

**STATE OF NORTH CAROLINA  
COUNTY OF WAKE**

**PURCHASE ORDER #  
STANDARD CONSTRUCTION AGREEMENT**

THIS AGREEMENT is entered into this \_\_\_\_ day of \_\_\_\_\_, 2024 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:**

The Town and the Contractor, for the consideration stated herein, agree as follows:

**1. SCOPE OF SERVICES.**

The Contractor shall furnish all labor, material, and equipment necessary to perform and complete the work as identified in the attached “2024 Road Rehabilitation Project” at the locations and to the specifications outlined in the “Contract Documents.” The Contract Documents include this Agreement and those documents identified in Sections 2 and 32 of this Agreement. In the event of a conflict between any of the Contract Documents and this Agreement, this Agreement shall control.

**2. SPECIFICATIONS.**

Contractor shall perform the services in accordance with the Contract Documents specified below which are hereby incorporated into this Agreement:

1. Plan sheets
2. Town of Apex Standard Specifications and Standard Details
3. NCDOT 2024 Standard Specifications for Roads and Structures
4. NCDOT 2024 Roadway Standard Drawings
5. US DOT Manual on Uniform Traffic Control Devices, including any NC Supplement

**3. TIME OF COMMENCEMENT AND COMPLETION.**

Refer to contract provision SP01 G008C CONTRACT TIME AND LIQUIDATED DAMAGES. Any changes to the schedule(s) provided in this Agreement or the Specifications must be agreed to in writing by the Town and the Contractor.

**4. CONSIDERATION AND PAYMENT OF SERVICES.**

In consideration of the above services, the Town will pay the Contractor based on the price and quantities reflected on the “2024 Road Rehabilitation Project Bid Tabulation” as those numbers pertain to the FSC II, LLC bid. The total bid, which is not to be exceeded, is in the amount of \$2,671,015.55. Contractor shall submit a monthly invoice for partial payments based on the components that have been completed.

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 invoices. Town shall pay Contractor’s invoices within thirty (30) days of invoice unless a bona fide dispute exists between Town and Contractor concerning the accuracy of said invoice or the services covered thereby.

## **5. CHANGE ORDERS.**

No changes in work may proceed unless a Change Order is approved by the Town. In the event a change in work is requested, 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. All Change Order approvals shall be in writing.

## **6. INDEMNIFICATION.**

To the extent permitted by law, the Contractor agrees to defend, pay on behalf of, indemnify, and hold harmless the Town of Apex, its elected and appointed officials, employees, agents, and volunteers against any and all claims, demands, suits or losses, including all costs connected therewith, for any damages which may be asserted, claimed or recovered against or from the Town of Apex, its elected or appointed officials, employees, agents, and volunteers by reason of personal injury, including bodily injury or death and/or property damage, including loss of use thereof resulting from the negligence of the Contractor.

## **7. 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 Agreement and the Contract Documents. This Agreement shall be governed by the laws of the State of North Carolina.

## **8. 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).

## **9. 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.

## **10. QUALITY AND WORKMANSHIP.**

All work shall be performed to the satisfaction of the Town. The work shall not be considered complete nor applicable payments rendered until the Town is satisfied with the services provided.

## **11. INSURANCE.**

The Contractor shall maintain valid general liability insurance in the minimum amount of \$1,000,000, commercial automobile liability insurance in the minimum amount of \$2,000,000, and provide certificates of such insurance naming the Town of Apex as an additional insured by endorsement to the policies. If the policy has a blanket additional insured provision, the Contractor's insurance shall be primary and non-contributory to other insurance. Additionally, the Contractor shall maintain and show proof of workers' compensation and employer's liability insurance in the minimum amount of \$1,000,000. The Contractor shall provide notice of cancellation, non-renewal or material change in coverage to the Town of Apex within

10 days of their receipt of notice from the insurance company. All required certificates of insurance, endorsements, and blanket additional insured policy provisions shall be provided to the Town prior to the start of the work contemplated by this Agreement and are considered part of this Agreement. 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.

**12. PRE-PROJECT SAFETY REVIEW MEETING.**

When specified by the Safety and Risk Manager, the Contractor shall attend a pre-project safety review meeting with the contacting Department Head and Supervisors and Safety and Risk Manager prior to the start of work.

**13. DEFAULT.**

In the event of substantial failure by Contractor to perform in accordance with the terms of this Agreement, Town shall have the right to terminate Contractor upon seven (7) days written notice in which event Contractor shall have neither the obligation nor the right to perform further services under this Agreement.

**14. TERMINATION FOR CONVENIENCE.**

Town shall have the right to terminate this Agreement 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. In the event of termination for convenience, the Town shall pay Contractor for all services satisfactorily performed.

**15. NOTICE.**

Any formal notice, demand, or request required by or made in connection with this Agreement shall be deemed properly made if delivered in writing or deposited in the United States mail, postage prepaid, to the address specified below.

TO CONTRACTOR:	TO TOWN:
FSC II, LLC	Town of Apex
Attn: Trevor Leander	Attn: Adam Stephenson
701 Corporate Center Drive, Suite 101	PO Box 250
Raleigh, NC 27607	Apex, NC 27502
<a href="mailto:Trevor.Leander@fredsmithcompany.net">Trevor.Leander@fredsmithcompany.net</a>	<a href="mailto:adam.stephenson@apexnc.org">adam.stephenson@apexnc.org</a>

**16. DELAY BEYOND THE CONTROL OF THE PARTIES.**

Neither Contractor nor Town, having taken commercially reasonable precautions, shall be in default of the provisions of this Agreement for delays in performance due to forces beyond the control of the parties. "Forces beyond the control of the parties" shall mean, but is not limited to, delay caused by natural disaster, fire, flood, earthquakes, storms, lightning, epidemic, pandemic, war, riot, civil disobedience, or other event reasonably outside of the parties' control.

**17. NONWAIVER FOR BREACH.**

No breach or non-performance of any term of this Agreement 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 Agreement 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.

#### **18. CONSTRUCTION.**

Should any portion of this Agreement 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.

#### **19. 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 Agreement, and they rely on no such representations; that they have fully read and understood this Agreement before signing their names; and that they act voluntarily and with full advice of counsel.

#### **20. SEVERABILITY.**

In the event for any reason that any provision or portion of this Agreement 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 Agreement, 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.

#### **21. COUNTERPARTS.**

This Agreement 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.

#### **22. MODIFICATION.**

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

#### **23. BINDING EFFECT.**

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

#### **24. 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 Agreement 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.

**25. INDEPENDENT CONTRACTOR.**

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

**26. NON-APPROPRIATION.**

Notwithstanding any other provisions of this Agreement, 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 Agreement for any fiscal year, this Agreement shall terminate immediately without further obligation of the Town.

**27. IRAN DIVESTMENT ACT CERTIFICATION REQUIRED BY N.C.G.S. 147-86.60**

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 Agreement 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.

**28. NONDISCRIMINATION.**

Pursuant to Section 3-2 of the Town of Apex Code of Ordinances, Contractor hereby warrants and agrees that Contractor will not discriminate against a protected class in employment, subcontracting practices, or the solicitation or hiring of vendors, suppliers, or commercial customers in connection with this Agreement. For the purposes of this Agreement “protected class” includes age, race, religious belief or non-belief, ethnicity, color, national origin, creed, sex, sexual orientation, gender identity, marital status, natural hair style, genetic information, pregnancy, familial status, disability, veteran or military status, or disabled veteran status.

**29. ELECTRONIC SIGNATURE.**

Pursuant to Article 40 of Chapter 66 of the North Carolina General Statutes (the Uniform Electronic Transactions Act) this Agreement and all documents related hereto containing an electronic or digitized signature are legally binding in the same manner as are hard copy documents executed by hand signature. The Parties hereby consent to use electronic or digitized signatures in accordance with the Town’s Electronic Signature Policy and intend to be bound by the Agreement and any related documents. If electronic signatures are used the Agreement shall be delivered in an electronic record capable of retention by the recipient at the time of receipt.

**30. CONTRACTOR’S WARRANTIES**

The Contractor hereby warrants and represents that it will be responsible for the maintenance and correction of any work completed pursuant to this Agreement that is defective at construction or may become defective

due to negligence or faulty workmanship or materials for a period of one (1) year after final acceptance by the Town of the work performed.

**31. BOND REQUIREMENTS**

Contractor agrees to provide the Town of Apex with a contract payment bond and a contract performance bond each in an amount equal to 100 percent of the amount of the Agreement. All bonds shall be in accordance with N.C.G.S. 44A-33. The corporate surety furnishing the bonds shall be authorized to do business in the State of North Carolina. Failure to provide acceptable bonds shall be just cause for rescinding the award of the Agreement and forfeiture of the bid bond or bid deposit.

**32. INCORPORATION OF DOCUMENTS**

The following are included in the Contract Documents and are hereby incorporated by reference into this Agreement as if fully set forth herein:

- A. Bid Advertisement
- B. Bid Form
- C. Bid Form Submission
- D. Notice of Award
- E. Notice to Proceed
- F. Special Provisions/Specifications
- G. Plan Sheets/Maps
- H. Addenda
- I. Certificate of Insurance

In witness thereof, the contracting parties, by their authorized agents, affix their signatures and seals this \_\_\_\_ day of \_\_\_\_\_, 2024.

**Contractor**

Name: \_\_\_\_\_  
Name of Contractor (type or print)

By: \_\_\_\_\_  
(Signature)

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Attest:  
\_\_\_\_\_  
(Secretary, if a corporation)

**Town of Apex**

\_\_\_\_\_  
Shawn Purvis, Interim Town Manager

Attest:  
\_\_\_\_\_  
Allen L. Coleman, Town Clerk

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

\_\_\_\_\_  
Antwan Morrison, Finance Director