



EXISTING CONTRACT PURCHASE AGREEMENT

**CITY OF SANTA FE
CONTRACT NO. 17-0057**

BOND COUNSEL SERVICES

Pursuant to terms and conditions of City of Santa Fe Contract No. 17-0057, between the City of Santa Fe and Modrall, Sperling, Roehl, Harris & Sisk, P.A. (Contractor), as amended and incorporated herein by reference, the City of Las Cruces (City) and Contractor hereby agree on this 24th day of April, 2017, as follows:

1. In a satisfactory and proper manner, the Contractor shall perform Bond Counsel Services pursuant to City of Santa Fe Contract No. 17-0057, as set forth in Attachment A, attached hereto and made a part of this agreement.
2. The effective period of this agreement shall coexist with City of Santa Fe Contract No. 17-0057 and expire on June 20, 2020.
3. In consideration for the performance of Bond Counsel Services, the Contractor shall be compensated pursuant to the cost terms of City of Santa Fe Contract No. 17-0057. Cost of delivered services shall be paid by City within 30 days upon receipt of undisputed invoice.

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

CITY OF LAS CRUCES

BY: 
Katherine M. Creagan
Attorney

BY: 
Deb Smith
Purchasing Manager

4/25/2017
Date

4-27-17
Date

APPROVED AS TO FORM


City Attorney

Attachment A

**City of Santa Fe
Contract No. 17-0057**

**CITY OF SANTA FE
PROFESSIONAL SERVICES AGREEMENT
WITH
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A
FOR BOND COUNSEL SERVICES**

THIS AGREEMENT is made and entered into this 25th day of January, 2018^{1^{mb}} by and between the **CITY OF SANTA FE**, hereinafter referred to as “the City,” and **MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.**, a New Mexico Corporation with its principal place of business located at 123 East Marcy Street, Suite 201, Santa Fe, NM 87501, hereinafter referred to as the “the Contractor.”

RECITALS

WHEREAS, the City desires to engage the Contractor to render certain services as described herein, and the Contractor is willing to render such services.

AGREEMENT

NOW THEREFORE, in consideration of the premises and mutual obligations herein, the parties hereto do mutually agree as follows:

1. SCOPE OF WORK

The Contractor shall:

- A. Prepare and deliver to the City the financing timetable, all bond resolutions and bond sale resolutions necessary to the issuance of the bonds, as well as all proceedings, transcripts and minutes that are required to be adopted by the City.
- B. Prepare information for and participate in presentations to rating agencies and prospective bond purchasers as required by the City and attend all meetings of the City Council at the time of the sale and closings, and additional meetings as required by the City.
- C. Collaborate with the City staff, the Financial Advisor, the Investment Committee and Underwriters to structure issues that minimize the City’s transactions costs and its credit risk and prepare all ordinances, agreements, preliminary offering statements, official statements, other securities laws disclosure documents and any other documents pursuant to which bonds will be authorized, secured and delivered.
- D. Upon request, assist the City with legal documentation and legislation in connection with obtaining loans through the New Mexico Finance Authority.

- E. Coordinate the delivery of the documents and other activities, and plan, coordinate and manage the pre-closing of bond sales in a manner to assure the timely closing of bond sales and the delivery of funds to the City; prepare and file final transcripts of the proceedings to the issuance of the bonds.
- F. Upon request, provide to the City continuing information concerning federal, state and local statutory and regulatory changes, including but not necessarily limited to arbitrage, and other current developments relating to the City's bond issues.
- G. Upon request, participate in discussions with the City and its financial advisors regarding the evaluation of options and alternatives for issuing additional bonds, refunding or calling of outstanding bonds and new financing techniques, including the delivery of oral and written legal advice on particular projects.
- H. Brief the City officials, employees, counsel and consultants on matters, which impact the issuance of the City bond financing. This includes rendering of an opinion and availability for phone consultation on questions of federal and state law, nature and priority of the security of bonds and legality of the issuance of the bonds under applicable securities laws, and the tax-exempt status of the bonds.
- I. Review and advise the City regarding drawdowns of bond proceeds,, procedures, and other matters regarding bond project disbursement regulations.
- J. Assist the City Attorney, if requested, in any litigation relating to or in any way affecting the issuance, sale, execution and delivery of the City bonds, notes, certificates, loan transactions or other debt transactions..
- K. Draft state legislation and provide testimony before legislative committees when requested by the City; provide other special advice or opinions requested by the City, relating to the City bond financing.

2. ADDITIONAL SERVICES

- A. The parties agree that all tasks set forth in Section 1. "SCOPE OF WORK," of this Agreement shall be completed in full, to the satisfaction of the City, in accordance with industry standards and the aforementioned statutes, for the amount set forth in Section 3. "COMPENSATION AND INVOICING" of this Agreement, and for no other cost, amount, fee or expense.
- B. The City may from time to time request changes in the scope of work to be performed hereunder. Such changes, including any increase or decrease in the amount of the Contractor's compensation, which are mutually agreed upon by and between the City and the Contractor, shall be incorporated in written amendments to this Agreement.

3. COMPENSATION AND INVOICING

- A. The services provided by the Contractor shall be compensated in accordance with the Fee Schedule, attached hereto as Exhibit A and made a part hereof by reference.
- B. The Contractor shall submit a written request for payment to the City whenever payment is due under this Agreement. Within fifteen (15) days of the City's receipt of the written request, the City shall issue a written certification of complete or partial acceptance or rejection of the contractual items or services for which payment is sought. The Contractor acknowledges and agrees that the City may not make any payment hereunder unless and until it has issued a written certification accepting the contractual items or services. Within thirty (30) days of the issuance of a written certification accepting the contractual items or services, the City shall tender payment for the accepted items or services. In the event the City fails to tender payment within thirty (30) days of the written certification accepting the items or services, the City shall pay late payment charges of one and one-half percent (1.5%) per month, until the amount due is paid in full.
- C. In the event the Contractor breaches this Agreement, the City may, without penalty, withhold any payments due the Contractor for the purpose of set-off until such time as the City determines the exact amount of damages it suffered as a result of the breach.
- D. Payment under this Agreement shall not foreclose the right of the City to recover excessive or illegal payment.

4. EFFECTIVE DATE AND TERM

This Agreement shall, upon due execution by all parties, become effective as of the date first written above and shall terminate on June 30, 2020, unless earlier terminated pursuant to Section 5. "TERMINATION," of this Agreement.

5. TERMINATION

- A. Termination of Agreement for Cause. Either party may terminate the Agreement based upon any material breach of this Agreement by the other party. The non-breaching party shall give the breaching party written notice of termination specifying the grounds for the termination. The termination shall be effective seven (7) days from the breaching party's receipt of the notice of termination, during which time the breaching party shall have the right to cure the breach

If, however, the breach cannot with due diligence be cured within seven (7) days, the breaching party shall have a reasonable time to cure the breach, provided that, within seven (7) days of its receipt of the written notice of termination, the breaching party (i) began to cure the breach and (ii) advised the non-breaching party in writing that it intended to cure.

- B. Termination for Convenience of the City. The City may, in its discretion, terminate this Agreement at any time for any reason by giving the Contractor written notice of termination. The notice shall specify the effective date of termination, which shall not be less than seven (7) days from the contractor's receipt of the notice. The City shall pay the Contractor for acceptable work, determined in accordance with the specifications and standards set forth in this Agreement, performed before the effective date of termination but shall not be liable for any work performed after the effective date of termination.

6. INDEPENDENT CONTRACTOR

The Contractor and its agents and employees are independent Contractors and are not employees or agents of the City. Accordingly, the Contractor and its agents and employees shall not accrue leave, participate in retirement plans, insurance plans, or liability bonding, use the City vehicles, or participate in any other benefits afforded to employees of the City. Except as may be expressly authorized elsewhere in this Agreement, the Contractor has no authority to bind, represent, or otherwise act on behalf of the City and agrees not to purport to do so.

7. PERSONNEL

- A. All work performed under this Agreement shall be performed by the Contractor or under its supervision.
- B. The Contractor represents that it has, or will secure at its own expense, all personnel required to discharge its obligations under this Agreement. Such personnel (i) shall not be employees of or have any contractual relationships with the City and (ii) shall be fully qualified and licensed or otherwise authorized or permitted under federal, state, and local law to perform such work.

8. ASSIGNMENT

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the advance written approval of the City. Any attempted assignment or transfer without the City's advance written approval shall be null and void and without any legal effect.

9. SUBCONTRACTING

The Contractor shall not subcontract or delegate any portion of the services to be performed under this Agreement without the advance written approval of the City. Any attempted subcontracting or delegating without the City's advance written approval shall be null and void and without any legal effect.

10. RECORDS AND INSPECTIONS

- A. To the extent their books and records relate to (i) their performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to the City as part of the procurement process, the Contractor agrees to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under this Agreement; (ii) allow the City or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with generally accepted accounting principles (“GAAP”).
- B. To the extent their books and records relate to (i) their performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to the City as part of the procurement process, the Contractor also agrees to require any sub the Contractor it may hire to perform its obligations under this Agreement to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under the subcontract; (ii) to allow the City or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with GAAP.

11. APPROPRIATIONS AND AUTHORIZATIONS

This Agreement is contingent upon sufficient appropriations and authorizations being made for performance of this Agreement by the City Council of the City and/or, if state funds are involved, the Legislature of the State of New Mexico. If sufficient appropriations and authorizations are not made in this or future fiscal years, this Agreement shall terminate upon written notice by the City to the Contractor. Such termination shall be without penalty to the City, and the City shall have no duty to reimburse the Contractor for expenditures made in the performance of this Agreement. The City is expressly not committed to expenditure of any funds until such time as they are programmed, budgeted, encumbered and approved for expenditure by the City. The City’s decision as to whether sufficient appropriations and authorizations have been made for the fulfillment of this Agreement shall be final and not subject to challenge by the Contractor in any way or forum, including a lawsuit.

12. PERMITS, FEES, AND LICENSES

The Contractor shall procure all permits and licenses, pay all charges, fees, and royalties, and give all notices necessary and incidental to the due and lawful performance of its obligations hereunder.

13. RELEASE

Upon its receipt of all payments due under this Agreement, the Contractor releases the City, its Elected Officials, officers, agents and employees from all liabilities, claims, and obligations whatsoever arising from or under or relating to this Agreement.

14. PUBLICATION, REPRODUCTION, AND USE OF MATERIAL; COPYRIGHTS

A. The City has the unrestricted right to publish, disclose, distribute and otherwise use, in whole or in part, any reports, data, or other material prepared under or pursuant to this Agreement.

B. The Contractor acknowledges and agrees that any material produced in whole or in part under or pursuant to this Agreement is a work made for hire. Accordingly, to the extent that any such material is copyrightable in the United States or in any other country, the City shall own any such copyright.

15. CONFLICT OF INTEREST

The Contractor represents that it has no and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of its obligations under this Agreement.

16. NO ORAL MODIFICATIONS; WRITTEN AMENDMENTS REQUIRED

This Agreement may not be modified, altered, changed, or amended orally but, rather, only by an instrument in writing executed by the parties hereto. The Contractor specifically acknowledges and agrees that the City shall not be responsible for any changes to Section 1, "SCOPE OF WORK", of this Agreement unless such changes are set forth in a duly executed written amendment to this Agreement.

17. ENTIRE AGREEMENT; INTEGRATION

This Agreement incorporates all the agreements, covenants, and understandings between the parties hereto concerning the subject matter hereof, and all such agreements, covenants and understandings have been merged into this written Agreement. No prior or contemporaneous agreement, covenant or understandings, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

18. EQUAL OPPORTUNITY COMPLIANCE

A. The Contractor agrees to abide by all Federal, State, and local laws, ordinances, and rules and regulations pertaining to equal opportunity and unlawful discrimination. Without in any way limiting the foregoing general obligation, the Contractor specifically agrees not to discriminate against any person with regard to employment with the Contractor or participation in any program or activity offered pursuant to this Agreement on the grounds of race, age, religion, color,

national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity.

- B. The Contractor acknowledges and agrees that failure to comply with this Section shall constitute a material breach of this Agreement.

19. SEVERABILITY

If any term or condition of this Agreement shall be held invalid or non-enforceable by any court of competent jurisdiction, the remainder of this Agreement shall not be affected and shall be valid and enforceable to the fullest extent of the law.

20. COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW

- A. In performing its obligation hereunder, the Contractor shall comply with all applicable laws, ordinances, and obligations.
- B. This Agreement shall be construed in accordance with the substantive laws of the State of New Mexico, without regard to its choice of law rules. The Contractor and the City agree that the exclusive forum for any litigation between them arising out of or related to this Agreement shall be the federal and state district courts of New Mexico, located in Santa Fe County.

21. NOTICE OF PENALTIES

The Procurement Code, Section 13-1-28 through 13-1-199 NMSA 1978, imposes civil and criminal penalties for its violation. In addition, New Mexico criminal statutes impose felony penalties for bribes, gratuities, and kickbacks.

22. NO THIRD-PARTY BENEFICIARIES

This Agreement was not intended to and does not create any rights in any persons not a party hereto.

23. FACSIMILE SIGNATURES

The parties hereto agree that a facsimile signature has the same force and effect as an original for all purposes.

24. NEW MEXICO TORT CLAIMS ACT

No provision of this Agreement modifies or waives any sovereign immunity or limitation of liability enjoyed by the City or its “public employees” at common law or under the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1, et seq.

25. INSURANCE

- A. General Conditions. The Contractor shall submit evidence of insurance at the City's request. Policies of insurance shall be written by companies authorized to write such insurance in New Mexico.
- B. General Liability Insurance, Including Automobile. The Contractor shall procure and maintain during the life of this Agreement a comprehensive general liability and automobile insurance policy with liability limits in amounts not less than \$1,050,000 combined single limits of liability for bodily injury, including death, and property damage for any one occurrence. Said policies of insurance shall include coverage for all operations performed for the City by the Contractor; coverage for the use of all owned, non-owned, hired automobiles, vehicles and other equipment, both on and off work; and contractual liability coverage under which this Agreement is an insured contract. The City of Santa Fe shall be a named additional insured on the policy.
- C. Workers' Compensation Insurance. The Contractor shall comply with the provisions of the Workers' Compensation Act.
- D. Increased Limits. If, during the life of this Agreement, the Legislature of the State of New Mexico increases the maximum limits of liability under the Tort Claims Act (NMSA 1978, Sections 41-4-1 through 41-4-29, as amended), The Contractor shall increase the maximum limits of any insurance required herein.
- E. Malpractice/Errors and Omissions Insurance. The Contractor shall procure and maintain during the life of this Agreement professional liability or errors and omissions insurance in amounts not less than \$10 million for any one occurrence and \$20 million per aggregate.

26. CONTRACTOR'S REPRESENTATIONS AND WARRANTIES

The Contractor hereby represents and warrants that:

- A. It is a corporation duly organized and in good standing under the laws of the State of New Mexico.
- B. This Agreement has been duly authorized by the Contractor, the person executing this Agreement has authority to do so, and, once executed by the Contractor, this Agreement shall constitute a binding obligation of the Contractor.
- C. This Agreement and the Contractor's obligations hereunder do not conflict with the Contractor's articles of incorporation or by-laws or any corporate resolution adopted by the Contractor.

27. CAMPAIGN CONTRIBUTION DISCLOSURE FORM

The Contractor agrees to compute and submit simultaneous with execution of this Agreement a Campaign Contribution Disclosure Form approved by the City.

28. NOTICES

All notices required to be given to the City under this Agreement shall be mailed (pre-postage paid) to:

City of Santa Fe
Finance Department
200 Lincoln Ave.
Santa Fe, NM 87504

All notices required to be given to the Contractor under this Agreement shall be mailed (pre-postage paid) to:

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
123 East Marcy Street
Suite 201
Santa Fe, NM 87501

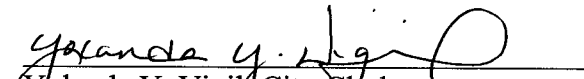
IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

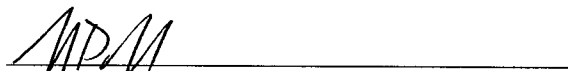
CITY OF SANTA FE:



Javier Gonzales, Mayor

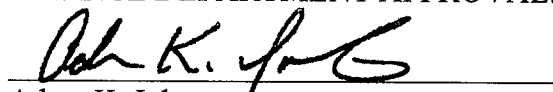
ATTEST:

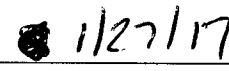

Yolanda Y. Vigil, City Clerk
CC mtg. 1/25/17
APPROVED AS TO FORM:


Kelley A. Brennan, City Attorney

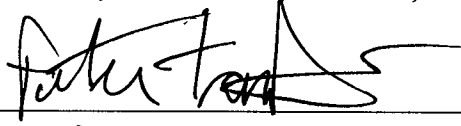
12/21/16
Date

FINANCE DEPARTMENT APPROVAL:


Adam K. Johnson
Finance Director


Date

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.:



By: Peter Franklin

3.1.17
Date

Title: Shareholder

FEDERAL IDENTIFICATION NUMBER

85-0283491

City of Santa Fe Business License No:
17-0003033

EXHIBIT A
FEE SCHEDULE

Fixed Fees Relating to Securities Issued by the City. For tasks related to the issuance of a specific series of securities for the City, Modrall, Sperling proposes the following fixed fees, based on the par amount of the bonds plus original issue premium:

Fixed Term-Fixed Rate New Money and Current Refunding General Obligation Bond Issues	
Size of Issue	Fee
\$5,000,000 or less	\$22,500
Between \$5,000,000 and \$7,500,000	\$22,500 plus \$1.50 per \$1,000 principal amount between \$5,000,000 and \$7,500,000
Over \$7,500,000	\$26,250 plus \$1.40 per \$1,000 principal amount over \$7,500,000

Fixed Term-Fixed Rate New Money and Current Refunding Revenue Bond Issues	
Size of Issue	Fee
\$5,000,000 or less	\$25,000
Between \$5,000,000 and \$7,500,000	\$25,000 plus \$1.75 per \$1,000 principal amount between \$5,000,000 and \$7,500,000
Over \$7,500,000	\$29,375 plus \$1.60 per \$1,000 principal amount over \$7,500,000

Our fee will be increased by ten percent (10%) for advance refundings to account for additional work establishing the escrow.

Fixed Rate Special Assessment District Bonds	
Size of Issue	Fee
\$2,000,000 or less	\$40,000
Between \$2,000,000 and \$5,000,000	\$40,000 plus \$5.00 per \$1,000 principal amount between \$2,000,000 and \$5,000,000
Over \$5,000,000	\$55,000 plus \$4.00 per \$1,000 principal amount over \$5,000,000

Industrial Revenue Bonds
<p style="text-align: center;">\$0.30 per \$1,000 face amount of the bonds with a minimum fee of \$25,000 per issue. (The cost of IRB review counsel services as bond counsel to the City will be passed through to the developer of the IRB project).</p>

Fixed Rate Public Improvement District Bonds	
Size of Issue	Fee
\$3,000,000 or less	\$45,000
Between \$3,000,000 and \$5,000,000	\$45,000 plus \$5.00 per \$1,000 principal amount between \$3,000,000 and \$5,000,000
Over \$5,000,000	\$55,000 plus \$4.00 per \$1,000 principal amount over \$5,000,000

Modrall, Sperling's bond counsel review of an application for a public improvement district ("PID") and issuance of PID bonds will be billed to the City separately, at the hourly rates described above. Those fees are recovered by the City from the application fee required from the applicant. The application fee paid by the developer of the PID project is generally recoverable from bond proceeds.

Fixed Rate Tax Increment Development District Bonds	
Size of Issue	Fee
\$3,000,000 or less	\$45,000
Between \$3,000,000 and \$5,000,000	\$45,000 plus \$5.00 per \$1,000 principal amount between \$3,000,000 and \$5,000,000
Over \$5,000,000	\$55,000 plus \$4.00 per \$1,000 principal amount over \$5,000,000

Modrall Sperling's bond counsel review of an application for a tax increment development district ("TIDD") and issuance of TIDD bonds will be billed to the City separately, at the hourly rates described above. Those fees are recovered by the City from the application

fee required from the applicant. The application fee paid by the developer of the TIDD project is generally recoverable from bond proceeds.

In the event that the securities are not issued, Modrall, Sperling will charge the City for professional fees at hourly rates for services provided up to the time the decision was made by the City to stop efforts to issue securities. We would also seek reimbursement of reasonable out-of-pocket expenses. We understand that payment in that situation would be dependent on the availability of funds and appropriations by Council in the discretion of the City.

Hourly Rates Not Relating to Securities to be Issued by the City. For tasks not related to issuance of a specific series of securities or substantial post-issuance tax or securities compliance matters, Modrall, Sperling agrees to bill the City at a blended rate of \$285 per hour for the services of Peter Franklin, Chris Muirhead; Creagan, and/or Daniel Alsup, in an amount not to exceed \$100,000, unless otherwise negotiated and agreed by the City and Modrall Sperling based on the scope and complexity of a particular task.

Modrall, Sperling utilizes specialized computer software for compiling and maintaining client bills and routinely provides its clients with detailed monthly billings summarizing the work performed.

New Mexico Finance Authority Loans. Our fee for New Mexico Finance Authority loans will be the same as the bond counsel fee-based on the principal amount of the loan. There is no disclosure and/or underwriter's counsel fee for New Mexico Finance Authority loans.

Fees Relating to Work as Disclosure and/or Underwriter Counsel. The fee for disclosure and/or underwriter counsel service such as the preparation of the preliminary official statement, the official statement and the 10b-5 opinion shall be 75% of the bond counsel fee outlined above. We recognize that some bond underwriters currently require independent counsel for preparation of the disclosure documents and the related due diligence investigation.

Fees Relating to Complex Issues. In unusual circumstances, where the complexity of the issue warrants an adjustment in the fees, we propose that Modrall, Sperling and the City negotiate a mutually acceptable fee prior to the date of the adoption of the final bond ordinance by the City. We believe that the rates we are quoting in this proposal are fair and at the "market rate." We do not follow the practice of bidding low on a proposal and then requesting an adjustment in the fee after issuance of the bonds, hoping to convince the public officials, overseeing the contract that the work was more complex than normal. No request for upper adjustment will be made by us unless it is clear to both the City and us that the issue was so out of the ordinary that the documents essentially had to be recreated. In such case, the City will be consulted as the issue progresses.

The fees quoted above do not contemplate issues involving multi-mode issues, credits swaps, interest rate swaps or other similar types of complex or nontraditional techniques, including those which may develop over the period of time covered by this proposal. With respect to such financing techniques, we -would propose to negotiate a mutually acceptable fee, based upon the complexity of the transaction.

Advice Against Issuance. Modrall, Sperling has provided and will continue to provide objective legal advice with respect to a proposed securities issue, without regard to fees, including advice against issuing of securities, if warranted.

It is our philosophy, if there are legal problems with respect to a proposed structure, to find a different structure or procedure to accomplish the goals of the client. Before advising against issuance, we will exhaust our resources to find a manner in which the issue can be restructured to accomplish the financing,

Subcontractor Fees. Modrall, Sperling does not anticipate that we will need to employ subcontractors; in the event it is necessary to do so, we would consult with and obtain the consent of the City prior to employing a subcontractor.

Reimbursable Costs and Taxes. We propose to bill gross receipts taxes and out-of-pocket expenses (such as photocopying, printing, long distance telephone and facsimile calls, express mailings, mileage, government filing fees, printing expenses and other similar expenses incurred by Modrall, Sperling in performing bond counsel services to the City) in addition to the amount billed for our services.

The rates quoted above are the same as the rates that Modrall, Sperling charges other clients for bond counsel services under recent bond counsel proposals.