

# Standard Form of Agreement Between Owner and Design-Builder - Lump Sum

*This document has important legal consequences. Consultation with  
an attorney is recommended with respect to its completion or modification.*

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This **AGREEMENT** is made as of the \_\_\_\_\_ day of \_\_\_\_\_ in the  
year of 2020, by and between the following parties, for services in connection with the Project identified below.

**OWNER:**

*(Name and address)*

Town of Yorktown, Indiana  
c/o Town Manager Pete Olson  
2400 S. Russ Street  
Yorktown, IN 47396

**DESIGN-BUILDER:**

*(Name and address)*

Smock Fansler Corporation  
2910 w. Minnesota Street  
Indianapolis, IN 46241

**PROJECT:**

*(Include Project name and location as it will appear in the Contract Documents)*

Sensory Plaza within Yorktown Civic Green

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder agree  
as set forth herein.

## **Article 1**

### **Scope of Work**

**1.1** Design-Builder shall perform all design and construction services, and provide all material, equipment,  
tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract  
Documents for the Sensory Plaza, and as outlined within the Exhibit-A attached.

## **Article 2**

### **Contract Documents**

**2.1** The Contract Documents are comprised of the following:

**2.1.1** All written modifications, amendments, minor changes and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2010 Edition) (“General Conditions of Contract”);

**2.1.2** The Basis of Design Documents, including the Owner’s Project Criteria, Design-Builder’s Proposal and the Deviation List, if any, contained in the Design-Builder’s Proposal, which shall specifically identify any and all deviations from Owner’s Project Criteria;

**2.1.3** This Agreement, including all exhibits and attachments, executed by Owner and Design-Builder (List for example, performance standard requirements, performance incentive requirements, markup exhibits, allowances, or unit prices);

**2.1.4** The General Conditions of Contract; and

**2.1.5** Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract.

## **Article 3**

### **Interpretation and Intent**

**3.1** Design-Builder and Owner, prior to execution of the Agreement, shall carefully review all the Contract Documents, including the various documents comprising the Basis of Design Documents, for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement.

**3.2** The Contract Documents are intended to permit the parties to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof. Conflicts existing within Section 2.1.2 shall be resolved by giving precedence first to the Deviation List, if any, then the Owner’s Project Criteria, and then the Design-Builder’s Proposal.

**3.3** Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

**3.4** If Owner’s Project Criteria contain design specifications: (a) Design-Builder shall be entitled to reasonably rely on the accuracy of the information represented in such design specifications and their compatibility with other information set forth in Owner’s Project Criteria, including any performance specifications; and (b) Design-Builder shall be entitled to an adjustment in the Contract Price and/or Contract Time(s) to the extent Design-Builder’s cost and/or time of performance have been adversely impacted by such inaccurate design specification.

**3.5** The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents.

## Article 4

### **Ownership of Work Product**

**4.1 Work Product.** All drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement (“Work Product”) are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in Sections 4.2 through 4.5 below.

**4.2 Owner’s Limited License Upon Project Completion and Payment in Full to Design-Builder.** Upon Owner’s payment in full for all Work performed under the Contract Documents, Design-Builder: (a) grants Owner a limited license to use the Work Product in connection with Owner’s occupancy of the Project; and (b) transfers all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in that portion of the Work Product that consists of architectural and other design elements and specifications that are unique to the Project. The parties shall specifically designate those portions of the Work Product for which ownership in the Work Product shall be transferred. Such grant and transfer are conditioned on Owner’s express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner’s sole risk and without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the “Indemnified Parties”), and on the Owner’s obligation to provide the indemnity set forth in Section 4.5 below.

**4.3 Owner’s Limited License upon Owner’s Termination for Convenience or Design-Builder’s Election to Terminate.** If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner’s payment in full of the amounts due Design-Builder under the Contract Documents, grant Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

**4.3.1** Use of the Work Product is at Owner’s sole risk without liability or legal exposure to any Indemnified Party and on the Owner’s obligation to provide the indemnity set forth in Section 4.5 below; and

**4.4 Owner’s Limited License upon Design-Builder’s Default.** If this Agreement is terminated due to Design-Builder’s default pursuant to Section 11.2 of the General Conditions of Contract, then Design-Builder grants Owner a limited license to use the Work Product to complete the Project and subsequently occupy the Project, and Owner shall thereafter have the same rights and obligations as set forth in Section 4.2 above. Notwithstanding the preceding sentence, if it is ultimately determined that Design-Builder was not in default, Owner shall be deemed to have terminated the Agreement for convenience, and Design-Builder shall be entitled to the rights and remedies set forth in Section 4.3 above.

**4.5 Owner’s Indemnification for Use of Work Product.** If Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall defend, indemnify and hold harmless such Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys’ fees, arising out of or resulting from the use or alteration of the Work Product.

## Article 5

### **Contract Time**

**5.1 Date of Commencement.** The Work shall commence within five (5) days of Design-Builder's receipt of Owner's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

**5.2 Substantial Completion and Final Completion.**

**5.2.1** Substantial Completion of the entire Work shall be achieved no later than September 1, 2020 (\_\_\_\_\_) calendar days after the Date of Commencement ("Scheduled Substantial Completion Date").

The parties agree that the definition for Substantial Completion set forth in Section 1.2.18 of the General Conditions of Contract is hereby modified to read as follows:

"*Substantial Completion* is the date on which the Work, or an agreed upon portion of the Work, is sufficiently complete in accordance with the Contract Documents so that Owner can occupy and use the Project or a portion thereof for its intended purposes, provided, however, that Substantial Completion shall be deemed to have been achieved no later than the date of issuance of a Temporary Certificate of Occupancy issued by the local building official."

**5.2.3** Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2.7 of the General Conditions of Contract.

**5.2.4** All of the dates set forth in this Article 5 (collectively the "Contract Time(s)") shall be subject to adjustment in accordance with the General Conditions of Contract.

**5.3 Time is of the Essence.** Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

## **Article 6**

### **Contract Price**

**6.1 Contract Price.** Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract the sum of Six Hundred Sixty Five Thousand Dollars (\$ 665,000.00) ("Contract Price"), subject to adjustments made in accordance with the General Conditions of Contract. Unless otherwise provided in the Contract Documents, the Contract Price is deemed to include all sales, use, consumer and other taxes mandated by applicable Legal Requirements.

## **Article 7**

### **Procedure for Payment**

**7.1 Progress Payments.**

**7.1.1** Design-Builder shall submit to Owner on the (5th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

**7.1.2** Owner shall make payment within ten (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.

## **7.2 Retainage on Progress Payments.**

**7.2.1** Owner will retain five percent (5%) of each Application for Payment provided through the first (\$500,000.00) of the contract completed, however, that when this value of the Work has been satisfactorily completed, as determined by the OWNERS REPRESENTATIVE, by Design-Builder and Design-Builder is otherwise in compliance with its contractual obligations, Owner will not retain any additional retention amounts from Design-Builder's subsequent Applications for Payment.

**7.2.2** OWNER reserves the right to withhold payment, in whole or in part to the extent necessary to protect itself from a loss on account of any of the following;

1. Defective Work
2. Evidence indicating the probable filing of claims by other parties against CONTRACTOR which may adversely affect the OWNER
3. Failure of CONTRACTOR to make payments due to subcontractors, materials suppliers, or employees
4. Damage to OWNER or a third party.

**7.2.3** Upon Substantial Completion of the entire Work or, if applicable, any portion of the Work, pursuant to Section 6.6 of the General Conditions of Contract, Owner shall pay an amount sufficient to increase total payments to CONTRACTOR to (95%), of the entire Work or completed portion of the Work, less an amount equal to (a) 100% of the value of all remaining or incomplete items of Work as noted in the Certificate of Substantial Completion and (b) all other amounts Owner is entitled to withhold pursuant to Section 6.3 of the General Conditions of Contract.

**7.3 Final Payment.** Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Owner shall pay the remainder of the Contract Price as recommended by the OWNER'S REPRESENTATIVE on Design-Builder's properly submitted and accurate Final Application for Payment within forty five (45) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.2 of the General Conditions of Contract.

**7.4 Interest.** Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest commencing sixty (60) days after payment is due at current prime rate up to a maximum of 6% per annum.

**7.5 Record Keeping and Finance Controls.** With respect to changes in the Work performed on a cost basis by Design-Builder pursuant to the Contract Documents, Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of three (3) years after Final Payment, Owner and Owner's accountants shall be afforded access to, and the right to audit from time-to-time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to changes in the Work performed on a cost basis in accordance with the Contract Documents, all of which Design-Builder shall preserve for a period of three (3) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties.

## **Article 8**

### **Termination for Convenience**

**8.1** Upon ten (10) days' written notice to Design-Builder, Owner may, for its convenience and without cause, elect to terminate this Agreement. In such event, Owner shall pay Design-Builder for all work executed and in place, with supporting documentation for all material, labor and equipment costs and as approved by the OWNER'S REPRESENTATIVE.

## **Article 9**

### **Representatives of the Parties**

#### **9.1 Owner's Representatives.**

**9.1.1** Owner designates the individual listed below as its Senior Representative ("Owner's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

Pete Olson, Town Manager

**9.1.2** Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

Veridus Group, Owner's representative  
Scott Senefeld  
6280 N Shadeland Ave., Ste-A  
Indianapolis, IN 46220  
(317) 695-2394  
ssenefeld@theveridusgroup.com

#### **9.2 Design-Builder's Representatives.**

**9.2.1** Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

Smock Fansler Corporation  
Tom Fansler  
2910 W. Minnesota St.  
Indianapolis, IN 46241  
(317) 248-8371  
tfansiii@smockfansler.com

**9.2.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers)*

## Article 10

### **Bonds and Insurance**

**10.1 Insurance.** Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit attached hereto and in accordance with Article 5 of the General Conditions of Contract.

**10.2 Bonds and Other Performance Security.** Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security:

**Performance Bond.**

Required                       Not Required

## Article 11

### **Other Provisions**

**11.1 Other provisions, if any, are as follows:** *(Insert any additional provisions)*

**11.2 E-Verify Compliance** Design-Builder affirms via the attached Affidavit that Design-Builder does not knowingly employ an unauthorized alien and has enrolled and is participating in the E-Verify program. Design-Builder is not required to participate should the E-Verify program cease to exist. Design-Builder agrees to provide documentation demonstrating that it has complied with this provision, if requested. Owner may terminate for default if Design-Builder fails to cure a breach of this provision no later than thirty (30) days after being notified.

**11.3 Payment for Stored Materials** The Owner shall authorize payment of stored materials on behalf of the project in accordance with the following requirements. All materials shall be stored at the jobsite or on premises of the Contractor. Any stored materials on premises of the Contractor shall be covered by the Contractor's insurance and a copy of which shall be provided to the Owner as proof of coverage. Any invoices submitted for stored materials shall be accompanied by an Invoice or Receipt from the supplier / fabricator, and shall include photos of the material showing the location of storage. The Owner reserves the right to inspect stored materials prior to payment. All materials stored shall be maintained by the Contractor's insurance until installed within the project.

**11.4 Limited Warranty** Contractor warrants that the improvements constructed as a part of this contract are reasonably free of defects and within customary tolerances of the construction industry in accordance with standards. Contractor further warrants and guarantees that the work reasonably conforms to the requirements of the contract documents, drawings, plans, and specifications. If any defects are found, contractor shall repair or replace any of the alleged defective work at its cost. The work to be corrected will be the particular part or area that is defective. Contractor shall start corrective work within a reasonable time after written notice from the Owner. This Warranty, as well as the statute of limitations for any claim of damages for defective work or materials, is on year from substantial completion.

In executing this Agreement, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

**OWNER:**

**DESIGN-BUILDER:**

\_\_\_\_\_  
*(Name of Owner)*

\_\_\_\_\_  
*(Name of Design-Builder)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Printed Name)*

\_\_\_\_\_  
*(Title)*

\_\_\_\_\_  
*(Title)*

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**Caution: You should sign an original DBIA document which has this caution printed in blue. An original assures that changes will not be obscured as may occur when documents are reproduced.**

EXHIBIT-A



## SCOPE OF WORK OUTLINE

The following shall outline the Scope of the Work to be included as a part of the Phase-II Design-Build Contract for the development of the Sensory Plaza within the Yorktown Civic Green.

The scope shall include the following;

1. Completion of necessary Site Construction Documents including all mechanical, electrical, and plumbing design and specifications for the following;
  - a. Sensory Plaza pavements, finishes, structures
    - i. Design and specifications for all sub-structure foundations and footings as may be required for finished water feature elements, structures, amenities, and pavements.
    - ii. Design and specification of all finished pavement materials selected by the Owner.
    - iii. Design and specification of all artwork, amenities, furnishings, and/or seating, as may be a part of the project.
  - b. Water Feature
    - i. Design and specifications for all water feature structures, finishes and equipment including nozzles, sprays, bubblers, and all other ancillary fittings for the complete system.
    - ii. Mechanical and plumbing design and specification of all systems and equipment necessary for the complete circulation of the system including but not limited to vaults, pumps, filtration systems, heaters, and all other ancillary fittings for a complete system.
    - iii. Electrical and lighting design and specification of all infrastructure, systems, controls, and finish fixtures for the complete operation of the water feature and lighting
  - c. Site Development
    - i. Design and specification of all infrastructure including sub-surface drainage, plumbing, and electrical provisions for the sensory plaza and water feature from point of connection at the limits of the work.
    - ii. Design and specification of all site lighting, and sound equipment and fixtures which may be a part of the project.
    - iii. Design and specification of Civic Green signage.
    - iv. Design and specification of all artwork which may be a part of the project.
    - v. Grade design including finished turf / landscape green space within the limits of the project.
2. Construction Implementation
  - a. Completion of all construction implementation of the design for the Sensory Plaza in accordance with the final Construction Documents including material, equipment, and finish selections made by the Owner.
  - b. Coordination requirements as a part of the implementation of the Sensory Plaza shall include the following;

- i. Smock Fansler shall coordinate their work in a timely manner with the Owner, Landscape Architect, and the Civic Green contractor as to provide for a completed project without delay. A representative of Smock Fansler shall be present at all bi-weekly progress meetings with the Owner, Landscape Architect, and the Owner's Representatives
    - ii. All necessary mechanical, plumbing, electrical for the Sensory Plaza shall be included by Smock Fansler and fully connected to the point of termination establishes as a part of the Civic Green Project
    - iii. All necessary sub-surface drainage for the Sensory Plaza shall be included by Smock Fansler and fully connected to the point of termination establishes as a part of the Civic Green Project
    - iv. All necessary fill and grading for the completion of the Sensory Plaza, from the point of sub-grade elevation as established by the Civic Green Contractor, shall be provided by Smock Fansler
    - v. Smock Fansler shall coordinate their schedule and the requirements of the irrigation for the Sensory Plaza with the Civic Green Contractor and the Landscape Architect. Installation of the complete Irrigation system and controls shall be installed, maintained, and warranted within the limits of the Sensory Plaza space by the Civic Green Contractor.
    - vi. All necessary topsoil fill, grading, and turf lawn sod within the Sensory Plaza shall be installed by Smock Fansler.
    - vii. All planting soils, amendments, plant material, mulch, tree grates & edging as identified along the west edge boundary of the sensory plaza shall be installed maintained and warranted by the Civic Green Contractor.
  - c. Warranty period for this contract shall be included from the point of substantial completion for a term of one-year
3. Initial Start-up and Closure of the Sensory Plaza Water Feature
- a. Smock Fansler shall include the complete 'drain-down' and closure of the Sensory Green Water Feature as appropriate at the end of the 2020 season.
  - b. Smock Fansler shall include the initial inspection and start-up of the Sensory Green Water Feature for the 2021 season as appropriate but no later than May 1, 2020.
4. Contract Documents
- a. At the execution of this Contract Smock Fansler shall provide to the Owner the completed Design-Development documents and outline specifications of all material, equipment, and finishes identified as a part of the project to be included herein as a part of the Scope of Work.
  - b. Construction Documents and Specifications shall be provided in the form of a final set for approval, in accordance with the project Budget, prior to commencement.
    - i. Note that the Owner reserves the right to modify the budget and the value of this Contract at any time via Change Orders, Directives, or appropriate means as a part of the contract
  - c. At the completion of the project and as a part of final payment, Smock Fansler shall provide all necessary O&M Manuals, Warranties, and Specifications, as well as the

performance of a scheduled training session with the Owner for the operation and routine maintenance of Sensory Plaza and water feature.