FORM OF PERFORMANCE AND INDEMNITY BOND

Bond No. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

for

**[\_\_\_\_\_\_\_\_\_\_] PROJECT**

**[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] Project Number**

**KNOW ALL WHO SHALL SEE THESE PRESENTS:**

**That Whereas,** the South Carolina Department of Transportation, an agency of the State of South Carolina (the “Obligee”) has awarded to [\_\_\_\_\_\_\_\_\_\_]***[Contractor’s legal name]*** (the “Principal”), that certain Agreement for the design and construction of the [\_\_\_\_\_\_\_\_\_\_]***[name of project]*** Project in [\_\_\_\_\_\_\_\_\_\_]***[insert county/ies]***, South Carolina, dated as of [\_\_\_\_\_\_\_\_\_\_]***[date]*** (the “Agreement”) to design and build the [\_\_\_\_\_\_\_\_\_\_]***[insert name of project]*** (the “Project”);

**AND WHEREas**, the Principal is a[n] [\_\_\_\_\_\_\_\_\_\_]***[entity type]***, duly formed and validly existing under the laws of the [\_\_\_\_\_\_\_\_\_\_]***[jurisdiction]***, and is duly authorized and in good standing to do business in the State of South Carolina;

**And WHEREAS**, it is one of the conditions of the Agreement that these presents shall be executed;

**Now Therefore**,we the undersigned Principal and [\_\_\_\_\_\_\_\_\_\_] (the “Surety” or “Co-Sureties”) are firmly bound and held unto the Obligee, in the penal sum of [\_\_\_\_\_\_\_\_\_\_] Dollars ($[\_\_\_\_\_\_\_\_\_\_])***[insert 100% Contract Price amount],*** good and lawful money of the United States of America, for the payment whereof, well and truly to be paid to the Obligee, we bind ourselves, our heirs, successors, executors, administrators, and assigns, jointly and severally, firmly by these presents.

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

1. If the Principal shall in all things stand to and abide by and well and truly keep, perform and complete all covenants, conditions, agreements, obligations and work under the Agreement, including any and all amendments, supplements, and alterations made to the Agreement as therein provided, on the Principal’s part to be kept and performed at the time and in the manner therein specified, if the Principal shall indemnify, defend, and hold harmless the Obligee, its commissioners, directors, officers, employees, representatives, consultants, and agents, as therein stipulated, and if the Principal shall reimburse upon demand of the Obligee any sums paid the Principal which exceed the final payment determined to be due upon final completion and acceptance of the Project, then these presents shall become null and void; otherwise they shall remain in full force and effect.

2. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Agreement, 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 Agreement, or any conditions precedent or subsequent in this bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this bond, or any fraud practiced by any other person other than the claimant seeking to recover this bond, shall in any way affect its obligations on this bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

3. The Surety (or Co-Sureties) agree(s) that payments made to contractors and suppliers to satisfy claims on the payment bond do not reduce the Surety’s legal obligations under this bond. Payments made to contractors or suppliers under any agreement where the Surety has arranged for completion of the work to satisfy this bond will not be considered payment bond claims.

4. Whenever the Principal shall be, and is declared by the Obligee to be, in breach or default under the Agreement, provided that the Obligee is not then in material default thereunder, the Surety (or Co-Sureties) shall promptly, and in each case with Obligee’s prior written consent:

(a) remedy such breach or default; or

(b) complete the work covered by this bond in accordance with the terms and conditions of the Agreement then in effect; provided, however that completion of such work shall not be effected by the Principal or any affiliate of the Principal, for and on behalf of the Surety, without the Obligee’s express prior consent, granted in its sole discretion; or

(c) select a contractor or contractors to complete all work covered by this Bond in accordance with the terms and conditions of the Agreement then in effect, using a contractor or contractors with qualifications that meet or exceed those in the procurement documents that had awarded the Agreement to the Principal and as are approved by the Obligee (provided, however, that the Surety may not select the Principal or any affiliate of the Principal to complete the work for and on behalf of the Surety without the Obligee’s express prior written consent, granted in its sole discretion), arrange for a contract meeting the requirements of the Agreement between such contractor or contractors and the Obligee, and make available as work progresses (even though there should be a breach or default (or a succession thereof) under such contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the unpaid balance of the contract price; but not exceeding, including other costs and damages for which Surety (or Co-Sureties) is (are) liable hereunder, the penal sum; or

(d) waive its right to remedy such breach or default, perform and complete, arrange for performance and completion, or obtain a new contractor or contractor (under the foregoing clauses (a) to (c)), and with reasonable promptness under the circumstances, in no case to exceed 60 days after dispatch of notice of such declaration by the Obligee of breach or default under the Agreement, determine the amount for which it may be liable to the Obligee and, as soon as practicable thereafter, make payment to the Obligee in full.

5. If the Surety (or Co-Sureties) do(es) not proceed as provided in the foregoing Section 4 with reasonable promptness (not to exceed such 60 day period), then the Surety shall be in default on this bond seven days after receipt of an additional written notice from the Obligee to the Surety demanding that the Surety perform its obligations under this bond, and the Obligee shall be entitled to enforce any remedy available to the Obligee at law or in equity.

6. If the Surety (or Co-Sureties) elect(s), and Obligee consents, to act under Section 4(a), Section 4(b), or Section 4(c), then the responsibilities of the Surety to the Obligee shall not be greater than those of the Principle under the Agreement, and the responsibilities of the Obligee to the Surety shall not be greater than those of the Obligee under the Agreement. Subject to the commitment by the Obligee to pay the balance of the contract price, the Surety is obligated, without duplication, for:

(a) the responsibilities of the Principal for correction of defective work and completion of the Project under the terms, and subject to the conditions, of the Agreement then in effect;

(b) additional legal, design professional, delay costs, disruption costs, and other additional costs resulting from the Principal’s breach or default, and resulting from the actions or failures to act of the Surety under Section 4; and

(c) damages claimed by, and due and owing to the Obligee under, the terms of the Agreement, including liquidated damages, if any.

For purposes of the foregoing, the “balance of the contract price” is the total amount payable by the Obligee to the Principal, if any, after all adjustments have been made (e.g., allowance to the Principal for insurance proceeds or settlements or other claims for damages), in each case, to which the Principal is entitled, collectively reduced by all payments made to or on behalf of the Principal under the Agreement.

7. ***Use in case of multiple or co-sureties*]** The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this bond, so that the Obligee and claimants will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this bond shall be sent to such designated representative. The designated representative may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative, signed by all of the Co-Sureties. The initial representative shall be [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], and correspondence to be directed at the following address(es): [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_].

8. This bond shall be governed by, and construed under, the laws of the State of South Carolina. Any dispute brought by the Surety (or Co-Sureties), the Principal, or the Obligee directly relating to the rights and obligations of any of the foregoing persons or entity under this bond shall be filed, heard, and decided non-jury in the Circuit Court for Richland County, South Carolina, which shall have exclusive jurisdiction and venue.

*[remainder of page intentionally blank]*

IN WITNESS WHEREOF, we have hereunto set our hands and seals on this at
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on this \_\_\_\_\_\_\_\_ day of\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, A.D., 20\_\_.

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| --- |
| **Principal (full legal name):** |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Address: |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_By: |
| Contact Name: |
| Phone: ( ) |
| **Surety (full legal name):** |
| Address: |
| By: |
| Contact Name: |
| Phone: ( ) |

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

[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 is not a member of the firm, partnership, or joint venture, or an officer of the legal entity involved, evidence of authority must be furnished.]