

**CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK (I-BANK)**

**STAFF REPORT**

**ISSUE:** Staff recommends that the Board of Directors (Board) appoint four firms:

<b>Firm</b>	<b>Proposed Contract Amount</b>
• Hawkins, Delafield & Wood LLP	\$50,000
• Orrick, Herrington & Sutcliffe LLP	\$75,000
• Ronald E. Lee, Attorney at Law and Law Office of Perry Israel	\$75,000
• Stradling Yocca Carlson & Rauth	\$50,000

to act as special counsel to the I-Bank for a three-year period beginning October 1, 2009 and ending September 30, 2012, and that the Board authorize a contract with each of the above firms for this period in an amount not to exceed the amount set forth above.

**HISTORY OF I-BANK'S USE OF SPECIAL COUNSEL SERVICES:** The I-Bank serves as issuer for a highly diverse universe of governmental and private activity conduit financing obligations and bonds, and as the lender of municipal loans, the majority of which are either financed by or pledged to secure governmental bonds. As such, the I-Bank must comply with highly complex statutory, constitutional and federal tax requirements. In order to ensure compliance with these requirements, the I-Bank has used the services of outside special counsel since 1999.

Over the past decade, the I-Bank Board has appointed the special counsel as follows:

July 1999	Orrick, Herrington & Sutcliffe LLP ("Orrick")
May 2002	Stradling, Yocca, Carlson & Rauth ("Stradling") to be used in the event Orrick had a conflict of interest
September 2003	Fulbright & Jaworski LLP Nossaman, Guthner, Knox & Elliott LLP Orrick Stradling
July 2006	Hawkins, Delafield & Wood LLP ("Hawkins") Orrick Stradling

The contracts entered into with the firms appointed in 2006 terminate on September 30, 2009. These contracts have been prudently used, and it is expected that there will be

unspent funds remaining at the expiration of each contract<sup>1</sup>. Any unspent funds will be available for other necessary operating expenses of the I-Bank (including the proposed contracts), or to make loans under the Infrastructure State Revolving Fund Program.

**SERVICES TO BE PROVIDED BY APPROVED FIRMS:** Each appointed firm shall be engaged to provide the following legal services upon request for specific services from the I-Bank's General Counsel:

- Advice related to structuring and securing governmental bond financings and governmental bond-financed programs, including advice on state public finance law and federal securities and tax law issues that arise in relation to the I-Bank's current governmental financing programs, and in relation to new governmental bond-financed programs considered or undertaken by the I-Bank.
- Advice related to structuring and securing private activity conduit revenue bond transactions considered or undertaken by the I-Bank under its Industrial Development, Exempt Facility and 501(c)(3) Revenue Bond Programs.
- Advice related to the I-Bank's duties or proposed duties as the agent for the State of California in relation to the sale and securitization of State of California assets, such as the sale of tobacco assets to the Golden State Tobacco Securitization Corporation.
- Advice to and representation of the I-Bank in the event of an Internal Revenue Service compliance check of I-Bank programs or practices, or review or audit of bonds issued by the I-Bank.
- Other advice or legal work related to a varied and wide spectrum of taxable and tax-exempt bonds and financings conducted by the I-Bank.

**SELECTION PROCESS:** On July 14, 2009, the I-Bank issued a Request for Qualifications for Special Counsel (RFQ). Because the special counsel services sought will be in connection with to tax-exempt bonds and loans financed or pledged to secure such bonds, the I-Bank staff distributed the RFQ by email to a group of over 35 bond counsel firms drawn from the State Treasurer's Office list of approved bond counsel. The RFQ was also listed on the I-Bank Website.

This RFQ differed from past RFQ's for special counsel services in order to encourage representation of the I-Bank by smaller firms. I-Bank staff recognized that many small bond counsel firms do not directly employ tax counsel as a member of the firm, but obtain tax advice through a variety of contractual relationships with special tax counsel. Further, tax counsel that do not otherwise practice as bond counsel frequently do not

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<sup>1</sup> The contract with Stradling was augmented to address the use of that contract during the period the I-Bank operated without a General Counsel. The entire amount of that augmentation has not been used.

seek appointment to the State Treasurer's bond counsel list. In order to retain the benefit of pre-qualification by the State Treasurer's Office and obtain the advice of nationally recognized tax experts, the RFQ specifically permitted joint responses by a combination of law firms, as long as one firm was on the State Treasurer's bond counsel list, and the combined firm could represent that it included one nationally recognized tax expert.

Seven firms responded to the RFQ via email by the August 5, 2009 due date.

- Hawkins
- Lofton & Jennings
- Orrick
- Quateman LLP
- Ronald E. Lee, Attorney at Law and Law Office of Perry Israel
- Sidley Austin LLP
- Stradling

I-Bank staff reviewed these responses to confirm compliance with the conditions of the RFQ and a committee consisting of the I-Bank's Assistant Executive Director, General Counsel and Infrastructure State Revolving Fund Program Manager, determined that all firms met the minimum qualifications, and evaluated each response based upon: the firm's qualifications and experience; the competitiveness of the proposed fees; and the overall quality of the written response to the RFQ.

Based upon these selection criteria, and in recognition of the unique expertise and experience of each of firm that applied along with the unique legal needs of the I-Bank, the review committee selected Hawkins, Orrick, Stradling and the combined firm of Ronald E. Lee, Attorney at Law and Law Office of Perry Israel. The review committee recommends the appointment of these four firms as special counsel to the I-Bank.

**SELECTION CRITERIA – EACH RECOMMENDED FIRM:** Each firm was chosen based on the unique combination of experience, competitiveness of its fee structure, and overall quality of its response to the RFQ as follows.

**All Recommended Firms:**

**Legal Proceedings.** Each proposed firm responded adequately to the RFQ's requirement that responders disclose legal proceedings (litigation or administrative actions) in connection with any offering of securities by a public entity pending against or settled within the last five years by the firm, its owners or employees. When a firm has disclosed legal actions, those are described in this staff report.

**Pro Bono Work.** State entities awarding legal services contracts that exceed \$50,000 are required to consider the efforts of potential contractors to provide a specific amount of certain specific types of pro bono services, primarily those for the benefit of persons which are indigent or of limited means and, other things being equal, to award contracts for legal services to firms that have provided such services. Outside counsel contracts are required to include an agreement by the contracting attorney to make a good faith effort to provide these services during the term of the contract.

All of the responding firms agreed to enter into a contract containing the good faith efforts clause. Two of the responding firms, Hawkins and Stradling, were unable to provide information sufficient for I-Bank staff to conclude that during the applicable period prior to the application, the firm had provided a sufficient amount of eligible pro bono services to meet the minimum requirement that the I-Bank must consider in awarding a contract in excess of \$50,000. However, as noted, the law requires that the I-Bank consider this information and, "other things being equal," to award contracts to firm that have provided such services. In light of the significantly lower fee structures offered by these two firms, I-Bank staff proposes that these firms be appointed, on the condition that the amount of the contract for each firm be limited to \$50,000.

**Hawkins Delafield & Wood LLP:**

**A. Firm's Qualifications and Experience.** Hawkins is one of the leading firms in the field of public finance and has represented several State issuers as bond counsel, including the California Housing Finance Agency, the Department of Water Resources and the Department of Veterans' Affairs. The firm has represented the I-Bank as special counsel since 2006. The firm's tax counsel recently provided satisfactory assistance to the I-Bank in relation to the I-Bank's recent response to an Internal Revenue Service review of governmental bond post-issuance compliance practices.

Hawkins, which is based primarily in New York, has taken steps to reflect its continuing commitment to California in the last four years, including adding a new partner in Los Angeles in 2006, and in 2007 relocating two partners to Sacramento and San Francisco.

**B. Competiveness of Proposed Fees.** Hawkins has proposed a highly competitive fee structure, comparable to the fee structure in its existing 2006 contract with the I-Bank. The firm proposes an annual adjustment based on an agreed-upon objective index. The proposed rates are:

Senior Partner	\$460
Junior Partner	420
Associates	250 to 400
Paralegals	135

The firm proposes reimbursement for travel and meals, required secretarial overtime, requires courier deliveries and required computer legal research.

**C. Overall Quality of the Written Response to the RFQ.**

The overall quality of the written response was determined to be acceptable by the review committee.

**Legal Proceedings:** The firm disclosed the settlement of a legal action in 2006. The action arose out of Hawkins' representation of the Connecticut Resources Recovery Authority (CRRRA) in relation to the 2000 restructuring of an energy purchase contract. Appellate Court records pertaining to a related, subsequently dismissed, case, reflect that "as a practical matter" the Connecticut Legislature required the utility party to that contract to buy out its obligation to purchase steam from CRRRA. The restructuring of that obligation provided for substantial payments over time from the utility's transferee, Enron Power. Enron Power filed for bankruptcy protection along with its guarantor, Enron Corporation, in 2001. As a result, a variety of litigation arose around the power purchase arrangement. Two of the matters alleged that Hawkins performed negligently in relation to the restructuring of the agreement. One matter brought by a local government that benefitted from the power purchase arrangement was dismissed on procedural grounds in 2004. A matter brought by CRRRA and the Connecticut Attorney General was ordered to trial in August of 2006, and was settled shortly thereafter by Hawkins' insurer for \$21 million.

Hawkins continues to state that the lawsuits were without merit. The California Department of Water Resources has employed the firm to represent it in its negotiation and renegotiation of long-term power purchase agreements, and to represent its short-term power purchase program on a wide range of other matters.

I-Bank staff concludes that the legal action settlement has been adequately disclosed by Hawkins and that court records reflect no finding of negligence on the part of Hawkins. I-Bank staff recommends the Board conclude that the disclosed legal action settlement will not materially affect Hawkins' ability to represent the I-Bank as special counsel.

**Pro Bono Work:** As noted, Hawkins' response did not reflect that the firm had provided the amount and type of pro bono services the I-Bank is required to take into consideration. In recognition of the firm's limited response in this area, but in further recognition of the firm's qualifications and expertise and highly competitive fee proposal, I-Bank staff is recommending that this firm be appointed, but that its contract be limited to \$50,000.

**Orrick, Herrington & Sutcliffe LLP:**

**A. Firm's Qualifications and Experience.** Orrick is one of the leading firms in the field of public finance and has represented several State issuers as bond counsel, including the California Housing Finance Agency and the Department of Water Resources, and is the State Treasurer's appointee as bond counsel for the State's General Obligation Bonds. Orrick has represented the I-Bank as special counsel since 1999. The firm provided legal advice to the I-Bank in the establishment of the Infrastructure State Revolving Fund Program ("ISRF Program") and the loans made through that program, is bond counsel for the issuance of ISRF Program Bonds used to leverage the program, and continues to provide advice on post-issuance matters relating to the ISRF Program Bonds. In addition, the firm provides post-issuance advice on the state school bonds issued by the I-Bank.

Orrick is uniquely qualified to act as special counsel for the I-Bank because of its long relationship with the I-Bank and its knowledge of the ISRF Program.

The firm's history and representation reflects a strong commitment to California. Orrick was established in San Francisco in 1863. During the last 12 months the firm has laid off approximately 15% of its non-partner attorney force world-wide, including attorneys in California. However, the firm reports that it currently employs 883 people in California.

**B. Competiveness of Proposed Fees.** Orrick has proposed the least competitive fee structure, which it notes are at a substantial discount from its normal rates for financing work, including for other State agencies. The proposed rates are:

Senior Partner	\$575
Junior Partner	560
Associates	230 to 550
Paralegals	250

The firm also proposes an annual rate adjustment of 3% per calendar year beginning January of 2010. Orrick proposes reimbursement for computer legal research as approved, and approved travel and couriers.

As a result of Orrick's non-competitive fee structure, I-Bank staff proposes a Board direction to the General Counsel to use this contract for work which Orrick can perform with unique efficiency due to its long history with certain I-Bank programs and bonds.

**C. Overall Quality of the Written Response to the RFQ.**

The overall quality of the written response was determined to be acceptable by the review committee.

**Legal Proceedings.** The firm disclosed one pending legal action. Orrick is a named defendant in the matter entitled *Copia Claims, LLC v. California Infrastructure and Economic Development Bank et al.*. The Board has been briefed on this litigation on numerous occasions and thus no further description of the case is set out here.

Orrick also disclosed the settlement of a case brought against the firm by the City of San Diego. This case was brought against the firm in November, 2005 by the City of San Diego alleging malpractice in connection with the City's failure to disclose its pension liability obligations. The litigation settled in 2008 for \$2.85 million, paid by Orrick's insurance carriers. The firm states that this amount is less than the estimated cost of defense of the case. The city has since added Orrick to its list of approved bond counsel. The case arose after the determination of an Orrick counsel, working as disclosure counsel for the City of San Diego, learned of undisclosed information regarding the City's pension plan obligations. Upon advice by Orrick, the City disclosed information regarding its pension plan, but sued Orrick, alleging that the firm should have discovered and disclosed the City's pension fund accounting practices. Orrick's position was that the subject information related to accounting practices it was not hired to provide and that as soon as the firm learned of the adverse information, it advised disclosure.

I-Bank staff concludes that the pending *Copia* matter and legal action settlement have been adequately disclosed by Orrick, and that no court records reflect a finding of negligence on the part of Orrick. I-Bank staff recommends the Board conclude that the disclosed pending legal action and legal action settlement will not materially affect Orrick's ability to represent the I-Bank as special counsel.

**Ronald E. Lee, Attorney at Law and Law Office of Perry Israel:**

**A. Firm's Qualifications and Experience.**

This proposed firm is a joint applicant made up of two sole practitioners. Ronald E. Lee is a bond attorney, and Perry Israel is a tax practitioner. Mr. Lee is qualified as a small business by the Department of General Services.

Mr. Lee was appointed as co-bond counsel and disclosure counsel by the State Treasurer's Office in a recent State general obligation bond transaction, has acted as underwriters counsel in a transaction with the Department of Water Resources, and as disclosure counsel in relation to bonds issued by the State

Public Works Board. He has served as bond counsel to the I-Bank in three conduit bond transactions.

Mr. Israel has practices as a tax counsel specializing in the area of tax exempt bonds for 29 years, including as an associate and partner at Orrick, Herrington & Sutcliffe. Since starting his solo practice in 2007, he has provided tax advice to bond counsel firms on a variety of transactions including in relation to the issuance of bonds by the Airport Commission of the City and County of San Francisco. He has also acted as special tax counsel with respect to seven conduit bond transactions.

Each of these attorneys reflects a strong commitment to working in California.

**B. Competiveness of Proposed Fees.**

Mr. Lee and Mr. Israel propose a competitive fee structure, which provides for an hourly rate for Mr. Lee of \$325, and an hourly rate for Mr. Israel of \$500. They also propose a negotiated rate adjustment of no greater than 5% per year, and reimbursement of overnight delivery charges and travel at State employee maximums if travel outside of Northern California as requested. Staff reports that travel outside of Northern California is not anticipated at this time.

**C. Overall Quality of the Written Response to the RFQ.**

The response to the RFQ submitted was clear, which was particularly welcomed light of the joint nature of the response.

**Stradling Yocca Carlson & Rauth:**

**A. Firm's Qualifications and Experience.**

Stradling is a multi-disciplinary firm with 27 public finance attorneys in Newport Beach, San Francisco and Sacramento. The firm has been appointed by the State Treasurer as bond counsel for the State's State Public Works board transactions. In addition, the firm has served as bond counsel for numerous local government transactions, as well as bond counsel for numerous I-Bank conduit transactions.

The firm has served as special counsel to the I-Bank since 2002. In particular, Stradling has represented the I-Bank in six audits by the Internal Revenue Service of I-Bank conduit transactions, all of which were resolved without effect to the tax-exempt status of the bonds.

Stradling's response to the RFQ reflects a strong commitment to growing its public finance practice in California. The firm began its public finance practice in

1978, and since then has included 27 attorneys in its practice. It has offices only in California.

**B. Competiveness of Proposed Fees.** Stradling has proposed a highly competitive fee structure, and has committed that their proposed fees will not be subject to increase for a period of three years. The proposed rates are:

Senior Partner	\$515
Junior Partner	395
Associates	250
Paralegals	135

The firm proposes reimbursement for travel at the request of the I-Bank, and required courier deliveries and required computer legal research.

**C. Overall Quality Of The Written Response To This RFQ.**

The overall quality of the written response was determined to be acceptable by the review committee.

**Pro Bono Response:** As noted, Stradling's response did not reflect that the firm had provided the amount and type of pro bono services the I-Bank is required to take into consideration. In recognition of the firm's limited response in this area, but in further recognition of the firm's qualifications and expertise and highly competitive fee proposal, I-Bank staff is recommending that this firm be appointed, but that it's contract be limited to \$50,000.

**RECOMMENDATION:** The contract manager for each contract shall be the I-Bank's General Counsel. Selection of a firm for each assignment will be at the discretion of the General Counsel and be based upon the firm's expertise and cost to the I-Bank.

As such, staff recommends approval of Resolution 09-35 appointing the following four firms:

<b>Firm</b>	<b>Proposed Contract Amount</b>
• Hawkins, Delafield & Wood LLP	\$50,000
• Orrick, Herrington & Sutcliffe LLP	\$75,000
• Ronald E. Lee, Attorney at Law and Law Office of Perry Israel	\$75,000
• Stradling Yocca Carlson & Rauth	\$50,000

to act as special counsel to the I-Bank for a three-year period beginning October 1, 2009 and ending September 30, 2012, authorizing a contract with each of the above firms for this period in an amount not to exceed the amount set forth above. In light of

the expressed willingness of the majority of the recommended firms to negotiate or forego annual cost increase adjustments, and the State's current fiscal situation, it is recommended that each contract provide for compensation at not greater than the hourly rates as proposed by each firm in its response to the RFQ without annual adjustments. It is further recommended that each contract provide for reimbursement of the types of costs specified in the firms' responses to the RFQ or as otherwise reasonably approved by the I-Bank contract manager.