

Report on current
Virginia law and best
practices as they relate
to the statute of
limitations on state
contracts for
construction services

Authority: Virginia Acts of Assembly, 2019, Chapter 856, Item 80

The Department of General Services (DGS) shall conduct a review of current Virginia law and best practices as they relate to the statute of limitations on state contracts for construction services and its fiscal implications, consistent with recommendations made by the Joint Legislative Audit and Review Commission (JLARC) in its June 2016 "Development and Management of State Contracts" report. DGS shall conduct this review in consultation with state and local government public bodies, the Office of the Attorney General, and representatives from the private sector construction community, to include contractors, insurers, and legal representatives. DGS shall report its findings and recommendations to the Chairmen of the House Appropriations and Senate Finance Committees, and the Governor by December 31, 2019. JLARC shall provide oversight of, and assistance as needed, to DGS pursuant to the review and completion of the report.

Agencies

Department of General Services

Joseph F. Damico, Director
Sandra Gill, Deputy Director
Matthew James, Deputy Director
Jessica Hendrickson, Director of Policy and Legislative Affairs
W. Michael Coppa, RA, Director, Division of Engineering and Buildings
Dena Potter, Director of Communications
Jennifer Boyd, Policy and Legislative Specialist
Killeen King, Communications Specialist

With assistance from

Office of the Attorney General

Curtis G. Manchester, Senior Assistant Attorney General

Joint Legislative Audit and Review Commission

Tracey R. Smith, Associate Director

Acknowledgement

DGS expresses its appreciation to the Office of the Attorney General, Joint Legislative Audit and Review Commission, institutions of higher education, Virginia Department of Transportation, other state and local government public bodies, and the private sector construction community involved in the collection and reporting of the survey data. DGS and staff are thankful for the cooperation and efforts by all parties in this reporting process.

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Executive Summary

The 2019 Appropriation Act required DGS to conduct a review of current Virginia law and best practices as they relate to the statute of limitations on state contracts for construction services and its fiscal implications.

Research revealed that there is no, and never has been, statute of limitations for the Commonwealth and its agencies to file a legal action for breach of contract. Under Virginia law, statutes of limitation do not apply to the Commonwealth unless it is expressly referenced in the statutes. Virginia's general statute of limitation for filing actions for breach of written contract does not refer to the Commonwealth. Nor did the General Assembly include a limitation for the Commonwealth's actions in connection with passage of the *Virginia Public Procurement Act* (VPPA).

Other states' statute of limitations vary: 22, including the District of Columbia, do not have a statute of limitations; 28 states have statute of limitations ranging from 3 to 15 years, with an average of 7.3 years. (See Appendix A for a state-by-state summary.)

DGS engaged stakeholder groups to better understand opinions about adding a statute of limitations to the Code of Virginia and to collect data on past claims that have been filed by state public bodies against construction contracts. Stakeholders included local government public bodies, state public bodies, institutions of higher education, contractors, architects and engineers, bonding and insurance companies, lobbyists, and industry legal representatives.

In consultation with JLARC and the OAG, DGS created a survey with 74 questions for the stakeholders. The survey solicited responses regarding knowledge of current law and the possibility of implementing a statute of limitations on state contracts for construction services. DGS solicited over 1,500 individuals and received 507 responses.

In October, DGS held stakeholder meetings over two days. The meetings allowed stakeholder groups the opportunity to hear an overview of the survey results and present their positions. One hundred twenty-one individuals registered and 93 attended, with 23 presenting their position.

The stakeholders presented varying opinions on whether Virginia should have a statute of limitations and, if so, what that limitation should be. Public bodies and institutions of higher education indicate that the law should remain unchanged. Private sector entities expressed a preference for establishing a statute of limitations, suggesting time frames from 5 to 10 years.

The fiscal implications related to statute of limitations are complex and indeterminate. The survey indicated that 58 percent of respondents were not aware that state agencies have no statute of limitations. Contractors, architects and engineers indicated that they now will consider their exposure and price services accordingly when responding to construction services procurement opportunities. Agencies indicated that adding a statute of limitations will result in a need for more inspections, which will increase agency costs. Should a statute of limitations be added and an agency discover a construction issue after the limitation has expired, agencies reported that they would need to seek an additional funding appropriation to address the issue.

The research conducted for this report does not indicate that a change to the Code of Virginia is needed related to a statute of limitations for construction services contracts for state agencies. Although adding a statute of limitations arguably could be financially beneficial to private sector entities, no data or information presented during DGS’s research was sufficiently compelling to support that doing so would meaningfully benefit either public bodies or the private sector. Moreover, it does not appear that state agencies frequently make claims against construction projects. Respondents to the survey reported that, in the last 15 years, 51 claims were made by state agencies on contracts for construction services. While more than 51 claims were likely made over the 15-year period, this is the best information currently available to estimate the frequency of claims, and the 51 claims reported represent only one percent of construction contracts awarded by state agencies during that period. In addition, the absence of a statute of limitations does not appear to deter contractors from doing business in the Commonwealth, as the number of registered contractors in Virginia increased over the past three fiscal years; in FY17 there were 590 contractors registered, in FY18 640 contractors were registered, and in FY19 677 contractors were registered.

Background

Previous Legislative Actions

During the 2018 and 2019 General Assembly sessions, legislation was introduced to amend and add language to the Virginia Public Procurement Act (VPPA). The bills, while not identical, sought to amend the section on 2.2-4340 Action on Performance Bond and add a section to create a statute of limitations for contracts for construction projects. None of the bills passed.

| Year | Bill# | Proposed SOL | Applicable |
|------|---------------------|---|--|
| 2018 | HB1084 | <ul style="list-style-type: none"> Five years after substantial completion of work on project | State, Higher Education, and Local Public Bodies |
| 2019 | HB 1667 and SB 1369 | <ul style="list-style-type: none"> Five years after completion of work on the project Latent defects: within five years of discovery of a latent defect but not more than 10 years from completion of work on the project Warranty or guaranty: brought no more than one year after the expiration | State (excluded VDOT), Higher Education, and Local Public Bodies |

Previous Study Related to Contracting

In 2016, JLARC conducted a study on the Development and Management of State Contracts in Virginia. The report included the identification and recommendations related to high-risk contracts. Recommendations included that, before execution, all contracts that meet the definition of high-risk be reviewed and approved by the Office of the Attorney General and DGS or the Virginia Information Technologies, as appropriate. The 2019 General Assembly Session passed legislation implementing these recommendations.

Review of Current Law

Statute of Limitations:

The Supreme Court of Virginia has explained that statutes of limitations do not apply to the Commonwealth and its agencies under the doctrine of nullum tempus, unless clearly expressed by statute. Commonwealth ex rel. Pross v. Bd. of Supervisors, 225 Va. 492, 495 (1983). This concept has been codified. Virginia Code §8.01-231 provides that no statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed to bar any proceeding by or on behalf of same.

In Virginia, as a general rule, the time limitation in a conventional statute of limitations begins to run when the cause of action accrues. For breach of contract, the cause accrues upon breach with damages. If there is an agreed period to cure, the right to sue will not arise until after the cure period ends without cure.

There is no, and never has been, statute of limitations for the Commonwealth and its agencies to file a legal action for breach of contract.

Statute of Repose:

Although Virginia's "statute of repose" applies to the Commonwealth (Va. Code § 8.01-250), it does not apply to actions for breach of contract and multiple other exceptions. The time limitation in a statute of repose begins to run from a specified occurrence of an event unrelated to the accrual of a cause of action. The expiration of the time extinguishes not only the legal remedy, but also causes of action whether accrued or not. School Bd. v. United States Gypsum Co., 234 Va. 32, 37 (1987).

Virginia's statute of repose precludes certain tort claims, such as negligence, for personal or property injury arising from defective or unsafe improvements to real property brought more than five years from conclusion of performing construction or related services.

Other States' Practices:

No Statute of Limitations: 22 states, including the District of Columbia, do not have statutes of limitations that apply to the state, either by statute or by the common law doctrine of *nullum tempus*.

Statute of Limitations: 28 states have a statute of limitations, either by statute or by exceptions to *nullum tempus*. Some of those states provide exceptions to the statute of limitations for:

- “General” public benefits or rights
- Government functions (but not for “proprietary” functions)
- Catastrophes (e.g., 2007 Minnesota Bridge Collapse)

Review of states construction policies and practices show that each state has its own approach to construction services, including how its projects are funded, and its capital outlay process is administered, making it difficult to compare to Virginia’s funding and capital outlay processes. Due to the vast differences in how Virginia functions compared to other states, DGS was not able to identify best practices related to a statute of limitations during this review period. (See Appendix A for a state-by-state summary.)

Consultation with stakeholders

Approach

DGS began identifying stakeholders in April 2019, once the language was included in the Appropriations Act. Through this process, DGS identified over 1,500 stakeholders consisting of local government, state public bodies, institutions of higher education, contractors, architects and engineers, bonding and insurance companies, lobbyists, and other legal representatives.

DGS worked with the OAG and JLARC to develop an electronic survey. The survey consisted of 74 questions and took an average of six minutes for each respondent to complete. The survey questions were designed to determine whether stakeholders were aware Virginia does not have a statute of limitations for state construction services procurements, gather information on claims made in the past 10 or more years on completed construction projects, and gauge opinions on how a statute of limitations of varying years would affect project costs.

DGS sent the survey to identified stakeholders in August 2019. DGS engaged organizations and asked them to share with their membership to ensure all stakeholders had an opportunity to participate. DGS encouraged stakeholders to share it with others outside their organization, as well.

The survey was open for three weeks to allow ample time for completion. DGS received 507 survey responses, with 80 percent (407) of the responses from architects, engineers, and contractors. The remaining responses were from local government (9 percent), bonding/insurance companies (5 percent), state public bodies and institutions of higher education (4 percent), and attorneys (2 percent).

In October, DGS held four stakeholder meetings over two days. Each three-hour meeting allowed stakeholder groups the opportunity to hear an overview of the survey results, present their position as it relates to a statute of limitations on state construction projects and engage in discussion with the Department. Over 1,500 invitations were sent to stakeholders and 121 individuals registered. Of the 121 registrants, 93 attended with 23 presenting their position. Additionally, DGS developed a webpage and posted the survey results and presentation materials from the meetings on its webpage (<https://dgs.virginia.gov/dgs/updates/sol-review/>). DGS allowed and encouraged stakeholders and interested parties to provide additional information for consideration.

Survey and Stakeholder Sessions

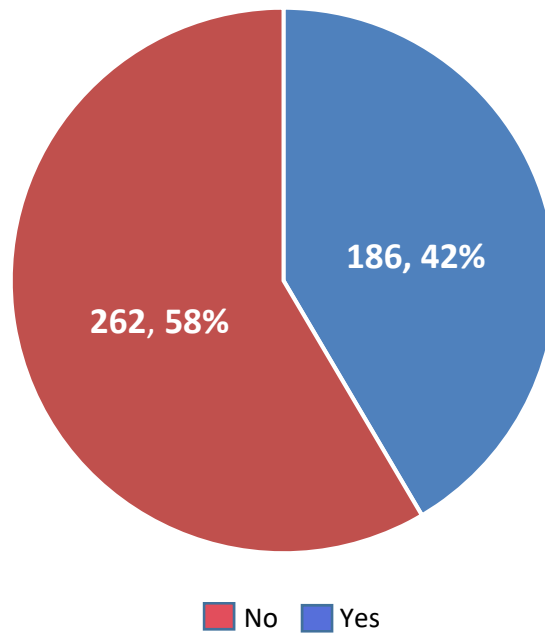
Data collected from the survey and stakeholder meetings show differences in opinion as to whether Virginia should enact a statute of limitations and, if so, how long it should be. State and local public bodies and institutions of higher education indicate that the law should remain unchanged. Architects and engineers want a statute of limitations enacted and have suggested 10 years. Contractors also support the addition, but express a desire for a five-year statute of limitations. Additionally, the survey and meeting data indicates much remains unknown about how the addition of a statute of limitations would affect state construction projects in Virginia. Forty-three percent of contractors and 50 percent of the architects and engineers who responded indicated that they did not know how adoption of a statute of limitations would affect performance and payment bonds, and insurance costs respectively. Of those respondents who were able to project how costs would be impacted, there was no clear consensus among either public or private entities as to whether costs would increase, decrease, or remain unchanged.

Some contractors at the stakeholder meetings indicated that their business practices related to state construction projects have changed because there is no statute of limitations. For example, some prime contractors have begun to apply the requirement to subcontractors, requiring the subcontractors to be subject to the same terms and conditions of their contract with the state, which would include an indefinite statute of limitations. Due to this requirement, a few subcontractors indicated they no longer sign contracts that have this requirement because they do not have the capacity to agree to an indefinite period.

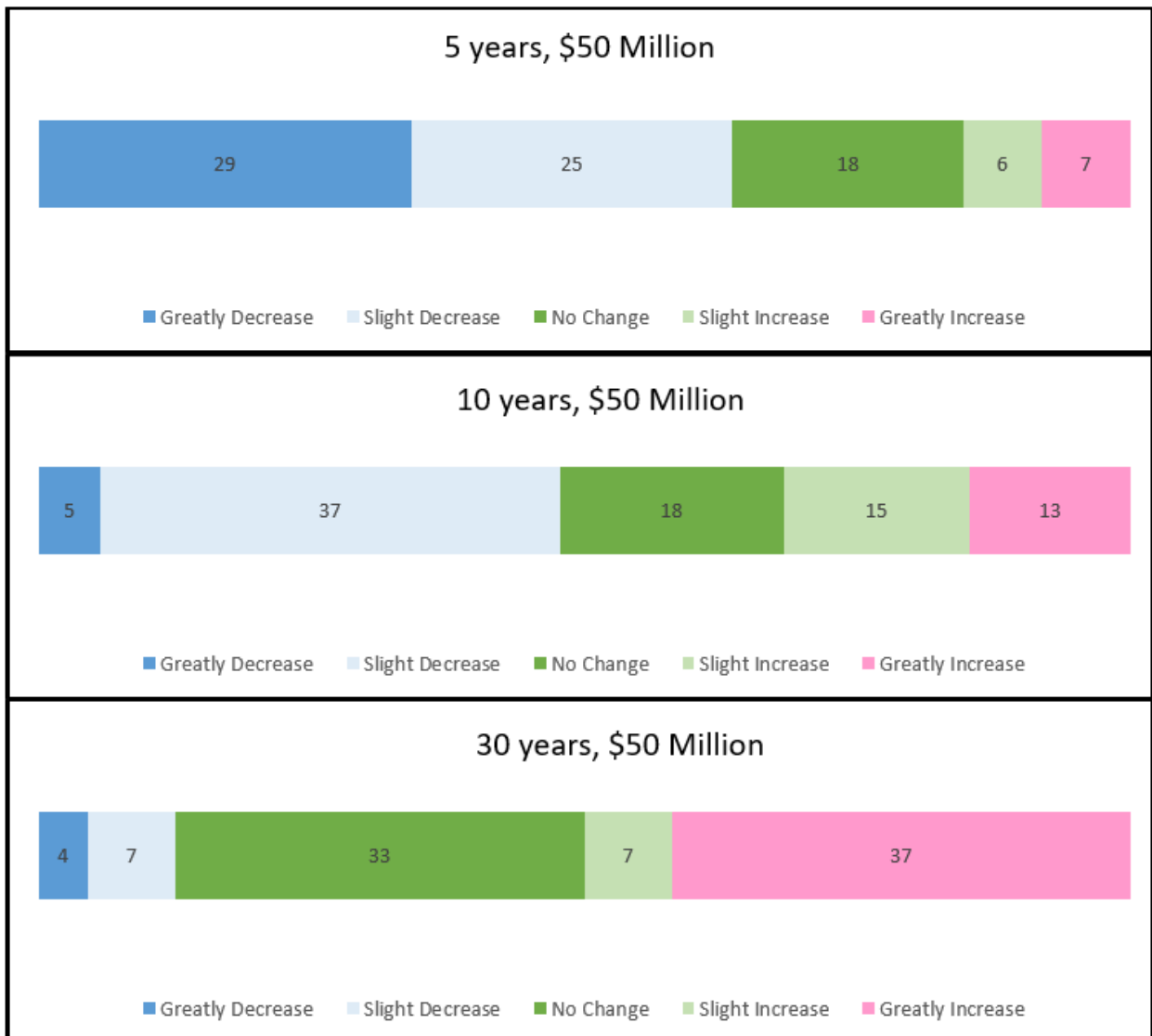
Summary of Survey Results:

The charts below represents stakeholder responses regarding awareness of current law and opinions on how the enactment of a statute of limitations would affect construction projects in Virginia. Respondents were not required to answer all questions.

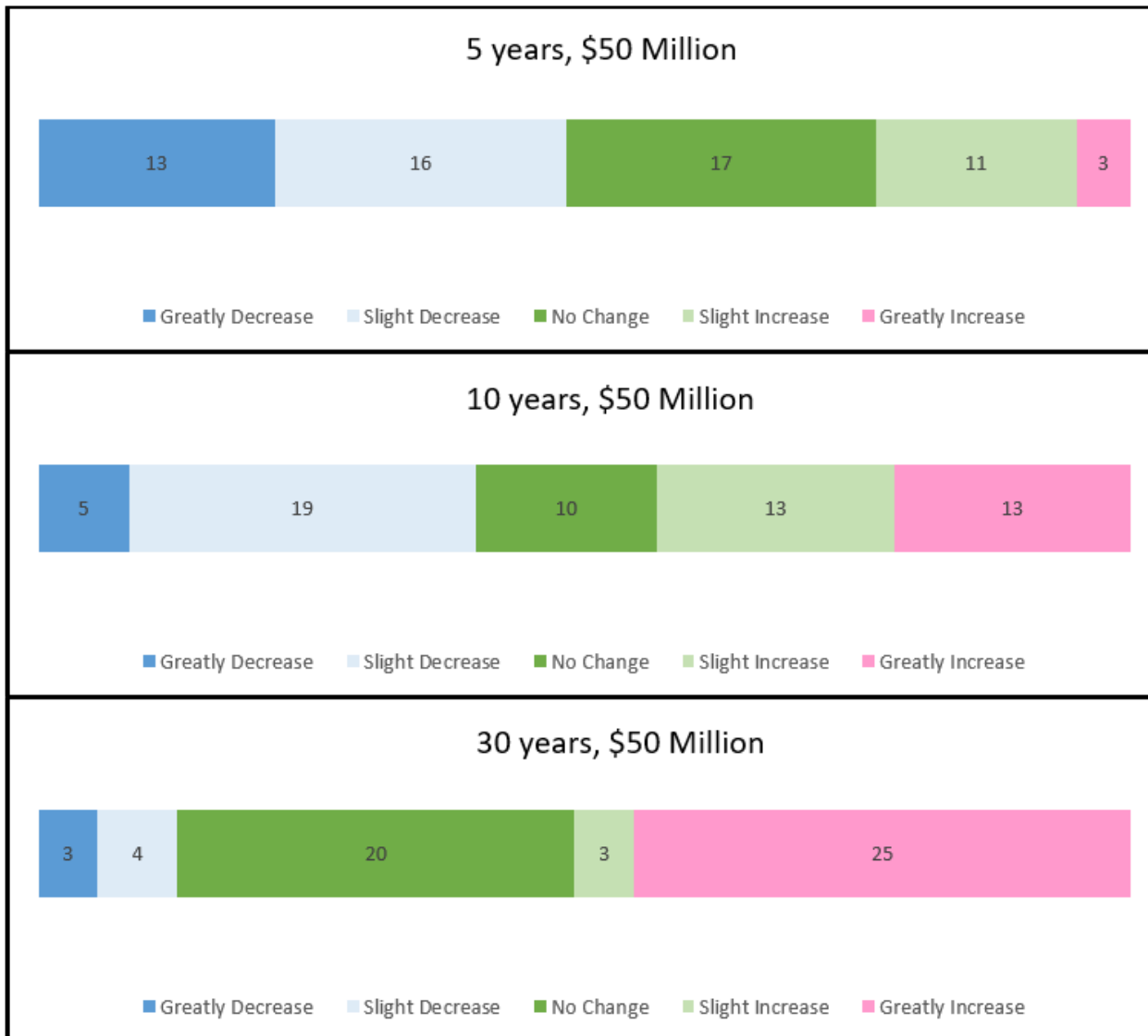
1. **Knowledge that Virginia and its agencies are not subject to a statute of limitations:** DGS asked if they were aware that there is no statute of limitations in Virginia. Of those who responded, 58 percent indicated they were not aware that state agencies do not have a statute of limitations. Respondents from both the private and public sectors reported being unaware.



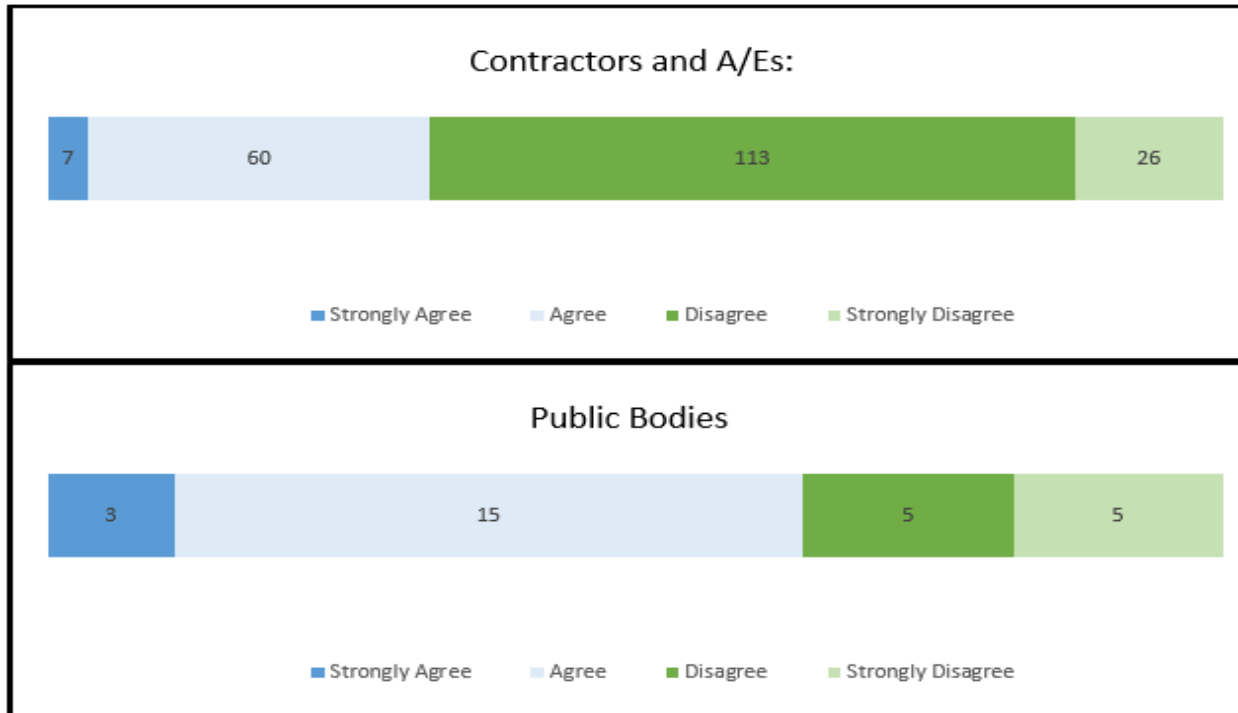
2. **Effect on architect and engineers' errors and omission insurance:** The survey asked how adoption of a statute of limitations would affect their errors and omissions insurance. The graphs below reflect the responses from the *architect and engineering stakeholders only*, indicating how their costs would be affected at five years, 10 years and 30 years for a \$50 million construction project. At 5 and 10 years, the majority of respondents say their cost would decrease or remain unchanged. At 30 years, respondents were split on whether they believe the cost would increase, or remain unchanged /decrease. (The graph below does not reflect an additional 86 architects and engineers (50 percent) who indicated they did not know how an adoption of a statute of limitations would affect their errors and omissions insurance.)



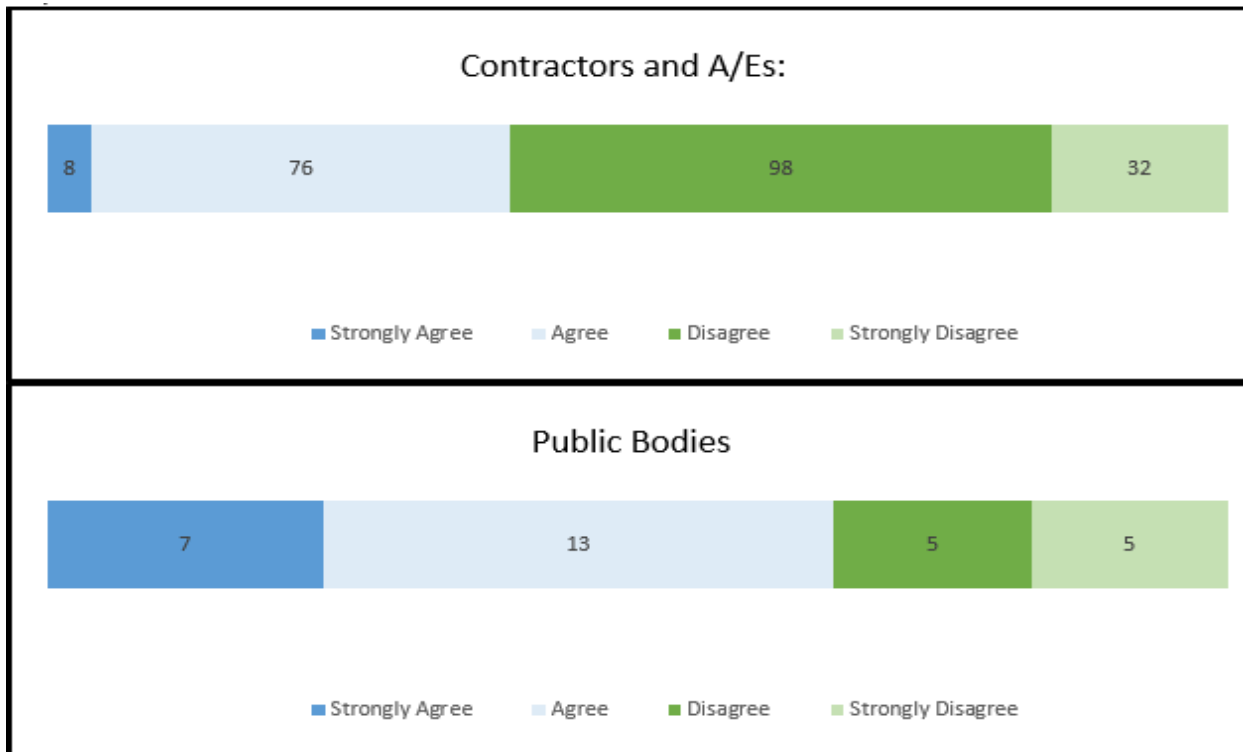
3. **Effect on contractors performance and payment bond costs:** The survey asked if Virginia adopts a statute of limitations, how it would affect their performance and payment bond costs. The graphs below reflect the responses from the *contractor stakeholders only*, answering how their costs would be affected at five years, 10 years and 30 years for a \$50 million construction project. At 5 and 10 years, a majority of respondents say their cost would decrease or remain unchanged. At 30 years, respondents were split on whether they believe the cost would increase, or remain unchanged/decrease. The graph below does not reflect an additional 46/49 contractors (43 percent) who indicated they did not know how an adoption of a statute of limitations would affect their performance and payment bond costs.)



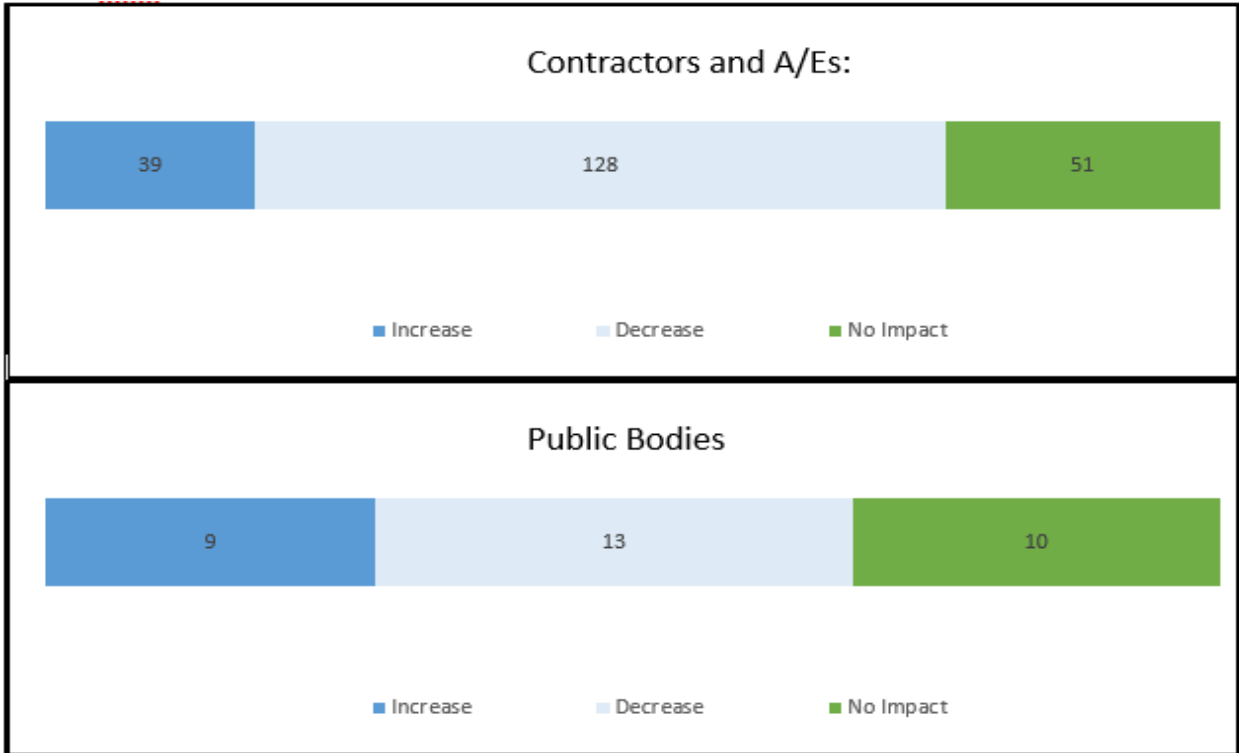
4. **Warranties:** The survey asked if adopting a statute of limitations would require a greater need for public bodies to extend warranty periods on construction projects. The responses show that most contractors, architects and engineers do not believe there will be a need to require additional extended warranties, while most public bodies believe there will be a need for extended warranties if Virginia adopts a statute of limitations on construction projects. (The graph below does not reflect an additional 40 respondents who indicated they did not know how an adoption of a statute of limitations would affect the need for extended warranties.)



5. **Inspections:** The survey asked if a statute of limitations on construction projects would require a greater need for more inspections during the construction process. About 40 percent of contractors, architects and engineers believe that this would be the case, and 67 percent of public bodies believe this will be the case. A greater number of inspections would increase costs for both public and private bodies. During the stakeholder meetings, a university representative stated that it already has increased its inspections on construction projects. (The graph below does not reflect an additional 30 respondents who indicated they did not know how an adoption of a statute of limitations would affect the need for more inspections during the construction process.)



6. **Overall costs of construction projects:** The survey asked if adding a statute of limitations (regardless of length of time) would affect the overall cost of construction/design projects. Most contractors, architects and engineers indicated they believed the overall costs on construction projects would decrease if Virginia adopts a statute of limitations. A majority of the public bodies also responded that they thought costs would decrease. (The graph below does not reflect an additional 83 respondents who indicated they did not know how an adoption of a statute of limitations would affect overall costs of construction projects.)



7. **Claims:** Stakeholders had the opportunity to provide data on any claims associated with public body construction projects. Respondents reported only 51 claims over the last 15 years. The information below reflects the 35 complete claim submissions received on the survey. The table does not include claims submitted that were incomplete.

| TIME BEYOND COMPLETION | TYPE OF CLAIM | AGGREGATE INITIAL VALUE OF CONTRACT | AGGREGATE INITIAL VALUE OF CLAIM | AGGREGATE SETTLED AMOUNT OF CLAIM |
|------------------------|-----------------------|-------------------------------------|----------------------------------|-----------------------------------|
| Less than 1 | Professional Services | \$ 331,835,000.00 | \$ 23,295,000.00 | \$ 11,030,000.00 |
| Less than 1 | Construction | \$ 15,675,000.00 | \$ 3,291,000.00 | \$ 1,091,000.00 |
| 1 - 3 | Professional Services | \$ 45,684,562.00 | \$ 10,406,500.00 | \$4,765,000.00 |
| 1 - 3 | Construction | \$ 16,968,000.00 | \$ 2,906,477.00 | \$ 1,420,096.00 |
| 4 - 6 | Professional Services | \$ 34,400,000.00 | \$ 1,565,000.00 | \$0.00 |
| 4 - 6 | Construction | \$ 11,300,000.00 | \$ 26,250,000.00 | \$108,000.00 |
| 7 - 9 | Professional Services | 0 | 0 | 0 |
| 7 - 9 | Construction | Do Not Know | \$ 2,000,000.00 | \$ 600,000.00 |
| 10 or more | Professional Services | 0 | 0 | 0 |
| 10 or more | Construction | \$ 79,000,000.00 | \$ 20,130,000.00 | \$12,000,000.00 |

Fiscal Implications

No change to Virginia law, with agencies not being subject to a statute of limitations

Fifty-Eight percent of survey respondents reported that they were not aware there is no statute of limitations for state agencies on state contracts for construction services. During the stakeholder meetings, contractors, architects and engineers who were not aware that a statute of limitations did not exist indicated that they would consider this when developing their costs to the agencies for construction services. Based on this feedback, it is possible that the costs of at least some contracts could increase even without a change to the statute.

Change to Virginia law, with agencies becoming subject to a statute of limitations

State agencies indicated that if a statute of limitations is implemented, there will be a need for more inspections, which will increase agency costs. Agencies will need to hire additional full-time staff or third-party inspectors, or possibly both. To mitigate risks, agencies may expand the extended warranty requirements in contracts, which will have a fiscal implication, as prices offered by contractors will be higher if agencies request longer warranty periods.

In instances where construction problems are discovered after a statute of limitations period has expired, agencies may not have funding to perform required repairs. In these cases, agencies may need to request additional funds from the General Assembly through the budgeting process.

Recommendation

The research conducted for this report does not indicate that a change to Virginia law related to a statute of limitations for construction services contracts is needed.

- In the past 15 years, the best available data indicates that only one percent of state agency construction contracts experienced a claim (51 out of 3,750 contracts). This low volume of claims suggests that contractors, architects, and engineers are generally not experiencing significant financial impacts from claims, although the impact of a single claim on an individual contractor, architect, or engineer could be significant.
- In many projects, if a problem arises, the owner and the contractor are able to find a resolution prior to making a claim. Creating a statute of limitations may incentivize state agencies to formally pursue a claim, rather than rely on informal resolutions, in order to protect their rights under the statute of limitations.
- Contractor registration data suggests that the absence of a statute of limitations is not having an impact on the number of contractors willing to do business in the Commonwealth. DGS data shows an increase in contractors registering to do business in the Commonwealth over the past three fiscal years; in FY17, there were 590 contractors registered, in FY18, 640 contractors were registered, and in FY19, 677 contractors were registered.

- More information is needed from other states that have statutes of limitations, especially those that have created exceptions to them, to develop a statute of limitations policy that optimizes state interests, should the General Assembly wish to modify current statute.

DGS recommends that it continue to collect data on (i) the number of contractors registered to provide construction services to Commonwealth agencies, (ii) the number of contractors responding to construction services solicitations, and (iii) feedback given to agencies by contractors, architects, and engineers on how the absence of a statute of limitations impacts their pricing for individual projects.

Appendices

Appendix A: Other States' Statutes of Limitations

| State | SOL | SOL Length (Years) | Exception from SOL** | Notes |
|---------------------------|-----|--------------------|----------------------|---|
| Alabama - AL | N | - | | |
| Alaska - AK | Y | 6 | | SOL enacted by statute, Alaska Stat. § 9.1.120 |
| Arizona - AZ | N | - | | Nullum tempus by statute, Ariz. Rev. Stat. § 12-510 |
| Arkansas - AR | N | - | | |
| California - CA | Y | 4 | | |
| Colorado - CO | Y | 3 | | SOL runs from discovery |
| Connecticut - CT | Y | 10 | | State construction-specific SOL enacted by statute, Conn. Gen. Stat § 52-584c |
| Delaware - DE | Y | 10 | | |
| District of Columbia - DC | N | - | | |
| Florida - FL | Y | 5 | | |
| Georgia - GA | Y | 6 | | |
| Hawaii - HI | N | - | | |
| Idaho - ID | N | - | | |
| Illinois - IL | Y | 10 | Y | SOL exception for "general public benefit" |

| State | SOL | SOL Length (Years) | Exception from SOL** | Notes |
|--------------------|------------|---------------------------|-----------------------------|---|
| Indiana - IN | N | - | | |
| Iowa - IA | N | - | | |
| Kansas - KS | N | - | | No SOL for "government" function, but SOL for "proprietary" function |
| Kentucky - KY | Y | 10 or 15 | | 15-year SOL period for contracts before July 15, 2014 & 10-year SOL period after; see Ky. Rev. State. §§ 413.090(2), 413.150, and 413.160 |
| Louisiana - LA | Y | 10 | Y | SOL as to state, but not for state agencies |
| Maine - ME | N | - | | |
| Maryland - MD | N | - | | |
| Massachusetts - MA | Y | 6 | | |
| Michigan - MI | N | - | | |
| Minnesota - MN | Y | 6 | Y | Following 2007 bridge collapse Court found no SOL where "catastrophe of historic proportion" |
| Mississippi - MS | N | - | | |
| Missouri - MO | Y | 10 | | |
| Montana - MT | Y | 8 | | |
| Nebraska - NE | Y | 5 | | |
| Nevada - NV | Y | 6 | | |

| State | SOL | SOL Length (Years) | Exception from SOL** | Notes |
|---------------------|-----|--------------------|----------------------|--|
| New Hampshire - NH | N | - | | |
| New Jersey - NJ | Y | 10 | | See N.J. Stat. § 2A 14-1.2 |
| New Mexico - NM | N | - | | |
| New York - NY | Y | 6 or 10 | | 10 years SOL for engineers and architects |
| North Carolina - NC | Y | 6 | | |
| North Dakota - ND | Y | 6 | | |
| Ohio - OH | N | - | | |
| Oklahoma - OK | Y | 5 | Y | SOL exception for "general public benefit" |
| Oregon - OR | Y | 10 | | SOL (10 years) from substantial completion |
| Pennsylvania - PA | Y | 12 | | |
| Rhode Island - RI | N | - | | |
| South Carolina - SC | Y | 8 | | See S.C. Code § 15-3-620 |
| South Dakota - SD | Y | 6 | Y | SOL exception for "known defective products" |
| Tennessee - TN | N | - | | No SOL for "government function" |
| Texas - TX | N | - | | No SOL for State |
| Utah - UT | N | - | | |

| State | SOL | SOL Length (Years) | Exception from SOL** | Notes |
|--------------------|------------|---------------------------|-----------------------------|--|
| Vermont - VT | Y | 6 | | See 12 V.S.A. § 511 |
| Virginia - VA | N | - | | |
| Washington - WA | N | - | | Nullum tempus by statute, Wash. Rev. Code § 4.16.160 |
| West Virginia - WV | Y | 10 | | |
| Wisconsin - WI | Y | 6 | | |
| Wyoming - WY | N | - | | No SOL for "traditional government functions" |

Last Updated: November 4, 2019

**Note: Exceptions are not fully encompassed/described/analyzed in this chart (e.g., statute of limitations for fraud running from date of discovery or products liability)

Appendix B: Breakdown of survey respondents

| | <i>A/E</i> | <i>Contractor</i> | <i>Attorney</i> | <i>Surety</i> | <i>State Govt/ Higher Ed</i> | <i>Local Govt</i> |
|--|-------------------------------|-----------------------------|--------------------|---------------------|----------------------------------|---------------------|
| <i># of total Responses (Total: 507)</i> | 269 53% | 138 27% | 10 2% | 24 5% | 19 4% | 47 9% |
| <i>Aware of no SOL in Virginia (yes)</i> | 74 out of 233 32% | 69 out of 131 53% | 6 out of 6 100% | 18 out of 22 82% | 7 out of 15 47% | 12 out of 41 29% |
| <i>Claims – responses on survey</i> | 19 (15 Prof Svc, 4 Constr) | 9 (4 Prof Svc, 5 Constr) | 0 | 0 | 4 (2 Prof Svc, 2 Constr) | 3 (3 Constr) |