their own procedures to address these duties when embarking upon major projects such as the SWQRP RFP. That being said, as we discuss below, the protocols adopted by Brampton to comply with its confidentiality duties during the SWQRP RFP were both appropriate and

necessary and in keeping with the above noted broadly recognized standards adopted in other jurisdictions. “

...

“ As the above discussion demonstrates, confidentiality is fundamental to the Competitive Dialogue/BAFO RFP process. The formalization of confidentiality agreements with competitive proponents is a recommended standard practice since it protects both the interest of bidders in preserving their proprietary business information and the interest of purchasing bodies in protecting the integrity of the tendering process to better encourage broad participation in its competitive processes.

Accordingly, rather than reflecting an inappropriate emphasis on secrecy, the adoption of a confidential covenant in the City of Brampton’s SWQRP RFP process was both reasonable and necessary to meet broadly recognized legal, business and administrative norms for running an open and fair competition involving a large and complex public procurement project. As will be discussed further under Issue 3, below, neither the terms contained in RFP documents nor the Confidentiality Agreement proponents were asked to sign contained anything unusual or inappropriate for such a process.

..., protecting confidentiality is not an absolute proposition and must be balanced against the need for transparency in the public tendering process. When the duty to balance confidentiality and transparency are applied to the facts of the Brampton SWQRP RFP process, it is apparent that the actions of City staff to protect the integrity of the bidding process through enforcement of a confidentiality protocol during the bidding and evaluation phases of the project fell within generally acceptance legal and industry norms and reflected the appropriate manner in which to deal with a project of this size and complexity ...”

As noted above under Issue 2, the terms contained in the three-page Confidentiality Agreement in question were standard terms for the purposes required of the City of Brampton’s SWQRP RFP. There was nothing inappropriate in these terms or in requiring proponents to sign this agreement. In fact, given the need to protect the integrity and confidentiality of the RFP process, this requirement was both reasonable and necessary to comply with the process terms of the RFP and to protect the confidentiality and integrity of the Competitive Dialogue/BAFO process.

It is beyond the scope of this opinion to speculate on the reasons behind Inzola’s apparent refusal to sign the standard confidentiality agreement and its stated desire to communicate directly with Council notwithstanding the express warnings of the staff responsible for administering the process. However, the City not only had the right, but was also under a duty to compliant proponents, to enforce the confidentiality rules and to disqualify any proponents, including Inzola, who failed to comply with those rules.

Had the City of Brampton failed to follow its process rules, waived the confidentiality agreement requirements and allowed Inzola’s request to meet with City Council in a manner that was never contemplated in the RFP, it could have undermined the defensibility of its ultimate contract award and subjected that award to a declaration by the courts that it was null and void under the principles of administrative law.

While this should be self-evident in a public procurement process, given the controversy that has arisen over the disqualification of Inzola, it bears noting that public institutions have both the right and duty to establish and enforce clear process rules for their competitive bidding processes. This is especially so when the award of major projects, like the SWQRP initiative, are concerned. Once a process is recommended by senior decision-makers, approved by Council, and duly delegated to staff, it is the obligation of staff to implement those procedures in accordance with the pre-established RFP process rules. Competing bidders are under a legal duty to attorn to those rules. They do not have the right to dispute or attempt to renegotiate the RFP process rules or, if they disagree with those rules, to go over the heads of duly designated staff to question the process norms directly with senior decision-makers. The fact that competing suppliers may engage in this conduct (which is referred to in the industry as “going political”) is a primary reason why confidentiality and non-lobbying provisions are customarily incorporated into public procurement processes in the first place.”

As outlined above, it was the RFP itself, and the interpretation given to it by all concerned, that its provisions imposed a ‘quiet – no contact period’, which led to the conclusion that Respondents, and others who were required to sign Confidentiality Agreements, were not allowed to communicate to anyone, including the Council and its Members, information relating to the bids, or information obtained during the course of the RFP process.

This was in a context of the City’s having undertaken a massive procurement process, with the obvious intent that the process be carried out in accordance with the requirements of the RFP, in a way which was clear, fair and justifiable for all concerned.

This process clearly established that Council decision-making was to proceed on the basis of the Evaluation Process and the Report(s) to Council proceeding from it, without extraneous input by anyone involved, through communications with Members of Council or others, which might have led to a skewing of the process, and the possibility that it might later be challenged or considered to have been improper or unfair.

In the words of Prof. McKellar, in his report of March 28, 2011 to the Council:

Confusion can arise over matters that are deemed ‘commercially confidential’. Confidentiality is essential when the private sector is invited to participate with the City in ‘crafting’ cost-effective solutions that depend on the open sharing of information that Respondents and the City deem to be of a confidential nature. In fact, confidentiality is an essential part of any procurement process. In the case of Competitive Dialogue it is directed at maintaining the requisite ‘competitive tension’ between Respondents and protecting the interests of Respondents with respect to proprietary or competitive information.”

I agree with the expressions of opinion of Mr. Emanuelli, and the views of Prof. McKellar, each quoted above, and conclude that the principles of confidentiality adopted and followed by the City throughout the SWQRP project, were lawful, and appropriately followed, by both Councillors and City staff.

Having outlined what I believe to have been the intent of the Council, I will withhold from commenting further with respect to this point, in view of the ongoing litigation against the City by Inzola, which may well lead to judicial determination of these issues.

(4) ISSUES INVOLVING THE OPTION AND CITY ACQUISITION OF THE PROPERTY AT 20 GEORGE STREET (Part of Phase 2);

The decision of the Council, made on March 28, 2011, to accept Dominus as the Preferred Respondent and to proceed with the negotiation of contractual agreements, and, on August 10, 2011, to enter into the Agreements with Dominus, related entirely to Phase 1 of the proposed project for the SWQRP, involving properties at 33 and 57 Queen Street West, and 41 George Street South.

The staff Reports which were presented to Council at those meetings, referred to the 0.35 acre property at 20 George Street as being included in Phase 2 of the Dominus proposal, for construction of a new 130,000 sq. ft. library and additional retail space (4,000 sq. ft.), and 4 floors of underground parking (360 spaces), but the evaluation and decision-making process at those meetings involved only the Phase 1 properties.

20 George Street is within the South-West Quadrant and the area shown on Figure 1 to the RFP, which set out the immediate City requirements for 126,000 sq. ft., as well as a “forecasted need for an additional 120,000 sq. ft. of Net Leasable space in the period 2014 to 2031”.

In the Staff Report dated July 29, 2011 to the Council, it was stated that: “Dominus has secured [by Agreement of Purchase and Sale], the Phase 2 lands that are not owned by the City.... The option for the City and Dominus to proceed with Phase 2 development will be available for three years from commencement of the Option period. If the City decides to proceed with Phase 2, it will ask Dominus to submit a proposal for Phase 2, addressing the City’s requirements and future amenities.”

Mr. Patteson has advised that, while the above option period expired on July 29, 2014, and the option on the property by Dominus had also lapsed, nevertheless, on November 1, 2011, the City entered into a Nominee Agreement with Dominus, which gave the City the right to direct Dominus to acquire the property on the City’s behalf, including authority to reimburse Dominus \$480,000. for the option which it had acquired. The City, at its Closed Meeting on **August 6, 2014**, gave that direction, by its adoption of the recommendations in the Staff Report of July 25, 2014, and accordingly, the City has purchased the property for the total price of \$2.48 million, budget for which was approved by Council at its Closed Meeting on September 10, 2014.

At that meeting, the Council decided “that a new capital project be established in the amount of \$2,480,000 for the acquisition of 20 George Street north, with funding of \$1,097,000 transferred from Reserve #12 – Land Proceeds, and the balance of \$1,383,000 transferred from Reserve #4 – Asset Repair and Replacement.”

In the Staff Report of July 25, 2014, it was stated that the 20 George Street North site, “is a

strategically important parcel of land, in light of continuing efforts to revitalize the Downtown core”, whether or not the City decides to proceed with the Phase 2 development of the SWQRP.

Mr. Patteson has confirmed that “we had the authority, through an open and approved capital account, [“and under a provision of Addendum 1 to the RFP”], to acquire the property” and that the previous expenditure of the \$480,000 option fee was done under the approved and open capital account for City Hall land acquisition.” (City of Brampton Capital Project #035110-City Hall Expansion Land Acquisition and Design). Mr. Patteson advises further that under that authority, “There was no requirement to do a reporting out to Council that we had acquired it. In fact, we were sensitive to the fact that we didn’t want to have any chance of losing that property...”.

Whether or not the Council specifically pre-authorized the initial option payment of \$480,000, its has subsequently, through receipt and acknowledgement of the information provided to it, and its decisions leading to the City’s acquisition of the property, recognized and approved the actions taken at that time., retroactively ratifying the decisions of its staff.

I have recently received a communication from Mr. Patteson, confirming that one of the authorities referred to by the Council in its decision-making of August 10, 2011, included, as set out in the Transaction Outline, “executed by the Mayor and Clerk), the following:

“...Dominus entered into an agreement to acquire that part of the Phase 2 site not owned by the City (the “ Additional Land”). Dominus will keep the Additional Land available for a period of three years from the execution of this agreement (the Phase 2 option period). The City may elect to proceed with Phase 2 at any time prior to the Phase 2 Option Period. If the City elects to proceed with Phase 2, Dominus shall submit a proposal for a Phase 2 project that addresses the requirements described in the proposal made by Dominus and such other features as the City may elect.”

“...the City shall keep the City-owned portion of the Phase 2 site available until the Phase 2 Option Expiry Date. Any rights acquired by Dominus in the Additional Land shall be acquired in trust for the City.”

“ The City may, at its option, elect to release the Phase 2 option earlier than the Phase 2 Option Expiry date and each of the City and Dominus will thereupon be released from any further obligations in respect of Phase 2.”

Mr. Patteson concludes that this documentation, along with the other approvals previously provided, (open and approved capital account for City Hall Expansion and Land Acquisition and Design, along with Finance Division approval to use this account for the option fee), demonstrate that staff had appropriate approvals and funds to enter into the Nominee agreement and pay the option fee.

Mr. Patteson continues:

“Following the expiration of the Phase 2 Option Period staff sought and received Council approval to acquire the First Choice lands, separate and distinct from the SWQ project.

“Any claims that the option fee would have been forfeited, had the City not proceeded with the acquisition of the site are unfounded. The payment for the option is no different from other payments made by the City for limited interest rights (lease, licence, consents, temporary use agreements, etc.), where there is no assurance that tangible assets will be acquired. The Nominee Agreement and the Option prevented others from acquiring the property, and prevented any escalation in the price.

Subsequently, issues were raised as to whether or not Dominus had a legally-binding right to secure the land in question, but in view of the fact that City Council ultimately acquired the land, and ratified the exercise of the option, I have not conducted a thorough review of this issue.

I conclude that, essentially, Council approved or delegated to staff authority for, acquisition of the option over the 20 George street lands, at a cost of \$480,000., and later purchased the land, for the amount of \$2,480,000., thus also ratifying the taking over of the option.

(5) FACTS AND ISSUES SURROUNDING THE DISQUALIFICATION OF THE SUBMISSION OF INZOLA, AND ITS IMPACT ON THE COMPETITIVE PROCESS AND THE EVALUATION OF PROPOSALS:

The actions and documentation leading to the letter of June 11, 2010, advising Inzola of the City’s position with respect to its Proposal in response to RFP 2009-072, is outlined above, in addition to the fact that this matter is currently the subject of a legal action in the Ontario Superior Court of Justice, in which the City of Brampton is represented by legal counsel retained by its insurers to defend the action.

Accordingly, I do not believe it appropriate that I address at this time the circumstances involving Inzola, and will leave these issues to be dealt with by the Court.

However, EMANUELLI addresses this issue from the point of view of the Procurement Process followed by the City, and I therefore include parts of his report, as follows:

“ The Disqualification of Inzola [numbering of paragraphs omitted]

RFP States that Rules Must Be Followed: The SWQRP RFP expressly noted that the competition would run in accordance with the “Competitive Dialogue” process to seek “creativity of the private sector to craft what the best solution might be to fit the particular needs of the City.” It also stated that this would be achieved through “a structured procedure that maintains competitive integrity throughout and respects commercial confidentiality,” and that “The rules must be adhered to” in order to “ensure the integrity of the entire RFP Process.”

RFP Established a Standard Single Point of Contact: As is typical with public solicitation processes generally, the RFP established a single point of contact for the RFP process and expressly stated that if a Respondent were found to be in communication with anyone other than the Purchasing Supervisor, such communication “may result in the City disqualifying the Respondent’s Submission.”

RFP Required a Confidentiality Agreement: The SWQRP RFP specifically required that each participant sign a confidentiality agreement in order to participate in the dialogue process, stating that “Respondents are required to sign and submit a confidentiality agreement in a form and substance prescribed by the [City] prior [to] the Competitive Dialogue/BAFO Process.”

RFP Stated No Inappropriate Influence: The RFP further stated that “The City of Brampton reserves the right to disqualify any Respondent which engages in acts or practices that are either directly or indirectly, or may reasonably be perceived, either directly or indirectly, to be made for the purposes of influencing the outcome of this RFP in its favour.”

Inzola Refused to Sign Confidentiality Agreement, Sought Council Deputation: Based on our review of the documentation provided by the Auditor General, Inzola was disqualified for its refusal to sign the required Confidentiality Agreement and for its attempts to communicate directly with Council in contravention of the rules of the RFP process.

Confidentiality [Agreement] Contained Standard Routine Terms: The terms contained in the Confidentiality Agreement were standard terms for the purposes required of Brampton’s SWQRP RFP. There was nothing inappropriate in these terms or in requiring proponents to sign this agreement. In fact, given the need to protect the integrity and confidentiality of the RFP process, this requirement was both reasonable and necessary to comply with the process terms of the RFP and to protect the confidentiality and integrity of the Competitive Dialogue/BAFO Process.

City Had Legal Duty to Disqualify: The City not only had the right, but was also under a duty to compliant proponents, to enforce the confidentiality rules and to disqualify any proponents, including Inzola, who failed to comply with those rules. While the RFP contains an express disclaimer that would typically serve as an effective shield against a successful lost-profit claim, the City of Brampton remained under a legal duty to enforce these confidentiality protocols since, as a public body, it is subject to the administrative law remedy of judicial review even in procurements where it has effectively shielded itself against commercial lost-profit claims.

Failure to Enforce Process Rules Could Have Undermined Legality of Competition: Had the City of Brampton failed to follow its process rules, waived the confidentiality agreement requirements and allowed Inzola’s request to meet with City Council in a manner that was never contemplated in the RFP, it could have undermined the defensibility of its ultimate contract award and subjected that award to a declaration by the courts that it was null and void under the principles of administrative law. “

ADDITIONAL ISSUES

- (6) Whether there was compliance with the City’s Purchasing By-law, Council policies, the principles of procurement, the Municipal Act, and other rules governing transactions of this nature:**

In the Province of Ontario, municipal corporations are created, and given power and responsibilities, by statutes of the Provincial Legislature, particularly the **Municipal Act, 2001**, as amended. Among the authorities contained in that Act relevant to the circumstances under discussion in this Report, are the following:

- s. 1(2), Definitions: - “lower-tier municipality” defined [which includes the City of Brampton];
- a municipality is a “person” for the purposes of this Act;
 - s. 2: purposes of a municipality;
 - s. 4: a municipality is a body corporate;
 - s. 5: the powers of a municipality shall be exercised by its council, by by-law, unless otherwise provided; It has been established by case law decided by the Courts, that this does not preclude a municipal body and its staff from exercising discretionary administrative functions and responsibilities which do not involve the “exercise of a power” ;
 - s. 8: the Act is to be given a broad interpretation;
 - s. 9: a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its statutory authority. This would presumably include such actions as entering into contracts and holding property, but is subject to the requirement that such be done in the course of the exercise of other statutory authority for the act in question;
 - s. 23.1: a municipality may delegate its powers and duties to a person or body, subject to the terms and conditions of the Act applicable to such delegation;
 - s. 224: the role of the council;
 - s. 227: the role of officers and employees;
 - s. 239: meetings of council are to be open to the public, with certain exceptions, such as:
 - (a) the security of the property of the municipality;
 - (c) a proposed or pending acquisition or disposition of land by the municipality;
 - (e) litigation or potential litigation affecting the municipality;
 - (f) advice that is subject to solicitor-client privilege.
 - ss. 253-5 retention and public inspection of records of the municipality (see also **Municipal Freedom of Information and Protection of Privacy Act**, which sets out certain exceptions from the general right of the public to access to municipal records, including grounds upon which a council may hold an in camera meeting, some of which are set out above).
 - s. 270: mandatory adoption of policies with respect to the procurement of goods and services;⁴⁰ the sale and disposition of land, and the delegation of the Council’s powers and duties.
- PART VII Budget and Financial Administration
PART XIII Debt and Investment.

The Province has, pursuant to the provision of the **Municipal Act**, enacted **Ontario Regulation 653/05**, relating to “Debt-related Financial Instruments and Financial Agreements” by municipalities.

⁴⁰ The December, 2014 issue of *Municipal World* contains, at p. 31, an excellent discussion and analysis of principles of procurement in the public sector context: *When Does Fairness End? – Negotiations and Procedural Fairness*, by expert procurement and public-private partnerships lawyer and specialist, Denis Chamberland, author of *Procurement: A Practical Guide for Canada’s Elected Municipal Leaders*.

On the basis of my review of that Regulation, I do not believe that its provisions apply to the process in question, since the SWQRP was not premised on the incurring of debt by the City of Brampton, and involved the designation of municipal capital facility, which does not appear to come within the description “lease financing agreement”.

Under its statutory authorities, including those in the **Municipal Act**, referred to above, the Council of the City of Brampton has enacted a number of By-laws and policies, including:

-Procedure By-law 160-2004, as amended, to provide rules governing the order and proceedings of the council and committees of the Council of the Corporation of the City of Brampton;

-Purchasing By-law 193-2007, a By-law to provide for the procurement of goods and services;
 s. 8.15 (**restricted contact period throughout the bidding period**): The official point of contact is always named in the bid document and that person or designate is the only person who communicates with vendors during the tender and award process.

-Purchasing By-law 35-2012, A By-law to provide for the procurement of goods, services and construction, (as Amended by By-law 243-2013), in force February 8, 2012, (subsequent to most of the transactions involved in the SWQRP process, but useful in terms of principles of procurement now in force in Brampton and other municipalities).

-the By-laws of the City of Brampton which preceded, and were consolidated by, the enactment of, By-law 191-2011, as amended, providing for the delegation of certain Council authority to City officials and staff, involving real estate transactions and other matters, and policies which are required to be promulgated by the Council, by by-law.

Such provisions deal with such matters as the delegation to officers, employees, committees and tribunals of the City, allowing and/or authorizing the execution of actions, specific agreements, the approval of invoices, and other administrative matters.

In April, 2008, City Council passed its **complementary Real Estate Policy**, delegating certain real estate transaction authority to staff, now incorporated in the Delegation of Authority By-law.

-File Classification and Records Retention By-law 163-2008, repealed and replaced by a new Records Retention By-law, as approved by Council at its meeting held on September 3, 2014.

-City of Brampton Corporate **Real Estate Policy** 14.9.0, April 9, 2008.

-the City Council has also adopted an Employee Code of Conduct and a Code of Conduct for Members of Council .

While I have reviewed all of the above legislative documents and provisions, I do not believe it to be necessary to conduct a complete analysis of the extent to which any of them applied to the conduct of the SWQRP project. There is no indication in any of the documentation which has been provided to me suggesting breach of, or failure to observe, any legislated requirements.

With respect to the issue of delegation, I have concluded that the Council did, explicitly and implicitly delegate to staff substantial responsibility in the conduct of the process in question, which it was authorized to do under the legislation referred to above.

With respect to the Code of Conduct for Members of Council, the City's then-Integrity Commissioner, in a report submitted to the Council on October 20, 2011, dismissed complaints against then-Mayor Fennell, in which it had been alleged that improprieties had occurred:

- (1) in the engagement of Prof. McKellar, who had advocated the adoption of the Competitive Dialogue process to be used for the SWQRP, and was subsequently engaged by the City as its Fairness Advisor in order to oversee the application of that process; and
- (2) with respect to alleged conflict of interest arising out of the Mayor's having allegedly received municipal election campaign contributions from parties associated with the Dominus bid on the RFP.

After an investigation, the Integrity Commissioner dismissed both Complaints on the basis that:

- (1) the decision to retain Prof. McKellar was made solely by staff, without any input or involvement of the Mayor or any other members of Council, a practice in accordance with one of the prime recommendations of the Bellamy Inquiry; and
- (2) "I...do not believe that it is improper for a Councillor to participate in a vote where the subject-matter of the vote is someone who had contributed to the Councillor's election campaign."

I would comment at this time, although the Integrity commissioner did not deal with the issue, that I do not believe that a consultant who recommends to a municipal council that it adopt a procedure which is within the specialized competence of the consultant to provide, and then accepts a retainer from the municipality to carry out a procurement process involving that procedure, and for the continued provision of advice with respect to its use, is thereby restricted in any way on the basis of alleged conflict, from accepting and acting upon such retainer, any more than a lawyer who advises his/her municipal client that it has a lawful defence to an action brought against it, would be disqualified from acting for the municipality in the defence of the action. In any event, as Prof. McKellar pointed out to me in our interview, his responsibility was to oversee the implementation of the process, not to make final decisions, and his position and circumstances were clear and transparent. Nothing was concealed.

(7) The allocation of risk and costs to be borne by Dominus and the City, respectively.

In his **Draft for Discussion**, dated October 16, 2009, Prof. McKellar outlined to the Council the key features of the Competitive Dialogue Approach, and generally the key needs and requirements involved in procuring a development partner, in a Public-Private sector Partnership. In that document, he stated, in supporting the approach actually adopted by City Council for the RFP for the SWQRP:

It is the City's intent to utilize the partnership with the private sector proponent to allocate risk to the party best suited to manage that risk and to ensure that the financial sector partner is commensurate with the risk transferred to that partner. It is the City's preference to pursue a solution that transfers the following risks and potential cost overruns associated with these risks to the private sector partner:

-Construction Risk including, but not limited to: Construction price certainty; Scheduling; project completion and delay avoidance; building design; benchmarking and market testing; and LEED design and construction obligations.

-Operating Risk including but not limited to meeting prescribed service standards, space availability, energy consumption, life-cycle facilities, maintenance and repair;

-Financial risk including debt and equity service risk; and

-Market Risk for all commercially tenanted space.

The City's financial commitment to the project is limited to an agreement to make monthly payments. It is not prepared to accept any financial risk beyond this commitment. However, the City is open to solutions that utilize City-owned sites and recognize the full market value of these lands.

...The City will secure enterprise zoning...[and] will also meet, at its expense, the requirements of s. 37 and 42 of the Planning Act. The City will complete a risk assessment and risk management plan for sites they own, and manage the process to get such plans approved, if approvals required, at their expense....

...The City will undertake to meet the flood plain requirements of the Toronto Regional Conservation Authority...

In addition to accepting all the risks agreed to, the Partner [will have responsibility for]:

- meeting all applicable planning and building requirements includes permits and approvals;*
- complying with all relevant policies and procedures...*
- maintaining all documentation and obtaining LEED...certification;*
- adopting a "fair wage" policy and adhere to labour requirements;*
- erecting and maintaining construction hoarding to the satisfaction of the City.*

This advice was provided to the City in advance of the publication of the RFP, and described the process adopted by the City, which was about to issue its RFP, which included the process prescribed by Prof. McKellar. Among the values said by him to be created by proceeding in this manner, would be: "Removal of risk for construction cost and time."

In my interview with him, Prof. McKellar said that he believed that the City had avoided high transaction costs because of the risk allocation model which it adopted.

In his Report, dated March 28, 2011, to City Council, he stated:

"...A second matter is that of the market and how market forces interact with RFP processes, particularly where risks that the public sector normally assumes are shifted to the private sector. Advancements in procurement processes are driving procurement solutions to public facility needs in the direction of risk transfer arrangements that Brampton embarked upon with this RFP. The process results in solutions that

the private sector feels the market can support. In this respect, the process that Brampton selected places it at the leading edge [of] changes that are largely driven by increasingly reliance on the private sector to address public sector needs using private capital and private sector operational capabilities."

The City did, of course, bear the political risks, which "cannot be transferred to the private sector".

(7a) Arising from the above question is the related issue of whether or not the City obtained value for money in its agreements to lease to own, and to pay up to \$8.2 million per annum for twenty-five years for accommodation services.

To provide a definitive response to this question would require financial and market-value expertise which I do not possess, and is dealt with elsewhere in this Final Report, through references to the commentary of financial consultant, Booker.

However, the expert opinions obtained by the City during its decision-making on the SWQRP, and the opinions of its own staff, all provide a sound basis for a conclusion that the City of Brampton obtained value for money in its transactions with Dominus to proceed with construction of the project on the terms and conditions accepted by the Council, and in its written Agreements with Dominus.

One of the grounds for this conclusion is the rigorous process conducted in the City in the administration of the RFP, the Competitive Dialogue procedure, the comprehensive and detailed Evaluation Process, and the negotiations that took place between the City and Dominus following its choice by the City as the Preferred Respondent.

The expert opinion of the City's financial consultant, Deloitte Touche, which was before the City Council at its meeting held on March 28, 2011, provided favourable conclusions with respect to this issue, confirming that the transaction "compared favourably to market indicators for similar projects, where the public sector is a guaranteed occupier."

At its meeting held on August 10, 2011, the Council had before it a report from Hanscomb Limited, expressing its opinion, on the basis of assumptions and information received from the City, that the costs of construction previously put forward as the cost to Dominus of constructing the project, were fair and reasonable, although there does not appear to have been a direct correlation of the construction cost to Dominus and the cost of the entire project to the City.

In response to a direct question by me to Mr. Patteson: "Are you satisfied that the City obtained value for money in this transaction?", he responded: "Yes. In fact Dominus and their solicitors think we did better than that. In their view, we negotiated very strongly and produced an outcome that was favourable to the City."

The Financial Evaluation Report presented to the Council at its meeting of March 28, 2011 by its staff, demonstrated that the Dominus proposal had received 480 out of a possible 500 available points, compared to 327 for the Morguard proposal. Following presentation of the Report, there followed a 6-hour period of questions posed to staff by the Council Members.

I conclude, based on the foregoing, and my review of the documentation as a whole, that the expert advice relied upon by the City of Brampton provided grounds upon which the Council could reasonably conclude that it would receive a beneficial value as related to its costs, in financing the SWQRP project. In other words, that the City received value for money. In this, my Final Report, I have taken into account the comments in the **Booker** report, in reaching my conclusion.

(8) The City's legal obligations assumed by the City to Respondents in the process, including whether or not the City may have any obligation to Dominus following the completion of Phase 1.

The City's legal obligations to Dominus are those to which it contracted in the Agreements duly executed on behalf of the City of Brampton.

There is nothing, in my opinion, in the RFP issued by the City, through which it undertook responsibilities to potential Respondents, or any other parties. The City, through the issuance of its RFP, sought proposals from a potential partner to solve the City's need for additional administrative space, which could deliver upon desired elements of the Southwest Quadrant Renewal Plan, on terms and conditions which would be arrived at through a process of competitive dialogue and negotiation.

The RFP stated, in its first paragraph, that: "This is a nonbinding competitive process."

While the Reports to the Council, and communications between the City and Dominus, referred to the City's eventual need for additional space, and referred to what were called Phase 2 and Phase 3, the actual authority of the Council, in adopting a series of recommendations at its meetings of March 28, 2011 and August 10, 2011, authorized the entering into of the appropriate Agreements with Dominus (other than the Nominee Agreement,) with respect to only Phase 1 of the SWQRP, and the parties proceeded on that basis in the entering into of the necessary Agreements for that purpose.

In my opinion, there are no further City obligations to Dominus, with respect to further potential action by the City in proceeding with the SWQRP. I have found nothing illegal in the decisions or action taken by the City of Brampton, or grounds upon which would invalidate its process. With respect to any other issues of law, or allegations of bias which might arise out of these circumstances, such issues are not within the terms of reference of my investigation, and I express no conclusions concerning them.

(9) Delegated Authority to Staff

As pointed out above, the City Council has the power, under s. 23.1 of the Municipal Act, to delegate its powers and duties to a person or body, subject to restrictions set out in that Part [Part II] of the Act. It is not necessary that the Council use the formal term, "delegation". Such a result may arise implicitly, for instance by the Council issuing directions to its staff, as was the case here on several occasions.

In addition to the above specific authority, even before it was enacted, it was recognized by law that,

while the powers of a municipality are exercised by its Council, it is also understood that staff have many administrative responsibilities necessary to support the maintenance of the affairs and well-being of the municipality, including the execution and carrying out of, the will of Council. This is the case, even aside from decisions of the Council using words of delegatory direction to its staff with respect to a specific subject-matter, such as that involving construction and acquisition, and otherwise securing, of administrative space for the City.

The description of the current and previous RFP processes set out above, demonstrates that the City Council of Brampton did delegate a number of substantial and important responsibilities to its staff, including to conduct the RFP, engage in Competitive Dialogue, maintain communications with the various Respondents, participate in negotiations, and report back to the Council with a recommended course of action.

It is not unusual for a municipality engaged in a process of procurement, a construction contract, or the purchase or lease of property, to give instructions to its staff to carry on the direct work involved in the transaction, and Report back to Council with recommendations, as was done in this case. In this respect, further reference is made to the principles embodied in the Bellamy Report, which concluded that it is not within the responsibilities of the Council to involve itself in the day-to-day negotiations of a procurement process.

On the basis of my review of the documentation, and information and opinions received during the course of my investigation, I conclude that City staff acted properly, and in accordance with their responsibilities and instructions from the Council, in the work transacted by them in the course of the SWQRP pursuant to delegation by the Council of the responsibilities to conduct the RFP process, carry on the competitive dialogue and negotiation processes, and provide to the Council a set of recommendations, upon which the Council could exercise its own discretionary power as to whether or not to adopt the Proposal before it.

This delegation of responsibilities and decision-making powers is consistent with the types of subject-matters, here the construction of a building and the entering into of a contract for payment by the City of accommodation rental, which municipalities often delegate to staff, and clearly have the power to do, and with the conclusions of the Bellamy Report.

(10) Whether or not there was any misconduct, inappropriate or improper actions or undue influence brought to bear by, or with respect to any Member or members of council or staff in the course of, or relating to, their involvement in the SWQRP.

On the basis of my investigation, and the foregoing discussion of the rigorous SWQRP procurement process engaged in by the City of Brampton, in which I have made reference to every decision or action of Council, its Members and staff which I believe to have had a significant impact on the result, my simple answer to the above question is: “No”.

This is in a context where:

- the procurement process was comprehensively documented, with Reports and Updates to Council from time to time throughout the process;

- the competitive dialogue and negotiations, and the Reports and Presentations to the Council, were carried out by the City's most experienced and senior staff, also the subject of full documentation;
- the City received and acted upon not only the recommendations by its own staff, but also the advice of outside independent expert consultants retained by the City for this purpose;
- while it may be too soon to conduct a full analysis and appraisal of whether or not the final result complied in full with the seven Principles adopted by the Council, all available facts and documentation available to me suggest grounds upon which such a conclusion would be supportable, and true;
- the process was continuous, with the views and advice of appropriate officials and consultants duly provided and taken into account, with the decisions of Council supported, and within the Council's jurisdiction, procedurally and substantively, to decide;
- there appears to have been no point in the process at which an individual Member of Council or of the public, was in a position to manipulate or skew the process to bring about a different result from that which occurred;
- the Council, at its meeting held on March 28, 2011, when it had before it the issue of whether or not to award the contract to Dominus, appears to have been collectively satisfied that it had before it sufficient information to make a decision, in view of the fact that a motion to defer the decision was rejected by the Council itself.

Accordingly, on the basis of the foregoing chronological history of events which occurred, and decisions made, in the process of the SWQRP project, and the documentation available to me, I find evidence and information sufficient for me to conclude that there was no misconduct, inappropriate actions or undue influence brought to bear by, or with respect to, any Member or members of Council or staff in the course of, or relating to, their involvement in the SWQRP.

On the same grounds, I believe that there is no basis for the allegations by Councillor Sprovieri (listed as points **(12)**, **(17)** and **(18)**, above, suggesting improper favouritism in the process; a pre-determination that the contract would be awarded to Dominus; failure by City staff to provide information to the Council; intentionally misleading by staff, of the Council; or decision-making by Council having been affected by undue influence or bias by, or of actual or suspected pay-backs to, any Member of the Council. There is no evidence before me of any of those alleged acts having occurred.

With respect to the remaining issues to be addressed, some deal with issues or complaints already addressed by the Council itself, at its meetings held by the Committee of Council, on September 18, 2013, and by Council, on September 25, 2013, or by the Staff Report of October 2, 2013 delivered in accordance with the instructions of the Council.

(11): The extent to which the final result of the SWQRP process is consistent with the seven Guiding Principles, and the directives, of the Council:

It appears that Council's decisions leading to the construction of the SWQRP, if fully implemented in accordance with decisions and transactions anticipated, will lead to results consistent with the intent of the General Principles adopted by Council on June 24, 2009, and the directives which formed their context.

Appropriate evaluation of attainment of some of the Principles would involve subjective analysis and appraisal by the Council and City staff, before any evaluation can be made of whether or not the SWQRP project accomplished Council's objectives.

Some involve long-term planning issues dependent on the happening of future events, including possible further decision-making of the Council and on the actual realizable and measurable impacts of past and future actions and transactions of the City of Brampton and other parties.

With respect to the third Principle, with respect to “**ensure value for money for taxpayers**”, this has been addressed under item **(7a)**, above.

With respect to the seventh Guiding Principle, “**ensure an appropriate balance between public and private sector risk**”, this is dealt with above under item **(7)** above.

(12): “favouritism” or ‘pre-determination of results’: dealt with under **(10)** above.

(13): “set-back of the building”, and (14) ‘contaminated soil’: these, among other concerns addressed by Councillor Sprovieri, were raised and addressed before the Council itself, and dealt with by it from time to time, particularly at a closed-session meeting held by the Council on October 9, 2013, and its receipt at that meeting of a lengthy staff Report, dated October 2, 2013, provided in response to similar concerns expressed by the Councillor prior to that time.

For instance, the set-back issue was settled by the enactment by the Council of its 2006 Central Area Zoning By-law, (File P26 CS), pursuant to which public uses owned or leased by the City are exempt from provisions of the By-law with respect to setbacks and height restrictions.

With respect to the issue of “**contaminated soil**”, the Report of October 2, 2011 stated that the original staff estimates (in 2003), of the cost of removing contaminated soil from the site was accurate, but later more stringent Ministry of the Environment guidelines came into effect which added to the actual cost, as well as the fact that “nine additional years of ground water dispersing the hydrocarbon impacts would [have] increased the amount of soil to be removed. The amount of soil to be removed is ultimately determined on the site during excavation, with on-going testing under the supervision of a qualified soil consultant. Any project on the same site would be required to remove the same amount of soil. In regards to soil remediation, Council received a briefing note in January 2013, and information pertaining to the impacted soil costs were presented at the May 2013 Council Workshop. (Additional information on the soil remediation process, as well as to other issues dealt with in this Report, was provided to Councillor Sprovieri, and the rest of **Council, at its Meeting held on September 25, 2013)**

With further respect to both the “contaminated soil” issue, and matters under the jurisdiction of the Toronto Region Conservation Authority, Mr. Patteson, when I interviewed him in January of this year, confirmed previous information which I had received, that “All of the land use approvals would have been obtained either ahead of time or through the site plan approval process...so there were no impediments in terms of land use controls to the construction of the building, “ and that the same goes for the environmental process with respect to soil remediation. I have received no information or documentation from Councillor Sprovieri inconsistent with these conclusions.

(15): financial component of the Dominus bid: and

(16): relationship to interest rates:

Both of these issues appear to be based on the assumption that the amount to be paid by the City to Dominus over the 25-year term of the project, is based upon, or intended to correlate directly to, the capital and/or interest costs to Dominus in erecting the buildings. Mr. Patteson has advised that this is not the case, and, as discussed above under items **(7) and (7a)**, advice received by the City from outside independent consultants, and from its own staff, was that the City received fair value for money, in entering into the transactions involved in its proceeding with the SWQRP project. The result of those transactions is that the City pays a fixed amount to Dominus over the 25-year term of the agreements, without ongoing additional amounts due by way of interest payments.

(17) duties of staff; and (18) “improper lobbying” issues: dealt with under item **(10)** above.

(19) “that Council tried improperly to muzzle Inzola, by trying to make its principals sign a very unusual confidentiality agreement”:

I do not know why Councillor Sprovieri singled out Inzola as having been particularly prejudiced by this requirement, in view of the words of the RFP to which it bid, and the fact that the other Respondents do not appear to have considered that their interests were compromised by the requirement to sign the same form of Confidentiality Agreement.

As described above, the RFP required, in paragraph J7, that “Respondents are required to sign and submit a confidentiality agreement in a form and substance prescribed by the City ... prior to the Competitive Dialogue process.” All three of the Respondents accepted this reasonable and expected requirement, by submitting their bids. The City later prescribed a form of confidentiality agreement, which Dominus and Morguard signed, but Inzola did not.

I will leave it to the Court in the Inzola litigation to decide upon such matters, if it sees fit to do so, but, in view of that action, I will not address this particular issue further.

(20): “that the City will be prejudiced if it allows Dominus to transfer its interest to Fengate (Brampton) LP.”

In the Space Lease entered into between Dominus/Citizen Brampton SWQRP Inc., as “Landlord”, and The Corporation of the City of Brampton, as “Tenant”, paragraph 11.3 provides, under “Dealings by Landlord”, that:

“The Landlord may sell, transfer, charge, encumber or otherwise deal with the Development or any portion thereof or any interest of the Landlord therein, in every case without the consent of the Tenant, and without restriction. To the extent that any purchaser or transferee from the Landlord has become bound by the covenants and obligations of the Landlord under the Lease, the Landlord shall, without further written agreement, be freed and relieved of liability with respect to such covenants and obligations, provided the Landlord has complied with each and every of its obligations under this Lease to the date of such assignment.”

The City has received an “Execution Copy” of a document titled ‘**ASSIGNMENT OF LANDLORD’S INTEREST IN SPACE LEASE**’, bearing the date July 30, 2014, and what appear to be signatures of execution on behalf of the parties, Dominus/Cityzen Brampton SWQRP Inc., the “Vendor”, and Fengate (Brampton) LP, “a limited partnership”, as “Purchaser”, including the following operative paragraphs:

“1. The Vendor sells, assigns and transfers to the Purchaser all the right, title and interest of the Vendor in the Space Lease and all renewals of the Space Lease and all Rents and all other rights, benefits, advantages whatsoever to be derived from the Space Lease from and after the date of this assignment, including the benefit of any guarantees given to the Vendor in respect of the Space Lease and the Rents.

“6. The Purchaser agrees to assume and will observe and perform, all of the obligations of the landlord under the Space Lease which do not constitute obligations of the Vendor under the Completion Agreement...”

**“4. The Vendor represents and warrants to the Purchaser that, to its knowledge, that:
1.1 the Space Lease is in full force and effect without default or breach, addition or amendment;”**

Assuming that the “Assignment of Landlord’s Interest in Space Lease” is in proper form, duly executed, and in valid binding form between the parties, and assuming that Dominus was, at the time of the Assignment in compliance with its obligations under the Space Lease, I conclude that Dominus, as Landlord, has acted in accordance with its rights under paragraph 11.3 of the Space Lease quoted above.

Representatives of the City whom I interviewed appear to have accepted that the Assignment has had that effect, and that the Assignment of the Space Lease does not prejudice or impact negatively upon, the interests of the City of Brampton. The City’s response is best summarized in the words of one of the City officials that: “It’s just a different landlord.”

Financial and other issues involving the assignment of Dominus’s leasehold interest to Fengate, were dealt with in the Construction Completion Certificate, referred to above.

In view of the foregoing, I conclude that the City will not be prejudiced by the Assignment from Dominus to Fengate, a legal transaction which the City has, in any event, authorized, as a term of the Space Lease to which it is bound.

ADDITIONAL ISSUES;

I / WHETHER THE CITY SHOULD HAVE BUILT THE PROJECT ITSELF

BOOKER CONCLUSIONS WITH RESPECT TO THE CITY’S DECISION NOT TO BUILD THE PROJECT ITSELF

BOOKER STATES AS FOLLOWS;

Analysis of Financing Options

"In the June 17, 2009 presentation to the Committee of Council the following options were identified as means by which the administrative space project could be achieved: City builds, City finances, capital lease option (lease-to-own).

The City wished to mitigate its risk in the administrative space project and given that the City does not have expertise in constructing buildings of the size contemplated it is understood why the City would not wish to assume the construction risk. However Booker did not see rationale in the June 2009 presentation nor in the documents from Professor McKellar why the City would not wish to self-finance or directly borrow to finance the construction of the project.

Given that the City is a public sector taxing body, it would generally be able to borrow at the most advantageous interest rates. The City would be able to borrow at a more preferred rate than the interest rates which companies in the private sector can borrow at. The ability to access funds at best interest rates depends on the overall financial health of the organization. The audited consolidated financial statements⁴¹ of the City as at December 31, 2009 reported that the City had total financial assets⁴² of \$754 million and financial liabilities of \$280 million resulting in a net financial asset position of \$484 million. Additionally the City had \$2.7 million in non-financial assets⁴³ and the City ended fiscal 2009 with a surplus of \$3.1 million and had a surplus of \$2.9 million in the prior year. This illustrates that the City had a solid financial position and therefore should be able to borrow at the best interest rates available.

By selecting a lease option, the City would not be taking advantage of its ability to borrow at the most beneficial lending rates. By selecting a lease option, the City pursued a more expensive option given that the private sector organization would likely not be able to borrow at the same low rate as the City and not only would the lease rate incorporate a

higher financing cost, there would likely be an additional amount which the City would need to pay to reflect a profit margin or administrative fee to the private developer. Staff noted the higher cost of financing in the lease option in its March 28, 2011 report to Council as follows: "The Dominus solution requires payments based on a higher cost of borrowed capital than available to the City of Brampton."⁴⁴

In the presentation to Committee of Council entitled Administrative Space Project dated June 17, 2009 it was shown that current borrowing rates under the Infrastructure Ontario Municipal Loan Program ranged from 2.78% for 5 years to 5.58% for 40 years.⁴⁵ The chart of comparisons showed that a \$100 million loan with a term of 10 years at an interest rate of 4.06% would have an annual servicing cost of \$12.4 million. This option would have a total order of magnitude of \$124 million. It was shown that a 20 year loan would have an annual servicing cost of \$8.1 million which would be a total order of magnitude of \$162 million. The staff had identified an order of magnitude for a build-to-own option of \$172 million to \$204 million depending on quality of finishes.⁴⁶

In the 2009 presentation, staff identified that a capital lease was also a financing option which the City could pursue. Under this option the City would enter into a long-term lease arrangement leading to eventual ownership of the building. It was noted that the City would occupy the building once constructed and commence making lease payments to the developer. An important item contained in this presentation was "lease payments are a function of the capital cost and the market capitalization rate."⁴⁷

In the 2009 presentation, staff also identified that the City had \$150 million of reserves not allocated to specific projects and interest of \$7.5 million was being earned on these funds

⁴⁵ Presentation to Committee of Council, Administrative Space Project, June 17, 2009, Slide 17

⁴⁶ Ibid, slide 12

⁴⁷ Ibid, slide 15

annually, a return of 5%. This demonstrates that the City had sufficient reserves so that it could self-fund the project.

In its 2009 presentation, the City staff appropriately identified three primary financing options – borrow, lease to own, and self-fund. Given that value for money is an important principle in procurement for the public sector, it would be reasonable to expect that the City would pursue the most cost effective option. Arranging the financing itself would be the most cost-effective given the City's clear capacity for assuming debt and given that the City can borrow at a preferential interest rate.

City Council passed motion C190-2009 on June 24, 2009 stating: "That any further consideration of a City led and sole financed build-to-own option for City Hall accommodation needs to be deleted as a possible development option including but not limited to the original project identified at an order of magnitude estimate of \$204 million." Through this motion the City eliminated a cost-effective financing option.

The order of magnitude in Council's motion in 2009 of up to \$204 million was for a 246,000 square foot building.⁴⁸ Staff illustrate in the March 21, 2011 report to Council and the presentation on March 28, 2011 that the process resulted in 120,000 square feet of administrative space. Therefore the order of magnitude should be an estimate of \$100 million.

Through its procurement process the recommendation from staff was that the City enter into a 25 year lease paying approximately \$8.2 million annually for a total aggregate cost of \$205 million for the duration of the lease. This approximates the upper end of the range of the order of magnitude set by Council in 2009 but for a building that did not provide 246,000 square feet.

The presentation to a Special Council Session on March 28, 2011 to review the final evaluation recommendations of the evaluation steering committee identified that a build-to-own option would have an approximate capital outlay of \$97.7 million and the lease-to-own would have a capital cost of approximately \$94.3 million.⁴⁹ The lease-to-own was shown as requiring \$3.4 million less in capital outlay than the build-to-own. However the annual cost was higher for the lease-to-own option.

*The annual cost to the City in the build-to-own scenario was shown at \$6.6 million and under lease-to-own, the annual cost was \$8.2 million.⁵⁰ The lease-to-own had a higher annual cost of \$1.6 million which would have neutralized the lower capital cost outlay in two years. The lease-to-own has a 25 year life so the \$1.6 million higher amount to be paid annually after recovering the higher capital cost, would aggregate to over \$36 million in **higher** cash outlay by the City. The build-to-own has a lower amount which would put less pressure on funding through the tax base. Exhibit I provides an illustration of the difference in the capital cost and the annual cost.*

Exhibit I: Illustration in Monetary Difference For Build-to-Own to Lease-to-Own

	Build to Own	Lease-to-Own	Difference
Capital Cost	\$97.7 million	\$94.0 million	Build-to-own \$3.4 million higher
Annual Cost	\$6.6 million	\$8.2 million	Build-to-own \$1.6 million lower per year; \$40 million over 25 years
Build to own has lower cost over 25 year time span and less pressure on funding from tax base:			\$36.6 million net

However in light of this comparison the City chose to pursue the lease-to-own option. One of the principles in public sector procurement and expenditures is value for money. It is not clear how the value for money principle was being adhered to by utilizing a financing option which had a higher cost.

An option for the City to have considered was to separate financing from the construction aspect. The City could have considered options such as:

- *City finances the construction stage and pays the fixed contract construction price to the builder/developer on occupancy;*
- *Developer arranges own financing for the construction period and City pays the fixed contract construction price to the builder/developer on occupancy plus the construction financing cost at a fixed amount.”*

II ARCHITECTURAL AND VISUAL ASPECTS OF THE PROPOSALS

As mentioned, associated with the Dominus proposal was the firm of Zeidler Partnership Architects, a highly distinguished and reputable firm, in operation since 1956, whose completed projects include the Toronto Eaton Centre, Ontario Place, the atrium at the Hospital for Sick Children, and Queen’s Quay Terminal, all in Toronto.

Petroff Partnership Architects, associated with the Morguard proposal, is, in the words of the Morguard proposal: “ranked by World Architecture magazine as one of the three largest firms in the country.” The firm “was founded in Toronto in 1957. The Petroff organization’s reputation is based primarily on its long-standing commitment to design excellence firmly grounded in economic reality. The firm’s success is the result of a wide range of both commercial and institutional projects...their work has long been recognized for excellence of design, innovation and creativity...”

Aside from the somewhat ambiguous objective that the SWQRP “contribute to the revitalization of the downtown”, and its reference to a “Signature building”, the City Council, in the adoption of its Guiding Principles, and, accordingly, those who were involved in the implementation of the Plan, proceeded mainly on the basis of satisfying the functional and economic objectives of the City, not on evaluating or comparing the design or architectural components of the proposals put forward by the Respondents.

Among the directives by the City Council arising out of its decision, on June 24, 2009, to direct the proceeding with of the RFP process was: “that proposals would be entertained for office space which would complement the existing [1991] City Hall.” However, there appears not to have been any subsequent follow-up on this vague expression of intent, nor evaluation, at least in any documentation presented to the Council, of whether or not the proposed project would comply, or did comply, with its terms.

Instead, the RFP document itself makes consistent reference to the City’s objective to “select the solution that clearly demonstrates the best value for money for the property taxpayers of the City”, and to “working with the Respondent which has submitted the most economically advantageous offer (Preferred Respondent)”.

In the Evaluation Table included in the RFP, “Design and Sustainability” is given a weighting of 10%, in the chart of Submission Requirements and Maximum Scores.

Frequently during the process of evaluation, including at the key closed session of City Council held on January 26, 2011, it was stated that “this project is not a design competition”, [unlike, for instance the selection by open competition, of the design for the current (1965) City Hall of Toronto, in which models of the various proposed buildings were put on public display]. At the meeting, reference was made to the display panels, containing pictorial illustrations associated with the two Proposals, as having been shown “for context only”.

Although the Presentation: “Final Evaluation Recommendations of the Evaluation Steering Committee and Corporate Implications”, presented to City Council at its Special council Session held on March 28, 2011, included “Conceptual Designs” (the illustrations referred to above, provided on behalf of Dominus and Morguard , prepared by their respective architectural firms, Zeidler and Petroff, respectively showing how their projects might appear), nevertheless, there appears to have been no architectural analysis of the proposals. In reference to the display panels, the Minutes of the Council discussion on this point, refer to:

“-the contextual assistance the pictures can provide, and acknowledgement that the design is secondary to the decision on a development partner in this RFP process;

- the need for the public to understand that any conceptual pictures [are of] secondary importance to the submission and do not factor directly into the selection of the development of development partner;

- clarification that the pictures are not final, and that any development design associated with a successful Respondent decision may change, since considerable discussion would be required to finalize the final design.”

In any event, the display panels were available for display to Members of Council, and the public, prior to, or at, the making of the key decisions by the Council at its meeting of March 28, 2011, to proceed with the Dominus proposal.

On the basis of the foregoing, it is unclear what, if any, the architecture or “design” of the visual depictions of the buildings proposed, played a role in the decision-making with respect to the SWQRP project.

In the Work Sheet for Evaluation Steering Committee for Brampton’s SWQRP project, “Architectural Design/Urban Quality” is allocated a maximum of 50 points, out of a total of 1,000 points under Evaluation Categories in total.

In the final Evaluation Steering Committee Report, of March 21, 2011, Dominus received 45 points under this category, and Morguard 22points.

CONCLUSION

I have set out in this my Final Report an outline and analysis of the facts and issues involved in the process, administration and implementation, of the Southwest Quadrant Renewal Plan by the City of Brampton, in accordance with the results of my investigation, mandated by City Council in appointing me as its (Interim) Auditor General.

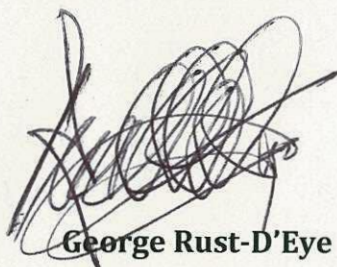
I conclude that the City of Brampton has, through its SWQRP process, brought about the creation of an impressive administrative building complex, designed by a distinguished

architectural firm, and appropriate for the City's purposes and utilization in the public interest, through a process, and in a manner, consistent with the objectives and Guiding Principles adopted and continued by its former and current City Councils.

I have included in my Report additional input by consultants, Fay Booker (financial), and Paul Emanuelli (procurement), retained by the City to provide the benefit of their experience and expertise in their respective areas of specialty.

It would be difficult to arrive at recommendations which would be of assistance to the City of Brampton in dealing with future transactions of this nature, since the SWQRP was unique, and the likelihood of a project of this magnitude and complexity arising again is somewhat low. In any event, such a development would also pose unique and complex issues, which the Council would have to deal with on the basis of circumstances existing at the time, albeit with the benefit of my hindsight investigation, and this Final Report, describing the SWQRP process.

Accordingly, the principal intended value of this Final Report, is to satisfy the concerns and perceptions raised concerning the SWQRP, following the conduct of a thorough review of the project, and a detailed description of the course of action followed by the City of Brampton in deciding upon the process that it would follow, and the party with whom it would contract, for the implementation of its Plan and the securing of its objectives.

A handwritten signature in dark ink, appearing to read "George Rust-D'Eye", with a large, circular flourish at the end.

(Interim) Auditor General to the City of Brampton

October 8, 2014

**TO: THE MAYOR AND MEMBERS OF THE CITY COUNCIL,
CITY OF BRAMPTON**

INTERIM REPORT BY THE INTERIM AUDITOR GENERAL FOR THE CITY OF BRAMPTON

INTRODUCTION

At its meeting held on September 10, 2014, the Council, by its adoption of Recommendations contained in the Report of September 9, 2014 from Mr. John Corbett, its Chief Administrative Officer (CAO), decided to establish the position of Auditor General for the City of Brampton, on an interim basis, "for the purpose to investigate the process and administration on the Southwest Quadrant (SWQ) project with all powers, duties and protections provided under the Municipal Act, effective September 10, 2014...."

The Council confirmed its decision in this regard by its enactment of By-law 319-2014, the "Auditor General By-law".

The Council also, on that date, appointed me as the City's Interim Auditor General, with the responsibilities set out above, to conduct the investigation, and to provide separate external legal advice if and when needed during this investigation. This appointment was also confirmed by By-law.

Pursuant to Council's authority, and following my previous research, and discussions with the CAO and the Associate Director, Corp. Development & Strategy, Mr. Matthew Palladina, I formally commenced my investigation immediately, on September 10, 2014, and have worked on it continually, on a full-time basis, since that time. In view of the lengthy proceedings of the Council, the transactions involved in the evolution of the Southwest Quadrant Renewal Plan, (SWQRP), and the project as a whole, and in accordance with the broad responsibilities and scope of authority imposed and conferred upon me by the Council's direction, I predict that my investigation may take another one or more months before I will be in a position to complete my final Report and Recommendations to the Council.

At the time of making its above decision, the Council also directed me to provide to it an interim report on my investigation within 4 weeks of Council's enactment of the By-law appointing me to office.

This is that Interim Report. It sets out the direction and progress of my investigation to date, not speculation as to possible conclusions, since that would be premature.

THE SUBJECT-MATTER OF MY INVESTIGATION

For the purposes of this Interim Report, I believe that it is necessary, and of assistance to the Council and other readers, to describe in some detail the decision-making process involved in the creation and implementation of the City's Southwest Quadrant Renewal Plan.

For many years, City Council and its administration have recognized the need to increase space to accommodate the City's administrative staff, given that the existing City Hall is at capacity, and for that reason have given consideration from time to time to proposals to supplement or expand City Hall administrative space, while improving the downtown.

One such project was in November, 2005, when the City issued a Request for Expressions of Interest, (RFEOI), to provide additional space for City administration, but that process was cancelled by Council, before it got to the stage of Requests for Proposals (RFP) from the four proponents, due to a number of factors and objectives which had changed during the course of the project.

Following that cancellation, staff was directed by Council to undertake a number of work packages and due diligence studies, which led to the commencement, in 2009, of a project to deliver a mixed-use revitalization of the Southwest Quadrant (that part of the downtown to the south and west of the "Four Corners", of Main Street South and Queen Street West), leading to a series of decisions of the Council to proceed with an RFP.

Some of the key actions and decisions of the Council and its staff in the course of that project, have been the following:

February 10, 2009: Meeting with Stakeholders, at which the Mayor and staff presented an overview of guiding principles for the City's long-term administrative space strategy;

April 27, 2009: Council Workshop;

June 17, 2009: Presentation to Committee of Council – Administrative Space Project – build, business and financing options, by Ms. Deborah Dubenofsky, City Manager; Minutes of that meeting contain, for the first time, reference to advice given to the City by Professor James McKellar, an outside consultant, being that the cost of construction and interest borrowing costs were then at an all-time low;

June 24, 2009: Council directed staff to prepare and issue, by no later than October 31, 2009, a "Proposal Call" to solicit responses from the market for a unique and creative way to deliver a mixed-use revitalization in the SWQ, (to be known as the Southwest Quadrant Renewal Plan, (SWQRP), including 41 George Street), requiring Respondents to meet the seven Guiding Principles adopted by the Council, and to include alternatives to a City-owned and operated building. Among additional directives of the Council were: that the market be encouraged to consider City-owned land in their submissions; that proposals would be entertained for office space which would complement the existing City Hall; that the project satisfy the City's economic and functional requirements and maximize private investment; and that proposals recognize the City's desire that City objectives be achieved with a nominal or no, additional impact to the property taxpayer.

The Council also decided at that time to give consideration in the 2010 budget deliberations to the establishment of a financial plan and reserve account to support the City's long-term space needs.

September 23, 2009: Council decided to proceed with a single-stage Proposal Call (RFP, as it was then, and subsequently, called), as opposed to a two-stage proposal call, which would have started with a Request for Qualifications. At that time, Council received advice from Prof. McKellar that in the proposal call, the City must demonstrate the same qualities that it expects of a potential partner, as well as other advice and information. The Council was advised by staff that the RFP then under development would include:

- a. contribution of City-owned lands;
- b. City's commitment to help secure other private land holdings;
- c. commitment to lease (or lease to own) and occupy 126,000 sq. ft. of administrative office space, as an initial requirement; and
- d. commitment to introduce an "Enterprise" type zoning, which would spur creative mixed-use
- e. development within the Quadrant.

Staff was to report back to Council, prior to the issuance date, to provide a preview of the RFP. I understand that Members of Council did review the draft RFP prior to its issuance, but not the later Addenda, some of which were quite substantial in volume;

October 30, 2009: RFP issued by staff, subsequently to be amended and supplemented by four Addenda, issued on November 27, 2009, December 18, 2009, January 13, 2010, and January 14, 2010, respectively. Closing Date for initial submissions to the RFP was February 11, 2010. The RFP stated that: "The RFP Process is based on the "Competitive Dialogue" process, which "seeks to harness the creativity of the private sector to craft what the best solutions might be to fit the particular needs of the City." The RFP, and particularly Addendum #1, set out in some detail the process and rules relating to the "competitive dialogue" procurement process, and the RFP process generally, to be followed after receipt of proposals;

November 27, 2009: Non-mandatory site meeting for prospective Respondents to the RFP – Members of Council not to attend, due to "no contact" period;

February 24, 2010: Council received a Status Update on the progress of the SWQRP, concluding that all staff deliverables, as set out in Council resolutions arising from the February 25, 2009 meeting, (when Council first decided to undertake a process to define the scope of the project and a detailed analysis and direction for its implementation), and Council's June 24, 2009 meeting, had been met. It was reported at that time that "City Council approved the use of the Competitive Dialogue process".

It was also reported to the Council at that time that three firms, Inzola Group Limited, (Inzola), Morguard Investments (Morguard), and Dominus Construction Group with Zeidler Partnership Architects, (Dominus), (the Respondents), had responded to the RFP, and that "A rigorous process has been established to evaluate the RFP submissions, including oversight by the Process and Fairness Advisor [Prof. McKellar]".

It is noted that the Dominus proposal suggested the splitting of the project into three phases, and addressed all three Phases of the SWQRP, although, for the most part, the immediate Council evaluation process dealt primarily with Phase 1 of the project.

Council established an Evaluation Steering Committee (ESC), comprised of the following members of staff:

1. Mo Lewis, Commissioner of Finance, (Chair);
2. Julian Patteson, Commissioner Buildings and Property Management, (Vice-Chair);
3. Dennis Cutajar, Commissioner Economic Development and Communications;
4. John Corbett, Commissioner Planning Design and Development;
5. Randy Rason, Director Building Design and Construction, BPN; and
6. Peter Honeyborne, Director Treasury Services.

There were no Members of Council appointed to the ESC.

The timetable for the ESC to evaluate the submissions, based on the criteria in the RFP, was as follows:

March 19, 2010: start of evaluation period; Respondents were to be invited to enter into the Competitive Dialogue phase of the evaluation process;

March 19 to July 9, 2010; the Competitive Dialogue stage;

After July 9, 2010; a potentially shorter list of Respondents would be asked to make a Final Offer, with a deadline of **July 23, 2010;**

July-August, 2010: Evaluation of Final Offers by the ESC. The ESC might seek clarification, speculation and fine-tuning from the Respondents;

August, 2010: ESC would recommend the Preferred Respondent to City Council;

September, 2010; following approval by the Council, the City would enter into a contract with the Preferred Respondent, with the building to be ready for occupancy by 2014.

In the Status Update, signed by the Chair and Vice-Chair of the ESC, it was noted: "A 'no contact or quiet' period began when the RFP was issued on October 30, 2009, and continues until the Council decision in September 2010. The 'no contact or quiet' period provisions are designed for the protection of both the City and Respondents. For a procurement this complex, proprietary and commercially-confidential information, within the submissions, must be protected. It is extremely important to adhere to the RFP provisions and not disclose information that could invalidate the process."

March 24, 2010: The Chair and the Vice-Chair of the ESC reported to the Council that all three of the Respondents had passed a series of reviews, namely the Procurement Process Review, (Completeness Review), the Preliminary Process Review and the Technical Review, in the Evaluation Period, which ended on March 19, 2010. It is noted in this regard, that the ESC had established three sub-committees, or "Teams", to handle each of these functions respectively and to make their recommendations to the ESC.

All three of the Respondents had received written invitations from the City to engage in Competitive Dialogue, which was to begin no later than the first week in July.

It was anticipated that during the Competitive Dialogue process, the Respondents would each be asked to clarify their respective Proposals and afford the ESC the ability to understand fully the details of them. The process "would be undertaken in a manner to protect the commercial confidentiality of each Respondent and the integrity of the RFP. Any information provided by the ESC during Competitive Dialogue would be given to all Respondents to maintain fairness and equity."

It was noted that "All participants in the Evaluation Stage, including staff [which would have included all of the members of the ESC], the Process and Fairness Advisor and Competitive Dialogue Advisor, were required to sign Confidentiality and Conflict of Interest Agreements. This was done to err on the side of caution and remove any perception of conflict and to ensure confidentiality throughout the process."

The three-page Confidentiality Agreement, in the form and substance prescribed by City Council, was required by the terms of the RFP, to be signed and submitted by each Respondent prior to the competitive dialogue process.

In the Minutes of the Committee of Council held prior to the Council meeting, it was noted that "staff advised that a report summarizing the process would be provided to Council, noting that staff would consult with legal counsel and the Fairness Advisor to discuss what information may be shared (with Council and the public) in regard to the proposals, to ensure there is no breach of confidentiality."

June 2, 2010: (at Committee of Council): Mr. John Cutruzzola, principal of Inzola, sought, through communication to Councillor Moore, to address the Committee of Council with respect to the SWQRP, which was still in the process of the RFP. The City Manager advised the Committee that, as part of the RFP process, all communication by a Respondent must be through the Purchasing Supervisor, and there are no provisions permitting contact with elected officials, in order to ensure the integrity of the process for the participants and Council. After the Committee had gone in camera to receive legal advice, the request for the delegation was withdrawn.

March 28, 2011: Council received and decided to accept and act upon, the Final Evaluation, adopted unanimously by the ESC, and supported by a Staff Report on Corporate Implications, recommending that Dominus be accepted as the Preferred Respondent, and that staff be directed to proceed with the negotiation of contractual agreements with Dominus, in the terms as identified in its Final Offer, based on lease-to-own payments by the City of not more than \$8.2 million per year for 25 years commencing in 2014, representing an aggregate payment amount of not more than \$205 million, for facilities with an estimated construction cost of \$94 million, to provide about 126,400 sq. ft. of administrative space, and other uses, to the City.

The material before the Council at that time, included: a comprehensive description of the process followed by the ESC in coming to their conclusion; a comparative analysis of the Final Offers of Dominus and Morguard, (Inzola's submission having been "disqualified" from the process); reference to the full range of incentives which had been offered to Respondents during the Competitive Dialogue, but not availed of; a supportive letter from Prof. McKellar, the Process and Fairness Advisor to the City, referring to the Competitive Dialogue Process and the need for confidentiality, and commending the City of Brampton for embarking on an RFP that is "leading edge"; a copy of the Final Offer by Dominus – "long-term vision for swgrp", and a letter, dated March 21, 2011, from Deloitte & Touche, referred to as the City's "Competitive Dialogue Advisor and Financial Advisor", concluding that: "The analysis suggested, that based on a debt to equity ratio of 80% to 20%, the Implied Internal Rate of Return (IRR) and Return on Equity (ROE) requirements compared favourably to market indicators for similar projects, where the public sector is a guaranteed occupier."

I interpret that to mean that, in the opinion of Deloitte, the City received market value for money in the SWQ transaction.

It is noted that Inzola, on July 4, 2011, commenced a civil Court action against the City, alleging negligence, bias and breach of contract, with respect to its disqualification from the procurement process, (by letter dated June 11, 2010 from the Purchasing Supervisor) apparently by reason of its communications to the City Clerk and Members of Council of information relating to the RFP process, in alleged contravention of its duty of confidentiality. This action is ongoing, and, of course, addresses the very issues which are the subject-matter of my investigation.

August 10, 2011: The Council received a report, dated July 29, 2011, from the Chair and Vice-Chair of the ESC, in response to the direction of the Council "to present financing options for Council's consideration that leverage private sector investment, take into account the City's financial capacity, support other Council service priorities and, above all, insulate taxpayers to the extent possible.

The report went on to state that "This report delivers on the above directives and demonstrates that partnering with Dominus will provide significant benefits to the City including:

1. -no occupancy cost payments till 2014
2. -\$100 million Legacy Reserve Fund remains intact
3. -City's Triple 'A' Credit Rating is preserved
4. -Administrative space needs satisfied
5. -development acts as a catalyst for future downtown revitalization
6. -Building ownership (including retail space) is transferred to the City at end of lease term at no additional cost
7. -Transfer of risk to private sector (construction, financing)
8. -Nominal or no increase to the taxpayer is achieved
9. -Additional retail space in the downtown core will be delivered in 2014."

Accordingly, the Council approved "the negotiated terms and conditions between the City and Dominus for Phase 1 and 1a development of the Southwest Quadrant Renewal Plan", and that " for the purpose of entering into the Ground Lease in compliance with Real Estate Policy 14.9.0 requirements for the disposal of land, the City-owned land required for the development of Phase 1 and Phase 1a, known municipally as 33 Queen Street West, 57 Queen Street West and 41 George Street South be declared surplus to the City's requirements." { in the context, it is clear that the references above to "Phase 1 and 1a", refer to what has also been described as Phase 1 of the SWQRP, which includes Sites 1 (41 George Street) and 1A (33 Queen Street West)}.

The Council also decided that: "upon closing of the transaction, Dominus Construction Group may commence construction of Phase 1 and 1a development of the Southwest Quadrant Renewal Plan".

It appears that the various Agreements between the City and Dominus were executed before the end of 2011.

June 18, 2014: The Council decided to authorize the Mayor and Clerk to execute on behalf of the City a Construction Completion Agreement with Dominus, and ancillary documents necessary thereto, in substantial accordance with the Term Sheet entitled Dominus SWQ Phase 1 and 1A Completion Proposal dated June 10,

2014, with content satisfactory to both the Chief Public Services Officer and Chief Administrative Officer, in a form satisfactory to the City Solicitor.

The building now, (**October, 2014**), on the basis of my observing it, appears to be in final stages of construction, but is obviously not yet ready for occupancy by the City.

THE CONDUCT OF MY INVESTIGATION TO DATE

The City has provided me with a fully equipped and lockable office at City Hall, in the CAO's department, where I have worked during the last four weeks, on the investigation.

My principal contact with the City has been through Mr. Palladina, (who was not involved in the development of the Project), and the CAO's Office Coordinator, Ms. Chandra Urquhart, both of whom have been extremely cheerful and helpful in welcoming me to City Hall, and making my tenure there, and the performance of my responsibilities, that much easier and more pleasant.

I have had minimal or no informal contact with other senior staff and officers, or Members of Council of the City, in order to maintain the integrity of my investigation, and comply with my statutory duties of independence and the preservation of secrecy in the performance of my responsibilities as the City's Interim Auditor General, as appointed and assigned by City Council.

I have done everything possible to maintain confidentiality in my investigation, and in reviewing and maintaining in my office so many important records, including in some cases the originals of documents provided to me in the course of my preliminary interviews of Members of Council and senior staff. I ensure that the door to my office is locked whenever I leave it.

I am pleased to say that I believe that I have received full co-operation from everyone in City Hall with whom I have come in contact, and that, to the best of my knowledge, staff have attempted to provide all requested assistance and documentation to me required for my investigation.

At the same time, there has been some delay in obtaining some of the documents which I need, which, together with the fact that I am receiving substantial amounts of records and documentary and graphic materials daily in response to my requests, has resulted in some delay in my review and making notes of records, some of which are extremely voluminous. I am still not in a position to sort and put the many documents into chronological order, which I believe necessary in order to pursue and complete the massive investigation which the Council has assigned me to complete. I have no doubt that I will realize the need to requisition many more documents as I go along, in order to ensure that my investigation is comprehensive and responds to the directions of the Council.

So far, I have received hundreds of relevant documents which I have not yet had the opportunity to review, any of which could have the effect of disclosing evidence suggesting problems in the handling by the City of the SWQRP project, allegations as to which supported the initiative for this investigation

Certainly I have not, to date, felt the need to exercise my coercive and enforcement powers as Auditor General to require co-operation or the production of documents, and I have seen nothing to suggest that anyone in the City is intentionally withholding documents or information, or doing anything to delay or interfere with the performance of my duties. To the contrary, I have been most pleased, and thankful, at the total co-operation and support which I believe I have received to date from everyone from whom I have requested assistance or disclosure.

The key activity which I need to perform in the investigation is to review carefully the terms and conditions contained in: the RFP;

- the Respondents' initial Proposals;
- the Respondents' Final Offers
- the staff and outside experts' Evaluations;
- the Council's information and decisions from time to time;
- the ongoing negotiations after the selection of the Dominus bid; and
- the wording of the Final Agreements.

In this way, I will be able to ascertain, and form conclusions about, the comparative analysis of the Respondents' Proposals, and whether or not the City, in its decision-making, followed principles of equity, fairness and impartiality, and the words of the RFP, in its administration of the process and the award of the final contractual transactions. This will be a time-consuming process, and may involve my recommending to the CAO that additional procurement or other specialized professional expertise should be obtained by retainer of one or more outside consultants.

This is in a context in which, by the inclusion or exclusion of a single term, paragraph or sentence, one or more of the parties could have been given an unfair advantage or disadvantage in what was intended to be constituted as a fair and equitable process of evaluation and negotiations, not just with respect to the gross pricing of the Proposals and the allocation of risk, but also with respect to other components of the Final Agreements.

Among the documents which I have obtained to date are the following:

1. -several binders, a number of file folders, and stacks of individual documents, relating to Council decision-making and transactions over the three years in which the bulk of the procurement process was carried on;
2. -two large binders of materials presented at the Council Workshop held on April 27, 2009;
3. -six volumes of transcripts of the discoveries held in the lawsuit of Inzola v The City of Brampton, and exhibits to those examinations, as well as the pleadings and Answers to Undertakings in that action;
4. -the original Proposal, and display panels, presented by Dominus and Morguard to the Council;
5. -a large binder containing executed copies of the many Agreements entered into between Dominus and the City;
6. -copies of the City's Purchasing By-laws, Procedure By-law, Delegation of Authority By-law, Councillor Code of Conduct, staff Code of Conduct and other By-laws and legislative documents of the City;
7. - the Municipal Act, the Municipal Freedom of Information and Protection of Privacy Act, the Municipal Conflict of Interest Act, Ontario Regulation 653-05, and other legislation relevant or possibly relevant to the subject-matter of my investigation;
8. -documentation provided to me by Members of Council and staff with whom I have conducted preliminary interviews to enable me to understand the process and each of their roles in the evolution and implementation of the SWQRP.

I have reviewed a large number of the documents which I have received to date, though certainly not all of them, and continue to receive a substantial number of additional documents each day.

1. During the last week, I have conducted preliminary interviews with:
2. Mr. Julian Patteson, Chief Public Services Officer, Former Commissioner of Buildings and Property Management, (September 29th);
3. Ms. Diane Oliveira, the City's Purchasing Supervisor, (September 29th);
4. Mr. John Corbett, Chief Administrative Officer, (September 30th)
5. Mr. Peter Fay, City Clerk, (October 1st);
6. Regional Councillor John Sprovieri, (October 1st); and
7. Regional Councilor Elaine Moore, (October 2nd).

Prior to the interviews, I arranged for the services of a court reporter, to record the interviews and provide transcripts, which will assist me in the drafting of my final report to Council.

I intend, during the course of my investigation, to re-interview some of the officials named above, as well as a number of other relevant staff and Councillors, in order to be assured, and to assure the Council, of the comprehensiveness of my investigation, and that I will have left no stone unturned in ascertaining the details of the SWQRP project, and whether or not there may have been errors or misconduct committed by anyone in the events leading up to, or after, approval of the project and the Dominus bid, by the Council.

I have identified a number of issues to which I intend to pay particular attention:

1. -the nature, degree of reasonableness, and implementation, of the Competitive Dialogue process of procurement: The City's adaptation and use of this procedure, never before employed in a procurement process by any other public agency in Canada, and little understood, is a subject which, I believe, requires close further study and analysis;
2. -the involvement, or lack of involvement, of Council and its Members in the process, and whether or not they, and members of the public, had reasonable and required notice and information, enabling them to have appropriate opportunity for input into the process: I have concerns about the extent to which Members of Council were provided with notice, time and useable information to enable them fully to understand the project, and the various terms and conditions proposed by each of the Respondents, particularly in a context in which the Council was told that it was required either to accept entirely the recommendations of staff or cancel the RFP;
3. -the atmosphere of secrecy and of the pressing need for confidentiality, fear of disclosure, and restrictions on access to information, by Council, members of the public, and staff, involved in the process: There appears to have pervaded an almost obsessive concern about loss of confidentiality over business information, and the perceived essential need for a "quiet-no contact" period, leading to the requirement of personal undertakings of secrecy, which were interpreted to the point of preventing the Respondents and staff from sharing information even with the Council. This issue should be reviewed in this investigation, with recommendations to be made to the Council;
4. -the acquisition of the option over the 20 George Street property, land which was not required by the City in Phase 1 of the Development, and for which the City paid Dominus \$480,000., apparently without specific Council authority to do so. I believe that further review of this situation is warranted.

5. -the facts and issues surrounding the disqualification of Inzola, and its impact on the competitive process and the evaluation of Proposals: this serious matter, the subject of a massive lawsuit against the City, currently before the Courts, is linked to issues of communications to Council and its Members, an important component of my investigation, (while avoiding prejudicing the City's interests before the Court).

Further concerns and issues which justify investigative review and scrutiny, are the following, (in no particular order):

1. Whether there was compliance with the City's Purchasing By-law, Council policies, the principles of procurement, the Municipal Act, and other rules governing transactions of this nature;
2. The allocation of risk and costs to be borne by Dominus and the City, respectively;
3. Whether or not the City obtained value for money in its agreements to lease to own, and to pay up to \$8.2 million per annum for twenty-five years for accommodation services;
4. The utilization and acquisition of City-owned lands for the purposes of the SWQRP;
5. The City's legal obligations to Respondents in the project, including whether or not the City has any obligation to Dominus following the completion of Phase 1;
6. The issue of what authority did Council delegate to staff, and the manner in which delegated authority and responsibilities were exercised;
7. Whether or not there was misconduct, inappropriate or improper actions, or undue influence brought to bear by or with respect to any member or members of Council or staff in the course of or relating to, their involvement in the SWQRP;
8. The extent to which the final result of the SWQRP process is consistent with the seven Guiding Principles, and the directives of the Council;
9. Additional issues arising during the course of the investigation, or raised by Councillors, (most of them by Regional Councillor Sprovieri), and others interviewed during the course of the investigation. These include the following:
 - a. That the Morguard bid was better than that of Dominus;
 - b. That the City showed favouritism in the process and in its award of the contract to Dominus, which was pre-determined;
 - c. Staff authorized payment of the option fee of \$480,000. To Dominus and a variance from the City's set-back By-law for the building to encroach on the George Street sidewalk, in both cases without proper authority from Council;
 - d. The site of the building has contaminated soil, which should have been removed before construction of the building;
 - e. The financial component of the Dominus bid was based on a miscalculation of the cost of the development;
 - f. The annual fee to be paid by the City to Dominus was based on an inaccurate relationship to interest rates;
 - g. Staff failed in their duty to advise Council of the foregoing problems of which they were aware, and intentionally misled the Council;

- h. Dominus improperly lobbied at least one member of Council, causing undue influence and bias in the result of the Council decision-making, and possible pay-back to the Member;
- i. Council tried improperly to muzzle Inzola by trying to make them sign a very unusual confidentiality agreement;
- j. The City will be prejudiced if it allows Dominus to transfer its interest to Fengate.

I have not, as yet, investigated any of these latter allegations or found any evidence of corroboration, and have made no conclusions whatever as to their possible validity.

MY OBSERVATIONS AND COMMENTS TO DATE

I am not yet in a position to have arrived at even preliminary conclusions on the issues which form the key objectives of my investigation, and will not be able to do so until I have completed my review of the documentation, and interviewed relevant witnesses on both sides of the issues. I need to establish whether or not there may be real evidence and facts corroborating allegations of wrong-doing, misconduct or errors.

I have been, and am, particularly impressed by the systematic, meticulous, thorough and accurate manner by which the City and its staff record and document the business activities and transactions of the City.

In a case such as this, involving a substantial, in fact huge, series of complicated and difficult transactions, occurring 3 to 5 years ago, the most important source of information is not so much the memories of the players, (though those whom I have interviewed appear to have a keen and accurate recollection and understanding of what occurred), but in the contemporary documentation which contributed to, recorded or constituted the key transactions, positions of the parties and legal compliance demonstrated by their actions and the process followed. Consequently, I believe that my review of the documentation referred to above will be most important in my conduct of the investigation and the preparation of my final report, analysis, legal advice and recommendations to the Council.

Despite the broad and comprehensive series of issues and facts noted above, I do not intend to attempt to second-guess the policy decisions of Council, or to unduly criticize or question the decisions of those whose responsibilities were to ascertain and disclose information or provide advice to the City and its Council, and who had the appropriate experience, and information available, at the time of the development of the SWQRP process.

I plan to take whatever steps possible to narrow the scope of my investigation, and to ensure that I am not wasting my time, and the City's money, in the investigation of issues which are outside of, or irrelevant to, the terms of reference imposed by the authority granted to me by the Council.

I am also well aware of the importance of my taking all steps possible to ensure that my investigation, and any reports to the Council, do not in any way interfere with, or prejudice, the conduct of the litigation, or the interests of the City.

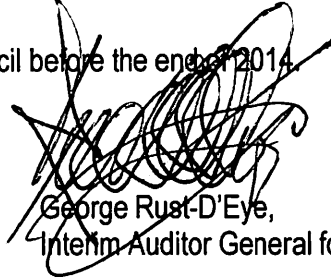
I believe that the recommendation leading to the establishment by the Council of the position of Interim Auditor General, and my appointment to that position, arose from accusations and allegations that the SWQRP project was somehow tinged with wrong-doing or impropriety, and that the litigation, and the information which it led to being released to the public, have raised public and media concerns, necessitating full and independent inquiry by an

accountability officer, with powers and resources to "clear the air", through a comprehensive and non-partisan review of the facts, analysis of the issues, application of legal principles, and clarification of the process followed and its results. I intend, through this investigation, to accomplish those objectives.

In my investigation, I will take into account at all times the most important principle of municipal law and practice called for by the Municipal Act and other legislation, namely the need for accountability and transparency in the manner in which municipal governments operate. Concerns relating to the need for compliance with that fundamental principle in the process followed by Council in this case, demonstrated to the Council the need for this investigation.

At this point, despite my careful review and notes of hundreds of documents and records which I have selected as having the greatest apparent relevance to the issues to be dealt with in my investigation and Final Report, I have not yet established whether or not any of the critical allegations are true or not. The evidence available to me may well disclose that they are. There are certainly many issues raised, and many facts to be established or dismissed. At this point, however, I can say only that so far I have not found corroborated evidence of wrong-doing on the part of any City staff member, official or Member of Council.

I expect to have a final report to Council before the end of 2014.

A large, stylized handwritten signature in black ink, appearing to read 'George Rust-D'Eye', is written over the printed name and title.

George Rust-D'Eye,
Interim Auditor General for the City of Brampton

December 9, 2014

TO: THE MAYOR AND MEMBERS OF THE CITY COUNCIL, THE CITY OF BRAMPTON

INVESTIGATION BY THE INTERIM AUDITOR GENERAL – STATUS UPDATE

Dear Mayor Jeffery and Members of Council:

First of all, may I introduce myself: I, George Rust-D'Eye, was appointed by the previous City Council as Interim Auditor General for the City, "for the purpose to investigate the process and administration on the Southwest Quadrant (SWQ) project with all powers, duties and protections provided under the Municipal Act, [s. 223.19], effective September 10, 2014..." .

The Southwest Quadrant project, ("Southwest Quadrant Revitalization Plan), was the project undertaken in 2009-2011 by the City to deliver a mixed-use revitalization of that part of downtown Brampton (south-west of the "Four Corners" of Main Street South and Queen Street West), involving, principally, the construction of the West Tower and other facilities, (currently still under construction), for City administrative offices to the west and north of City Hall, on land owned by the City.

The subject-matter of the investigation is the process leading to the award of the contract for construction to Dominus Construction Group with Zeidler Partnership Architects, through a Request for Proposals, ("RFP"), competitive dialogue procurement process, and selection of Dominus as the preferred Respondent . The project, a long and complicated one, involving tens of thousands of documents, is the subject of current litigation in the Ontario Superior Court of Justice, in proceedings brought against the City by Inzola Group Limited, one of the three Respondents to the RFP, whose bid was disqualified from the process.

I have been involved in the investigation, (quite separate from the Court proceedings, which are being handled by counsel for the City's insurers), on a virtual full-time basis, since September 10th.

In accordance with Council's instructions, I delivered my Interim Report to the Council, dated October 8, 2014, a copy of which is attached as Schedule "A" to this Report. In that Report, I advised that "I expect to have a final report to Council before the end of 2014."

In view of the unforeseen quantity and volume of additional relevant material and information which I have received since the commencement of my investigation, and am continuing to receive on a daily basis, I now realize that the predicted timing of my report was overly optimistic. I must therefore advise the Council that it appears that my final report will not be completed until at least the end of January, although I will certainly do everything possible to deliver it before then.

I regret the length of time that the investigation is taking, but assure the Council that such is inevitable in order for me to conduct the required investigation, give consideration to all information and evidence relevant to its subject-matter, and fulfil the responsibilities mandated to me by the Council.

George Rust-D'Eye,


Interim Auditor General for the City of Brampton

Southwest Quadrant Renewal Plan

Updated September 5, 2012

Council meetings with SWQ on Agenda (open to the public)

2009	Feb. 25, March 11, April 27, June 17, June 24, Sept. 23
2010	Feb. 24, March 24, June 2
2011	March 28, Aug. 10

Public Information Meetings

2009	June 1
2011	Nov. 2

April 27, 2009	Council Workshop Meeting to discuss the complexities of the City's administrative space needs and receive information from staff.
June 1, 2009	Public information meeting to receive public comment on the City's long-term administrative space needs
June 24, 2009	Council votes to proceed with Southwest Quadrant (SWQ) Renewal Plan. Directs staff to prepare and issue by October 31, 2009, a Proposal Call to solicit responses from the market for a unique and creative way to deliver a mixed-use revitalization of the southwest quadrant.
October 30, 2009	City issues Request for Proposal (RFP).
Feb. 11 – March 19, 2010	<p>Submissions are reviewed by members of the staff-comprised Evaluation Steering Committee.</p> <p>Each bidder's submission passes through three separate sub-committees that review the RFPs.</p> <p>Each sub-committee conducts an independent review:</p> <ul style="list-style-type: none"> • Procurement Process Review (Completeness Review) • Financial Review • Technical Review
March 19, 2010	City invites Inzola Group Limited, Morguard Investments and Dominus Construction Group to the next stage: Competitive Dialogue.
April 6, 2010	<p>Deadline for respondents to confirm interest in participating in the Competitive Dialogue process.</p> <p>All three firms confirm interest.</p>

December 9, 2010	<p>Final offers received from Dominus Construction Group and Morguard Investments Limited.</p> <p>Inzola Group Limited's submission was previously disqualified.</p>
March 21, 2011	<p>City receives letter from Deloitte & Touche LLP stating their opinion that the SWQ project returns compare favourably to market indicators for similar projects.</p> <p>Note: <i>Deloitte & Touche LLP is one of Canada's leading professional services firms, providing audit, tax, consulting, and financial advisory services.</i></p>
March 28, 2011	<p>Staff presentation to Council on final report of the Evaluation Steering Committee.</p> <p>Council approves staff recommendation of Dominus Construction Group as the preferred partner and directs staff to proceed to the negotiation phase.</p>
April 12, 2011	<p>A Brampton resident requests access to the City's records for clarification of the calculation of total square footage, and the square foot cost, for Phase 1 and 1a of the project.</p>
May 2011	<p>City Clerk treats the request as being a request for a record, and identifies that the information being requested was provided to the City directly by a third party, Dominus Construction Group.</p> <p>Note: <i>The City Clerk, as the head of the institution for the purposes of Municipal Freedom of Information and Protection of Privacy Act (MFIPPA), has a duty to refuse to disclose a record that reveals commercial or financial information supplied in confidence.</i></p>
June 9, 2011	<p>City Clerk gives notice of decision not to grant disclosure of the request for record (received on April 12) in accordance with MFIPPA.</p> <p>By refusing to release the information, the City Clerk acted appropriately for these reasons:</p> <ul style="list-style-type: none"> • The information is considered confidential – it is "commercial" information belonging to a third party; and • There is an expectation by the third party that the information will be held in confidence by the City as part of the Southwest Quadrant Renewal Plan RFP 2009-072. • When asked, the third party (Dominus) refused to give permission for the information to be released.

July 27, 2011	<p>City receives letter from Hanscomb Ltd. stating their opinion that the proposed project cost of \$94 million is fair and reasonable.</p> <p><i>Note: Hanscomb Ltd. is a third-party consultant specializing in value management, feasibility studies, construction loan monitoring, cost planning and cost control.</i></p>
August 10, 2011	<p>Presentation to Council on negotiated agreements between the City and Dominus, along with financing options.</p> <p>Council approves staff recommendation and directs staff to finalize Agreement Documents.</p>
November 2, 2011	Public Information Session is attended by more than 400 people.
Nov. – Dec. 2011	Construction of SWQ project commences.
January, 2012	Demolition of City-owned, four-storey building at 41 George Street is completed.
February 8, 2012	Groundbreaking ceremony is held at 41 George Street.
March 2012	Shoring commences at 41 George Street
May 2012	Demolition of 33 Queen Street is completed.
June 2012	Excavation of 41 George Street commences.
August 2, 2012	<p>The Information and Privacy Commissioner of Ontario (IPC) delivers an order (dated July 31, 2012) requiring the City to disclose information in the April 12, 2011 Freedom of Information (FOI) request.</p> <p>In making its ruling, the IPC applied a three-part legal test:</p> <ul style="list-style-type: none"> • The IPC agreed with the decision of the City Clerk, that the first two parts of the legal test were satisfied, regarding (1) commercial information and (2) reasonable expectation of confidentiality. • The IPC disagreed with the Clerk on the issue of (3) "harm", determining that releasing the information would not harm the business of either Dominus or the City. <p>The City will release the information after August 31, 2012 and before September 6, 2012.</p>
September 5, 2012	City releases the requested information named in the April 12, 2011 FOI request.
January 2014	Target date for occupancy of the new building.