

Underwriting Services Agreement

This Agreement is made and entered into this ____ day of _____, _____, by and between the City of Overland Park, Kansas, (hereinafter, the "City") and _____, (hereinafter, the "Underwriter").

Whereas, the City has solicited proposals from qualified underwriting firms in connection with the proposed issuance of approximately \$19,300,000 of Transportation Development District Sales Tax Revenue Bonds expected to be issued by the City in order to finance construction of certain public improvements in connection with the redevelopment of Oak Park Mall in the City; and

Whereas, the Underwriter has submitted a proposal in response to the City's RFP outlining the offer of its services; and

Whereas, the City and the Underwriter desire to enter into an agreement setting forth the terms and conditions of their understanding regarding the services;

Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

SECTION 1. SCOPE OF SERVICES

The Underwriter agrees to perform the services as set forth in Exhibit A (RFP for Underwriting Services and Underwriter's response to RFP) attached hereto and incorporated herein by reference, (hereinafter the "Services").

SECTION 2. STATUS

Underwriter is an independent contractor and as such is not an agent or employee of the City.

SECTION 3. COMPENSATION

A. Fee. City agrees that Underwriter compensation will be as follows:

Management Fee	\$_____	per \$1,000 bonds issued
Underwriting Risk	\$_____	per \$1,000 bonds issued
Takedown	\$_____	per \$1,000 bonds issued
Underwriter's Counsel	\$_____	per \$1,000 bonds issued
Estimated Expenses	\$_____	per \$1,000 bonds issued
Total Compensation	\$_____	per \$1,000 bonds issued

If any adjustments in fee are deemed to be necessary, such adjustments shall be agreed upon in writing by both parties.

B. Manner of Payment. Payment of any and all fees and expenses is contingent upon completion of the transaction and issuance of the TDD bonds. Bond issue proceeds will be the source of payment.

C. Additional Services. If any additional services beyond the Services outlined in Exhibit A are deemed to be necessary, the compensation for said Services shall be agreed upon in writing by both parties.

SECTION 4. TERM AND TERMINATION

The term of this Agreement shall commence on the date the Agreement is executed referenced above, and shall continue in force through the completion of the transaction and issuance of the TDD bonds referenced herein.

Either party may terminate this Agreement with or without cause subject to written notice to the other party.

SECTION 5. INSURANCE

During the performance of this contract, the Underwriter agrees to maintain for the duration of the contract insurance coverage of the types and minimum liability as set forth below. Before entering into a contract, the successful Firm shall furnish to the City a Certificate of Insurance verifying such coverage. The certificate holder on the Certificate of Insurance shall be as follows:

City of Overland Park, Kansas
c/o City Clerk
8500 Santa Fe Drive
Overland Park, KS 66212

Certification of insurance coverage shall be on the City's standard Certificate of Insurance form or on forms acceptable to the City.

Prior to any material change or cancellation, the City will be given thirty (30) days advanced written notice by registered mail to the stated address of the certificate holder.

A. Errors & Omissions / Professional Liability

\$ 1,000,000 per wrongful act and \$ 1,000,000 annual aggregate.

B. Financial Institution Bond, Form 14

Coverage must be provided on Financial Institution Bond, Form 14 with a minimum limit of \$1,000,000 per loss.

C. Workers' Compensation and Employer's Liability

This insurance shall protect the Firm against all claims under applicable state workers' compensation laws. The Firm shall also be protected against claims for injury, disease or death of employees which, for any reason, may not fall within the provisions of a workers' compensation law. The policy limits shall not be less than the following:

Workers' Compensation:	<u>Statutory</u>
Employer's Liability:	
Bodily Injury by Accident	\$100,000 each accident
Bodily Injury by Disease	\$500,000 policy limit
Bodily Injury by Disease	\$100,000 each employee

D. Industry Ratings

The City will only accept coverage from an insurance carrier who offers proof that it:

- 1) Is licensed to do business in the State of Kansas;
- 2) Carries a Best's policyholder rating of A- or better;

AND

- 3) Carries at least a Class VIII financial rating.

OR

Is a company mutually agreed upon by the City and Firm.

SECTION 6. INDEMNITY

A. Definition

For purposes of indemnification requirements, the term "Loss" shall have the meaning set forth as follows:

"Loss" means any and all loss, damage, liability or expense, of any nature whatsoever, whether incurred as a judgment, settlement, penalty, fine or otherwise (including attorney's fees and the cost of defense), in connection with any action, proceeding, demand or claim for injury, including death, to any person or persons or damages to or loss of, or loss of the use of, property of any person, firm or corporation, including the parties hereto, which arise out of or are connected with, or are claimed to arise out of or be connected with, the performance of this contract whether arising before or after the completion of the work required hereunder.

B. Indemnity

For purposes of this Agreement, Underwriter hereby agrees to indemnify, defend and hold harmless the City, its employees and agents from any and all loss where loss is caused or incurred or alleged to be caused or incurred in whole or in part as a result of the negligence or other actionable fault of the Underwriter, its affiliates, subsidiaries, employees, agents and subcontractors/assignees and their respective servants, agents and employees.

It is agreed as a specific element of consideration of this Agreement that this indemnity shall apply notwithstanding the joint, concurring or contributory or comparative fault or negligence of the City or any third party and, further notwithstanding any theory of law including, but not limited to, a characterization of the City's or any third party's joint, concurring or contributory or comparative fault or negligence as either passive or active in nature; provided, however, that the Underwriter's obligation hereunder shall not include amounts attributable to the fault or negligence of the City or any third party for whom the Underwriter is not responsible.

In the case of any claims against the City, its employees or agents indemnified under this Agreement, by an employee of the Underwriter, its affiliates, subsidiaries, or assignees, the indemnification obligation contained in this Agreement shall not be limited by any limitation on amount or type of damages, compensation or benefits payable by or for the Underwriter, its affiliates, subsidiaries, or assignees, under workers' compensation acts, disability benefit acts, or other employee benefit acts.

SECTION 7. DISPUTE RESOLUTION

City and Underwriter agree that disputes relative to the project should first be addressed by negotiations between the parties. If direct negotiations fail to resolve the dispute, the party initiating the claim that is the basis for the dispute shall be free to take such steps as it deems necessary to protect its interests; provided, however, that notwithstanding any such dispute Underwriter shall proceed with the work as per this Agreement as if no dispute existed; and provided further that no dispute will be submitted to arbitration without the City's express written consent.

SECTION 8. AFFIRMATIVE ACTION/OTHER LAWS.

A. Equal Employment Opportunity. During the performance of this contract, the Underwriter agrees as follows:

1. The Underwriter shall comply with the Kansas Act against discrimination and shall not discriminate against any employee because of race, religion, color, sex or national origin and will abide by the provisions of the Age Discrimination in Employment Act of 1967, as amended. The Underwriter will take affirmative action to ensure that applicants are employed and that applicants are treated during employment without regard to their race, religion, color, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment advertisement; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Underwriter agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the requirements of these nondiscrimination provisions.

2. The Underwriter will, in all solicitations or advertisements for employees placed by or on behalf of the Underwriter, state that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex or national origin and shall include the phrase "equal opportunity employer" or a similar phrase approved by the Kansas Commission on Civil Rights.

3. If the Underwriter fails to comply with the manner in which the Underwriter reports to the commission in accordance with the provisions of K.S.A. 44-1031 and amendments thereto, the Underwriter shall be deemed to have breached the present Agreement and it may be canceled, terminated or suspended, in whole or in part, by the City.

4. If the Underwriter is found to have violated the Kansas Act against discrimination under a final decision or order of the Kansas Commission on Civil Rights, the Underwriter shall be deemed to have breached the Agreement, and it may be canceled, terminated or suspended, in whole or in part, by the City.

5. The Underwriter will include all of Subsections 1 through 4 in every subcontract or purchase order, so that such provisions will be binding upon each subcontractor or vendor.

B. Other Laws. The Underwriter agrees to abide by all other federal, state or local laws, ordinances and regulations applicable to this Project and to furnish any certification required by any federal, state or local governmental agency in connection with same.

SECTION 9. PROHIBITION AGAINST CONTINGENT FEES

Underwriter warrants that it has not employed or retained any person, firm, or corporation, other than a bona fide employee working solely for Underwriter, to solicit or secure the awarding of this Agreement based upon an arrangement that the person, firm or corporation would receive any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award of this Agreement. For the breach or violation of the foregoing provision, the City shall have the right to terminate the Agreement without liability and, at its discretion to deduct from the contract price, or otherwise recover the full amount of such fee, commission, percentage, gift or consideration.

SECTION 10. CONSEQUENTIAL DAMAGES

Notwithstanding anything in this Agreement to the contrary, under no circumstances shall the City be liable to the Under writer for anticipatory profit or consequential damages.

SECTION 11. GENERAL PROVISIONS

A. This Agreement contains the complete agreement between the parties and shall, as of the effective date hereof, supersede all other agreements between the parties. The parties stipulate that neither of them has made any representation with respect to the subject matter of this Agreement except such representations as are specifically set forth in this document and each of the parties acknowledges that it has relied on its own judgment in entering into this Agreement.

B. Any modification of this Agreement or additional obligation assumed by either party in connection herewith shall be binding only if evidenced in writing signed by each party or an authorized representative of each party.

C. If any provision, or any portion thereof, contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, the remainder of this Agreement, or portion thereof, shall be deemed severable, shall not be affected, and shall remain in full force and effect.

D. It is the intention of the parties that this Agreement and the performance hereunder, and all suits and special proceedings under this Agreement, be construed in accordance with and under and pursuant to the laws of the State of Kansas and that, in any action, special proceeding or other proceeding that may be brought arising out of, in connection with, or by reason of this contract, the laws of the State of Kansas shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted.

E. The titles to sections of this Agreement are solely for the convenience of the parties and shall not be used to explain, modify, simplify, or aid in the interpretation of the provisions of this Agreement.

SECTION 10. EXECUTION OF AGREEMENT

The parties hereto have caused this Agreement to be executed on the day and year first above written.

CITY OF OVERLAND PARK, KANSAS

Carl Gerlach, Mayor

ATTEST:

Marian Cook, City Clerk

APPROVED AS TO FORM:

Tammy Owens
Senior Assistant City Attorney

UNDERWRITER

Authorized Signatory

Name: _____

Title: _____