

COMPREHENSIVE AGREEMENT

BY AND BETWEEN

THE CITY OF HOPEWELL, VIRGINIA

AND

HOPEWELL NUTRIENT PARTNERS

June 2014

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**COMPREHENSIVE AGREEMENT
BY AND BETWEEN
THE CITY OF HOPEWELL, VIRGINIA
AND
HOPEWELL NUTRIENT PARTNERS**

This Comprehensive Agreement (the “Agreement”) is made and entered into as of this ___ day of June, 2014, by and between the City of Hopewell, Virginia, a municipal corporation and political subdivision of the Commonwealth of Virginia (the “City”), and Hopewell Nutrient Partners, A Joint Venture of HDR Constructors and PC Construction (the “Private Entity”).

Recitals

A. In enacting the Public-Private Education Facilities and Infrastructure Act of 2002 (as amended, the “PPEA”), which became effective on July 1, 2002, the Virginia General Assembly found and declared, among other things, that:

(i) there is a public need for timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of education facilities and other public infrastructure and government facilities within the Commonwealth of Virginia that serve a public need and purpose;

(ii) such public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, operated, implemented, or installed; and

(iii) authorizing private entities to develop or operate one or more qualifying projects may result in the availability of such projects to the public in a more timely or less costly fashion, thereby serving the public safety, benefit, and welfare.

B. The PPEA grants the City the authority to approve the development or operation by a private entity of an education facility, technology infrastructure or other public infrastructure or government facility needed by the City as a qualifying project, or the design or equipping of a qualifying project so developed or operated, if the City determines that the qualifying project serves the public purpose of the PPEA.

C. The PPEA permits a private entity to initiate the approval process for a qualifying project in accordance with the provisions of the PPEA.

D. Under the PPEA, the City may determine that a qualifying project serves the public purpose of the PPEA if:

(i) there is a public need for or benefit derived from the qualifying project of the type the private entity proposes as a qualifying project;

(ii) the estimated cost of the qualifying project is reasonable in relation to similar facilities; and

(iii) the private entity's plans will result in the timely development or operation of the qualifying project.

E. On February 9, 2010, the City's Council (the "Council") adopted and made publicly available guidelines (the "Guidelines") sufficient to enable it to comply with the PPEA. The Guidelines are attached as Exhibit E.

F. On or about December 17, 2013, the City issued and advertised a public notice of its receipt of an unsolicited proposal and an invitation for competing proposals relating to the Alternative 4A-1 Light, Phase 2 Project (the "Phase 2 Project") of the city-owned Hopewell Regional Wastewater Treatment Facility, 231 Hummel Ross Road, Hopewell, Virginia 23860, pursuant to the PPEA.

G. On March 11, 2014, the City Council received a conceptual review report from the City Manager and directed staff to proceed and that the "competitive negotiation" method, as described in Article IV(C)(1) of the Guidelines, would be used to consider the unsolicited proposal and any competing proposals and that doing so is likely to be advantageous to the City and the public based upon (i) the probable scope, complexity or priority of need; (ii) the risk sharing including guaranteed cost or completion guarantees, added value or debt, or equity investments proposed by the private entity; and/or (iii) the increase in funding, dedicated revenue or other economic benefit that would otherwise not be available.

H. On or about November 8, 2013, the Private Entity submitted to the City a proposal for the Alternative 4A-1 Light, Phase 2 Project of the city-owned Hopewell Regional Wastewater Treatment Facility. The Private Entity later submitted to the City a detailed proposal as well as replies to the City's subsequent requests for additional information related thereto.

I. The Council determined that analysis of the specifics, advantages, disadvantages, and the long and short-term costs of each of the requests for approval of a qualifying project, as set forth in the proposals, shall be performed by employees of the City.

J. Pursuant to the PPEA and the Guidelines, the City administration presented to the Council at its May 13, 2014, meeting its recommendation that the City enter into a comprehensive agreement with the Private Entity for the Alternative 4A-1 Light, Phase 2 Project of the city-owned Hopewell Regional Wastewater Treatment Facility.

K. The City and the Private Entity have now negotiated a comprehensive agreement consistent with the PPEA, the Guidelines, and other applicable law, the terms of which are set out in this Agreement.

L. The City has determined that the Alternative 4A-1 Light, Phase 2 Project of the city-owned Hopewell Regional Wastewater Treatment Facility to be delivered by the Private Entity in accordance with the terms of this Agreement serves the public purpose of the PPEA

under the criteria of Virginia Code §56-575.4(C), as amended, and the Council has approved this Agreement.

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Agreement

In consideration of the covenants contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the City and the Private Entity agree as follows:

1. Incorporation of Recitals. The foregoing recitals are true and correct and are incorporated herein by reference.

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, the Design-Build Contract (together with all documents referenced in Article 2 thereof) and any written amendments thereto, and the General Conditions. “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. The priority of the other Contract Documents shall be as set forth in Section 3.2 of the Design-Build Contract.

(b) “Contract Sum” means the aggregate amount of compensation that the City will be obligated to pay to the Private Entity pursuant to this Agreement and the Design-Build Contract. The Contract Sum is subject to upward or downward adjustment pursuant only to the Contract Documents.

(c) “Design-Build Contract” means DBIA Document No. 525 Standard Form of Agreement Between Owner and Design-Builder – Lump Sum, as modified and set forth as Exhibit A, by and between the City (referenced to therein as “Owner”) and the Private Entity (referenced to therein as “Design-Builder”).

(d) “General Conditions” means DBIA Document No. 535 Standard Form of General Conditions of Contract Between Owner and Design-Builder, as modified and set forth as Exhibit B.

(e) “Project” means all of the labor, materials, and other work necessary to complete the Alternative 4A-1 Light, Phase 2 Project of the city-owned Hopewell Regional Wastewater Treatment Facility. “Project” shall include both the entirety of the Project as well as any part thereof. It is intended that the term “Project” will be construed consistent with the definition of “Project” in the Design-Build Contract.

(f) “Project Schedule” means the schedule for the Project as approved by the parties.

(g) “Site” means the real property on which the Project is to be located, all of which is owned by the City. More specifically, the Site is located at 231 Hummel Ross Road, Hopewell, Virginia 23860, located in the City, and is further described by the drawings attached as Exhibit A.

(h) “Work” means all of the architectural, engineering, construction and other duties and services to be furnished and provided by the Private Entity as required by the Contract Documents. “Work” may include the entirety of the Work or a portion thereof.

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

3. Scope of Work. Under this Agreement, the City and the Private Entity agree that the Project shall be designed and constructed by the Private Entity for the benefit of the City in accordance with the Contract Documents. The general scope of the Work to be provided by the Private Entity is detailed in Exhibit A. The Private Entity shall be paid by the City for the Work in accordance with the Contract Documents. The Private Entity shall furnish all necessary personnel, material, equipment and services (except as otherwise specified in the Contract Documents) to fully and properly perform the Work in accordance with the Contract Documents.

Upon the execution of this Agreement, the Private Entity shall engage the services of a Virginia licensed architect or engineer to prepare detailed drawings and plans fully describing the work to be performed as listed in Exhibit A. Once all said plans and drawings have been completed, the City staff shall have fifteen (15) days to review all said drawings and plans and identify any changes that need to be made to the plans and/or drawings. Only once the City staff has approved the plans and drawings shall the actual project work commence.

4. Term. The term of this Agreement shall begin on the date of this Agreement and shall continue until its termination pursuant to the terms hereof, any other provision of this Agreement or any other Contract Document, or by law, or until all obligations under this Agreement have been properly and fully performed.

5. Notice to Proceed. The City’s delivery to the Private Entity of this executed Agreement shall constitute notice to proceed with the Work in accordance with the Project Schedule.

6. Project Schedule. The Project Schedule shall be as set forth in the Design-Build Contract. This schedule shall be modified under the circumstances set forth in the Design-Build Contract and the General Conditions. The City and Private Entity shall use reasonable efforts to maintain the Project Schedule and each of them shall (a) 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 (b) perform obligations in accordance therewith. To help keep the Project on schedule, the City shall give prompt attention to permits, reviews and approvals required for the Project.

7. Compensation to Private Entity; Appropriation of Funds.

(a) The amount of compensation to be paid by the City to the Private Entity shall be established pursuant to the terms of the Design-Build Contract and shall be referred to herein as the "Contract Sum." Payment of the Contract Sum by the City to the Private Entity shall be made in accordance with the terms of the Design-Build Contract.

(b) The City shall arrange to finance the 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.

8. Representations and Warranties.

(a) City Representations and Warranties. The City hereby represents and warrants to the Private Entity 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 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 the Private Entity any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the City is aware.

(vi) The zoning for the Site is consistent with the requirements of the Project and is otherwise suitable and appropriate for the Project.

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

(i) The Private Entity is a duly organized joint venture partnership created under the laws of the Commonwealth of Virginia. 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) The Private Entity 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 the Private Entity to which the Private Entity is a party has been or at such time of execution will be duly authorized to execute each such document on behalf of the Private Entity.

(iv) Neither the execution and delivery by the Private Entity of this Agreement and the other Contract Documents executed by the Private Entity 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 the Private Entity which challenges the Private Entity's authority to execute, deliver or perform, or the validity or enforceability of, this Agreement and the other Contract Documents to which the Private Entity is a party, or which challenges the authority of the Private Entity official executing this Agreement or the other Contract Documents to which the Private Entity is a party, and the Private Entity 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 the Private Entity is aware.

9. Termination.

(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 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 in accordance with the Design-Build Contract.

(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 and all of the Private Entity's construction obligations under this Agreement have been fulfilled.

10. 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 arising out of or in relation to the Design-Build Contract shall be resolved in accordance with the terms thereof.

(c) All other disputes, claims and other matters in question between the parties shall be resolved as follows:

(i) A party shall give to the other party written notice of any claim for any additional compensation, damages or delay, or of any other claim, dispute or other matter in question, within fifteen (15) days of the reasonable discovery of the occurrence of the event leading to the dispute, claim or question, and shall submit any supporting data within thirty (30) days after the occurrence giving rise to the dispute, claim or question ends.

(ii) The parties shall first endeavor to resolve any disputes, claims or other matters in question between them through direct negotiations, and if such direct negotiations fail, by non-binding mediation conducted pursuant to the Construction Industry Mediation Procedure of the American Arbitration Association, with the site of the mediation being in the City of Hopewell, Virginia, or such other site as may be agreed upon by the parties. Should the dispute, claim or other matter in question remain unresolved for the shorter of (A) ninety (90) days following negotiation and mediation, or (B) ninety (90) days after mediation is invoked by a party, either party may proceed in accordance with subsection (iii) below.

(iii) If the procedures of subsection (ii) above have been followed, and the dispute, claim or matter in question remains unresolved, then either party may institute a lawsuit or chancery action, as appropriate, only in the Circuit Court of the City of Hopewell, Virginia, or if the subject or amount in controversy is within its jurisdiction, the General District Court of the City of Hopewell, Virginia.

(iv) Nothing in subsections (ii) or (iii) shall prevent a party from seeking temporary injunctive or other temporary equitable relief in the Circuit Court of the City of Hopewell, Virginia, if circumstances so warrant.

11. Records.

(a) Protected Records. If the Private Entity 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 contains trade secrets or other information exempt or protected from disclosure pursuant to applicable law, the Private Entity 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 Private Entity of such request and the date by which it anticipates responding.

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

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

(iv) If the Private Entity 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 the Private Entity shall 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, the Private Entity shall assist the City in its defense, and shall indemnify the City for direct damages assessed and reasonable costs the City incurs in such defense, excluding any damages or costs resulting from the City's negligence.

12. Conditions Precedent and Subsequent to Agreement's Effectiveness.

(a) Council Approval. It shall be a condition precedent to this Agreement's effectiveness that entry into a Comprehensive Agreement between the City and the Private Entity for the Project pursuant to the terms hereof has first been approved by the Council; that this Agreement has been properly executed by the City; and that the approved, executed Agreement has been delivered to the Private Entity no later than _____; and

(b) Entry into Design-Build Contract. It shall be a condition subsequent to this Agreement's effectiveness that the parties enter into the Design-Build Contract for the Facility Renovation in form and substance satisfactory to the City and the Private Entity consistent with

the provisions of this Agreement.

13. 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.

14. State Corporation Commission Identification Number. Private Entity must be authorized to transact business in the Commonwealth as a domestic or foreign business as required by Title 13.1 or Title 50 of the Code of Virginia, as amended, or as otherwise required by law. Private Entity shall provide the identification number issued to it by the State Corporation Commission.

Private Entity shall not allow its existence to lapse or its certificate of authority or registration to transact business in the Commonwealth, if so required under Title 13.1 or Title 50, to be revoked or cancelled at any time during the term of the Agreement. Doing so shall be deemed to be a violation of this Agreement.

15. Employment Discrimination/Drug-Free Workplace By Contractor. Private Entity certifies to the City that it will conform to the provisions of the Federal Civil Rights Act of 1964, as amended, as well as the Virginia Fair Employment Contracting Act of 1975, as amended, where applicable, the Virginians With Disabilities Act, the Americans With Disabilities Act and §11-51 of the *Virginia Public Procurement Act*. During the performance of this Agreement, the Private Entity agrees as follows:

a. The Private Entity 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 state law related discrimination employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The Private Entity agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.

b. The Private Entity, in all solicitations or advertisements for employees placed by or on behalf of the Private Entity, will state that such Private Entity is an equal 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 these requirements of this section.

d. To provide a drug-free workplace for the Private Entity's employees.

e. To 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 the Private Entity's workplace and specifying the actions that will be taken against employees for violations of such prohibition.

f.. To state in all solicitations or advertisements for employees placed by or on behalf of the Private Entity that it maintains a drug-free workplace.

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 the prior written consent of the parties to this Agreement.

(b) 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 of Hopewell
Attn: Mark Haley, City Manager
300 North Main Street
Hopewell, VA 23860

with a copy to: City of Hopewell
Attn: David C. Fratarcangelo, City Attorney
300 North Main Street
Hopewell, VA 23860

To Private Entity: Hopewell Nutrient Partners
Tony Snead, Vice-President
HDR Constructors, Inc., Managing Partner
4435 Main Street, Suite 1000
Kansas City, MO 64111

(c) 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.

(d) Relationship of Parties. The relationship of the Private Entity 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 the Private Entity in its execution of the Work under this Agreement.

(e) No 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.

(f) 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.

(g) 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.

(h) 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.

(i) Entire Agreement. This Agreement and the Exhibits attached hereto and forming a part hereof set forth all the covenants, promises, agreements, conditions and understandings between the Private Entity 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.

(j) 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.

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

[Signatures on following page]

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

CITY OF HOPEWELL, VIRGINIA, a
municipal corporation of the Commonwealth of
Virginia

By: _____
Mark Haley, City Manager

HOPEWELL NUTRIENT PARTNERS, a Joint Venture
Partnership

By: _____
Tony Snead, Vice-President
HDR Constructors, Inc., Managing Partner