

**THE PORT OF VIRGINIA ECONOMIC AND INFRASTRUCTURE  
DEVELOPMENT GRANT PROGRAM**

**MEMORANDUM OF UNDERSTANDING**

This **Memorandum of Understanding** made and entered this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ (the "MOU"), by and between the Virginia Port Authority, a political subdivision of the Commonwealth of Virginia (the "VPA"), and \_\_\_\_\_ (the "Company"), a \_\_\_\_\_ [corporation] [authorized to transact business in the Commonwealth].

WITNESSETH:

WHEREAS, the Company has qualified for a grant of and expects to receive \$\_\_\_\_\_ ("POV Grant") from The Port of Virginia Economic and Infrastructure Development Grant Program through the Virginia Port Authority ("VPA") for the purpose of inducing the Company to [purchase] [construct] [expand] and improve a [distribution] [manufacturing] facility in \_\_\_\_\_, Virginia (the "Facility") within the Commonwealth of Virginia, thereby utilizing or impacting The Port of Virginia and creating and Maintaining, as hereinafter defined, a significant number of New, Permanent Full-Time Positions, as hereinafter defined;

WHEREAS, the amount above is subject to available funds and in the event that the amount above exceeds the funds available, the amount above or the amount above minus the amount received by the Company per Section 3(b) of this MOU, whichever is applicable, shall be paid in the next fiscal year in which funds are available;

WHEREAS, the VPA will provide the funds to or for the use of the Company, provided that the Company promises to meet certain criteria relating to The Port of Virginia and New, Permanent Full-Time Positions;

WHEREAS, the VPA and the Company desire to set forth their understanding as to the payout of the POV Grant, the obligations of the Company regarding the utilization of, or impact on, the growth of The Port of Virginia and New, Permanent Full-time Position creation and Maintenance, and the repayment by the Company of all or part of the POV Grant under certain circumstances;

WHEREAS, the [purchase / construction / expansion] and operation of the Facility has entailed the creation of \_\_\_\_ New, Permanent Full-Time Positions at the Facility; and

WHEREAS, the stimulation of maritime commerce through The Port of Virginia and the creation and Maintenance of New, Permanent Full-Time Positions constitute a valid public purpose for the expenditure of public funds and are the animating purposes for the POV Grant:

NOW, THEREFORE, in consideration of the foregoing, the mutual benefits, promises and undertakings of the parties to this MOU, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows.

## **Section 1. Definitions.**

For the purposes of this MOU, the following terms shall have the following definitions:

“Maintain” means that the New, Permanent Full-Time Positions created in the POV Grant will continue without interruption at all times during the three years immediately following receipt of the full amount or first portion of the POV Grant. Positions for the New, Permanent Full-Time Positions will be treated as Maintained during periods in which such positions are not filled due to (i) temporary reductions, not longer than two consecutive quarters in a calendar year, in the Company’s employment levels (so long as there is active recruitment for open positions), (ii) strikes, or (iii) other temporary work stoppages.

“New, Permanent Full-Time Position” means a job of indefinite duration, created by the Company as a result of operations within the Commonwealth of Virginia. It requires a minimum of 35 hours of a Qualified Full-Time Employee’s time per week for the entire normal year of the Company’s operations, which normal year shall consist of at least 48 weeks, or a position of indefinite duration that requires a minimum of 35 hours of a Qualified Full-Time Employee’s time per week for the portion of the taxable year in which the Qualified Full-time Employee was initially hired for the Company’s Facility within Virginia.

- Seasonal or temporary positions or jobs created when a position is shifted from an existing location in the Commonwealth to the Company’s new facility do not count as New, Permanent Full-Time Positions.
- Building and grounds maintenance at the Company’s location within the Commonwealth of Virginia do not count as New, Permanent Full-Time Positions.

“Performance Date” means \_\_\_\_\_, 20\_\_ (three (3) years from the date that the Company receives the full amount or first portion of the POV Grant).

“Qualified Full-Time Employee” means an employee filling a New, Permanent Full-Time Position in the Company’s Facility within the Commonwealth of Virginia. A Qualified Full-Time Employee does not include an employee:

- (i) For whom a tax credit was previously earned pursuant to the Major Business Facility Job Tax Credit (Virginia Code Section 58.1-439) or the International Trade Facility Tax Credit (Virginia Code Section 58.1-439.12:06) by the Company, a related party, or a trade or business under common control;
- (ii) Who was previously employed in the same job function at an existing location in Virginia by the Company, a related party, or a trade or business under common control; or
- (iii) Whose job function was previously performed at a different location in Virginia by an employee of the Company, a related party, or a trade or business under common control.

For these purposes, “related party” is as defined in Section 267(b) of the Internal Revenue Code of 1986, as amended, and a “trade or business under common control” is as defined in Section 52(b) of the Internal Revenue Code of 1986, as amended.

“Virginia Code” means the Code of Virginia of 1950, as amended.

**Section 2. Obligations.**

(a) *Qualified Company:* The Company has [developed][expanded] its Facility in the Commonwealth of Virginia, at \_\_\_\_\_, \_\_\_\_\_, Virginia \_\_\_\_\_.

The Company commenced [developing] [expanding] its Facility in calendar year 20\_\_.

The Company is involved in maritime commerce, or exports or imports manufactured goods through The Port of Virginia, by \_\_\_\_\_.

The Company is engaged in one or more of the following: the distribution, freight forwarding, freight handling, goods processing, manufacturing, warehousing, crossdocking, transloading, or wholesaling of goods exported and imported through The Port of Virginia; ship building and ship repair; dredging; marine construction; or offshore energy exploration or extraction. [INSERT IN BLANK ABOVE A BRIEF DESCRIPTION OF MARITIME COMMERCE OR EXPORT/IMPORT ACTIVITIES]

(b) *New, Permanent Full-Time Positions:* At the commencement of the [development][expansion] of the Facility in 20\_\_, the Company had [no][\_\_\_] permanent full-time positions at the Facility. On \_\_\_\_\_, 20\_\_, after one year of operation, the Company had \_\_\_ New, Permanent Full-Time Positions at the Facility. The Company shall Maintain at least \_\_\_ New, Permanent Full-Time Positions at all times during the three years immediately following receipt of the full amount or first portion of the POV Grant.

(c) *Operations:* The Company will operate the Facility through the Performance Date.

**Section 3. Disbursement of POV Grant.**

(a) The Company has qualified for a POV Grant in the amount of \$\_\_\_\_\_. The Company acknowledges that the existence of the POV Grant program was an inducement to the Company to [develop][expand] the Facility [and increase the Company's use of The Port of Virginia]. The \$\_\_\_\_\_ qualifying amount of the POV Grant was determined by multiplying the \_\_\_ New, Permanent Full-Time Positions that the Company has created and has promised to Maintain by [\$1,000][\$1,500][\$2,000][\$3,000], subject to a maximum POV Grant of \$500,000].

(b) \$\_\_\_\_\_ of the qualifying POV Grant will be paid by the VPA to the Company within 30 days of the execution and delivery of this MOU, or within 60 days of the Company's certification, whichever is first. This amount was determined by taking into account the amount of funds available.

(c) If applicable, the remaining portion of the POV Grant in the amount of \$\_\_\_\_\_ shall be paid in the next fiscal year in which funds are available, pursuant to § 62.1-132.3:2 of the Virginia Code, notwithstanding any repayment obligations and calculations provided by Section 4 of this MOU.

(d) If the full amount of the POV Grant exceeds the funds available and none of the POV Grant will be received by the Company the fiscal year in which this MOU is executed, \$\_\_\_\_\_ shall be paid to the Company in the next fiscal year in which funds are available.

#### **Section 4. Repayment Obligation.**

(a) *Repayment Based Upon Performance:* As noted in Sections 2(b) and 3, since the Company has created and has agreed to Maintain at all times during the three years immediately following receipt of the full amount or first portion of the POV Grant at least \_\_\_\_\_ New, Permanent Full-Time Positions, the Company, based on the availability of funds, has qualified for a POV Grant equal to [\$1,000][\$1,500][\$2,000][\$3,000] for each such New, Permanent Full-Time Position ], subject to a maximum POV Grant of \$500,000]. If, for any of the three years immediately following receipt of the full amount or first portion of the POV Grant, the Company has Maintained fewer than \_\_\_\_\_ New, Permanent Full-Time Positions, the Company must repay all or a portion of the POV Grant, as follows:

(i) If fewer than 25 New, Permanent Full-Time Positions have been Maintained for any of the three years immediately following receipt of the full amount or first portion of the POV Grant, the full amount or full amount received of the POV Grant shall be repaid by the Company to the VPA. If the Company has only received a portion of the POV Grant, the Company shall no longer be eligible for the unpaid portion of the POV Grant; [or]

(ii) If, for any of the three years immediately following receipt of the full amount or first portion of the POV Grant, the New, Permanent Full-Time Positions Maintained are greater than 24, but less than 50, the Company may retain a portion of the POV Grant equal to \$1,000 times the number of New, Full-Time Positions Maintained, and shall repay the remainder of the POV Grant to the VPA; [or]

(iii) If, for any of the three years immediately following receipt of the full amount or first portion of the POV Grant, the New, Permanent Full-Time Positions Maintained are greater than 49, but less than less than 75, the Company may retain a portion of the POV Grant equal to \$1,500 times the number of New, Full-Time Positions Maintained, and shall repay the remainder of the POV Grant to the VPA; [or]]

(iv) If, for any of the three years immediately following receipt of the full amount or first portion of the POV Grant, the New, Permanent Full-Time Positions Maintained are greater than 74, but less than 100, the Company may retain a portion of the POV Grant equal to \$2,000 times the number of New, Full-Time Positions Maintained, and shall repay the remainder of the POV Grant to the VPA; [or]]

(v) If, for any of the three years immediately following receipt of the full amount or first portion of the POV Grant, the New, Permanent Full-Time Positions Maintained are greater than 99, the Company may retain a portion of the POV Grant equal to \$3,000 times the number of New, Full-Time Positions Maintained, and shall repay the remainder of the POV Grant to the VPA.]

In the event the Company receives some, but not all, of the POV Grant and there is an unpaid portion of the POV Grant to be paid in the next fiscal year in which funds are available per § 62.1-132.3:2(F) of the *Code of Virginia*, and the Company fails to Maintain \_\_\_\_\_ prior to receiving the full amount of the POV Grant, the remaining amount of the POV Grant not yet paid to the Company shall be reduced by the amount the Company is required to repay the VPA under this Section. If the reduction results in the remaining amount of the POV Grant being exhausted, then the Company still must repay the VPA for failure to Maintain, Section 4(a)'s repayment formula shall

apply, and the Company shall repay the difference to the VPA. The Company shall no longer be eligible for the unpaid portion of the POV Grant.

(b) *Determination of Inability to Comply:* If the VPA determines at any time prior to the Performance Date that the Company is unable or unwilling to Maintain at least 25 New, Permanent Full-Time Positions, the full amount or amount received of the POV Grant shall be repaid by the Company to the VPA. If the Company qualified for more than what it received under the POV Grant, the Company shall no longer be eligible for the unpaid portion of the POV Grant. Notwithstanding Section 4(a), such a determination will be based on such circumstances as a filing by or on behalf of the Company under Chapter 7 of the U.S. Bankruptcy Code, the liquidation of the Company, an abandonment of the Facility by the Company or other similar significant event that demonstrates the Company will be unable or is unwilling to Maintain at least 25 New, Permanent Full-Time Positions at any time prior to the Performance Date.

(c) *Failure to Comply:* If the Company violates any term of this MOU, the Company shall repay the full amount of or amount received from the POV Grant to the VPA and if applicable, Company shall no longer be eligible for the unpaid portion of the POV Grant. This subsection shall apply even if such violation is discovered after the Performance Date.

(d) *Repayment Dates:* ***Such repayment shall be due from the Company to the VPA within sixty days of the date in which the VPA has determined and notified the Company of its failure to Maintain or to comply with Section 4(b).*** Any moneys repaid by the Company to the VPA hereunder shall be redeposited into The Port of Virginia Economic & Infrastructure Development Grant Fund. The VPA shall use its best effort to recover such funds, including legal action for breach of this MOU.

## **Section 5. Company Reporting.**

The Company shall provide, at the Company's expense, detailed verification reasonably satisfactory to the VPA of the Company's progress on the Obligations. Such progress reports will be provided annually, on March 31, 20\_\_, March 31, 20\_\_ and March 31, 20\_\_ covering the period through the prior 12 months.

With each such progress report, if applicable, the Company shall report to VPA the amount of TEUs or tonnage imported or exported through The Port of Virginia. If the company is involved in maritime commerce such as ship building and ship repair; dredging; marine construction; or offshore energy exploration and extraction, the Company shall provide a statement of the impact of the facility on the growth of The Port of Virginia in lieu of cargo verification.

**Section 6. Notices.**

Any notices required or permitted under this MOU shall be given in writing, and shall be deemed to be received upon receipt or refusal after mailing of the same in the United States Mail by certified mail, postage fully pre-paid or by overnight courier (refusal shall mean return of certified mail or overnight courier package not accepted by the addressee):

if to the Company, to:

with a copy to:

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if to the VPA, to:

with a copy to:

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**Section 7. Miscellaneous.**

(a) *Entire Understanding; Amendments.* This MOU constitutes the entire agreement between the parties hereto as to the POV Grant and may not be amended or modified, except in writing, signed by each of the parties hereto. This MOU shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. The Company may not assign its rights and obligations under this MOU without the prior written consent of the VPA.

(b) *Governing Law; Venue.* This MOU is made, and is intended to be performed, in the Commonwealth of Virginia and shall be construed and enforced by the laws of the Commonwealth. Jurisdiction and venue for any litigation arising out of or involving this MOU shall lie in the Circuit Court of the City of Richmond, and such litigation shall be brought only in such court.

(c) *Counterparts.* This MOU may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

(d) *Severability.* If any provision of this MOU is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

(e) *Subject to Available Funds.* This MOU is subject to appropriations by the Virginia General Assembly.

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**IN WITNESS WHEREOF**, the parties hereto have executed this Memorandum of Understanding as of the date first written above.

**VIRGINIA PORT AUTHORITY**

By \_\_\_\_\_

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

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

Date: \_\_\_\_\_, 20\_\_

\_\_\_\_\_

By \_\_\_\_\_

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

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

Date: \_\_\_\_\_, 20\_\_