

**FORM OF PERFORMANCE BOND**

BOND NO. \_\_\_\_\_

PENAL SUM: \$[●]

**KNOW ALL MEN BY THESE PRESENTS, THAT:**

**WHEREAS**, the Virginia Passenger Rail Authority (“Owner”) has awarded to [●], a [●] duly organized and existing under the laws of the State of [●] (“Contractor”) a contract (“Contract”) for the [●] (“Project”) dated [●]; and

**WHEREAS**, one of the conditions of the Contract is that Contractor provide this duly executed instrument (“Bond”).

**NOW THEREFORE**, We, the undersigned Contractor and [●], a corporation duly organized and existing under and by virtue of the laws of the State of [●] and authorized to transact business as a surety within the Commonwealth of Virginia (“Surety”), are held and firmly bound unto Owner, as obligee, and its successors and assigns in the sum of [●], lawful money of the United States of America, for the payment of which, well and truly be made to Owner, Contractor and Surety bind themselves and each of their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Any reference to the “Surety” in this Bond shall be read as a reference to the Co-Sureties and each of them on the basis of such joint and several liability.

**THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT:**

1. The Contract is hereby incorporated by reference herein as if said Contract were fully set forth herein. Initially capitalized terms not otherwise defined herein shall have the meanings set forth in the Contract.

2. If Contractor shall at all times promptly, and faithfully perform the Contract and any alteration in or addition to the obligations of Contractor arising thereunder in strict accordance with the terms and conditions of the Contract, including the matter or infringement, if any, of patents or other proprietary rights, and all guarantees and warranties, including the guarantee and warranty periods, established by the Contract, and comply with all of the covenants therein contained, in the manner and within the times provided in the Contract, and shall fully indemnify and save harmless Owner from all costs and damages which it may suffer by reason or failure so to do, and shall fully reimburse and repay Owner all outlay and expenses which it may incur in making good any default, and reasonable counsel fees incurred in the prosecution of or defense of any action arising out of or in connection with any such default, then Surety’s obligations under this Bond shall be void; otherwise such obligations shall remain in full force and effect.

3. This Bond shall cover the cost to perform all the obligations of Contractor arising out of or required under the Contract, and the obligations covered by this Bond

specifically include Contractor's liability for liquidated damages as specified in the Contract.

4. Whenever Contractor shall be, and is declared by Owner to be in default under the Contract, the Surety shall within thirty (30) days of receipt of a letter from Owner in the form set forth in Schedule A:

- (a) remedy such default; or
- (b) ~~submit to Owner a proposed plan to procure a new contractor using a delivery method and process acceptable to Owner, and thereafter undertake completion of the Contract itself; or~~
- (c) ~~tender to Owner a proposed contract procured using the Owner-accepted procurement process~~ for completion of the Contract by a contractor acceptable to Owner, secured by performance and payment bonds issued by a qualified surety, combined with payment to Owner of the amount of damages in excess of the remaining Contract balance incurred by Owner as a result of the default, including costs of completion; or
- (ed) waive the Surety's right to remedy such default, undertake completion of the Contract, or ~~submit~~tender to Owner a proposed ~~plan to procure a new contractor~~contract for completion, and with reasonable promptness under the circumstances, make payment of the full penal sum of the bond to Owner-; or
- (e) dispute liability under this Bond and proceed in accordance with paragraph 5 below.

5. In the event that Surety disputes its liability under this Bond, which includes any allegations of fraud, such dispute shall be determined in the first instance in accordance with the dispute resolution process ("DRP") attached hereto as Schedule B. If Surety fails to make an election within the thirty (30) days set forth in paragraph 4 of this Bond, then the claim shall be deemed to be in dispute for purposes of this paragraph. A Decision, as defined in Schedule B, shall be rendered within thirty (30) days of the Adjudication Commencement Date, or as otherwise extended pursuant to the DRP. The Decision shall be binding on the Surety, Contractor, and Owner as to their respective rights and obligations under this Bond but subject to each party's right to commence a de novo appeal of the Decision to a court of competent jurisdiction at any time. The parties shall immediately begin to comply with the Decision and the terms of this Bond until the Final Completion Date under the Contract notwithstanding of, and during, any appeal de novo of the Decision and unless or until such time as a court of competent jurisdiction issues a final order or ruling vacating or modifying the Decision, either in whole or in part, at the conclusion of any de novo appeal of the Decision (the "Obligation to Comply with the Decision"). Surety's costs to fulfill its Obligation to Comply with the Decision is limited to the penal sum of the Bond.

6. The parties acknowledge that the Obligation to Comply with the Decision is of the essence of the Bond, and the parties agree that Surety's failure to fulfill its Obligation to Comply with the Decision will cause irreparable harm to Owner and Contractor. Accordingly, Surety waives and releases any right it may have to initiate any action in court seeking a stay of its obligations arising pursuant to the Decision or seeking a stay of enforcement of the Decision. Surety's only recourse to court processes in connection with the Decision is to file for a de novo appeal of the Decision while continuing to fulfill its Obligation to Comply with the Decision. In any such de novo appeal or in any action seeking enforcement of the Decision, the Surety (a) waives any right to file for an interim stay of its obligations arising pursuant to the Decision or to seek a stay of enforcement of the Decision, (b) waives any right to object to or contest an action brought to enforce specific performance of Surety's obligations arising pursuant to the Decision and waives all defenses in such an action, and (c) consents to an order or ruling directing and requiring Surety to perform its obligations arising pursuant to the Decision, and that an action for such an order or ruling may be sought on an expedited (emergency) basis under the rules of the court. The parties' Obligation to Comply with the Decision does not alter any party's right to pursue a de novo appeal of the Decision in a court of competent jurisdiction.

7. On the day following the Final Completion Date ("Step-Down Date"), the Penal Sum of [●] shall automatically be reduced to [●], with the understanding that such reduced Penal Sum shall be the aggregate liability of the surety and shall only be applicable to any claims submitted, or suits, or actions brought, after the Step-Down Date. For the avoidance of doubt, the entire Penal Sum of [●] is subject to any claims submitted, or suits or actions brought, against the Bond prior to the Step-Down Date; *provided, however*, that notwithstanding anything to the contrary herein, Surety's aggregate liability hereunder shall in no event exceed the Penal Sum of [●].

8. Surety, for value received, hereby stipulates and agrees that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the Work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any rescission or attempted rescission by Contractor of the Contract, or this Bond, shall in any way affect its obligations on this Bond, and Surety does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

9. Correspondence or claims relating to this Bond shall be sent to Surety at the following address: [●]

10. Schedules A and B are an integral part of this Bond and are specifically incorporated herein as if set out in full in the body of this Bond.

11. If any provision of this Bond is found to be unenforceable as a matter of law, all other provisions shall remain in full force and effect.

12. Any provision in this Bond which conflicts with applicable laws, regulations, and ordinances, shall be deemed modified to conform to applicable laws, regulations, and ordinances. This Bond shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, without regard for conflicts of laws principles, and any action seeking enforcement of the Bond will be litigated exclusively in the courts of the Commonwealth of Virginia.

13. ***[Note: Use in case of multiple sureties (“Co-Sureties”) or, otherwise, delete; If Co-Sureties are used, modify the preceding language accordingly to reflect this]*** The Co-Sureties agree to empower and designate a single “Lead Surety” with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that Owner will have no obligation to deal with multiple sureties hereunder. All correspondence from Owner to the Co-Sureties and all claims under this Bond shall be sent to the Lead Surety and shall be deemed served upon all Co-sureties. The Lead Surety may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to Owner designating a new Lead Surety, signed by all of the Co-Sureties. The initial Lead Surety is [●].

*[Signature Page Follows]*

**IN WITNESS WHEREOF**, We have hereunto set our hands and seals on this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

**CONTRACTOR** (full legal name):

Address:

By: \_\_\_\_\_

Title:

Contact Name:

Phone: (    )

**SURETY** (full legal name):

Address:

By: \_\_\_\_\_

Title:

Contact Name:

Phone: (    )

[Note: Date of this Bond must not be prior to date of Contract.]

[Note: If more than one surety, then add appropriate number of lines to signature block.]

[Note: A copy of a certificate that the Surety (or Co-Sureties) is (are) authorized to transact business in Virginia must be attached.]

[Note: The Bond shall be signed by authorized persons. Where such persons are signing in a representative capacity (e.g., an attorney-in-fact), but are not a members of the firm, partnership, or joint venture, or an officer of the legal entity involved, evidence of authority including the appropriate power of attorney documentation must be attached.]

**SCHEDULE A  
FORM OF DEMAND**

Date

Re: Performance Bond No.: [\_\_\_\_] (the "Bond")

Principal: [\_\_\_\_\_] (the "Principal")

Obligees: Virginia Passenger Rail Authority (the "Obligee")

Contract: The Contract, dated [\_\_\_\_\_] between the Principal as Contractor and the Virginia Passenger Rail Authority for the [●] Project (the "Contract")

Dear Sir:

Pursuant to the Bond, the Obligee hereby certifies that:

1. the Principal is and continues to be in default of the Principal's obligations under the Contract;
2. the Obligee has issued a notice of default to the Principal in accordance with the provisions of the Contract; and
3. the Obligee has honored and will continue to honor and perform in all material respects its obligations under the Contract.

We hereby demand that the Surety honor its obligations under the Bond forthwith.

The Obligee acknowledges that if the Surety intends to dispute its liability pursuant to the Bond, then the parties shall proceed immediately with the DRP set forth in Schedule B.

Yours truly,

Virginia Passenger Rail Authority

By: \_\_\_\_\_

Name:

Title:

## SCHEDULE B DISPUTE RESOLUTION PROCESS

Given the on default nature of the Bond, the Principal, the Surety and the Obligee acknowledge that they may not agree whether the Surety is liable to perform or make payment pursuant to the Bond. To ensure that such disputes are determined quickly so as to allow for the orderly and timely completion of the Contract, the Principal, the Surety and the Obligee agree to submit such disputes to the dispute resolution process set out below. Terms not defined herein shall have the meaning ascribed to them in the body of the Bond. The parties acknowledge that any decision rendered in the dispute resolution process (an "Award") will be binding, but subject to appeal de novo by any party at any time to a court of competent jurisdiction.

1. "Dispute" means a disagreement as to the Surety's liability pursuant to the Bond following an Obligee's Demand.
2. Disputes arising out of or in connection with the Bond shall be submitted for binding resolution to adjudication (the "Adjudication") administered by JAMS – The Resolution Experts! ("JAMS") in accordance with the procedure set out below. The JAMS' Dispute Resolution Rules for Surety Bond Disputes, effective as of the effective date of the Bond shall apply to the resolution of any Dispute unless modified by the provisions herein, in which case, the provisions of this Bond shall govern.
3. The Surety or the Obligee shall demand Adjudication by filing an Adjudication statement electronically with JAMS, and serving electronic copies by email upon the Principal and the Obligee, utilizing the electronic forms and filing directions provided by JAMS on its website at [www.jamsadr.com](http://www.jamsadr.com). The Adjudication statement shall set forth in detail the factual and legal issues submitted for Adjudication and shall be sent no later ~~than~~ the later of 10 days following the initiation of ~~after~~ (a) the Adjudication ~~Surety makes its election pursuant to paragraph 4 of the Bond, or (b) the claim is deemed to be in dispute pursuant to paragraph 5 of the Bond.~~
4. Within three (3) Business Days after the Adjudication statement is filed and served, the parties shall appoint an adjudicator (the "Adjudicator") who shall be a panelist on the JAMS Global Engineering & Construction Panel ("JAMS GEC Panel") of dispute adjudicators. JAMS shall appoint an Adjudicator administratively from the JAMS GEC Panel if the parties fail to appoint an Adjudicator within the three day period. The Adjudicator shall be under a duty to act impartially and fairly and shall serve as an independent neutral.
5. The Adjudication shall commence on the date that JAMS receives the Adjudication statement and initial deposit of funds, and confirms the appointment of the Adjudicator (the "Adjudication Commencement Date"). Unless the Adjudicator decides otherwise, the Principal, the Surety and the Obligee shall pay the final fees and expenses of Adjudication in accordance with the provisions set forth in the Contract governing the payment of fees and expenses of dispute resolution. In an Adjudication in which the

Adjudicator determines that the Principal and Surety are aligned with the same commonality of interest against the Obligee, the Principal and Surety jointly shall be charged with one share and the Obligee will be charged with one share. Should any party fail to deposit funds as required by JAMS, any other party may advance the deposit, and the amount of that advance deposit will be taken into consideration in the Adjudicator's decision.

6. Upon commencement of the Adjudication, the Adjudicator is empowered to take the initiative in ascertaining the facts and the law, and to exercise sole discretion in managing the Adjudication process. Among other things, the Adjudicator may require the parties to make additional factual submissions such as sworn witness statements and business documents, may interview important witnesses after notice to the parties and affording opportunity to attend, may request and consider expert reports and may call for memoranda on legal issues. Notwithstanding the foregoing, the Adjudicator must decide the following questions:
  - a. Is the Principal in default of the Principal's obligations under the Contract?
  - b. Is the Surety liable to perform in accordance with Paragraph 4 and/or 5 of the Bond? (which liability, for the avoidance of doubt, does not arise if Obligee is in uncured material breach of its obligations under the Contract)?
7. The Adjudicator shall issue a written decision (the "Decision") which shall be binding upon and enforceable by the parties through the completion of the Principal's obligations under the Contract, subject to any party's right to commence an appeal de novo in a court of competent jurisdiction at any time in accordance with the terms of the Bond. Any payment required in the Decision shall be made immediately. The Decision shall be issued through JAMS as soon as practicable but in no event later than thirty (30) calendar days of the Adjudication Commencement Date or within any later time agreed upon by the parties. Unless the parties agree otherwise, the Decision shall state reasons therefore and shall be admissible in later administrative, arbitral or judicial proceedings solely concerning Surety's liability pursuant to the Bond between the parties.
8. This 30 calendar day period also may be extended by the Adjudicator in its sole discretion up to 14 days in the event that JAMS has requested any party to make an additional fee and expense deposit and such funds have not been deposited as requested or advanced by another party.
9. Any party may request clarification of the Decision within five (5) business days after issuance, and the Adjudicator shall endeavor to respond within an additional five (5) business days, and, subject to any party's right to commence an appeal de novo in a court of competent jurisdiction at any time in accordance with the terms of the Bond. The parties shall comply with the Decision, unless and until subsequently vacated or modified, through the completion of the Principal's obligations under the Contract.

10. Upon any settlement by the parties of the Dispute prior to issuance of a Decision, the parties shall jointly terminate the Adjudication. Such removal or termination shall not affect the parties' continuing joint and several obligations for payment to JAMS of unpaid fees and expenses.

If the Decision is that the Surety is liable to perform in accordance with Paragraphs 4 and 5 of the Bond, then notwithstanding the commencement of any appeal de novo of the Decision, the Surety shall perform in accordance with the Decision and with the terms of the Bond until the Principal's Obligations under the Contract are completed, but not to exceed the penal sum of the Bond.