INTERIM AGREEMENT

This INTERIM AGREEMENT ("Interim Agreement") dated as of ____ day of _____, 2017, is made between the City of Harrisonburg, Virginia (the "City" or "Owner"), a municipal corporation of the Commonwealth of Virginia and a Responsible Public Entity under the Public-Private Education Facilities and Infrastructure Act of 2002 ("PPEA") and Momentum Earthworks, LLC, a Virginia limited liability company ("PPEA Contractor" or "Contractor"; collectively, the "Parties").

WHEREAS, Owner contemplates development of the following Project ("Project") identified as: **Northend Greenway Trail & Blacks Run Stream Restoration Project**; and

WHEREAS, the PPEA Contractor submitted its Unsolicited PPEA Proposal ("Proposal") on December 2, 2016, in order to form a public-private partnership to provide Owner certain design, permitting, and construction services in connection with the Project; and

WHEREAS, as required by applicable law, on or about January 14, 2017, the Owner advertised receipt of the Proposal and invited any competing proposals to be submitted to it by March 6, 2017, for consideration; and

WHEREAS, Owner subsequently determined the Proposal to be a qualifying project, and advised PPEA Contractor that Owner intended to proceed with negotiations through an Interim Agreement for the design and construction of the Project; and

WHEREAS, Owner and PPEA Contractor desire to commence, on the terms and subject to the conditions set forth in this Agreement, the certain design, engineering, and other preliminary services, as defined below, while the parties are negotiating the definitive Comprehensive Agreement for PPEA Contractor's full performance of the construction of the Project (the "Comprehensive Agreement").

NOW, THEREFORE, in consideration of the Recitals set forth above, which are expressly incorporated herein, the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. PPEA Contractor's Responsibilities.

A. Under this Interim Agreement, PPEA Contractor shall provide all services necessary for the PPEA Contractor to proceed with

construction of the Project, all as more particularly set forth in the Proposal.

B. PPEA Contractor shall provide the services in accordance with the schedule set forth in "Interim Agreement Scope of Work" and attached hereto as **Exhibit A**.

C. Owner and PPEA Contractor shall use their best efforts to maintain the Interim Agreement Schedule, attached hereto as **Exhibit B**, which can be modified by mutual written agreement of the Parties as circumstances warrant.

D. The parties intend to use a design-build approach for the design and construction of the Project.

E. PPEA Contractor shall provide to the Owner, upon request, any documentation necessary to meet Virginia Department of Transportation requirements.

2. Owner's Responsibilities.

In addition to making timely payment for the services rendered by the PPEA Contractor as herein set forth, the Owner agrees to cooperate with the PPEA Contractor in the performance of this Contract, including having progress meetings between staff for the PPEA Contractor and City staff not less frequently than once monthly.

3. Interim Agreement Price and Payments.

A. The PPEA Contractor shall submit invoices to the Owner monthly, detailing the work actually done for the Northend Greenway Trail portion and the person or persons who actually did the work. The schedule of values for accomplishment of specific tasks is set forth in the schedule of prices set forth in **Exhibit C** for the Northend Greenway Trail portion of the Project.

B. Payment shall be made within 30 days of receipt of an invoice by the Owner. Any invoice not paid within 60 days after receipt, unless under dispute as set forth herein, shall be paid with interest, to accrue at a 5.0% annualized rate.

C. In the event that the Owner disputes any charge, Owner shall give notice to the PPEA Contractor within 14 days of receipt of the invoice of the disputed charge(s), detailing the reason(s) therefor. Owner shall have authority to withhold only such portion of the charges that is in dispute.

D. In the event of a dispute as set forth herein, the Owner and the PPEA Contractor shall engage in good-faith negotiations for not less than 30 days in order to resolve such dispute.

E. The Owner additionally agrees to make a deposit payment to the PPEA Contractor in the amount of $241,410.00 in pursuit of certification by the Virginia Non-Point Source Nutrient Credit Registry, administered by the Virginia Department of Environmental Qualify, for the Blacks Run Stream Restoration portion of the Project. This deposit shall serve as a down payment toward future phosphorous credits purchased by the Owner from the PPEA Contractor. Milestones and payment phasing shall be agreed to in writing by both Parties.

4. Prompt Payment to Subcontractors.

A. Within seven days of payment by the Owner, the PPEA Contractor shall either:

i. Pay the subcontractor its proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or

ii. Notify the Owner and subcontractor, in writing, of its intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

B. Failure to satisfy the requirement under sub-section A shall not, of itself, constitute breach or grounds to terminate this Interim Agreement.

C. The PPEA Contractor's partners in submitting the Proposal shall not be construed to be contractors for the purposes of this section.

5. Public Procurement Act Required Provisions.

A. PPEA Contractor represents and warrants to the Owner that during the performance of this Interim Agreement it:

a. Will comply and conform with the provisions of the Civil Rights Act of 1964, as amended, the Virginia Fair Employment Contracting Act of 1975, as amended, and the Virginia Human Rights Act, as amended, where applicable;
b. Not employ illegal alien workers or otherwise violate the provisions of the Immigration Reform and Control Act of 1986, as amended; and

c. Comply with all federal, state, and local laws and regulations applicable to the performance of the services or supply of the goods procured.

B. PPEA Contractor agrees during the period of performance of this Interim Agreement that it:

a. Will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by local, state, or federal law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the PPEA Contractor;
b. Will state, in all solicitations and advertisements for employees placed by or on behalf of the PPEA Contractor during the Contract Period, that the PPEA Contractor is an Equal Opportunity Employer;
c. Provide a drug-free workplace for its employees;
d. Post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in its workplace and specify the actions that will be taken against any employee for a violation;
e. State in all of its solicitations or advertisements for employees that PPEA Contractor maintains a drug-free workplace. For the purposes of this sub-paragraph, "drug-free workplace" means a site for the performance of work done in connection with the scope of work set forth in this Interim Agreement;
f. In addition to the provisions contained herein, the PPEA Contractor must comply with the Drug Free Workplace Act of 1988, as amended;
g. Shall maintain its certificate of authority to transact business in the Commonwealth, if such is required by law;
h. Will include the provisions of the foregoing subparagraphs in every subcontract or purchase order exceeding $10,000 issued by the PPEA Contractor in order to fulfill its obligations under this Interim Agreement, so that the provisions will be binding on each subcontractor or subvendor employed by the PPEA Contractor.

C. The PPEA Contractor certifies that its PPEA proposal:

a. Has been prepared without prior participation, understanding, agreement, or connection with any corporation, firm or other person that is also submitting a bid or proposal in response to the same Solicitation;

b. Is in all respects fair, without misrepresentations of fact, and free from collusion or fraud;
c. Is in full compliance with the Virginia Conflict of Interests Act, Chapter 31 of Title 2.2 of the Code of Virginia, 1950, as amended, and all provisions relating to ethics in public contracting;
d. Is or is intended to be competitive and free from any collusion with any person, firm or corporation; and
e. Has been prepared without the benefit of being provided information not available to the general public.

D. The PPEA Contractor certifies that it has not offered or received any kickback from any other bidder, proposer, or offeror, supplier, manufacturer, or subcontractor in connection with the bid/proposal on the PPEA Proposal. A kickback is defined as an inducement for the award of a contract, subcontract, or order, in the form of any payment, loan, subscription, advance, deposit of money, services or anything else, present or promised, unless consideration of substantially equal or greater value is exchanged. Further, no person may demand or receive any payment, loan, subscription, advance, and deposit of money, services or anything of value in return for an agreement not to compete on a public contract.

E. The PPEA Contractor certifies that it is not a party to nor has it participated in nor is it obligated or otherwise bound by agreement, arrangement or other understanding with any person, firm or corporation relating to the exchange of information concerning bids, prices, terms or conditions upon which the contract resulting from the acceptance of his bid proposal is to be performed.

F. The PPEA Contractor certifies that it understands that collusive bidding is a violation of the Virginia Governmental Frauds Act as well as federal law, and can result in fines, prison sentences, and civil damage awards and agrees to abide by all conditions of this proposal.

6. Insurance.

At all times during the performance of the work under this Agreement, PPEA Contractor shall take out and maintain each of the following insurance, for which the Owner shall be made an additionally insured party and for which documentation shall be provided to the Owner:

A. Workers' Compensation and Employers' Liability Insurance for all of its employees engaged in work on the Project in an amount not less than the minimum required by Va. Code §§ 2.2-4332 and 65.2-100 *et seq.*, and, in case any of such work on the Project is sublet, PPEA Contractor shall require each subcontractor similarly to provide

Workers' Compensation Insurance for all of the latter's employees to be engaged in such work.

B. Commercial General Liability of $2,000,000 for each occurrence and Professional Liability of $2,000,000 for each claim and aggregate.

C. In no event may the PPEA Contractor's liability under this Interim Agreement exceed the limits of its insurance as set forth herein.

7. Comprehensive Agreement.

The Parties will make best efforts to finalize the Comprehensive Agreement in accordance with **Exhibit B**, the Proposal, and PPEA requirements.

8. Notices.

All requests, notices and other communications required or permitted to be given under the Contract Documents shall be in writing. Delivery of a notice shall be deemed to have been made when such notice is either:

(1) Duly mailed by first-class mail, postage prepaid, return receipt requested, or any comparable or superior postal or air courier service then in effect; or

(2) Transmitted by hand delivery, telegram, telex, telecopy or facsimile transmission, to the party entitled to receive the same at the address indicated below or at such other address as such party shall have specified by written notice to the other party. Notices to the Owner shall be sent to:

Brian Shull
City Manager's Office
409 South Main St.
Harrisonburg, Virginia 22801
brian.shull@harrisonburgva.gov

To PPEA Contractor:

Hans Harman, President
Momentum Earthworks, Inc.
1500 Pleasants Dr.
Harrisonburg, Virginia 22801
hans@momentumearthworks.com

Any party may, upon prior notice to the others, specify a different address for the giving of notice without necessity of a formal amendment to this Interim Agreement. Notices shall be effective one (1) day after sending if sent by overnight courier or three (3) days after sending if sent by certified mail, return receipt requested.

9. 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 Interim Agreement may not be assigned by PPEA Contractor without the prior written consent of Owner.

10. Independent Contractor.

The parties understand and agree that PPEA Contractor, in performing its obligations under this Interim Agreement, shall be deemed an independent contractor and not an agent, employee, partner, or co-venturer of Owner.

11. Counterparts.

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

12. Choice of Law and Forum Selection.

This Interim Agreement is made and entered under the laws of the Commonwealth of Virginia, and is to be construed in accordance with the laws thereof without reference to its principles of conflicts of law. Any suit, at law or in equity, to enforce or interpret the terms hereof shall be brought in the Virginia state courts for the City of Harrisonburg, Virginia, and in no other.

13. Exhibits and Attachments.

The following are attached hereto and made part of this Interim Agreement as if fully set forth herein:

Exhibit A—Interim Agreement Scope of Work
Exhibit B—Interim Agreement Schedule
Exhibit C—Schedule of Prices

IN WITNESS WHEREOF the undersigned have executed this contract on the dates set forth beside their respective signatures.

PPEA CONTRACTOR:

MOMENTUM EARTHWORKS, INC.

_____

Hans Harman, President

Dated: _____

OWNER:

CITY OF HARRISONBURG, VIRGINIA

_____

Kurt Hodgen, City Manager

Dated: _____

Approved as to legal form:

_____

Chris Brown, City Attorney

EXHIBIT A: INTERIM AGREEMENT SCOPE OF WORK

STAGE A: ASSESSMENT & BASEMAPPING

1) Existing Conditions Survey & Analysis (ES, GNI)
    - Topography/Infrastructure/Utilities/Vegetation
    - Functional Stream Assessment
    - USACE Preliminary Jurisdictional Determination (Wetland & Stream Delineation)
    - Geologic Mapping
    - Pollutant Loading Assessment

STAGE B: 30% DESIGN/PLANS & REGULATORY PERMITTING (ES, GNI)

1) 30% Stream Restoration Construction Plans
2) 30% Utility Relocation Plans
3) 30% Greenway Trail Path Construction Plans
4) USACE Preliminary Jurisdictional Determination (PJD) and Pre-Application Meeting for Nationwide Permit 27

STAGE C: 60% DESIGN/PLANS & REGULATORY PERMITTING (ES, GNI)

1) 60% Stream Restoration Construction Plans
2) 60% Utility Relocation Plans & Specifications
3) 60% Greenway Trail Path Construction Plans
4) Hydraulic modeling for No-Rise Analysis
5) Apply for FEMA No-Rise Certificate/Coordinate with Local Floodplain Administrator
6) Apply and Obtain USACE Nationwide Permit 27
7) Apply for VSMP/VESCP/Land Disturbance Permits for Erosion & Sediment Control/Stormwater Management
8) Obtain all rights-of-way and easements, in the name of the City of Harrisonburg, that are included in the PPEA proposal
9) Provide the City with all survey information required in order for the City to obtain necessary rights-of-way and easements not included in the PPEA proposal

STAGE D: 90-100% DESIGN/PLANS AND REGULATORY PERMITTING (ES, GNI)

1) 90% Stream Restoration Construction Plans & Technical Specifications
2) 90% Utility Relocation Plans & Technical Specifications
3) 90% Greenway Trail Path Construction Plans & Technical Specifications
4) Acquire FEMA approval/No-Rise Certificate
5) Obtain VSMP/VESCP/Land Disturbance Permits

Exhibit B: Interim Agreement Schedule

Stage	Start Date	End Date
A – Assessment & Basemapping	August 1st, 2017	September 15th, 2017
B – 30% Design/Plans & Regulatory Permitting	August 1st, 2017	October 1st, 2017
C - 60% Design/Plans & Regulatory Permitting	October 1st, 2017	December 1st, 2017
D – 90-100% Design/Plans & Regulatory Permitting	December 1st, 2017	February 1st, 2018

Exhibit C: Interim Agreement Schedule of Prices

Northend Greenway Trail

Task	Fee
Environmental Assessment & Permitting	$10,200
Engineering/Design & Plans	$54,900
Utilities Engineering Design & Plans	$24,000
PPEA Admin and Permitting Fees/Oversight and Monitoring	$24,000

Blacks Run Stream Restoration

Task	Fee
Principal Deposit for 13 LBS of Phosphorus Credits Preliminary cost of credit estimated at $18,570/LB	$241,410*

* To be credited against final purchase price of credits.