




**OFFICE OF COUNTY COUNSEL
INTER-DEPARTMENT MEMORANDUM**

TO: Pam Carlone
CAO/Proc. & Contracts

FROM: Michael J. Ciccozzi 
Deputy County Counsel

RE: County Counsel Contract No. 331-S0710
Identix, Inc.

DATE: 1/12/07

Your office has requested that we review the above referenced contract. The following are my comments after review:

1. Page 2, Article II, Term – this establishes the term of the contract as being July 1, 2006 through June 30, 2007. In my discussion with Mary picrc she advised that we are not retroactively increasing the agreed compensation to the contractor for services performed between July and present.
2. Article XI, Indemnity - This provision is not the standard indemnity provision for County contracts. While we have in the past approved non-standard indemnity agreements, Board policy was to have the Department explain why the non-standard indemnity language was recommended. In this case, the uniqueness of the service provided by the vendor is something to be considered in weighing their desire to have the comparative indemnity language. I do not have any objection to comparative indemnity. The provision does not speak to which party would be responsible for the costs of defending against any claim or action arising from the services provided under the agreement. The Indemnity language does not include indemnification for costs and attorney's fees incurred in the defense

of a claim or action. The use of the term "damages" in the provision has been interpreted to not include attorney's fees or costs. The contract does not otherwise provide for the recovery of attorney's fees or costs by the prevailing party. The statute which provides for the recovery of attorney fees and costs in cases where a party prevails on a claim for implied indemnity would not apply was ours would be a claim for contractual indemnity not implied indemnity. Unless, the provision is amended the County would not be entitled to a defense of claims made as the result of the negligence of the Contractor or to recover the costs incurred in the defense of a claim arising from the negligence of the Contractor. Recommended language would be "Contractor agrees to defend and indemnify County, its officers agents and employees from and against any and all claims, damages, suits, actions including attorney's fees and costs incurred in the defense of any claim, suit or action arising from or related to the negligent act or omission of Contractor, its officers, agents, employees."

3. Article XI, Indemnity – The provision as written limits the Contractor's indemnity obligation to the "maximum extent of Contractor's insurance policy." First, there is no reason we should agree to such a limitation. If the Contractor's negligence causes damages in excess of their policy limits, they should not be relieved of their responsibility to indemnify us. While practically the insurance proceeds may be the only dollars available to satisfy the Contractor's indemnity obligation, if the Contractor has other assets from which the County could be indemnified, then we should have access to those assets. Again, this is not a legal requirement, but is a consideration.
4. Article XI, Indemnity – This provision includes a paragraph whereby the County waives any and all warranties with respect to the products or services provided by the Contractor. This limits the nature of contract actions the County could bring against the Contractor in the event the contractor's product or services are poor quality.
5. Article XI, Indemnity – This provision also includes a sentence which limits the Contractor's liability to the County in a fashion rather unfavorable to the County. The provision states that the Contractor is not responsible for any "indirect, special, punitive, incidental, consequential or costs of cover damages including but not limited to damages arising out of this Agreement." Broadly read it could be argued this constitutes a release of all claims by the County against the Contractor for any damages "arising out of this Agreement." At a minimum, it precludes the County from

- recovering a variety of damages which could arise from the contractor's work. By way of example, if the Contractor's defective product or negligent service causes a delay in the processing of fingerprints requiring additional hours of staff time to sort out the problem, the County would be precluded from seeking compensation for those damages. I strongly suggest that this language be stricken.
6. Exhibit A to the contract which is incorporated as part of the contract contains Section VII, Limited Warranty/Disclaimer/Limitation of Liability which raises the same concerns expressed above in numbers 4 and 5.
 7. Exhibit A, section IX, Miscellaneous – this provision states that the Agreement is governed by the laws of Minnesota. I am not familiar with the laws of Minnesota and as such cannot say what effect this provision may have upon contract interpretation or the remedies to which the County may be entitled.
 8. I initially had a concern over the fact that according to Exhibit B, one of the Livescan units to be serviced was in the Placerville Police Department. After the explanation by Mary Pierce, this no longer appears to be a concern.

As none of the issues cited above renders the contract an illegal contract, I am approving the contract. If after reviewing this memo you have any concerns, please feel free to give me a call.

mjc
s:sheriff/corr/identixcontractmemo