

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF THE COUNTY OF SAN BERNARDINO
AND RECORD OF ACTION**

June 8, 2021

FROM

ENSEN MASON, Auditor-Controller/Treasurer/Tax Collector

SUBJECT

Agreement with Fitch Ratings, Inc. for Investment Ratings

RECOMMENDATION(S)

Approve **Fee Agreement No. 21-421** with Fitch Ratings, Inc. for the provision of investment ratings for the San Bernardino County Investment Pool for the five-year term of July 1, 2021, through June 30, 2026, in an annual amount not to exceed \$17,500 for the first three years, \$18,500 for the fourth year, and \$19,500 for the fifth year; for a total contract amount not to exceed \$90,500.

(Presenter: John Johnson, Chief Deputy Treasurer, 382-3002)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Improve County Government Operations.

Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT

This item will not result in the use of additional Discretionary General Funding (Net County Cost). Investment pool management costs, including the cost of the recommended agreement with Fitch Ratings, Inc. (Fitch Ratings), are deducted from pooled fund earnings prior to interest earnings apportionment in accordance with California Government Code Section 27013. Sufficient appropriation and revenue have been included in the Auditor-Controller/Treasurer/Tax Collector's 2020-21 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

The San Bernardino County Investment Pool is made up of property tax dollars and local government agency funds. Together, they constitute the treasury for all of the County's school districts, community college districts, County departments, water districts, and Board of Supervisors governed special districts. The Treasurer is responsible for holding and safely investing the pooled funds for the County and over 200 local agencies depositing funds into the pool.

Since 1998, the County's Investment Pool has consecutively earned the highest possible investment ratings awarded by Fitch Ratings. The "AAA/S1" ratings are based on the high credit quality of the portfolio, its appropriate levels of asset liquidity, as well as the Treasurer's investment management oversight and operational controls.

Maintaining the "AAA/S1" ratings for the Investment Pool communicates to pool participants, the marketplace, and the public that the Treasurer is upholding its fiduciary responsibility to provide

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safety, liquidity, and yield for those funds entrusted to its care. The County, school districts, and local government agency participants benefit from lower borrowing costs on debt proceeds deposited into the Investment Pool.

The Fitch Ratings Fee Agreement (Agreement) contains its standard commercial contract terms, which includes terms that differ from the standard County contract and omits certain County standard contract terms. The non-standard and missing terms include the following:

1. The Agreement does not contain an attorney's fees provision.
 - The County standard contract attorney's fee provision requires each party to bear their own fees and costs.
 - Potential Impact: In the absence of an attorney's fees provision, under California law each party must bear their own fees unless a court awards fees to the prevailing party. However, the contract is to be interpreted under New York law. County Counsel is not licensed to advise on New York law.
2. The Agreement does not contain a dispute resolution provision.
 - The County standard contract dispute resolution provision states that in a dispute, the parties shall use their best efforts to settle the dispute through negotiation with each other in good faith.
 - Potential Impact: Under California law, there is implied in each contract, a covenant of good faith and fair dealing. However, the contract is to be interpreted under New York law. County Counsel is not licensed to advise on New York law.
3. The Agreement provides that governing law is New York law and venue is in the courts in New York, New York.
 - The County standard contract requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having governing law other than California will require retention of attorneys licensed in New York in the event of a dispute and a venue outside of San Bernardino County may result in additional expenses that exceed the amount of the contract.
4. The Agreement contains no indemnification for any claims made against the County.
 - The County standard contract indemnity provision requires the Contractor to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person.
 - Potential Impact: The County will be liable for the defense of all claims arising under the contract and the County will be financially liable for all defense costs and damages without reimbursement from Fitch, which could exceed the total contract amount.
5. The Agreement does not require Fitch to meet the County's insurance standards.
 - The County standard contract requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department.
 - Potential Impact: The County has no assurance that Fitch will be financially responsible for claims that may arise from the County's use of Fitch's ratings, which could result in expenses to the County that exceed the total contract amount.

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6. Total liability of Fitch to the County for causes of action arising under the Agreement are limited to 7 times the amounts paid by the County to Fitch during the 12 months preceding the action, or USD 5 million, whichever is less.
 - The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the contract amount leaving the County financially liable for the excess. In addition, the County's liability under the contract is not similarly limited.
7. The Agreement contains no termination for convenience provision.
 - The County standard contract gives the County the right to terminate the Contract, for any reason, with a thirty (30) day written notice of termination without any obligation other than to pay amounts for services rendered and expenses reasonably incurred prior to the effective date of termination.
 - Potential Impact: Any attempted termination by County without cause during the term would result in payment liability for the full contract amount, which could result in payment liability where no funds are available due to lack of allocation or loss of funding and any fees already paid are non-refundable.
8. The Agreement contains no warranty of the credit rating product.
 - The County standard contract warranty term provides that the contractor fully warrants its services and products.
 - Potential Impact: The County's use of the ratings is solely at its own risk.

PROCUREMENT

Historically, the Treasury has utilized ratings services from all three major Nationally Recognized Statistical Ratings Organizations (NRSRO) that rate local government investment pools (LGIPs), which are: Standard & Poor's, Moody's, and Fitch Ratings.

The Purchasing Department has issued annual purchase orders to Fitch Ratings, Inc. since 1998 for investment ratings for the San Bernardino County Investment Pool. The last Purchase Order No. 4100160556 for \$17,500 was issued on September 2, 2020.

Purchasing supports the continued use of a non-competitive procurement for these services, as Fitch Ratings continues to provide the best qualitative and quantitative ratings based on governmental needs including the County Investment Pool.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Robert F. Messinger, Chief Assistant County Counsel, 387-5455) on May 5, 2021; Risk Management (LeAnna Williams, Director, 386-8621) on April 30, 2021; Purchasing (Bruce Cole, Supervising Buyer, 387-2148) on May 12, 2021; Finance (Carl Lofton, Administrative Analyst, 387-5404) on May 24, 2021; and County Finance and Administration (Robert Saldana, Deputy Executive Officer, 387-5423) on May 24, 2021.

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Record of Action of the Board of Supervisors
County of San Bernardino

APPROVED (CONSENT CALENDAR)

Moved: Janice Rutherford Seconded: Joe Baca, Jr.
Ayes: Col. Paul Cook (Ret.), Janice Rutherford, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: June 8, 2021



cc: ATC - Johnson w/agree
Contractor - C/O ATC w/agree
File - w/agree
CCM 06/14/2021