

COMPREHENSIVE AGREEMENT
BETWEEN
THE CITY OF HARRISONBURG, VIRGINIA
AND
MOMENTUM EARTHWORKS, LLC

_____, 2018

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List of Exhibits:

- A. Unsolicited PPEA Proposal for: Northend Greenway Shared Use Path With Blacks Run Stream Restoration, City of Harrisonburg, Va., Vols. I & II.
- B. [notice for competing proposals]
- C. [public hearing notice]
- D. [interim agreement]
- E. Contract Between Owner and Design Builder
- F. General Conditions of the Design Build Contract & Supplementary Conditions
- G. Nutrient Credit Purchase Agreement
- H. Technical Specifications, Plans, etc.....

**COMPREHENSIVE AGREEMENT
BETWEEN
CITY OF HARRISONBURG, VIRGINIA
AND
MOMENTUM EARTHWORKS, LLC**

This Comprehensive Agreement (the “Agreement”) is made and entered into as of _____, 2018, by and between the City of Harrisonburg, Virginia, a municipal corporation of the Commonwealth of Virginia (“City” or “Owner”), and Momentum Earthworks, LLC, a Virginia limited liability company (“Momentum” or “Design/Builder”).

Recitals

R-1. Virginia’s Public-Private Education Facilities and Infrastructure Act of 2002 (“PPEA”) as set forth in the Code of Virginia §§ 56-575.1, *et seq.*, and the City of Harrisonburg Guidelines to the Public-Private Facilities and Infrastructure Act of 2002 (“Guidelines”) provide the City the authority and procedure required to enter into an agreement with a private entity to develop or operate certain qualified public infrastructure or government facility projects.

R-2. Pursuant to the PPEA and Guidelines, on or about December 2, 2016, a private entity, Momentum, submitted to the City an unsolicited conceptual proposal (the “Unsolicited Proposal”) to provide the City certain design, permitting, and construction services in connection with the construction of certain transportation facilities and for the sale of nutrient credits for the City’s use. A copy of the Unsolicited Proposal is attached hereto as Exhibit A.

R-3. On January 10, 2017, the City accepted the Unsolicited Proposal for consideration and thereafter, the City posted and published public notice that it would accept for simultaneous consideration any competing proposals to be submitted by a specified deadline. A copy of the City’s public notice is attached hereto as Exhibit B.

R-4. Following the City’s review, analysis, and evaluation of the Unsolicited Proposal, the City Council of the City of Harrisonburg (“Council”) authorized staff to move forward with the preparation of an interim agreement between Momentum and the City, pursuant to the Guidelines and in accord with the Unsolicited Proposal, for construction of the facilities set forth in the Unsolicited Proposal.

R-5 The City held a public hearing on the Unsolicited Proposal on June 12, 2018 and provided an opportunity for public comment on the Unsolicited Proposal for a period in excess of thirty (30) days. A copy of the notice with regard to the public hearing is attached hereto as Exhibit C.

R-6. On July 27, 2017, the City and Momentum entered into an Interim Agreement, attached hereto as Exhibit D, to begin preliminary work on the Project, pending the negotiation of a comprehensive agreement for the full performance and construction of the Project. The City and Momentum have now negotiated a comprehensive agreement consistent with the PPEA and the Guidelines, the terms of which are set out in this Agreement.

R-7. In accordance with the PPEA and the City’s Guidelines, this Comprehensive Agreement shall be posted on the City’s website, along with the Proposal, for public comment.

R-8. The City hereby determines that the Work set forth in the Contract Documents serves the public purpose of the PPEA under the criteria of Virginia Code § 56-575.4(C), as amended, and the parties desire to enter into this Agreement.

NOW THEREFORE, for an in consideration of the mutual promises, conditions, and covenants herein set forth, the parties agree as follows:

1. Incorporation of Recitals. The foregoing recitals are true and correct and are incorporated herein by reference. The duties of a “private entity” as set forth in the PPEA and as

applicable to the contracted work hereunder, are hereby incorporated into this Agreement and imposed upon Momentum (Design/Builder).

2. Definitions. The following definitions apply to this Agreement:

(a) “Contract Documents” means this Agreement (together with all of its Exhibits) and any written amendments thereto. “Contract Document” means any one of these documents. In the event of any discrepancies between or among any of the Contract Documents, the language in this Agreement and any amendments thereto shall take priority, followed by the Design-Build Contract and then the General Conditions.

(b) “General Conditions” means General Conditions of the Design Build Contract, as modified by the Supplemental Conditions, if any, and set forth herein as Exhibit F. The General Conditions shall serve as the General Conditions of Contract as referenced in the Design-Build Contract.

(c) “ Nutrient Credit Purchase Agreement” means the agreement for production, purchase, and sale of nutrient credits as set forth in Exhibit G.

(d) “Project” means the design and construction of the Northend Greenway Shared Use Path, the scope of which is set forth in the Contract between Owner and Design Build Contractor, Exhibit E. It also includes the monitoring and other regulatory permit obligations. “Project” includes both the entirety of the Project or a part thereof.

(e) “Project Progress Schedule” means the proposed schedule for the Project to be prepared and approved pursuant to the Contract Documents.

(f) “Scope of Work” or “Work” means all of the design, construction, and other duties and services to be furnished and provided by Momentum as set forth in the Contract Documents. “Work” may include the entirety of the Work or a portion thereof.

(g) “Site” means the real property on which the components of the Projects are to be located.

(h) “Work Product” means all the data, information, documentation and other work product produced, prepared, obtained or deliverable by or on behalf of Momentum and in any way related to the Project.

3. General Scope. The City and Momentum agree that the Project shall be designed and constructed by Momentum for the benefit of the City and its successors or assigns, if any, in accordance with the Contract Documents.

4. Term. The term of this Agreement shall begin on the date of this Agreement and shall continue until its termination pursuant to Section 9 hereof, any other provision of this Agreement, or any other Contract Document, or by law.

5. Design-Build Contract. The City and Momentum shall execute and deliver the Design-Build Contract and all necessary permits for commencement of the Project concurrent with their execution and delivery of this Agreement.

6. Project Progress Schedule. Momentum shall submit the Project Progress Schedule as required by the Contract Documents and the City shall timely review such Schedule and approve it as appropriate. The City and Momentum shall also (i) execute and deliver in a timely fashion all instruments and documents as contemplated by the terms of this Agreement and the other Contract Documents, and (ii) perform obligations in accordance therewith. The Project Progress Schedule may be modified as circumstances warrant by written agreement of the parties. To help keep the Project on schedule, the City shall give prompt attention to permits, reviews, and approvals required for the Project.

7. Nutrient Credit Purchase Agreement. The Nutrient Credit Purchase Agreement sets forth the general terms and conditions of the Blacks Run Stream Restoration Project, which shall not be subject to the General and Supplemental Conditions, but is intended to be a self-contained project separate from the North End Greenway Project.

8. Payment to Private Entity.

(a) Payment by the City to Momentum for Work shall be as set forth in the Design-Build Contract, the General Conditions, and the Nutrient Credit Purchase Agreement.

(b) The City shall arrange to finance any costs of the Project in a manner that results in the availability of funds in the amounts and at the times required to meet the projected needs for the Project. The City represents and warrants that it has or will request City Council to appropriate the funds necessary to fulfill all of the City's financial obligations related to the Project in the amounts and at the times required to meet the projected needs of the Project, including but not limited to a reasonable contingency to address adjustments reasonably required. Notwithstanding the foregoing, if the City is unable to finance the Project due to City Council's failure to appropriate funding or for any other reason, this Contract may be terminated by the City upon written notice to Momentum and City shall only pay Momentum for work performed up to the date of termination.

9. Representations and Warranties.

(a) City Representations and Warranties. The City hereby represents and warrants to Momentum as follows:

(i) The City is the responsible public entity, as that term is used in the PPEA and the Guidelines, for the Project. As such, the City has full power, right, and authority to

execute, deliver, and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Contract Documents.

(ii) The City has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Contract Documents.

(iii) Each person executing this Agreement or any other Contract Document, or any other agreement, instrument or document on behalf of the City to which the City is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of the City.

(iv) Neither the execution and delivery by the City of this Agreement and the other Contract Documents executed by the City concurrently herewith, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.

(v) There is no known action, suit, proceeding, investigation or litigation pending and served on the City which challenges the City's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Contract Documents to which the City is a party, or which challenges the authority of the City official executing this Agreement or the other Contract Documents to which the City is a party, and the City has disclosed to Momentum any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the City is aware.

(b) Private Entity Representations and Warranties. Momentum hereby represents and warrants to the City as follows:

(i) Momentum is a duly organized limited liability company created under the laws of the Commonwealth of Virginia. It holds a Class A license issued by the Virginia Board for Contractors, and it has and will maintain throughout the term of this Agreement the requisite power and all required licenses (or it or its subcontractors will have all required licenses prior to the time activities which require licenses are undertaken) to carry on its present and proposed activities, and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement and the other Contract Documents.

(ii) Momentum has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under, this Agreement and the other Contract Documents.

(iii) Each person executing this Agreement or any other Contract Document on behalf of Momentum to which Momentum is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of Momentum.

(iv) Neither the execution and delivery by Momentum of this Agreement and the other Contract Documents executed by Momentum concurrently herewith, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.

(v) There is no action, suit, proceeding, investigation, indictment or litigation pending and served on Momentum which challenges Momentum's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Contract Documents to which Momentum is a party, or which challenges the authority of the

Momentum official executing this Agreement and the other Contract Documents to which Momentum is a party, and Momentum has disclosed to the City any pending and unserved or threatened action, suit, proceeding, investigation, indictment or litigation with respect to such matters of which Momentum is aware.

10. Termination.

This Contract may be terminated:

(a) If a party to this Agreement defaults or fails or neglects to carry out a material obligation under this Agreement (for purposes of this section, the “Defaulting Party”) and if the other party (for this purposes of this section, the “Non-Defaulting Party”) is not in material breach of this Agreement at the time, the Non-Defaulting party may give written notice to the Defaulting Party that it intends to terminate this Agreement, which notice shall contain a reasonably detailed explanation of the reasons for the proposed termination. The Defaulting Party shall correct the default, failure, or neglect within thirty (30) days after being given such notice; provided, however, if (i) the nature of such default, failure or neglect is such that it is not reasonably capable of being corrected within such thirty (30) day period and (ii) the Defaulting Party notified the Non-Defaulting Party of a reasonable alternative period reasonably acceptable to the Non-Defaulting Party with fifteen (15) days of receipt of such notice, the Defaulting Party shall be allowed such reasonable alternative period to correct the default, failure or neglect so long as the Defaulting Party promptly commences and diligently pursues such corrections to completion. If the Defaulting Party fails to make such corrections within the thirty (30) day period or fails to commence and diligently pursue to completion such corrections within the alternative period, then the Non-Defaulting Party may, at its sole discretion and without prejudice to any other remedy, terminate this Agreement. The terms of this Section 10 shall not

apply to a failure on the part of the City of timely payment to Momentum, which shall be governed by the Design-Build Contract and the General Conditions. Notwithstanding the above, the City may terminate this Agreement if City Council fails to appropriate funds for the project as set forth in Section 7(b).

(b) If not sooner terminated pursuant to the terms of subsection (a) above, or by mutual agreement, the Agreement shall terminate when all terms and conditions of all the Contract Documents (exclusive of warranty and indemnity obligations) have been satisfied.

11. Cooperation; Resolution of Disputes, Claims and Other Matters.

(a) The parties agree to cooperate to achieve the objectives of this Agreement, and to use reasonable and good-faith efforts to resolve all disputes and disagreements that may arise hereunder. Each party agrees to designate representatives with the authority to make decisions binding upon such party (subject in the case of the City to those matters requiring an appropriate vote) so as to not unduly delay the Project Schedule.

(b) All disputes, claims and other matters in question between the parties shall be resolved in accordance with the General Conditions.

12. Financial Statement. On an annual basis, Momentum shall file with the City a statement reflecting the general condition of Momentum.

13. Records.

(a) Protected Records. If Momentum believes that any Work Product or any other document or item subject to transmittal to or review by the City under the terms of this Agreement or any other Contract Document contain trade secrets or other information exempt or protected from disclosure pursuant to applicable law, Momentum shall use its reasonable efforts

to identify such information prior to such transmittal or review, and the City shall confer an appropriate means of ensuring compliance with applicable laws prior to transmittal or review.

(b) Requests for Public Disclosure. The City recognizes that certain Work Product and other documents or materials of which the City obtains a copy, may contain trade secrets or other information exempt from disclosure under applicable law, or may include information that is otherwise subject to protection from misappropriation or disclosure. Should any such items become the subject of a request for public disclosure, the City shall respond as follows:

(i) The City shall use reasonable efforts to immediately notify the Momentum of such request and the date by which it anticipates responding.

(ii) Momentum must then assert in writing to the City any claim that such items are protected from disclosure.

(iii) If Momentum fails to make such assertion within three (3) business days after the City notifies Momentum of its intended response, the City shall have the right to make such disclosure.

(iv) If Momentum makes a timely assertion that the requested items contain trade secrets or other information exempt from disclosure or otherwise protected under applicable law, the City and Momentum may seek judicial declaration of the rights of the parties. Until such declaration is made, the City will maintain the confidentiality of such items.

(v) If the City's denial of a request for disclosure of items is challenged in court, Momentum shall assist the City in its defense and shall indemnify the City against any award of attorney's fees or fines ordered by the court.

14. Conditions Precedent to Agreement's Effectiveness. It shall be a condition precedent to this Agreement's effectiveness that:

(a) Entry into this Comprehensive Agreement and Contract Documents, including the Nutrient Credit Purchase Agreement, between the City and Momentum for the Project pursuant to the terms hereof has first been approved by the Council; that this Agreement and the Contract Documents have been properly executed by the City; and that the approved, executed Agreement and Contract Documents have been delivered to Momentum; and

(b) Momentum has certified that all material representations, information and data provided by Momentum to the City in support of, or in connection with, the Proposal are true and correct in all material respects; that such certification has been made by an officer of Momentum who has knowledge of the information provided in the Proposal; and that the executed certification has been delivered to the City.

(c) Momentum has obtained all required governmental permits and approvals for the Project. All permits required from the City will be delivered to Momentum not later than the date of delivery of the Notice to Proceed.

(d) City has secured all easements necessary for the construction of the Project.

15. Copy of Agreement to Auditor of Public Accounts. The City shall submit a copy of this Agreement to the Auditor of Public Accounts of the Commonwealth of Virginia within thirty (30) days of its effective date.

16. Miscellaneous.

(a) Successors and Assigns. Except as expressly otherwise provided, all of the terms, covenants and conditions hereof shall be binding upon and inure to the benefit of the

parties hereto and their respective successors and assigns. This Agreement may not be assigned without prior written consent of the parties to this Agreement.

(b) Mandatory Virginia Public Procurement Act Contract Provisions. During the term of this Contract, Momentum agrees as follows:

1. Pursuant to Virginia Code § 2.2-4311.1, Momentum does not, and shall not during the performance of this Contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the Federal Immigration Reform and Control Act of 1986.
2. Pursuant to Virginia Code § 2.2-4311.2, Momentum shall be authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 of the Code of Virginia (1950), as amended, or as otherwise provided by law. Momentum shall not allow its existence to lapse or its certificate of authority to be revoked or cancelled at any time during the term of this contract. City may void this Contract if Momentum fails to remain in compliance with the provisions of this section.
3. Pursuant to Virginia Code § 2.2-4311:
 - a) Momentum will not discriminate against any subcontractor, employee, or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of its business. Momentum agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - b) Momentum, in all solicitations or advertisements for employees placed by or on behalf of Momentum, will state that Momentum is an equal employment opportunity employer.
 - c) Notices, advertisements, and solicitations placed in accordance with federal law, rule, or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.
 - d) Momentum will include the provisions of the foregoing paragraphs 1, 2, and 3 in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor.
4. Pursuant to Virginia Code § 2.2-4354:

- 1) Within seven (7) days after receipt of amounts paid to Momentum by the City:
 - a) Momentum will pay subcontractor, if any, for the proportionate share of the total payment received from the City attributable to the work performed by subcontractor under the Contract; or
 - b) Notify the City and subcontractor, if any, of Momentum's intention to withhold all or a part of subcontractor's payment with the reason for nonpayment.
- 2) Momentum shall provide its federal employer identification number to the City.
- 3) Momentum shall pay interest to the subcontractor, if any, on all amounts owed to subcontractor that remain unpaid after seven (7) days following receipt by Momentum of payment from the City for work performed by subcontractor under the Contract, except for amounts withheld as allowed in section 1(b) above.
- 4) Unless otherwise provided under the terms of this Contract, interest shall accrue at the rate of one (1) percent per month.
- 5) Momentum shall include in each of its subcontracts a provision requiring each subcontractor to include the same payment and interest requirements as set forth herein with respect to each lower-tier subcontractor, if any.
- 6) Momentum's obligation to pay an interest charge to a subcontractor pursuant to this section shall not be construed to be an obligation of the City.
- 7) Momentum's consortium partners shall not be construed to be subcontractors for the purposes of this section.

(c) Notices. All notices and demands by either party to the other shall be given in writing and sent by a nationally recognized overnight courier or by United States certified mail, postage prepaid, return receipt requested, and addressed as follows:

To City: City Manager
409 South Main Street
Harrisonburg, VA 22801

With a copy to: Director of Public Works

320 East Mosby Road
Harrisonburg, VA 22801

To Private Entity: Momentum Earthworks, LLC
Attention Hans Harman
1500 Pleasants Drive
Harrisonburg, VA 22801

(d) Binding Effect. Subject to the limitations of subsection (a) above, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and permitted assigns, and wherever a reference in this Agreement is made to any of the parties hereto, such reference also shall be deemed to include, wherever applicable, a reference to the legal representatives, successors and permitted assigns of such party, as if in every case so expressed.

(e) Relationship of Parties. The relationship of Momentum to the City shall be one of an independent contractor, not an agent, partner, joint venturer or employee, and the City shall have no rights to direct or control the activities of Momentum in its performance under this Agreement except as specifically set forth herein or in the Contract Documents.

(f) Third-Party Beneficiaries. Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement.

(g) Waiver. No waiver by any party of any right or remedy under this Agreement or the other Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Contract Documents. The consent by one party to any act by the other party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given. No provision of this

Agreement shall be deemed to have been waived unless such waiver shall be in writing signed by the party to be charged.

(h) Severability. If any term or provision of this Agreement shall be determined to be invalid or unenforceable in any respect, it shall be replaced with a substantially similar provision to the greatest extent possible, and the Agreement shall remain in full force and effect.

(i) Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but both of which such counterparts together shall be deemed to be one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for the other counterpart.

(j) Entire Agreement. This Agreement, the other Contract Documents, and the exhibits attached hereto and forming a part hereof set forth all the covenants, promises, agreements, conditions and understandings between Momentum and the City concerning the Project, and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth. No alteration, amendment, change or addition to this Agreement shall be binding upon either party unless reduced to writing and signed by each party.

(k) Headings. The section and paragraph headings appearing in this Agreement are for convenience of reference only, and shall not be deemed to alter or affect the meaning or interpretation of any provision hereof.

(l) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia.

IN WITNESS WHEREOF, the parties have executed this Comprehensive Agreement as of the day and year first above written.

CITY OF HARRISONBURG, a Virginia Municipal Corporation

Eric D. Campbell, City Manager

STATE OF VIRGINIA,
COMMONWEALTH AT LARGE,
COUNTY/CITY OF HARRISONBURG, to-wit:

The foregoing instrument was acknowledged before me in the aforesaid jurisdiction this ____ day of _____, 2018, by Eric D. Campbell, City Manager of the City of Harrisonburg, a Virginia municipal corporation, on behalf of said city.

My commission expires: _____

Registration number: _____

Notary Public

Momentum Earthworks, LLC
A Virginia limited liability company

BY:
IT'S:

STATE OF VIRGINIA,
COMMONWEALTH AT LARGE,
COUNTY/CITY OF HARRISONBURG, to-wit:

The foregoing instrument was acknowledged before me in the aforesaid jurisdiction this _____ day of _____, 2018, by _____, as _____ for Momentum Earthworks, LLC, a Virginia limited liability company.,

My commission expires: _____

Registration number: _____

Notary Public