

**HECO-10**

**STANDARD PERFORMANCE BOND**

**KNOW ALL BY THESE PRESENTS**: That       (“Contractor”) whose principal place of business is located at       and       (“Surety”) whose address for delivery of ‘Notices’ is located at       are held and firmly bound unto the Commonwealth of Virginia and The Rector and Visitors of the University of Virginia, the Owner (collectively, the “University”) in the amount of       Dollars ($      ) for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

**WHEREAS,**

Contractor has by written agreement dated       entered into a contract with University for       which contract (the "Contract") is by reference expressly made a part hereof;

**NOW THEREFORE, THE CONDITION OF THIS OBLIGATION** is such that, if the Contractor shall promptly and faithfully perform said Contract in strict conformity with the plans, specifications and conditions of the Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

Provided, that any alterations which may be made in the terms of the Contract, or in the Work to be done under it, or the giving by the University of any extension of time for the performance of the Contract, or any other alterations, extensions or forbearance on the part of either or both of the University or the Contractor to the other shall not in any way release the Contractor and the Surety, or either of them, their heirs, executors, administrators, successors, or assigns from their liability hereunder, notice to the Surety of any such alterations, extension, or forbearance being hereby waived.

No action shall be brought on this bond unless brought within five years after completion of the Contract. Completion of the Contract is established when the final payment is made to the Contractor pursuant to the terms of the Contract. However, if a final certificate of occupancy or written final acceptance of the Project is issued prior to final payment, the five-year period to bring an action shall commence no later than 12 months from the date of the certificate of occupancy or written final acceptance of the Project.

The Surety represents to the Contractor and to the University that it is legally authorized to do business in the Commonwealth of Virginia.

Signed and sealed this       day of

      \_\_\_\_\_\_\_\_

*Contractor* **Seal**

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

*Witness* Typed Name:

Title:

      \_\_\_\_\_\_\_\_

*Surety* **Seal**

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

*Attorney-in-Fact*

Typed Name:

**AFFIDAVIT AND ACKNOWLEDGEMENT OF ATTORNEY-IN-FACT**

COMMONWEALTH OF VIRGINIA

(or alternatively, Commonwealth or State of       )

of

I, the undersigned notary public, do certify that      , whose name is signed to the foregoing performance bond in the sum of       Dollars ($     ) and dated       and which names the Commonwealth of Virginia and The Rector and Visitors of the University of Virginia, as obligee, personally appeared before me today in the above jurisdiction and made oath that he/she is the attorney-in-fact of      , a       corporation which is the Surety in the foregoing bond, that he/she is duly authorized to execute on the above Surety’s behalf the foregoing bond pursuant to the Power of Attorney noted above and attached hereto, and on behalf of the surety, he/she acknowledged the foregoing bond before me as the above Surety’s act and deed.

She/he has further certified that her/his Power of Attorney has not been revoked.

(The Power of Attorney, or a copy or facsimile thereof, should be attached hereto.)

Given under my hand this       day of      .

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_

*Notary Public*  Seal

My name (printed) is:

My registration number is:

My commission expires:

APPROVED:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*Attorney General/ Designee* Date

### Terms and Conditions of the Performance Bond

1. The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the University for the prompt and faithful performance of the Construction Contract, which is incorporated herein by reference.
2. If the Contractor promptly and faithfully performs the Construction Contract in strict conformity with the plans, specifications and conditions of the Construction Contract, the Surety and the Contractor shall have no obligations under this Bond.
3. In the event of the Contractor's Default, and subsequent notification to the Surety pursuant to Section 41 of the General Conditions of the Construction Contract, the Surety shall, within fourteen (14) Days of receipt of such notice, contact the University in writing, and arrange a meeting with the University to discuss methods of completing the Construction Contract. See paragraph 4, below, for the options to be discussed. If the Surety fails to arrange a meeting or fails to attend such meeting, the Surety shall be deemed to be in default on this Bond and the University may, at its sole discretion, take what measures it deems necessary to protect the University's interests, without further notice to the Surety, and the University shall be entitled to enforce any remedy available to the University under the Construction Contract or under Virginia law.
4. Within thirty (30) Days after such meeting, during which time the Surety may investigate and otherwise analyze the project, and which period shall not toll any Construction Contract time periods nor operate as a waiver of any of the University's rights, the Surety shall, at its own expense, notify the University in writing that it is taking one of the following actions, which shall be acceptable to the University, at the University's sole discretion:

4.1 By written takeover agreement with the University, the Surety itself shall undertake to perform and complete the Construction Contract, which it may do through its licensed agents or through licensed independent contractors. If the University, at its sole discretion, consents, the Contractor may serve as the Surety's independent contractor (however, due to conflicts with the Rules, the University may not directly contract with an otherwise qualified independent contractor produced by the Surety); or

4.2 The Surety may, if acceptable to the University and at the University's sole discretion, waive its right to perform and complete the Construction Contract, and with reasonable promptness under the circumstances:

4.2.1 Pay to the University all amounts for which it may be liable to the University as surety on this Performance Bond, including the damages described in paragraph 6 below; or

4.2.2 Deny liability, in whole or in part, and provide written notice thereof to the University, citing reasons therefore.

5. If, after the meeting described in paragraph 4, above, the Surety does not proceed with reasonable promptness with one of the options provided in subparagraphs 4.1 or 4.2 (including its subparts), above, the University may send additional written notice to the Surety demanding that the Surety perform its obligations under the Bond. If the Surety does not proceed to perform its obligations under the Bond within fifteen (15) Days after receipt of said notice, the Surety shall be deemed to be in default on this Bond. Thereafter, the University shall be entitled to enforce any remedy available to the University under the Bond, the Construction Contract or Virginia law. If the Surety proceeds as provided in Subparagraph 4.2, and the Surety and the University are unable to agree as to the amount for which the Surety may be liable to the University, or if the Surety has denied liability, in whole or in part, the University, without further notice, shall be entitled to enforce any remedy available to the University under the Bond, the Construction Contract or Virginia law. In such event, the University may immediately proceed to complete the work in any manner authorized by law.

6. After the University has terminated the Contractor’s right to complete the Construction Contract, and if the Surety elects to act under Subparagraph 4.1 or 4.2.1, above, then the responsibilities of the Surety to the University shall not be greater or less than those of the Contractor under the Construction Contract, and the responsibilities of the University to the Surety shall not be greater than or less than those of the University under the Construction Contract. To the limit of the amount of this Bond, plus the increased cost of any change orders under the Construction Contract, provided the University commits the balance of the Construction Contract Price to the prompt and faithful completion of the Construction Contract, the Surety is obligated without duplication for:

6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;

6.2 Additional legal, design professional and delay costs resulting from the Contractor’s Default, and resulting from the actions or failure to act of the Surety under Paragraph 4; and

6.3 Liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

The University, at its sole discretion, may waive its claim to delay costs and/or liquidated damages.

7. The Surety shall not be liable to the University for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the University, its officers, agencies, administrators, successors or assigns.

8. The Surety hereby waives notice of any changes, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations. The Surety understands and agrees that the penal amount of the bond shall be increased or decreased by any changes to time and amount incorporated into any Change Orders.

9. Any proceeding by the University, legal or equitable, under this Bond may be instituted in any Virginia state court of competent jurisdiction, as permitted under Section 8 of the General Conditions of the Construction Contract and §§ 29 and 32 of the Rules, or by the Contractor or Surety, as permitted under the Construction Contract or under Virginia law.

10. Notice to the Surety shall be mailed or delivered to the address shown on the Standard Performance Bond in the space for Surety address for delivery of Notices

11. When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond when furnished to comply with statutory requirements.

12. DEFINITIONS

12.1 **Balance of the Construction Contract Price**: The total amount payable by the University to the Contractor under the Construction Contract after all proper adjustments have been made, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.

12.2 **Construction Contract**: The agreement between the University and the Contractor identified on first page of the Standard Performance Bond, HECO-10, including all Construction Contract Documents and duly executed modifications and change orders thereto.

12.3 **Contractor Default**: Failure of the Contractor, as defined under Section 41 of the General Conditions to the Construction Contract, which has neither been remedied, as permitted under Section 41 at the University's sole discretion, nor expressly waived by the University, to perform or otherwise to comply with the terms of the Construction Contract.

12.4 **Rules**: The “Rules Governing Procurement of Goods, Services, Insurance, and Construction” (the “Rules”) attached as Attachment 1 to that certain “Policy Governing the Procurement of Goods, Services, Insurance, and Construction and the Disposition of Surplus Materials” (the “Policy”) adopted by the Board of Visitors of the University of Virginia, included in Exhibit F of  Chapter 3 of the  Management Agreement dated November 15, 2005, by and between the Commonwealth of Virginia and The Rector and Visitors of the University of Virginia (as enacted by Chapters 933 and 943 of the 2006 Acts of Assembly, as amended by Chapters 675 and 685 of the 2009 Acts of Assembly and Chapters 116 and 161 of the 2011 Acts of Assembly) (the “Management Agreement”).

13. Nothing in these General Conditions shall prevent a surety from becoming involved in the Construction Contract prior to termination, upon notice from the University of the Contractor's failure to promptly and faithfully perform the Construction Contract in strict conformity with the plans, specifications and conditions of the Construction Contract.