

TOWN OF APEX GREENWAY CONSTRUCTION CONTRACT

FOR

Construction of Beaver Creek Greenway Extension Phases 1, 2 and 1A
Apex, NC

SCOPE OF WORK

Construct Beaver Creek Greenway Extension Phases 1, 2 and 1A in accordance with Construction Plans titled “EB-6021 Beaver Creek Greenway Extension, Phases 1, 2 and 1A” dated August 27, 2021, including all sheets: by Kimley-Horn.

THIS GREENWAY CONSTRUCTION CONTRACT is effective the ___ day of ____ 2023, by and between, FSC II, LLC dba Fred Smith Company, a North Carolina limited liability corporation with its principal business offices located at 701 Corporate Center Drive Suite 101 Raleigh NC 27607 (the “Contractor”), and the Town of Apex, a municipal corporation of the State of North Carolina, (the “Town”). Town and Contractor may collectively be referred to as “Parties” hereinafter.

WITNESSETH:

WHEREAS, Town is engaged in the planning and operation of public greenways which require construction, installation, evaluation, testing, and other related services; and

WHEREAS, the professional services of contractors from time to time are needed by the Town for the services as described above; and

WHEREAS, Contractor provides services of the nature required by the Town and employs trained and experienced technical personnel possessing adequate knowledge, skills, and experience to provide such professional services to the Town; and

WHEREAS, the Town has complied with Article 8 of Chapter 143 of the North Carolina General Statutes in announcing its need for services of the nature described in this Contract through a “Request for Proposal” and associated advertisement.

NOW THEREFORE, in consideration of the foregoing recitals, and the premises and mutual covenants herein contained, the receipt and adequacy of which is hereby acknowledged, the Parties, intending to be legally bound, hereto do contract and agree as follows:

1. DEFINITIONS

- A. “Change Order” is a written order to the Contractor authorizing a change in the Contract.
- B. “Contract Documents” is defined in Section 2 of this Contract.
- C. “Contractor” is the entity performing construction services pursuant to this Contract.
- D. “Final Acceptance” is the date on which the Town accepts the construction as totally complete. This includes inspection and acceptance of the Work by the Town and the Special Inspector.
- E. “Inspection” means the examination of Work completed or in progress to determine its compliance with the Contract Documents.
- F. “Liquidated damages” is the amount stated in this Contract reasonably estimated in advance to cover the consequential damages associated with the Town’s loss in not being able to use the Project for its intended purposes at the end of the Contract’s completion date by reason of failure of the Contractor to complete the Work within the time specified. Liquidated damages does not include the Town’s extended contract administration costs (including but not limited to, additional fees for architectural and engineering services, testing services, inspection services, commissioning services, etc.), such other damages directly resulting from delays caused solely by the Contractor, or consequential damages that the Town identified in the bid documents that may be impacted by any delay caused solely by the Contractor (e.g. delays in start other projects that are dependent on

the completion of this Project, extension of leases and/or maintenance agreements for other facilities).

- G. "Project" is the total construction Work to be performed under the Contract Documents by the Contractor and the Contractor's subcontractors.
- H. "Special Inspector" is the entity who inspects materials, installation, fabrication, erection, placement of components and connections requiring special expertise to ensure compliance with the approved Construction Documents and referenced standards, and/or provides geotechnical inspection services.
- I. "Subcontractor" shall be an entity that has entered into a direct contract with the Contractor, and includes an entity that furnishes materials designed in accordance with plans and specifications covered by the Contract Documents but does not include an entity furnishing materials not requiring the design described above.
- J. "Surety" means the bonding company which is bound with and for the Contractor, and which engages to be responsible for the Contractor and the Contractor's acceptable performance of the Work.
- K. "Time of Completion" is the consecutive calendar days measured from the date established in the written Notice to Proceed.
- L. "Town" is the Town of Apex
- M. "Written Notice" is defined as notice in writing delivered to either the Contractor or Town as identified in the Contract Documents, in person or by registered by mail.
- N. "Work", when used as a noun, includes the materials, labor, and workmanship of the Contractor.

2. SCOPE OF SERVICES.

The Contractor agrees to provide all materials, equipment, machinery, tools, apparatus, power, sanitary facilities, water, means of transportation, incidentals, and labor necessary for the proper and lawful construction of the Beaver Creek Greenway Extension Phases 1, 2 and 1A, located in Apex, NC as identified by the Town representative named in Section 31 of this Contract. Materials shall be new and of the quality specified. Construction shall include, but not necessarily be limited to, the following:

- A. Grading
- B. Drainage
- C. Paving
- D. Curb and Gutter
- E. Traffic Control
- F. Signing
- G. Erosion Control
- H. Structures

Said construction will be performed in accordance with the "Contract Documents." The term "Contract Documents" includes this Contract and the following which are hereby incorporated into this Contract as if fully contained herein:

- A. Construction Plan sheets titled "EB-6021 Beaver Creek Greenway Extension, Phases 1, 2 and 1A" dated August 27, 2021, including all sheets: by Kimley-Horn.
- B. Bid Advertisement
- C. Town of Apex Standard Specifications and Standard Details
- D. Instructions to Bidders
- E. Execution of Bid
- F. Bid Form

- G. Bid Form Submission
- H. Bid Bond
- I. Accepted Form of Proposal
- J. Notice of Award
- K. Performance & Payment Bonds
- L. Power of Attorney
- M. Notice to Proceed
- N. Special Provisions
- O. Project Manual for EB-6021 Beaver Creek Greenway Extension, Phases 1, 2 and 1A including all technical specifications
- P. Addenda:
 - 1. No. 1 Dated: June 16, 2023
 - 2. No. Dated:
 - 3. No. Dated:
 - 4. No. Dated:
 - 5. No. Dated:
- Q. Certificate(s) of Insurance

Contractor shall maintain at its job office a complete set of the plans, drawings, and specifications for the Work which shall be available for use by the Town.

3. TIME OF COMMENCEMENT AND COMPLETION.

- A. Contractor shall commence the work required in this Contract upon the issuance of a Notice to Proceed, and the Contractor shall complete the entire Work within 540 consecutive calendar days of the issuance of the Notice to Proceed (“Time of Completion”). For each day in excess thereof, liquidated damages, reasonably estimated in advance to cover the losses to be incurred by the Town by reason of failure of Contractor to complete the Work within the time specified, such time being of the essence in this Contract and a material consideration thereof, shall be assessed in the amount of \$1,000.00 per calendar day. If Contractor has not satisfactorily completed the work within the times specified in the Contract Documents, the Town may declare such delay a material breach of contract and default and may pursue all available remedies outlined in the Contract Documents as well as all other available legal and equitable remedies. Any changes to the schedule(s) provided in the Contract Documents must be agreed to in writing by the Town and the Contractor.
- B. If the Contractor is delayed at any time in the progress of his work by any act or negligence of the Town; Contractor’s separate contractor or subcontractor; by changes ordered in the Work; by abnormal weather conditions; by any causes beyond the Contractor's control or by other causes deemed justifiable by Town, then the contract time may be reasonably extended in a written order from the Town upon written request from the Contractor. Request for extension of time shall be made in writing to the Town within twenty (20) days following the cause of delay. In case of continuing cause for delay, the Contractor shall notify the Town, with copies to the Town of the delay within twenty (20) days of the beginning of the delay and only one claim is necessary.
- C. For the purpose of determining the extent of delay attributable to unusual weather phenomena, a determination shall be made by comparing the weather for the Contract period involved with the average of the preceding five (5) year climatic range during the same time interval based on the National Oceanic and Atmospheric Administration National Weather Service statistics for the

locality where Work is performed and on daily weather logs kept on the job site by the Contractor reflecting the effect of the weather on the progress of the Work and initialed by Town's representative.

- D. Time extensions for weather delays, labor disputes, fire, delays in transportation, unavoidable casualties or other delays which are beyond the control of the Town do not entitle the Contractor to compensable damages for delays. Any Contractor claim for compensable damages for delays is limited to delays caused solely by the Town or its agents. Contractor caused delays shall be accounted for before Town caused delays in the case of concurrent delays.
- E. Contractor shall notify its Surety in writing of any granted extension of time.

4. CONSIDERATION AND PAYMENT OF SERVICES.

In consideration of the above services, the Town will pay the Contractor, subject to additions and deductions as provided in the Contract Documents, as follows:

Total Sum: Six Million Five Hundred Ninety Two Thousand Nine Hundred Fifty Six Dollars and Zero Cents (\$6,592,956.00).

Summary of Contract Award:

Base Bid:	<u>\$6,592,956.00</u>
Alternate 1:	\$ _____
Alternate 2:	\$ _____
Total:	<u>\$6,592,95.00</u>

- A. No later than the fifth day of the month, the Contractor shall submit application for payment reflecting work completed during the preceding calendar month to the Town Representative identified in Section 31 of this Contract. The request shall be in the form agreed upon between Contractor and the Town but shall show substantially the value of the work completed and materials delivered to the site during the period since the last payment and shall sum up the financial status of the Contract with following information:
 - 1. Total of Contract including change orders.
 - 2. Value of work completed to date.
 - 3. Less retainage, as defined below.
 - 4. Less previous payments.
 - 5. Current amount due.
- B. Prior to submitting the first pay application, Contractor shall prepare for the Town a schedule showing a breakdown of the Contract price into values of the various parts of the Work, arranged so as to facilitate payments to subcontractors.
- C. When payment is made on account of stored materials and equipment, such materials must be stored on the Town's property, and the requests for payments shall be accompanied by invoices or bills of sale or other evidence to establish the Town's title to such materials and equipment. Such payments

will be made only for materials that have been customized or fabricated specifically for this Project. Raw materials or commodity products costs may not be submitted. Responsibility for such stored materials and equipment shall remain with the Contractor regardless of title of ownership. Such stored materials and equipment shall not be removed from the Town's property. Should the space for storage on-site be limited, the Contractor, at its option, shall be permitted to store such materials and/or equipment in a suitable space off-site. Should the Contractor desire to include any such materials or equipment in its application for payment, they must be stored in the name of the Town in an independent, licensed, bonded warehouse approved by the Town and located as close to the site as possible. The warehouse selected must be approved by the Contractor's bonding and insurance companies; the material to be paid for shall be assigned to the Town. Upon approval by the Town of the storage facilities and materials and equipment, payment therefore will be made. Responsibility for such stored materials and equipment shall remain with the Contractor. Such stored materials and equipment shall not be moved except for transportation to the Project site.

- D. Retainage: In accordance with N.C.G.S 143-134.1, for projects costing more than \$100,000.00, the Town may withhold a percentage of payment until the Project has been satisfactorily completed. Retainage on periodic and final payment for this Project shall be as follows:
- a. Retainage withheld shall not exceed 5% at any time.
 - b. The same terms shall apply to the general contractor and subcontractors alike.
 - c. Following 50% completion of the Project, the Town, with written consent from the Surety, shall not retain further retainage if the Contractor continues to perform satisfactorily and any nonconforming work identified in writing prior to that time has been corrected by the Contractor and accepted by the Town. The Project shall be deemed 50% complete when the Contractor's gross Project invoices, excluding the value of materials stored off-site, equal or exceed 50% of the value of the Contract, except the value of materials stored on-site shall not exceed 20% of the Contractor's gross Project invoices for the purpose of determining whether the Project is 50% complete.
 - d. If the Town determines that the Contractor is not performing satisfactorily, the Town may reinstate retainage for each subsequent periodic payment application up to 5%. Following 50% completion of the Project, Town is authorized to withhold additional retainage not to exceed 5% from a subsequent periodic payment application if the amount of total retainage withheld falls below 2.5%, through the completion of the Project.
- E. If the pay application is approved by the Town, the Town will process all pay applications within 30 days after receipt from the Contractor. Town has the right to require the Contractor to produce for inspection all of Contractor's records and charges to verify the accuracy of all applications for payment. Town shall pay Contractor's invoices at times set forth above unless a bona fide dispute exists between Town and Contractor concerning the accuracy of said invoice or the services covered thereby.

5. FINAL PAYMENT.

- A. Upon completion, the Contractor shall submit satisfactory evidence that all payrolls, material bills and other costs incurred by the Contractor in connection with the construction of the work have been paid in full. Final payment will be made within forty-five (45) days after acceptance of all work by the Town and after receipt of the final pay request which shall include the Contractor's affidavit, sworn and notarized, in the following form:

"This is to certify that all costs of materials, equipment, labor, subcontracted work, and all else entering into the accomplishment of this contract, including payrolls, have been paid in full, and no claims or liens exist against Contractor in connection with this Contract."

The Town may withhold payment for any of the following reasons:

1. Faulty or defective work not corrected.
2. The unpaid balance remaining on the Contract is not sufficient to complete the work in the sole judgement and discretion of the Town.
3. To provide a sufficient contract balance to cover liquidated damages that will be assessed.
4. Evidence that subcontractors have not been paid.

B. Prior to submitting request for final payment to the Town, Contractor shall provide the following:

1. Warranties and bonds, guarantees, maintenance agreements, as-built drawings, certificates of inspection or approval from agencies having jurisdiction.
2. List of minority business subcontractors and material suppliers showing breakdown of contract amounts and total actual payments to subcontractors and material suppliers.
3. Contractor's affidavit of payment to material suppliers and subcontractors.
4. Consent of Surety to final Payment.
5. Certificates of state agencies (if any) required by law.

6. CONSTRUCTION SUPERVISION AND SCHEDULE

- A. Throughout the progress of the Work, the Contractor shall keep at the job site, a competent superintendent and supervisory staff satisfactory to the Town. The superintendent and supervisory staff shall not be changed without the consent of the Town unless said superintendent ceases to be employed by the Contractor or ceases to be competent as determined by the Contractor or Town. The superintendent and other staff designated by the Contractor in writing shall have authority to act on behalf of the Contractor, and instructions, directions or notices given to the superintendent shall be as binding as if given to the Contractor. However, directions, instructions, and notices shall be confirmed in writing.
- B. Contractor shall examine and study the drawings and specifications and fully understand the Project design and shall provide constant and efficient supervision to the Work. Should Contractor discover any discrepancies of any sort in the drawings or specifications, Contractor shall report them to the Town without delay. Contractor will not be held responsible for discrepancies in the drawings and/or specifications but shall be held responsible to report them should they become known to Contractor.
- C. Contractor is required to attend job site progress conferences as called by the Town. The Contractor shall be represented at these job progress conferences by both home office and Project personnel. These representatives shall have authority to act on behalf of the Contractor. These meetings shall be open to subcontractors, material suppliers and any others who can contribute toward maintaining required job progress. It shall be the principal purpose of these meetings, or conferences, to effect coordination, cooperation and assistance in every practical way toward the end of maintaining progress of the Project on schedule and to complete the Project within the specified contract time. The Contractor shall be prepared to assess progress of the Work as required in the Contract Documents and to recommend remedial measures for correction of progress as may be appropriate. The Contractor shall turn over a copy of his daily reports to the Town at the job site progress conference. Town will determine daily report format.

- D. Contractor shall prepare the Project construction schedule which shall graphically show all outstanding features of the Work required to construct the Project from start to finish and within the allotted time established in the Contract. Contractor shall maintain a Project progress schedule for the Town and shall notify the Town of any requested changes in the Project schedule.
- E. The Project construction schedule shall indicate the estimated starting and completion dates for each major element of the Work by area and shall schedule dates for all outstanding features, including but not limited to the placing of orders for materials, the manufacture and delivery of material, the testing and the installation of materials, supplies and equipment, and all Work activities to be performed by the Contractor. The Contractor shall allow sufficient time in his schedule for all required inspections. Each Work activity will be assigned a time estimate by the Contractor. One day shall be the smallest time unit used.
- F. The Contractor is responsible for its Work activities and will notify Town of any required changes to its Work. If any Work activities are behind schedule the Contractor shall, in writing, describe what measures will be taken to bring each such activity back on schedule and to ensure that the Contract completion date is not exceeded. A plan of action and recovery schedule shall be developed and submitted to the Town by the Contractor, when (1) the Contractor indicates delays, that are in the opinion of the Town, of sufficient magnitude that the Contractor's ability to complete the Work by the scheduled completion is brought into question; (2) the updated construction schedule is thirty (30) days behind the planned or baseline schedule and no legitimate time extensions, as determined by the Town, are in process; or (3) the Contractor desires to make changes in the sequencing of Work or the planned duration of future activities which in the opinion of the Town, are of a major nature. The plan of action, when required shall be submitted to the Town for review within two (2) business days of the Contractor receiving the Town's written demand. The recovery schedule, when required, shall be submitted to the Town within five (5) calendar days of the Contractor's receiving the Town's written demand. Failure to provide an updated construction schedule or a recovery schedule may be grounds for rejection of payment applications or withholding of funds.
- G. The proposed Project construction schedule shall be presented to the Town no later than fifteen (15) calendar days after the issuance of the written Notice to Proceed. No application for payment will be reviewed or paid until this schedule is accepted by the Town.

7. USE OF PREMISES.

- A. Contractor shall confine its apparatus, the storage of materials and the operations of its workers to limits indicated by law, ordinances, permits or directions of the Town and shall not exceed those established limits in its operations.
- B. Contractor shall enforce the Town's instructions regarding signs, advertisements, fires and smoking.
- C. No firearms, any type of alcoholic beverages, or drugs (other than those prescribed by a physician) will be permitted at the job site.

8. PROTECTION OF WORK, PROPERTY AND THE PUBLIC.

- A. The Contractor shall be responsible for the entire site and the building or construction of the same and provide all the necessary protections, as required by the Town, and by laws or ordinances governing such conditions. Contractor shall be responsible for any damage to the Town's property, or of that of others on the job, by them, their personnel, or their subcontractors, and shall pay for or repair any such damages. Contractor shall be responsible for and pay for any damages caused to the Town.
- B. The Contractor shall provide cover and protect all portions of the Project being constructed when the Work is not in progress as needed, provide and set all temporary roofs, covers, and all other materials necessary to protect all the Work on the Project, whether set by the Contractor, or any of the subcontractors. Any Work damaged through the lack of proper protection or from any other cause, shall be repaired or replaced without extra cost to the Town.
- C. No fires of any kind will be allowed inside or around the operations during the course of construction without special permission from the Town.
- D. The Contractor shall protect all trees and shrubs designated to remain in the vicinity of the operations by building substantial boxes around same. Contractor shall barricade all walks, roads, etc., as directed by the Town to keep the public away from the construction. All trenches, excavations or other hazards in the vicinity of the Work shall be well barricaded and properly lighted at night.
- E. The Contractor shall provide all necessary safety measures for the protection of all persons on the job and shall fully comply with all state laws or regulations and North Carolina State Building Code requirements to prevent accident or injury to persons on or about the location of the Work. Contractor shall clearly mark or post signs warning of hazards existing and shall barricade excavations and similar hazards. Contractor shall protect against damage or injury resulting from falling materials and shall maintain all protective devices and signs throughout the progress of the Work.
- F. The Contractor shall adhere to the rules, regulations and interpretations of the North Carolina Department of Labor relating to Occupational Safety and Health Standards for the Construction Industry (Title 29, Code of Federal Regulations, Part 1926, published in Volume 39, Number 122, Part II, June 24, 1974, *Federal Register*), and revisions thereto as adopted by General Statutes of North Carolina 95-126 through 155.
- G. The Contractor shall designate a responsible person of its organization as safety officer/inspector to inspect the Project site for unsafe health and safety hazards, to report these hazards to the Contractor for correction, and whose duties also include accident prevention on the Project, and to provide other safety and health measures on the Project site as required by the terms and conditions of the Contract Documents. The name of the safety inspector shall be made known to the Town at the time of the preconstruction conference and in all cases prior to any Work starting on the Project.
- H. In the event of emergency affecting the safety of life, the protection of Work, or the safety of adjoining properties, the Contractor is hereby authorized to act at Contractor's own discretion, without further authorization from anyone, to prevent such threatened injury or damage.

- I. Any and all costs associated with correcting damage caused to adjacent properties of the construction site or staging area shall be borne by the Contractor. These costs shall include but not be limited to flooding, mud, sand, stone, debris, and discharging of waste products.

9. UTILITIES.

Contractor shall provide necessary and adequate facilities for water, electricity, gas, oil, sewer and other utility services which may be necessary and required for completion of the Project including all utilities required for testing, cleaning, balancing, and sterilization of designated plumbing, mechanical and electrical systems. Any permanent meters installed shall be listed in the Contractor's name until Work has a Final Acceptance. The Contractor will be solely responsible for all utility costs prior to Final Acceptance. Contractor shall contact all affected utility companies prior to bid to determine their requirements to provide temporary and permanent service and include all costs associated with providing those services in their bid. Coordination of the Work of the utility companies during construction is the sole responsibility of the Contractor.

10. CHANGE ORDERS.

- A. In the event Town has changes in the Work not covered by the Contract, these changes will not invalidate or relieve Contractor from any guarantee it has given in this Contract. These changes will not relieve the Surety or Sureties of any bonds and all extra Work shall be performed under the conditions of this Contract. Except in an emergency endangering life or property, changes in Work shall *not* proceed without a Change Order approved by the Town. Contractor shall provide a complete breakdown of all labor and material costs with the Change Order request. The breakdown shall include the Contractor's allowance for overhead and profit not to exceed 10% of the net cost of the change with Work provided directly by the Contractor. For purposes of this Contract, "net cost" shall mean the difference between all proper cost additions and deductions. No claim for adjustments of the contract price shall be valid unless the procedure outlined in this section is followed. Any Work performed pursuant to an approved change order shall be governed by the terms of this Contract.
- B. The Parties agree that there are two methods that may be utilized to determine the cost of changes:
 1. If unit prices are quoted in the proposal or bid and the additional work is covered by those unit prices, or can be subsequently agreed to by the Parties, the cost of the change shall be computed by application of the unit prices based on quantities. If this method is used no additional allowances shall be made for overhead and profit.
 2. If the additional work is not covered by unit prices, unit prices were not provided in the proposal or bid, or the Parties mutually agree, then Town and Contractor may negotiate and agree upon the value of the change prior to the issuance of the Change Order and the Change Order shall identify the corresponding lump sum adjustment to the contract price.
- C. In the event concealed conditions are discovered in the performance of the Work below grade, or in the event concealed or unknown conditions in an existing structure vary from the conditions indicated in the Contract Documents, the contract sum and time for completion may be adjusted by Change Order upon claim by either party made within thirty (30) days after the condition has been identified. The cost shall be determined by one of the methods outlined in this Contract.
- D. Change Orders shall be submitted by the Contractor for the Town's review and approval. Contractor shall provide all applicable supporting data and information. Delay in approval of a Change Order

due to Contractor's failure to submit proper documentation shall not be grounds for a time extension or basis of a claim. The Town shall respond to the Contractor's proposal within fourteen calendar (14) days of receipt of the proposal. If accepted, the Town shall prepare the Change Order for the Contractor's signature. The Town shall execute the approved Change Order within seven (7) days of receipt from the Contractor. The Contractor shall notify its bonding company that the Contract has been changed by the amount of the Change Order and provide a copy of the approved Change Order to the Surety. In the event a Change Order cannot be agreed upon by the Parties, nothing in this Contract shall preclude the Town from performing, or having performed, the Work requested in a Change Order.

11. MINOR CHANGES.

The Town may order minor changes in the Work not involving an adjustment in the Contract sum or Time for Completion, and not inconsistent with the intent of the Contract Documents. Such changes shall be executed by written order and shall be binding on the Contractor and subject to the terms of this Contract.

12. INSPECTION OF THE WORK.

- A. It is a condition of this Contract that the Work shall be subject to inspection during normal working hours and during any time Work is in preparation and progress by the Town or a Special Inspector designated by the Town, and those persons required by state law to test Work for official approval. The Contractor shall therefore provide safe access to the Work at all times for such inspections.
- B. All Work shall be inspected by the Town or Special Inspector (if applicable) prior to being covered by the Contractor. Contractor shall give a minimum two weeks' notice of needed inspections unless otherwise agreed to by all parties. If an inspection fails, all costs associated with additional re-inspections shall be borne by the Contractor.
- C. Where special inspection or testing is required by virtue of any state laws, instructions of the Town, specifications, or codes, the Contractor shall give adequate notice to the Town of the time set for such inspection or test. Such special tests or inspections will be made in the presence of the Town's representative, and it shall be the Contractor's responsibility to serve ample notice of such tests.
- D. All laboratory tests shall be paid by the Town unless provided otherwise in the Contract Documents, except the Contractor shall pay for laboratory tests to establish design mix for concrete, and for additional tests to prove compliance with Contract Documents where materials have tested deficient except when the testing laboratory did not follow the appropriate ASTM testing procedures.
- E. Should any Work be covered up or concealed prior to inspection and approval by the Town or Special Inspector, such Work shall be uncovered or exposed for inspection, if requested by the Town. Inspection of the Work will be made upon notice from the Contractor that the Work has been uncovered or exposed. In the event Work has been covered or concealed, all costs involved in uncovering, repairing, replacing, recovering and restoring to design condition said Work will be paid by the Contractor.

13. TOWN'S RIGHT TO PERFORM WORK.

If at any point during the performance or progress of the work, or during the period of guarantee, Contractor fails to perform the Work in a satisfactory manner or to perform in accordance with the terms of this Contract, the Town, after seven (7) days' written notice to the Contractor from the Town, may perform or have performed that portion of the Work. The cost of the associated Work may be deducted from any amounts due or that become due to the Contractor. In the event the cost of such performance exceeds the amount due the Contractor, then the Contractor or the Surety (if applicable), or both, shall be liable for and shall pay to the Town the amount of the excess.

14. UNCORRECTED FAULTY WORK

Should the correction of faulty or damaged Work be considered inadvisable by the Town, the Work will not be corrected and the Town shall be reimbursed by the Contractor for the devaluation of the Project as a result of the faulty Work. A change order will be issued to reflect the reduction in Contract sum.

15. FINAL INSPECTION AND FINAL ACCEPTANCE

- A. Upon notification from the Contractor that the Project is complete and ready for inspection, the Town shall complete a final inspection to verify that the Project is complete. The Contractor shall schedule the final inspection at a time and date acceptable to the Town.
- B. Upon final inspection, the Town shall, if job conditions warrant, record a list of items that are found to be incomplete or not in accordance with the Contract Documents. At the conclusion of the Town's final inspection, the Town shall make one of the following determinations:
 - 1. That the Project is completed and accepted.
 - 2. That the Project will be accepted subject to the correction of any identified discrepancies or faulty construction.
 - 3. That the Project is not complete and a date for another final inspection will be established.

The date of Final Acceptance will establish the beginning of the guarantees and warranties period and the termination of utility cost to the Contractor. No liquidated damages will be assessed after this date.

16. CORRECTION OF WORK PRIOR TO FINAL PAYMENT

- A. Any Work, materials, fabricated items or other parts of the Work which are not in accordance with the Contract shall be promptly removed from the Work site by the Contractor and shall be immediately replaced by new Work in accordance with the Contract Documents at no additional

cost to the Town. Work or property of other contractors or the Town, damaged or destroyed by virtue of such faulty Work, shall be made good at the expense of the Contractor.

- B. Correction of faulty Work described above shall commence within twenty-four (24) hours after receipt of notice from the Town, and shall make satisfactory progress, as determined by the Town, until completed.
- C. Should Contractor fail to proceed with the corrections in a timely fashion Town may complete the Work in accordance with this Contract.

17. CORRECTION OF WORK AFTER FINAL PAYMENT

Neither the final payment or use of the premises by the Town, nor any provision of the Contract, nor any other act or instrument of the Town, shall relieve the Contractor from responsibility for negligence, or faulty material or workmanship, or failure to comply with the drawings and specifications. Contractor shall correct or make good any defects due thereto and repair any damage resulting there from, which may appear during the guarantee period following Final Acceptance of the Work. The Town will report any defects as they may appear to the Contractor and establish a time limit for completion of corrections by the Contractor. The Town will be the judge as to the responsibility for correction of defects.

18. MINORITY BUSINESS PARTICIPATION

Contractor is required to identify participation of Minority and Women-Owned Business Enterprises (MWBE) in its proposal and document how that participation is achieved. There is a verifiable goal of seven percent (7%) for participation by minority businesses in the total value of work for the Project. Contractor shall comply with the document titled "Guidelines For Recruitment and Selection of Minority Businesses For Participation In Town of Apex Construction Contracts", including associated Affidavits and Appendices which are hereby incorporated herein.

19. APPLICABILITY OF LAWS AND REGULATIONS.

The Contractor shall adhere to all laws, ordinances, and regulations of the United States, the State of North Carolina, the County of Wake, and the Town of Apex in the performance of the services outlined in this Contract and any attached specifications. This Contract shall be governed by the laws of the State of North Carolina.

Contractor shall obtain all required permits and inspections and shall give all notices required by law in performance of this Project. In the event Contractor observes that any drawings or specifications are not in compliance with any such rules, laws, or regulations, Contractor shall promptly notify the Town in writing. Contractor shall not perform any Work knowing it to be contrary to any laws, ordinances, codes, rules or regulations.

All Work under this Contract shall be performed in accordance with the North Carolina Building Code and all other applicable state or national codes.

20. E-VERIFY COMPLIANCE.

The Contractor shall comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify). Contractor shall require all of the Contractor's subcontractors to comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (E-Verify).

21. QUALITY AND WORKERSHIP.

Contractor shall provide services in accordance with all governing agency regulations and shall be held to the same standard and shall exercise the same degree of care, skill and judgment in the performance of

services for Town as is ordinarily provided by a similar professional under the same or similar circumstances at the time in North Carolina. Contractor hereby certifies that Contractor is a licensed general contractor as defined by N.C.G.S. 87-1.

22. SURETY.

If at any time after the execution of this Contract and the surety bonds included in the Contract Documents for the faithful performance of the Contract, the Town shall deem the surety or sureties upon such bonds to be unsatisfactory, or if, for any reason, such bonds cease to be adequate to cover the performance of the Work, the Contractor shall, at its expense, within five (5) days after the receipt of notice from the Town so to do, furnish an additional bond or bonds in such form and amount, and with such surety or sureties as shall be satisfactory to the Town. In such event no further payment to the Contractor shall be deemed to be due under this Contract until such new or additional security for the faithful performance of the Work shall be furnished in manner and form satisfactory to the Town.

23. BOND REQUIREMENTS.

Within ten (10) days of the award of the Contract, Contractor shall provide the Town of Apex with a contract payment bond and a contract performance bond executed by a surety company authorized to do business in North Carolina, each in an amount equal to 100 percent of the amount of the Contract. All bonds shall be in conformity with N.C.G.S. 44A-33 and countersigned by an authorizing agent of the bonding company.

Failure on the part of the Contractor to file acceptable bonds within the required timeframe shall be just cause for the forfeiture of the bid bond or bid deposit and rescinding award of the Contract. Award may then be made to the next lowest responsible bidder or the Work may be re-advertised.

24. CONTRACTOR'S WARRANTIES.

The Contractor, in executing this Contract, unconditionally guarantees the materials and workmanship against defects arising from faulty materials, faulty workmanship or negligence for a period of twelve (12) months following the Final Acceptance of the Work by the Town and shall replace all such defective materials or workmanship without cost to the Town. In the case where materials or equipment carry a manufacturer's warranty for any period in excess of twelve (12) months, then the manufacturer's warranty shall apply for that specific equipment or material. During the manufacturer's warranty period the Contractor shall be responsible for the replacement of such defective equipment or materials.

Nothing in this section shall preclude the Town from bringing an action for latent defects caused by the negligence of the Contractor which is concealed, hidden, or not readily apparent to the Town at the time of Final Acceptance, in accordance with applicable law. Guarantees that are stipulated in the specifications or drawings shall govern those particular materials or equipment.

25. CODES AND STANDARDS.

Wherever reference is made to codes, standard specifications, or other data published by regulating agencies it shall be understood that said reference is to the latest edition published prior to the date of the Contract Documents. These regulating agencies include, but are not limited to, North Carolina state building codes, federal specifications, national electric codes, ASTM specifications and various institute specifications.

26. INDEMNIFICATION.

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Town and its agents, consultants, elected officials, and employees, from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees, arising out of or resulting from the performance or failure of performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the

Work itself) including the loss of use resulting there from, and (2) is caused in whole or in part by any negligent act or omission of the Contractor, the Contractor's subcontractor, or the agents of either the Contractor or the Contractor's subcontractor. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this section.

27. INSURANCE.

Work under this Contract shall not begin until the Contractor has obtained all required insurance set forth below and verifying certificates of insurance have been provided to the Town. All required certificates of insurance, endorsements, and blanket additional insured policy provisions are attached and considered part of this Contract. These certificates shall document that coverages afforded under the policies will not be cancelled, reduced in amount or eliminated without written notice, by certified mail, to the Town of such alteration or cancellation. Notwithstanding the foregoing, neither the requirement of Contractor to have sufficient insurance nor the requirement that Town is named as an additional insured, shall constitute waiver of the Town's governmental immunity in any respect, under North Carolina law.

A. Worker's Compensation and Employer's Liability

The Contractor shall provide and maintain, until Final Acceptance, Worker's compensation insurance, as required by law, as well as employer's liability coverage with a minimum limit of \$1,000,000.

B. Public Liability and Property Damage

The Contractor shall provide and maintain, until Final Acceptance, comprehensive general liability insurance, including coverage for premises operations, independent contractors, completed operations, products and contractual exposures, as shall protect such contractors from claims arising out of any bodily injury, including accidental death, as well as from claims for property damages which may arise from operations under this Contract, whether such operations be by the Contractor or by any subcontractor, or by anyone directly or indirectly employed by either of them and the minimum limits of such insurance shall be as follows:

Commercial General Liability:

Each Occurrence: Two Million (\$2,000,000)

General Aggregate: Four Million (\$4,000,000)

Products-Completed/Operations Aggregate: Four Million (\$4,000,000)

Such coverage for completed operations must be maintained for at least two (2) years following Final Acceptance of the Work performed under the Contract.

C. Commercial Automobile Liability Coverage

The Contractor shall purchase and maintain, until Final Acceptance, commercial automobile liability insurance as follows:

Combined Single Limit Per Accident: Two Million (\$2,000,000) for bodily injury, death of any person, and property damage covering vehicles owned, non-owned, and hired by Contractor and used during construction.

D. Property Insurance (Builder's Risk/Installation Floater)

The Contractor shall purchase and maintain property insurance until Final Acceptance, upon the entire Work at the site to the full insurable value thereof. This insurance shall include the interests of the Town, the Contractor, the subcontractors and sub-subcontractors in the Work and shall insure against

the perils of fire, wind, rain, flood, extended coverage, and vandalism and malicious mischief. If the Town is damaged by failure of the Contractor to purchase or maintain such insurance, then the Contractor shall bear all reasonable costs properly attributable thereto; the Contractor shall obtain and maintain similar property insurance on portions of the Work stored off the site when request for payment per articles so includes such portions.

E. Environmental Pollution Liability

Pollution Liability in the following minimum amounts:

Each Occurrence: Two Million (\$1,000,000)

Aggregate: Four Million (\$4,000,000)

F. Deductible

Any deductible, if applicable to loss covered by insurance provided, is to be borne by the Contractor.

G. Other Insurance

The Contractor shall obtain such additional insurance as may be required by the Town or by the General Statutes of North Carolina including motor vehicle insurance, in amounts not less than the statutory limits.

Commercial General Liability and Commercial Automobile Liability limits can be satisfied under a combination of Primary and Umbrella/Excess Liability Insurance policies.

Waiver of Subrogation is required on General Liability, Auto Liability, Worker's Compensation and Umbrella policies.

Town of Apex is to be named as Additional Insured on General Liability and Automobile Liability policies.

H. Proof of Carriage

The Contractor shall furnish the Town with satisfactory proof of carriage of the insurance required before approval of the insurance is granted by the Town.

28. SUBCONTRACTORS.

Contractor shall be fully responsible for Contractor's own acts or omissions as well as those of any subcontractor retained to perform services pursuant to this Contract. Contractor acknowledges that no contractual relationship exists between the subcontractor and the Town in regards to this Contract and that the subcontractor is acting as an agent or employee of the Contractor. Contractor acknowledges that the terms of this Contract apply to each subcontractor as it does to the Contractor and Contractor will take whatever steps necessary to bind all subcontractors working on this Project to these terms.

29. DEFAULT.

In the event the Contractor fails to begin the Work pursuant to the Contract Documents within the time specified, or the progress of the Work is not maintained on schedule, or the Work is not completed within the time specified, or fails to perform the Work with sufficient staff and equipment or with sufficient materials to ensure the prompt completion of said Work, or shall perform the Work unsuitably or shall discontinue the prosecution of the Work, or if the Contractor shall become insolvent or be declared bankrupt

or commit any act of bankruptcy or insolvency, or allow any final judgment to stand against Contractor unsatisfied for a period of forty-eight (48) hours, or shall make an assignment for the benefit of creditors, or for any other cause whatsoever shall not carry on the Work in an acceptable manner, the Town may give notice in writing, sent by certified mail, return receipt requested, to the Contractor and its surety of such delay, neglect or default, specifying the same, and if the Contractor within a period of seven (7) days after such notice shall not proceed in accordance with the notice, then the Town shall, declare this Contract in default. Upon a declaration of default the following shall apply:

The Surety shall promptly take over the Work and complete the performance of this Contract in the manner and within the time frame specified. In the event the Surety shall fail to take over the Work to be done under this Contract within seven (7) days after being so notified and notify the Town in writing, sent by certified mail, return receipt requested, that it is taking the same over and stating that it will diligently pursue and complete the same, the Town shall have full power and authority, without violating the Contract, to take the prosecution of the Work out of the hands of said Contractor, to appropriate or use any or all contract materials and equipment on the grounds as may be suitable and acceptable and may enter into an agreement, either by public letting or negotiation, for the completion of said Contract according to the terms and provisions thereof or use such other methods as in Town’s opinion shall be required for the completion of said Contract in an acceptable manner. All costs and charges incurred by the Town, together with the costs of completing the Work under Contract, shall be deducted from any monies due or which may become due said Contractor and Surety. In the event the expense shall exceed the sum which would have been payable under the Contract, then the Contractor and the Surety shall be liable and shall pay to the Town the amount of said excess.

30. TERMINATION FOR CONVENIENCE.

Town shall have the right to terminate this Contract for the Town’s convenience upon thirty (30) days written notice to Contractor. Contractor shall terminate performance of services on a schedule acceptable to the Town. Unless otherwise notified, upon termination Contractor shall discontinue all Work and the placement of orders for materials and supplies in connection with this Contract.

Upon such termination, Contractor shall be entitled to payment only as follows: (1) the actual cost of the Work completed in conformity with this Contract; plus, (2) such other costs actually incurred by Contractor as are permitted by the Contract and approved by Town. There shall be deducted from such sums as provided in this subparagraph the amount of any payments made to Contractor prior to the date of the termination of this Contract. Contractor shall not be entitled to any claim or claim of lien against Town for any additional compensation or damages in the event of such termination and payment.

31. NOTICE.

Any formal notice, demand, or request required by or made in connection with this Contract shall be deemed properly made if delivered in writing in person by registered mail to the address specified below.

<p>TO CONTRACTOR:</p> <p>FSC II, LLC dba Fred Smith Company Attn: Walter Biele 701 Corporate Center Drive Suite 101 Raleigh, NC 27607</p> <p>Email: wbiele@fredsmithcompany.net</p>	<p>TO TOWN:</p> <p>Town of Apex Attn: Angela Reincke PO Box 250 Apex, NC 27502</p> <p>Email: Angela.Reincke@apexnc.org</p>
--	---

32. NONWAIVER FOR BREACH.

No breach or non-performance of any term of this Contract shall be deemed to be waived by either party unless said breach or non-performance is waived in writing and signed by the parties. No waiver of any

breach or non-performance under this Contract shall be deemed to constitute a waiver of any subsequent breach or non-performance and for any such breach or non-performance each party shall be relegated to such remedies as provided by law.

33. CONSTRUCTION.

Should any portion of this Contract require judicial interpretation, it is agreed that the Court or Tribunal construing the same shall not apply a presumption that the terms hereof shall be more strictly construed against any one party by reason of the rule of construction that a document is to be more strictly construed against the party who prepared the documents.

34. NO REPRESENTATIONS.

The parties hereby warrant that no representations about the nature or extent of any claims, demands, damages, or rights that they have, or may have, against one another have been made to them, or to anyone acting on their behalf, to induce them to execute this Contract, and they rely on no such representations; that they have fully read and understood this Contract before signing their names; and that they act voluntarily and with full advice of counsel.

35. SEVERABILITY.

In the event for any reason that any provision or portion of this Contract shall be found to be void or invalid, then such provision or portion shall be deemed to be severable from the remaining provisions or portions of this Contract, and it shall not affect the validity of the remaining portions, which portions shall be given full effect as if the void or invalid provision or portion had not been included herein.

36. COUNTERPARTS.

This Contract may be executed in two or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one instrument.

37. MODIFICATION.

This Contract contains the full understanding of the parties. Any modifications or addendums to this Contract must be in writing and executed with the same formality as this Contract.

38. BINDING EFFECT.

The terms of this Contract shall be binding upon the parties' heirs, successors, and assigns.

39. ASSIGNMENT.

Contractor shall not assign, sublet, or transfer any rights under or interest in (including, but without limitation, monies that may become due or monies that are due) this Contract without the written consent of the Town. Nothing contained in this paragraph shall prevent Contractor from employing such independent consultants, associates, and sub-contractors as it may deem appropriate to assist Contractor in the performance of services rendered.

40. INDEPENDENT CONTRACTOR.

Contractor is an independent contractor and shall undertake performance of the services pursuant to the terms of this Contract as an independent contractor. Contractor shall be wholly responsible for the methods, means and techniques of performance.

41. NON-APPROPRIATION.

Notwithstanding any other provisions of this Contract, the parties agree that payments due hereunder from the Town are from appropriations and monies from the Town Council and any other governmental entities. In the event sufficient appropriations or monies are not made available to the Town to pay the terms of this

Contract for any fiscal year, this Contract shall terminate immediately without further obligation of the Town.

42. IRAN DIVESTMENT ACT CERTIFICATION.

N.C.G.S. 147-86.60 prohibits the State of North Carolina, a North Carolina local government, or any other political subdivision of the State of North Carolina from contracting with any entity that is listed on the Final Divestment List created by the North Carolina State Treasurer pursuant to N.C.G.S. 147-86.58. N.C.G.S. 147-86.59 further requires that contractors with the State, a North Carolina local government, or any other political subdivision of the State of North Carolina must not utilize any subcontractor found on the State Treasurer’s Final Divestment List. As of the date of execution of this Contract the Contractor hereby certifies that the Contractor is not listed on the Final Divestment List created by the North Carolina State Treasurer and that the Contractor will not utilize any subcontractors found on the Final Divestment List.

43. ANTI-HUMAN TRAFFICKING.

The Contractor warrants and agrees that no labor supplied by the Contractor or the Contractor’s subcontractors in the performance of this Agreement shall be obtained by means of deception, coercion, intimidation or force, or otherwise in violation of North Carolina law, specifically Article 10A, Subchapter 3 of Chapter 14 of the North Carolina General Statutes, Human Trafficking.

In witness thereof, the contracting parties, by their authorized agents, affix their signatures and seals this ____ day of _____, 2023.

Contractor: _____

Town of Apex

(Print name)

Shawn Purvis, (Interim)Town Manager

Signature

Attest:

Title

Allen L. Coleman, CMC, NCCCC, Town Clerk

Attest:

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

Secretary (if a corporation)

Antwan Morrison, Finance Director