

**CONTRACT #2**

**RFS # N/A**

**TBR # 100237**

**Tennessee Board of Regents  
Tennessee Technology Centers**

**VENDOR:  
Thinking Media**



## Tennessee Board of Regents

1415 Murfreesboro Road - Suite 350 - Nashville, Tennessee 37217-2833  
(615) 366-4400 FAX (615) 366-4464

May 28, 2009

RECEIVED

MAY 28 2009

FISCAL REVIEW

Ms. Leni S. Chick  
Fiscal Analyst  
Rachel Jackson Building, 8<sup>th</sup> Floor  
Nashville, TN 37243

Dear Ms. Chick:

Enclosed please find an Amendment between Tennessee Board of Regents (on behalf of the Tennessee Technology Centers) and Thinking Media providing for access to the KeyTrain Learning Management System which provides remedial and developmental program instruction, employability and communication skills training for students. Please note that this is a non-competitive amendment to a competitive RFP process in which Thinking Media was the successful proposer and awarded the contract. This Amendment shall provide licensure to 55 Local Workforce Investment Area partners, as part of a grant received from the Department of Labor, and will be used with thousands of ARRA funded Summer Youth.

Per Fiscal Review's request to see non-competitive agreements/amendments, this contract must be approved by the Committee. **Please contact me regarding the date this will go before the Fiscal Review Committee and I will inform the representatives to insure they are present for the meeting in which the contract will be discussed.** If you have any questions, please do not hesitate to contact me at 366-4436.

Information regarding the contract may be sent to my attention at the Tennessee Board of Regents, 1415 Murfreesboro Road, Suite 350, Nashville, Tennessee 37217.

Sincerely,

Angela A. Gregory  
Director of Purchasing and Contracts

cc: Charles Manning  
Dale Sims  
Lynn Goodman, TTC Office

Austin Peay State University • East Tennessee State University • Middle Tennessee State University • Tennessee State University  
Tennessee Tech University • University of Memphis • Chattanooga State Technical Community College  
Cleveland State Community College • Columbia State Community College • Dyersburg State Community College  
Jackson State Community College • Motlow State Community College • Pellissippi State Technical Community College  
Roane State Community College • Southwest Tennessee Community College • Volunteer State Community College  
Walters State Community College • Nashville State Technical Community College • Northeast State Technical Community College  
The Tennessee Technology Centers

## MEMORANDUM

**TO:** Charles Manning, Chancellor

**FROM:** James D. King, Vice Chancellor

**DATE:** May 21, 2009

**SUBJECT:** Contract Amendment before Fiscal Review Committee

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As you remember, on May 7, 2009 I informed you that the Tennessee Technology Centers are in the midst of executing two contracts with the Tennessee Department of Labor for grants allowing activities funded by ARRA funds. The project funder, Mrs. Susan Cowden, Administrator for the Tennessee Department of Labor, requested that the start date of these contracts be May 1, 2009 and you approved her request. The contracts have now been fully executed and are awaiting implementation.

In one of the items enumerated in the Scope of Services of the above mentioned grants, the Tennessee Department of Labor requested that we provide the licensure for Key Train, a comprehensive web-based learning management system (LMS) written specifically for WorkKeys, to some 55 Local Workforce Investment Area partners. As a result of an RFP issued in November, 2006, a contract was awarded to Thinking Media in January, 2007. Therefore, the Tennessee Technology Centers already have access to Key Train and have found it to be very beneficial in helping prepare students in remedial and developmental program instruction, employability and communication skills training. Since the Workforce Investment Areas work so closely with the TTCs and with thousands of dislocated workers, the Department of Labor wishes for the WIAs to also have access to Key Train through Thinking Media. The WIAs have a great need for this product as it will be used with thousands of ARRA funded Summer Youth who will begin their programs within the next few days. This amendment will allow approximately 55 local Workforce Investment Area locations licensure rights to Key Train through Thinking Media. Because this request is within the scope of the competitive process that was completed in 2006 and due to the urgency at hand and to expedite the purchase of this system, the Department of Labor is requesting that the TBR purchase this product with an amendment to the existing contract with Thinking Media. The web-based LMS is offered only through Thinking Media.

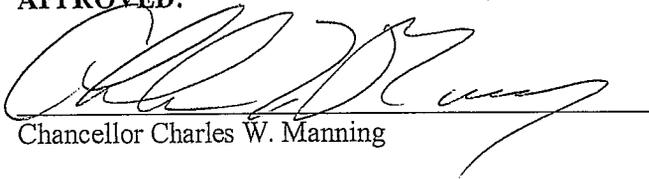
Pursuant to Fiscal Review Committee requirements, any non-competitive amendment over \$250,000 must go before the Fiscal Review Committee. The amendment would increase the value of the existing contract by \$400,000. Included in this amended amount is \$78,000, the current remaining balance for the 2010 and 2011 Calendar Years.

The TTC staff have worked extremely hard over the past year building and strengthening our relationship with the Department of Labor. Because of the tight timelines and urgent nature of this project, I am requesting permission to move forward with the presentation of this non-competitive amendment with Thinking Media to the Fiscal Review Committee.

I will be happy to discuss this further if you have any questions. Thank you for your consideration of this request.

JDK/ljg

**APPROVED:**

  
Chancellor Charles W. Manning

  
Date

# REQUEST: NON-COMPETITIVE AMENDMENT

APPROVED

Commissioner of Finance & Administration  
Date:

EACH REQUEST ITEM BELOW MUST BE DETAILED OR ADDRESSED AS REQUIRED.

1) RFS #			
2) State Agency Name :	Tennessee Board of Regents/ Tennessee Technology Centers		
<b>EXISTING CONTRACT INFORMATION</b>			
3) Service Caption :	Licensure for KeyTrain software for 55 local Workforce Investment Offices across the state of Tennessee		
4) Contractor :	Thinking Media		
5) Contract #	100237		
6) Contract Start Date :	January 1, 2007		
7) <u>Current</u> Contract End Date IF <u>all</u> Options to Extend the Contract are Exercised :	December 31, 2011		
8) <u>Current</u> Total Maximum Cost IF <u>all</u> Options to Extend the Contract are Exercised :	\$208,000		
<b>PROPOSED AMENDMENT INFORMATION</b>			
9) <u>Proposed</u> Amendment # (The first two amendments were renewal amendments)	100237-4		
10) <u>Proposed</u> Amendment Effective Date : (attached explanation required if date is < 60 days after F&A receipt)	Upon Execution		
11) <u>Proposed</u> Contract End Date IF <u>all</u> Options to Extend the Contract are Exercised :	December 31, 2011		
12) <u>Proposed</u> Total Maximum Cost IF <u>all</u> Options to Extend the Contract are Exercised :	\$530,000		
13) Approval Criteria : (select one)	<input type="checkbox"/> use of Non-Competitive Negotiation is in the best interest of the state		
	<input checked="" type="checkbox"/> only one uniquely qualified service provider able to provide the service		
14) Description of the Proposed Amendment Effects & Any Additional Service :	Amending this contract will provide for the purchase of additional software for local Workforce Investment Areas (WIA) . The amendment is within the scope of the competitive process that was completed in 2006.		
15) Explanation of Need for the Proposed Amendment :			

The Grant money awarded to the TBR/TTCs through the Department of Labor will provide for services to thousands of dislocated workers at Tennessee Technology Centers through local workforce areas. Expanding this contract to purchase software for the local WIAs will more evenly distribute the training work load of remedial preparation between the TTCs and the WIAs to ensure students are ready for employment.

**16) Name & Address of Contractor's Current Principal Owner(s) :**  
(not required if proposed contractor is a state education institution)

Shelia Boyington; Thinking Media; 340 Frazier Avenue; Chattanooga TN 37405

**17) Documentation of Office for Information Resources Endorsement :**  
(required only if the subject service involves information technology)

**select one:**  Documentation Not Applicable to this Request  Documentation Attached to this Request

**18) Documentation of Department of Personnel Endorsement :**  
(required only if the subject service involves training for state employees)

**select one:**  Documentation Not Applicable to this Request  Documentation Attached to this Request

**19) Documentation of State Architect Endorsement :**  
(required only if the subject service involves construction or real property related services)

**select one:**  Documentation Not Applicable to this Request  Documentation Attached to this Request

**20) Description of Procuring Agency Efforts to Identify Reasonable, Competitive, Procurement Alternatives :**

The original contract was through a 2006 competitive procurement. This amendment is to purchase additional quantities under the original contract.

**21) Justification for the Proposed Non-Competitive Amendment :**

Vendor is uniquely qualified to deliver this software program.

**REQUESTING AGENCY HEAD SIGNATURE & DATE :**

(must be signed & dated by the ACTUAL procuring agency head as detailed on the Signature Certification on file with OCR— signature by an authorized signatory will be accepted only in documented exigent circumstances)



Agency Head Signature

5/28/09

Date

# CONTRACT SUMMARY SHEET

021406

<b>RFS #</b>	<b>Contract #</b>
	<b>100237</b>

<b>State Agency</b>	<b>State Agency Division</b>
Tennessee Board of Regenst	Tennessee Technology Centers

<b>Contractor Name</b>	<b>Contractor ID # (FEIN or SSN)</b>
Thinking media	<input type="checkbox"/> C- or <input type="checkbox"/> V-

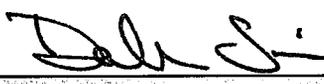
**Service Description**  
 Licensure for KeyTrain software for 55 local Workforce Investment Offices across the state of Tennessee

Contract BEGIN Date	Contract END Date	Subrecipient or Vendor?	CFDA #
1-Jan-07	31-Dec-11		

**Mark Each TRUE Statement**

<input type="checkbox"/> Contractor is on STARS	<input type="checkbox"/> Contractor's Form W-9 is on file in Accounts
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Allotment Code	Cost Center	Object Code	Fund	Funding Grant Code	Funding Subgrant Code
<b>FY</b>	<b>State</b>	<b>Federal</b>	<b>Interdepartmental</b>	<b>Other</b>	<b>TOTAL Contract Amount</b>
2007		\$ 52,000.00			\$ 52,000.00
2008		\$ 39,000.00			\$ 39,000.00
2009		\$ 39,000.00			\$ 39,000.00
					\$ -
					\$ -
					\$ -
<b>TOTAL:</b>	\$ -	\$ 130,000.00	\$ -	\$ -	\$ 130,000.00

<b>— COMPLETE FOR AMENDMENTS ONLY —</b>			<b>State Agency Fiscal Contact &amp; Telephone #</b>
<b>FY</b>	<b>Base Contract &amp; Prior Amendments</b>	<b>THIS Amendment ONLY</b>	DALE SIMS 615-366-3921
2010		\$ 200,000.00	<b>State Agency Budget Officer Approval</b>
2011		\$ 200,000.00	
			<b>Funding Certification</b> (certification, required by T.C.A., § 9-4-5113, that there is a balance in the appropriation from which the obligated expenditure is required to be paid that is not otherwise encumbered to pay obligations previously incurred)
<b>TOTAL:</b>	\$ -	\$ 400,000.00	
<b>End Date</b>			

**Contractor Ownership** (complete only for base contracts with contract # prefix: FA or GR)

<input type="checkbox"/> African American	<input type="checkbox"/> Person w/ Disability	<input type="checkbox"/> Hispanic	<input type="checkbox"/> Small Business	<input type="checkbox"/> NOT disadvantaged
<input checked="" type="checkbox"/> Asian	<input type="checkbox"/> Female	<input type="checkbox"/> Native American	<input type="checkbox"/> OTHER minority/disadvantaged—	

**Contractor Selection Method** (complete for ALL base contracts— N/A to amendments or delegated authorities)

<input checked="" type="checkbox"/> RFP	<input type="checkbox"/> Competitive Negotiation	<input type="checkbox"/> Alternative Competitive Method
<input type="checkbox"/> Non-Competitive Negotiation	<input type="checkbox"/> Negotiation w/ Government(eg, ID, GG, GU)	<input type="checkbox"/> Other

**Procurement Process Summary** (complete for Alternative Method, Competitive Negotiation, Non-Competitive Negotiation, OR Other)

The licensures purchased under the original contract were procured through an RFP.

Supplemental Documentation Required for  
Fiscal Review Committee

*Contact Name:	Angela Gregory	*Contact Phone:	615-366-4436		
*Contract Number:	100237	*RFS Number:			
*Original Contract Begin Date:	January 1, 2007	*Current End Date:	December 31, 2011		
Current Request Amendment Number: <i>(if applicable)</i>	100237-3 (two prior renewals)				
Proposed Amendment Effective Date: <i>(if applicable)</i>	Upon Execution				
*Department Submitting:	Tennessee Board of Regents				
*Division:	Tennessee Technology Centers				
*Date Submitted:					
*Submitted Within Sixty (60) days:	No				
<i>If not, explain:</i>	Review requested as a result of last minute ARRA funds through the TN Department of Labor				
*Contract Vendor Name:	Thinking Media				
*Current Maximum Liability:	\$208,000				
<b>*Current Contract Allocation by Fiscal Year: (Calendar Year)</b> <i>(as Shown on Most Current Fully Executed Contract Summary Sheet)</i>					
FY:2007	FY: 2008	FY: 2009	FY: 2010	FY: 2011	FY
\$ 52,000	\$ 39,000	\$ 39,000	\$ 39,000	\$ 39,000	\$
<b>*Current Total Expenditures by Fiscal Year of Contract:</b> <i>(attach backup documentation from STARS or FDAS report)</i>					
FY: 2007	FY: 2008	FY: 2009	FY: 2010	FY: 2011	FY
\$ 52,000	\$ 39,000	\$ 39,000	\$	\$	\$
IF Contract Allocation has been greater than Contract Expenditures, please give the reasons and explain where surplus funds were spent:			Contract Allocation has not been greater than Contract Expenditures.		
IF surplus funds have been carried forward, please give the reasons and provide the authority for the carry forward provision:			There have been no surplus funds.		
IF Contract Expenditures exceeded Contract Allocation, please give the reasons and explain how funding was acquired to pay the overage:			Contract Expenditures have not exceeded Contract Allocation.		
*Contract Funding Source/Amount:	State:		Federal:	\$208,000	
Interdepartmental:			Other:		

Supplemental Documentation Required for  
Fiscal Review Committee

If "other" please define:			
Dates of All Previous Amendments or Revisions: <i>(if applicable)</i>		Brief Description of Actions in Previous Amendments or Revisions: <i>(if applicable)</i>	
12/3/2007		Renewal Amendment	
12/8/2008		Renweal Amendment	
Method of Original Award: <i>(if applicable)</i>		RFP # 07-0431 – Awarded 1-1-2007	

AMENDMENT TO AGREEMENT  
BETWEEN  
TENNESSEE BOARD OF REGENTS  
AND  
THINKING MEDIA

This amendment to said agreement made this \_\_\_\_th day of \_\_\_\_\_, 2009, by and between The Tennessee Board of Regents ("Board") and Thinking Media ("Contractor"), for the purpose of amending the Agreement between the parties providing a web-based learning network for the Technology foundations Program and expanding that to other locations.

WITNESSETH

Section B.1. is modified to read as follows: The Contract shall be effective for the period commencing on May 1, 2009 to June 30, 2011. The TBR shall have no obligation for services rendered by the Contractor which are not performed within the specified period.

Section A. is amended with the following paragraphs:

The Contractor shall provide the Career Ready 101 learning system via a web-based network delivered over the Internet, subject to the same specifications as for KeyTrain above.

The Contractor shall also prepare materials to be distributed to, and provide training for, twelve Local Workforce Investment Areas (LWIA) in the State of Tennessee, and will expand the license for KeyTrain and Career Ready 101 to include LWIA's 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13 and respective partner agencies.

All other terms and conditions of the original agreement are hereby ratified and affirmed.

This amendment will be provided for a fee of \$400,000 that is payable upon the set up of licenses for the TTC sites and the respective LWIA's.

IN WITNESS WHEREOF, the parties, through their authorized representatives, have affixed their signatures.

TENNESSEE BOARD OF REGENTS

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Charles W. Manning  
Chancellor

Date

THINKING MEDIA



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Sheila C. Boyington  
President

5 | 7 | 2009

Date

AMENDMENT TO AGREEMENT  
BETWEEN  
TENNESSEE BOARD OF REGENTS  
AND  
THINKING MEDIA

This renewal of agreement, made this 5th day of December, 2008, by and between The Tennessee Board of Regents ("Board") and Thinking Media ("Contractor"), for the purpose of renewing the Agreement between the parties providing a web-based learning network for the Technology foundations Program.

W I T N E S S E T H

Section B.1. is modified to read as follows: The Contract shall be effective for the period commencing on January 1, 2009 to December 31, 2009. The TBR shall have no obligation for services rendered by the Contractor which are not performed within the specified period.

In addition, the following provision is hereby added to the Agreement:

- E.13. Voluntary Buyout Program. The Contractor acknowledges and understands that, for a period of two years beginning August 16, 2008, restrictions are imposed on former state employees who received a State of Tennessee Voluntary Buyout Program (VBP) severance payment with regard to contracts with state agencies that participated in the VBP.
- a. The State will not contract with either a former state employee who received a VBP severance payment or an entity in which a former state employee who received a VBP severance payment or the spouse of such an individual holds a controlling financial interest.
  - b. The State may contract with an entity with which a former state employee who received a VBP severance payment is an employee or an independent contractor. Notwithstanding the foregoing, the Contractor understands and agrees that there may be unique business circumstances under which a return to work by a former state employee who received a VBP severance payment as an employee or an independent contractor of a State contractor would not be appropriate, and in such cases the State may refuse Contractor personnel. Inasmuch, it shall be the responsibility of the State to review Contractor personnel to identify any such issues.
  - c. With reference to either subsection a. or b. above, a Contractor may a written request for a waiver of the VBP restrictions regarding a former state employee and a contract with a state agency that participated in the VBP. Any such request must be submitted to the State in the form of the *VBP Contracting Restriction Waiver Request* format available from the



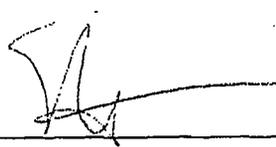
ATTACHMENT A

ATTESTATION RE PERSONNEL USED IN CONTRACT PERFORMANCE

CONTRACT NUMBER:	
CONTRACTOR LEGAL ENTITY NAME:	SAI Interactive Inc., d/b/a Thinking Media
FEDERAL EMPLOYER IDENTIFICATION NUMBER: (or Social Security Number)	62-1839608

The Contractor, identified above, does hereby attest, certify, warrant, and assure that the Contractor shall not knowingly utilize the services of an illegal immigrant in the performance of this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant in the performance of this Contract.

SIGNATURE &  
DATE:

 12/8/08

NOTICE: This attestation MUST be signed by an individual empowered to contractually bind the Contractor. If said individual is not the chief executive or president, this document shall attach evidence showing the individual's authority to contractually bind the Contractor.

AMENDMENT TO AGREEMENT  
BETWEEN  
TENNESSEE BOARD OF REGENTS  
AND  
THINKING MEDIA

This renewal of agreement, made this 26<sup>th</sup> day of November, 2007, by and between The Tennessee Board of Regents ("Board") and Thinking Media ("Contractor"), for the purpose of renewing the Agreement between the parties providing a web-based learning network for the Technology foundations Program.

WITNESSETH

Section B.1. is modified to read as follows: The Contract shall be effective for the period commencing on January 1, 2008 to December 31, 2008. The TBR shall have no obligation for services rendered by the Contractor which are not performed within the specified period.

In addition, the following provision is hereby added to the Agreement:

E.12. Prohibition on Hiring Illegal Immigrants. Tennessee Public Chapter No. 878 of 2006, TCA 12-4-124, requires that Contactor attest in writing that Contractor will not knowingly utilize the services of illegal immigrants in the performance of this Contract and will not knowingly utilize the services of any subcontractor, if permitted under this Contract, who will utilize the services of illegal immigrants in the performance of this Contract. The attestation shall be made on the form, Attestation re Personnel Used in Contract Performance ("the Attestation"), which is attached and hereby incorporated by this reference as Attachment A.

If Contractor is discovered to have breached the Attestation, the Commissioner of Finance and Administration shall declare that the Contractor shall be prohibited from contracting or submitting a bid to any Tennessee Board of Regents institution or any other state entity for a period of one (1) year from the date of discovery of the breach. Contractor may appeal the one (1) year by utilizing an appeals process in the Rules of Finance and Administration, Chapter 0620.

All other terms and conditions of the original agreement are hereby ratified and affirmed.

IN WITNESS WHEREOF, the parties, through their authorized representatives, have affixed their signatures.



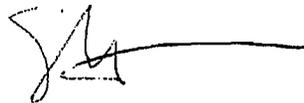
ATTACHMENT A

ATTESTATION RE PERSONNEL USED IN CONTRACT PERFORMANCE

CONTRACT NUMBER:	100237
CONTRACTOR LEGAL ENTITY NAME:	SAI Interactive, Inc dba Thinking Media
FEDERAL EMPLOYER IDENTIFICATION NUMBER: (or Social Security Number)	62-1839608

The Contractor, identified above, does hereby attest, certify, warrant, and assure that the Contractor shall not knowingly utilize the services of an illegal immigrant in the performance of this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant in the performance of this Contract.

SIGNATURE &  
DATE:



NOTICE: This attestation MUST be signed by an individual empowered to contractually bind the Contractor. If said individual is not the chief executive or president, this document shall attach evidence showing the individual's authority to contractually bind the Contractor.

100237

Original Agreement

**CONTRACT  
BETWEEN  
TENNESSEE BOARD OF REGENTS  
AND  
THINKING MEDIA**

This Contract, by and between the Tennessee Board of Regents, hereinafter referred to as the "Institution" and Thinking Media, hereinafter referred to as the "Contractor," is for the provision of a web-based learning network for the Technology Foundations program, as further defined in the "SCOPE OF SERVICES."

The Contractor is a for-profit corporation. The Contractor's address is:

340 Frazier Avenue  
Chattanooga, TN 37405

The Contractor's place of incorporation or organization is Tennessee.

**A. SCOPE OF SERVICES:**

As provided in the Request for Proposal, the Contractor shall provide the Institution access to KeyTrain®, a comprehensive web-based learning management system written specifically for WorkKeys. The KeyTrain instructional program is a fully-hosed Internet and print-based curriculum system composed of both multi-media and audio components that will provide remedial and developmental program instruction, employability and communication skills training for students enrolled in the Institution. The KeyTrain Learning Management System will provide the Institution with comprehensive on-demand and standard performance and accountability reports. KeyTrain will provide assessments that simulate, diagnose and prescribe skill development based on specific skill deficiencies, standards, testing targets or skills identified by the Institution. These assessments will also correlate to other assessments such as Compass and the TABE. KeyTrain will not replace WorkKeys assessments, which are a certification of skills attainment. KeyTrain embedded assessments are intended for instructional purposes.

In addition, the system will provide a tracking system to enable instructors and/or program administrators to monitor individual student progress in specific subject areas. KeyTrain will also provide pre and post-instruction embedded assessments for identified skills including work ethics. The system will be available to users of the Institution twenty-four hours a day, seven days a week from anywhere on the Internet.

The Contractor will provide the prescribed KeyTrain Learning System via a web-based network delivered over the Internet and accessible through Internet Explorer, Netscape, and Firefox browsers on Windows or via the Safari browser on Macintosh. The Contractor, Thinking Media, will provide complete hosting services for KeyTrain to include industry-standard, high reliability, dedicated servers; industry-standard server software; maintenance of upgrades and security updates; regular automated backups to offsite servers and expert webmaster supervision. System data will be stored in state-of-the-art data centers using keycard protocols, biometric scanning protocols and continuous surveillance. The system will be managed via multiple levels of secure accounts using individual user password authentication with an unlimited number of staff accounts for the Institution. The Contractor will provide 24-hour/7 day technical support via both a toll-free number and email for the term of the contract.

In collaboration with staff of the Tennessee Board of Regents, the Contractor will prepare materials to be distributed to the 26 Tennessee Technology Centers to initiate implementation of the learning system. The Contractor will coordinate planning sessions

with administrative staff of the Tennessee Board of Regents to provide high-level overview training to include General WorkKeys and KeyTrain Awareness sessions and in-depth training to include on-site training and train-the-trainer sessions at each of the 26 Technology Centers referenced in the RFP. In addition, the Contractor will conduct training in the technical aspects of the system for appropriate Information Technology or system administrative staff in each of the Technology Centers. The Contractor will provide project consultants to provide follow-up with Institution trainers to ensure complete and effective implementation of the system in each of the Technology Centers. The Contractor will also conduct, on an as-needed basis, webcasts for trainers to provide further training and support to ensure the success of the system throughout the term of the contract.

The Contractor will provide any other specifications or requirements not stated above as outlined in Attachment 6.4 of the Request for Proposal.

**B. CONTRACT TERM:**

- B.1. Contract Term. This Contract shall be effective for the period commencing on January 1, 2007 and ending on December 31, 2007. The Institution shall have no obligation for services rendered by the Contractor which are not performed within the specified period.
- B.2. Term Extension. The Institution reserves the right to extend this Contract for an additional period or periods of time representing increments of no more than one year and a total contract term of no more than five years, provided that the Institution notifies the Contractor in writing of its intention to do so at least 120 days prior to the Contract expiration date. An extension of the term of this Contract will be effected through an amendment to the Contract. If the extension of the Contract necessitates additional funding beyond that which was included in the original Contract, the increase in the Institution's maximum liability will also be effected through an amendment to the Contract and shall be based upon rates provided for in the original Contract.

**C. PAYMENT TERMS AND CONDITIONS:**

- C.1. Maximum Liability. In no event shall the maximum liability of the Institution under this Contract exceed two hundred and eight thousand dollars [\$208,000] as shown in the cost timetable as follows:

	LICENSE FEE	IMPLEMENTATION INSTALLATION	MAINTENANCE SUPPORT FEE
Year 1	\$39,000.00	\$13,000.00	\$0.00
Year 2	\$39,000.00	0.00	\$0.00
Year 3	\$39,000.00	0.00	\$0.00
Year 4	\$39,000.00	0.00	\$0.00
Year 5	\$39,000.00	0.00	\$0.00
<b>TOTAL</b>	<b>\$195,000.00</b>	<b>\$13,000.00</b>	<b>\$0.00</b>

The Service Rates in Section C.3 include, but are not limited to, all applicable taxes, fees, overheads, and all other direct and indirect costs incurred or to be incurred by the Contractor. The maximum liability represents available funds for payment to the Contractor and does not guarantee payment of any such funds to the Contractor under this Contract unless the Institution requests work and the Contractor performs the work.

- C.2. Compensation Firm. The Service Rates and the Maximum Liability of the Institution under this Contract are firm for the duration of the Contract and are not subject to escalation for any reason unless this Contract is amended.
- C.3. Payment Methodology. The Contractor shall be compensated based on the Service Rates herein for units of service authorized by the Institution in a total amount not to exceed the Contract Maximum Liability established in Section C.1. The Contractor's compensation shall be contingent upon the satisfactory completion of units of service or project milestones listed below. The Contractor shall be compensated based upon the following Service Rates:

SERVICE UNIT/MILESTONE	DUE DATE	AMOUNT
LICENSE FEE	Upon Receipt & Invoice	\$39,000
IMPLEMENTATION and INSTALLATION	January 15, 2007	\$ 6,500
TRAINING	February 28, 2007	\$ 6,500

The Contractor shall submit monthly invoices, in form and substance acceptable to the Institution with all of the necessary supporting documentation, prior to any payment. Such invoices shall be submitted for completed units of service or project milestones for the amount stipulated.

- C.4. Travel Compensation. The Contractor shall not be compensated or reimbursed for travel, meals, or lodging.
- C.5. Payment of Invoice. The payment of an invoice by the Institution shall not prejudice the Institution's right to object to or question any invoice or matter in relation thereto. Such payment by the Institution shall neither be construed as acceptance of any part of the work or service provided nor as an approval of any of the amounts invoiced therein.
- C.6. Invoice Reductions. The Contractor's invoice shall be subject to reduction for amounts included in any invoice or payment theretofore made which are determined by the Institution, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute proper remuneration for compensable services.
- C.7. Deductions. The Institution reserves the right to deduct from amounts which are or shall become due and payable to the Contractor under this or any Contract between the Contractor and the Institution any amounts which are or shall become due and payable to the Institution by the Contractor.

D. TERMS AND CONDITIONS:

- D.1. Required Approvals. The Institution is not bound by this Contract until it is approved by the appropriate officials in accordance with applicable Tennessee laws and regulations as shown on the signature page of this Contract...
- D.2. Modification and Amendment. This Contract may be modified only by a written amendment executed by all parties hereto and approved by the appropriate officials.

- D.3. Ethnicity. This Contract shall not be executed until the Contractor has completed the Minority/Ethnicity Form.
- D.4. Termination for Convenience. The Institution may terminate this Contract without cause for any reason. Termination under this Section D. 4 shall not be deemed a Breach of Contract by the Institution. The Institution shall give the Contractor at least 120 days written notice before the effective termination date. The Contractor shall be entitled to receive compensation for satisfactory, authorized service completed as of the termination date, but in no event shall the Institution be liable to the Contractor for compensation for any service which has not been rendered. Upon such termination, the Contractor shall have no right to any actual general, special, incidental, consequential, or any other damages whatsoever of any description or amount.
- D.5. Termination for Cause. If the Contractor fails to perform its obligations under this Contract in a timely or proper manner, or if the Contractor violates any term of this Contract, the Institution shall have the right to immediately terminate the Contract and withhold payments in excess of fair compensation for completed services; provided, however, Institution shall have the option to give Contractor written notice and a specified period of time in which to cure. Notwithstanding the above, the Contractor shall not be relieved of liability to the Institution for damages sustained by virtue of any breach of this Contract by the Contractor.
- D.6. Subcontracting. The Contractor shall not assign this Contract or enter into a subcontract for any of the services performed under this Contract without obtaining the prior written approval of the Institution. If such subcontracts are approved by the Institution, they shall contain, at a minimum, sections of this Contract pertaining to "Conflicts of Interest" and "Nondiscrimination". Notwithstanding any use of approved subcontractors, the Contractor shall be the prime contractor and shall be responsible for all work performed.
- D.7. Conflicts of Interest. The Contractor warrants that no part of the total Contract amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract.
- D.8. Nondiscrimination. The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of disability, age, race, color, religion, sex, veteran status, national origin, or any other classification protected by Federal, or State constitutional or statutory law. The Contractor shall, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.
- D.9. Records. The Contractor shall maintain documentation for all charges against the Institution under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this Contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the Institution, the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be prepared in accordance with generally accepted accounting principles.
- D.10. Monitoring. The Contractor's activities conducted and records maintained pursuant to this Contract shall be subject to monitoring and evaluation by the Institution, the Comptroller of the Treasury, or their duly appointed representatives.

- D.11. Progress Reports. The Contractor shall submit brief, periodic, progress reports to the Institution on a quarterly basis.
- D.12. Strict Performance. Failure by any party to this Contract to insist in any one or more cases upon the strict performance of any of the terms, covenants, conditions, or provisions of this Contract shall not be construed as a waiver or relinquishment of any such term, covenant, condition, or provision. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written amendment signed by the parties hereto.
- D.13. Independent Contractor. The parties hereto, in the performance of this Contract, shall not act as employees, partners, joint venturers, or associates of one another. It is expressly acknowledged by the parties hereto that the parties are independent contracting entities and that nothing in this Contract shall be construed to create an employer/employee relationship or to allow either to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever.
- The Contractor, being an independent contractor and not an employee of the Institution, agrees to carry adequate public liability and other appropriate forms of insurance on the Contractor's employees, and to pay all applicable taxes incident to this Contract.
- D.14. Institution Liability. The Institution shall have no liability except as specifically provided in this Contract.
- D.15. Force Majeure. The obligations of the parties to this Contract are subject to prevention by causes beyond the parties' control that could not be avoided by the exercise of due care including, but not limited to, acts of God, riots, wars, epidemics or any other similar cause.
- D.16. State and Federal Compliance. The Contractor shall comply with all applicable State and Federal laws and regulations, including Institution policies and guidelines in the performance of this Contract.
- D.17. Governing Law. This Contract shall be governed by and construed in accordance with the laws of the State of Tennessee. The Contractor agrees that it will be subject to the exclusive jurisdiction of the Tennessee Claims Commission in actions that may arise under this Contract. The Contractor acknowledges and agrees that any rights or claims against the Institution or its employees hereunder, and any remedies arising therefrom, shall be subject to and limited to those rights and remedies, if any, available under ***Tennessee Code Annotated***, Sections 9-8-101 through 9-8-407.
- D.18. Severability. If any terms or conditions of this Contract are held to be invalid or unenforceable as a matter of law, the other terms and conditions hereof shall not be affected thereby and shall remain in full force and effect. To this end, the terms and conditions of this Contract are declared severable.
- D.19. Headings. Section headings of this Contract are for reference purposes only and shall not be construed as part of this Contract.

E. ADDITIONAL TERMS AND CONDITIONS:

E.1. Communications and Contacts.

The Institution:

Angela Gregory, Director of Purchasing and Contracts  
Tennessee Board of Regents  
1415 Murfreesboro Road, Suite 350  
Nashville, TN 37217  
(615) 366-4436  
(615) 366-4464

The Contractor:

Sheila Boyington, President  
Thinking Media  
340 Frazier Avenue  
Chattanooga, TN 37405  
423-266-2244  
423-266-2111

All instructions, notices, consents, demands, or other communications shall be sent in a manner that verifies proof of delivery. Any communication by facsimile transmission shall also be sent by United States mail on the same date as the facsimile transmission. All communications which relate to any changes to the Contract shall not be considered effective until agreed to, in writing, by both parties.

E.2. Subject to Funds Availability. The Contract is subject to the appropriation and availability of State and/or Federal funds. In the event that the funds are not appropriated or are otherwise unavailable, the Institution reserves the right to terminate the Contract upon written notice to the Contractor. Termination under this Section E.2 shall not be deemed a breach of Contract by the Institution. Upon receipt of the written notice, the Contractor shall cease all work associated with the Contract. Should such an event occur, the Contractor shall be entitled to compensation for all satisfactory and authorized services completed as of the termination date. Upon such termination, the Contractor shall have no right to recover from the Institution any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount.

E.3. Breach. A party shall be deemed to have breached the Contract if any of the following occurs (However, this list is not exclusive.):

- failure to perform in accordance with any term or provision of the Contract;
- partial performance of any term or provision of the Contract;
- any act prohibited or restricted by the Contract, or
- violation of any warranty.

For purposes of this Contract, these items shall hereinafter be referred to as a "Breach."

a. Contractor Breach— Institution shall notify Contractor in writing of a Breach.

- (1) In event of a Breach by Contractor, the Institution shall have available the remedy of actual damages and any other remedy available at law or equity.

- (2) Liquidated Damages— [INCLUDE THIS SECTION ONLY IF APPLICABLE AND ADD ATTACHMENT AS DESCRIBED BELOW] In the event of a Breach, the Institution may assess Liquidated Damages. The Institution shall notify the Contractor of amounts to be assessed as Liquidated Damages. The parties agree that due to the complicated nature of the Contractor's obligations under this Contract it would be difficult to specifically designate a monetary amount for a Breach by Contractor as the amounts are likely to be uncertain and not easily proven. Contractor hereby represents and covenants it has carefully reviewed the Liquidated Damages provisions contained in the above referenced, Attachment [NUMBER] and agrees that the amounts represent a reasonable relationship between the amount and what might reasonably be expected in the event of Breach, and are a reasonable estimate of the damages that would occur from a Breach. It is hereby agreed between the parties that the Liquidated Damages represent solely the damages and injuries sustained by the Institution in losing the benefit of the bargain with Contractor and do not include any injury or damage sustained by a third party. The Contractor agrees that the liquidated damage amount is in addition to any amounts Contractor may owe the Institution pursuant to the indemnity provision or other section of this Contract.

The Institution may continue to withhold the Liquidated Damages or a portion thereof until the Contractor cures the Breach, the Institution exercises its option to declare a Partial Default, or the Institution terminates the Contract. The Institution is not obligated to assess Liquidated Damages before availing itself of any other remedy. The Institution may choose to discontinue Liquidated Damages and avail itself of any other remedy available under this Contract or at law or in equity; provided, however, Contractor shall receive a credit for Liquidated Damages previously withheld except in the event of a Partial Default.

- (3) Partial Default— In the event of a Breach, the Institution may declare a Partial Default. In which case, the Institution shall provide the Contractor written notice of: (1) the date which Contractor shall terminate providing the service associated with the Breach; and (2) the date the Institution will begin to provide the service associated with the Breach. Notwithstanding the foregoing, the Institution may revise the time periods contained in the notice written to the Contractor.

In the event the Institution declares a Partial Default, the Institution may withhold, together with any other damages associated with the Breach, from the amounts due the Contractor the greater of: (1) amounts which would be paid the Contractor to provide the defaulted service; or (2) the cost to the Institution of providing the defaulted service, whether said service is provided by the Institution or a third party. To determine the amount the Contractor is being paid for any particular service, the Institution shall be entitled to receive within five (5) days of any request, pertinent material from Contractor. The Institution shall make the final and binding determination of the amount.

The Institution may assess Liquidated Damages against the Contractor for any failure to perform. Upon Partial Default, the Contractor shall have no right to recover from the Institution any actual, general, special, incidental, consequential, or any other damages whatsoever of any

description or amount. Contractor agrees to cooperate fully with the Institution in the event a Partial Default is declared.

- b. **Institution Breach**— In the event of a Breach of contract by the Institution, the Contractor shall notify the Institution in writing within 30 days of any Breach of contract by the Institution. The notice shall contain a description of the Breach. In the event of Breach by the Institution, the Contractor may avail itself of any remedy available in the Claims Commission; provided, however, failure by the Contractor to give the Institution written notice and opportunity to cure as described herein operates as a waiver of the Institution's Breach. Failure by the Contractor to file a claim before the Claims Commission within one (1) year of the written notice of Breach shall operate as a waiver of the claim in its entirety. It is agreed by the parties this provision establishes a contractual period of limitations for any claim brought by the Contractor.
- E.4. **Copyrights and Patents / Institution Ownership of Work Products.** Contractor grants Institution a world-wide, perpetual, non-exclusive, irrevocable, fully paid up license to use any proprietary software products delivered under this Contract. The Institution shall have royalty-free and unlimited rights to use, disclose, reproduce, or publish, for any purpose whatsoever, as well as share in any financial benefits derived from the commercial exploitation of all work products created, designed, developed, or derived from the services provided under this Contract. The Institution shall have the right to copy, distribute, modify and use any training materials delivered under this Contract for internal purposes only.
- The Contractor agrees to indemnify and hold harmless the Institution as well as its officers, agents, and employees from and against any and all claims or suits which may be brought against the Institution for infringement of any third party's intellectual property rights, including but not limited to, any alleged patent or copyright violations. The Institution shall give the Contractor written notice of any such claim or suit and full right and opportunity to conduct the Contractor's own defense thereof. In any such action brought against the Institution, the Contractor shall take all reasonable steps to secure a license for Institution to continue to use the alleged infringing product or, in the alternative, shall find or develop a reasonable, non-infringing alternative to satisfy the requirements of this Contract.
- The Contractor further agrees that it shall be liable for the reasonable fees of attorneys for the Institution in the event such service is necessitated to enforce the obligations of the Contractor to the Institution.
- E.5. **Competitive Procurements.** If this Contract provides for reimbursement of the cost of goods, materials, supplies, equipment, or services, such procurements shall be made on a competitive basis, when practical.
- E.6. **Inventory/Equipment Control.** No equipment shall be purchased under this Contract.
- E.7. **Institution Furnished Property.** The Contractor shall be responsible for the correct use, maintenance, and protection of all articles of nonexpendable, tangible, personal property furnished by the Institution for the Contractor's temporary use under this Contract. Upon termination of this Contract, all property furnished shall be returned to the Institution in good order and condition as when received, reasonable use and wear thereof accepted. Should the property be destroyed, lost, or stolen, the Contractor shall be responsible to the Institution for the residual value of the property at the time of loss.

- E.8. Contract Documents. Included in this Contract by reference are the following documents:
- a. This Contract document and its attachments
  - b. Request for Proposal 07-0431
  - c. The Contractor's Proposal dated 11/7/06

In the event of a discrepancy or ambiguity regarding the interpretation of this Contract, these documents shall govern in order of precedence as listed above.

- E.9. Prohibited Advertising. The Contractor shall not refer to this Contract or the Contractor's relationship with the Institution hereunder in commercial advertising in such a manner as to state or imply that the Contractor or the Contractor's services are endorsed.

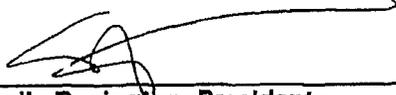
- E.10. Hold Harmless. The Contractor agrees to indemnify and hold harmless the Institution as well as its officers, agents, and employees from and against any and all claims, liabilities, losses, and causes of action which may arise, accrue, or result to any person, firm, corporation, or other entity which may be injured or damaged as a result of acts, omissions, or negligence on the part of the Contractor, its employees, or any person acting for or on its or their behalf relating to this Contract. The Contractor further agrees it shall be liable for the reasonable cost of attorneys for the Institution in the event such service is necessitated to enforce the terms of this Contract or otherwise enforce the obligations of the Contractor to the Institution.

In the event of any such suit or claim, the Contractor shall give the Institution immediate notice thereof and shall provide all assistance required by the Institution in the Institution's defense. The Institution shall give the Contractor written notice of any such claim or suit, and the Contractor shall have full right and obligation to conduct the Contractor's own defense thereof. Nothing contained herein shall be deemed to accord to the Contractor, through its attorney(s), the right to represent the Institution in any legal matter, such rights being governed by **Tennessee Code Annotated**, Section 8-6-106.

- E.11. Debarment and Suspension. The Contractor certifies, to the best of its knowledge and belief, that it and its principals:
- a. are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal or state department or agency;
  - b. have not within a three (3) year period preceding this Contract been convicted of, or had a civil judgment rendered against them from commission of fraud, or a criminal offence in connection with obtaining attempting to obtain, or performing a public (Federal, State, or Local) transaction or grant under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, or receiving stolen property;
  - c. are not presently indicted for or otherwise criminally or civilly charged by a government entity (Federal, State, or Local) with commission of any of the offenses listed in section b. of this certification; and
  - d. have not within a three (3) year period preceding this Contract had one or more public transactions (Federal, State, or Local) terminated for cause or default.

IN WITNESS WHEREOF:

THINKING MEDIA:



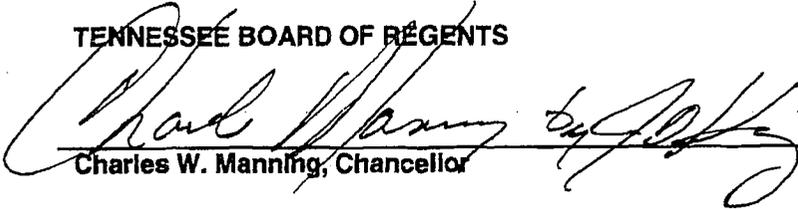
Shella Boyington, President

12-14-06

Date

APPROVED:

TENNESSEE BOARD OF REGENTS



Charles W. Manning, Chancellor

Date

1-12-07