

Member-Requested Participation Addendum (MPA)

This Addendum (“**MPA**”) is entered into by State of South Carolina (“**Member**” or “**State**”) and Lifestyles US Opco dba SXWELL USA, LLC, a limited liability company with a principle address of 111 Wood Ave South, Suite 210, Iselin, NJ 08830 (“**Vendor**”) and incorporates the MMCAP Infuse, an agency of the State of Minnesota (“**MMCAP Infuse**”), vendor contract MMS18009 (“**Vendor Contract**”).

WHEREAS, MMCAP Infuse and Vendor executed the Vendor Contract on July 1, 2018.

WHEREAS, Member and Vendor wish to amend the terms and conditions of the Vendor Contract to address the matters of Member.

WHEREAS, MMCAP Infuse has sole approval authority to any changes to the Vendor Contract, thus is a signatory to this MPA.

WHEREAS, Member, MMCAP Infuse, and Vendor do not intend to alter, amend, interfere, modify, or adjust the contractual relationship of MMCAP Infuse and Vendor nor the relationship between any other member of MMCAP Infuse and the Vendor.

THEREFORE, the parties agree as follows:

I. **DEFINITIONS**

- A. **Membership**: Means the joint power cooperative comprised of the MMCAP Infuse authorized states, departments, facilities, and other municipalities.
- B. **Facilities**: Means the following:
 - 1. “SC Participant(s)” means all participating South Carolina public procurement units (as defined by S.C. Code Ann. § 11-35-4610(5), as amended) or governmental bodies (as defined by S.C. Code Ann. § 11-35-310(18), as amended); or
 - 2. “Using Governmental Unit” means all South Carolina Public Procurement Units [11-35-4610(5)] eligible to purchase under this MPA.

II. **EFFECTIVE DATE AND TERM**

- A. **Effective Date**: This MPA is effective the date all signatures have been obtained.
- B. **Termination**: This MPA terminates upon:
 - 1. Thirty (30) calendar days’ written notice upon written notice to the other parties; or
 - 2. The termination of the Vendor Contract between MMCAP Infuse and the Vendor; or
 - 3. Written agreement executed by all parties.

III. **SCOPE**

- A. **Exhibit A**: Which is attached and incorporated herein, identifies the Vendor Contract and all other previous agreements and amendments to be incorporated into the contractual relationship between Member and Vendor.
- B. **Exhibit B**: Which is attached and incorporated herein, identifies the additional Facilities and Procurement Officials, in which Member and MMCAP Infuse has approved to access the Vendor Contract and MPA.

- C. **Exhibit C:** Which is attached and incorporated herein identifies the language to be incorporated into the contractual relationships between Member and Vendor, as referenced on Exhibit A. In the event of any conflict between the terms of the Vendor Contract and Exhibit C of this MPA, the terms of Exhibit C will supersede as between Member and Vendor. *MMCAP Infuse, the State of Minnesota, nor any other party of the Membership (except for Facilities in Exhibit B)) are bound by the terms of Exhibit C.*

IV. **GENERAL PROVISIONS**

- A. **Assignment:** Except as affirmed in this MPA, the Member nor Vendor will assign, delegate, or transfer any rights or obligations under this MPA without the prior written consent of MMCAP Infuse.
- B. **Counterparts and Electronic Signature:** The MPA cannot be executed in counterparts and will not be enforceable until MMCAP Infuse has obtained all required signatures. If requested by MMCAP Infuse, Member and Vendor expressly agree to conduct transactions under the MPA by electronic means (including, without limitation, with respect to execution, delivery, storage and transfer of this MPA by electronic means and to the enforceability of this electronic agreement). MMCAP Infuse will be deemed to have control of the authoritative copy for the electronic transferable record, in each case regardless of whether applicable law recognizes electronic transferable records or control of electronic transferable records and regardless of whether this MPA is an electronic record or transferable record. Member and Vendor will cooperate with and take all actions required by MMCAP Infuse in order for this MPA to be a transferable record, to ensure that MMCAP Infuse has control of the authoritative copy of such transferable record.
- C. **Amendments:** Any amendment or modification to this MPA must be in writing and will not be effective until executed by Vendor, the Member, and MMCAP Infuse.
- D. **Jurisdiction and Venue:** This MPA, except for the contents of Exhibit C, will be governed by the laws of Minnesota. Venue for all legal proceedings involving MMCAP Infuse arising out of this MPA, or breach thereof, will be in the state or federal court with competent jurisdiction in Ramsey County, Minnesota. All disputes between Member and Vendor will be governed as agreed upon in the Vendor Contract.

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IN WITNESS WHEREOF, the undersigned parties have caused this MPA to be signed on their behalf intending to be bound thereby.

BY AND BETWEEN:

FOR THE MEMBER:

STATE OF SOUTH CAROLINA

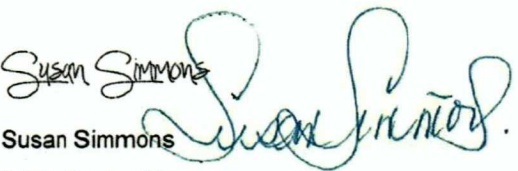
Signature: 

Printed: MICHAEL S. SREAKMON

Title: PROCUREMENT MANAGER

Date: 4/29/2019

VENDOR: Lifestyles US Opco dba SXWELL USA, LLC

Signature: 

Printed: Susan Simmons

Title: Public Sector Manager

Date: April 5, 2019

IN AN APPROVAL CAPACITY ONLY:

State of Minnesota for MMCAP Infuse

In accordance with Minn. Stat. § 16C.03, subd. 3

Signature: _____ Printed: _____ Date: _____

Minnesota Commissioner of Administration

In accordance with Minn. Stat. § 16C.05, subd. 2

Signature: _____ Printed: _____ Date: _____

[SIGNATURE PAGE]

EXHIBIT A

Vendor Contract and other Applicable Legal Documents

The following is a list of the legal documents to be referenced and to be incorporated with the terms and conditions of Exhibit C.

1. Vendor Contract MMS18009

EXHIBIT B

South Carolina Facilities and Procurement Officials

1. **Definitions:**

“Authorized Agent” All authority regarding the conduct of this procurement is vested solely with the responsible Procurement Officer. Unless specifically delegated in writing, the Procurement Officer is the only government official authorized to bind the government with regard to this procurement.

“Authority” means the South Carolina State Fiscal Accountability Authority.

“Procurement Officer” means the person, or his successor, identified as such in this MPA.

“Procurement Services (PS)” the organization that issues and maintains term contracts for the benefit of all South Carolina state and local public entities.

“SC Participant(s)” means all participating South Carolina public procurement units (as defined by S.C. Code Ann. § 11-35-4610(5), as amended) or governmental bodies (as defined by S.C. Code Ann. § 11-35-310(18), as amended).

2. **Authority as Procurement Officer:** The Procurement Officer is an employee of the Authority acting on behalf of the Using Governmental Unit(s) pursuant to the Consolidated Procurement Code. Any contracts awarded as a result of this procurement are between the Vendor and the Using Governmental Units(s). The Authority is not a party to such contracts, unless and to the extent that the Authority is a using governmental unit, and bears no liability for any party’s losses arising out of or relating in any way to the MPA.
3. **Relationship of Using Governmental Units:** Each Using Governmental Unit’s obligations and liabilities are independent of every other Using Governmental Unit’s obligations and liabilities. No Using Governmental Unit shall be responsible for any other Using Governmental Unit’s act or failure to act.

EXHIBIT C

Language Modification of the Vendor Contract

The following terms and conditions are entered into between Vendor and the Member and incorporate the documents identified on Exhibit A. Neither MMCAP, the State of Minnesota, nor the Membership, except for the Member (and applicable Facilities), are bound by the terms within this Exhibit.

Modification of Terms:

1. Member will refer to the Vendor Contract as 4400021123

Additional Terms:

1. Primary Contacts: The primary contact individual for this MPA are as follows (or their named successors):

Participating Member

Name:	Michael Speakmon
Address:	1201 Main St, Ste 600, Columbia SC 29201
Telephone:	803-737-9816
Email:	mspeakmon@mmo.sc.gov

2. South Carolina Prompt Payment Statute: The obligations of any SC Participant are governed by Section 11-35-45 of the South Carolina Code of Laws, if the participant is a "governmental body," as that term is defined in Section 11-35-310(18).
3. SC Registered Distributor: Vendor agrees to distribute its products to South Carolina governmental bodies through vendors registered with the South Carolina Secretary of State as an authorized South Carolina vendor <http://www.scbos.com>.
4. Open Trade: During the contract term, including any renewals or extensions, Vendor will not engage in the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in SC Code Section 11-35-5300.
5. Payment & Interest: (a) The State shall pay the Vendor, after the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified herein, including the purchase order, payment shall not be made on partial deliveries accepted by the Member. (b) Unless otherwise provided herein, including the purchase order, payment will be made by check. (c) Notwithstanding any other provision, payment shall be made in accordance with S.C. Code Section 11-35-45, which provides the Vendor's exclusive means of recovering any type of interest from the Member. Vendor waives imposition of an interest penalty unless the invoice submitted specifies that the late penalty is applicable. Except as set forth in this paragraph, the State shall not be liable for the payment of interest on any debt or claim arising out of or related to this contract for any reason. (d) Amounts due to the State shall bear interest at the rate of interest established by the South Carolina Comptroller General pursuant to Section 11-35-45 ("an amount not to exceed fifteen percent each year"), as amended. (e) Any other basis for interest, including but not limited to general (pre- and post-judgment) or specific interest statutes, including S.C. Code Ann. Section 34-31-20, are expressly waived by both Member and Vendor. If a court, despite this agreement and waiver, requires that interest be paid on any debt by either party other than as provided by items (c) and (d) above, the Member and Vendor further agree that the applicable

interest rate for any given calendar year shall be the lowest prime rate as listed in the first edition of the Wall Street Journal published for each year, applied as simple interest without compounding.

6. Drug Free Work Place Certification: Vendor will comply with all applicable provisions of The Drug-free Workplace Act, Title 44, Chapter 107 of the South Carolina Code of Laws, as amended.
7. CISG: The Vendor and Member expressly agree that the UN Convention on the International Sale of Goods shall not apply to this agreement.
8. Statewide Term Contract – Contract Limitations: No sales may be made pursuant to this MPA for any item or service that is not expressly included in the scope. No sales may be made pursuant to this MPA after expiration of this MPA. Violation of this provision may result in termination of this MPA and may subject Vendor to suspension or debarment in South Carolina.
9. South Carolina Fee: Each Facility will be assessed a South Carolina Fee of one percent (1%) by participating in this MPA. The South Carolina Fee will be added on top of the Vendor Contract prices and in addition to the MMCAP Administrative Fee. The SC Participants shall pay the South Carolina to Vendor as a part of the contract price and not separately itemize or invoice the South Carolina Fee. Vendor is responsible both for collecting the South Carolina Fee at the time of billing and for remitting the South Carolina Fee to Procurement Services (PS). The South Carolina Fee to be collected is constitutes a debt by to PS.
 - A. As used in this clause, the term “reporting period” means each full calendar quarter (Jan. -- Mar., Apr. -- Jun., Jul. -- Sep., and Oct. -- Dec.) and any remaining periods less than a full calendar quarter during the term of this contract. For each reporting period, Vendor shall report to PS its total sales pursuant to this contract for the period and shall remit the South Carolina to the PS Reports Manager. Payment for each reporting period is due no later than the last day of the month immediately following the end of the reporting period (Example: payment for the reporting period ending March 31 is due April 30). If the amount due for a reporting period is less than \$10.00, no payment or reporting is required. The Procurement Officer will provide Vendor an information packet, including a detailed explanation of reporting and payment requirements, within fifteen (15) calendar days following the effective date of the MPA. You may contact the Reports Manager at:

Procurement Services Division
Attn: Reports Manager
1201 Main Street, Suite 600
Columbia, SC 29201
Phone: (803) 737-0600 (ask to speak to the Reports Manager)
 - B. Vendor shall submit a usage report for each reporting period, unless there if no payment is due for the reporting period. The usage report shall include any information requested by PS to verify the amount due. At a minimum, each usage report shall reflect the following information for the applicable reporting period: Vendor’s name, contract number, contract description, reporting period/quarter, total dollar value of sales (excluding sales taxes and showing any adjustments for credits or refunds), total number of units (if practicable), and the number, date, and amount of Vendor’s check to PS. Unless otherwise specified by the reports manager, the usage report shall be submitted electronically according to instructions in the information packet. If the reports manager requires the Vendor to provide a more detailed usage report, the reports manager will work directly with the Vendor to determine the appropriate content and format of the report.

- C. Payments of the South Carolina Fee which are due and unpaid by the Vendor (including amounts disclosed by audit) shall bear simple interest from the date due until paid unless paid within 30 calendar days of becoming due. The interest rate shall be the highest prime rate (as published in The Wall Street Journal) plus 2% per annum (unless a higher rate is provided by law, but in no event be greater than the maximum interest rate permitted by law), shall be variable, and shall be adjusted effective at the close of business on the day of any change in the prime rate. In addition to the South Carolina Fee and interest, Vendor agrees to pay to PS its reasonable expenses of collection, including costs and attorneys' fees (and fees for inside counsel), whether or not PS commences legal action.
- D. If the Vendor fails to (i) timely submit accurate usage reports; (ii) remit to PS the South Carolina Fee when due; or (iii) promptly and fully cooperate with an audit request, the State may, without prejudice to any other remedy available to the State, take any one or more of the following actions:
- i. order the Vendor to not accept any further orders under the contract MPA from SC Gov Units until the cause for such order has been eliminated;
 - ii. terminate this MPA;
 - iii. the Vendor to not accept any further orders under any other South Carolina statewide term contract;
- E. Reports MUST reference the SC contract number 4400021123 to assure accurate accounting of purchases under this contract and reported South Carolina Fees. Each remittance will include the period covered and the contract number.
10. Taxes: Any tax the Vendor may be required to collect or pay upon the sale, use or delivery of the products shall be paid by the State, and such sums shall be due and payable to the Vendor upon acceptance. Any personal property taxes levied after delivery shall be paid by the State. It shall be solely the State's obligation, after payment to Vendor, to challenge the applicability of any tax by negotiation with, or action against, the taxing authority. Vendor agrees to refund any tax collected, which is subsequently determined not to be proper and for which a refund has been paid to Vendor by the taxing authority. In the event that the Vendor fails to pay, or delays in paying, to any taxing authorities, sums paid by the State to Vendor, Vendor shall be liable to the State for any loss (such as the assessment of additional interest) caused by virtue of this failure or delay. Taxes based on Vendor's net income or assets shall be the sole responsibility of the Vendor.
11. Subcontractors: All contractors, dealers, and resellers authorized in the State of South Carolina as shown on the dedicated Vendor (cooperative contract) website, are approved to provide sales and service support to participants in the Vendor Contract. The Vendor's dealer participation will be in accordance with the terms and conditions set forth in the aforementioned Vendor Contract.
12. Orders: Any order placed by a Participating Entity or Purchasing Entity for a product and/or service available from this contract shall be deemed to be a sale under (and governed by the prices and other terms and conditions) of the Vendor Contract.
13. Term of MPA: This MPA expires no later than the expiration date of the Vendor Contract.