

20105828D

SENATE BILL NO. 607

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary
on February 5, 2020)

(Patrons Prior to Substitute—Senators Norment and Cosgrove [SB 195])

A BILL to amend and reenact §§ 2.2-4340, 8.01-232, and 23.1-1017 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-4340.1 and 2.2-4340.2, relating to Virginia Public Procurement Act; statute of limitations on actions on construction contracts; statute of limitations on actions on performance bonds.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4340, 8.01-232, and 23.1-1017 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.2-4340.1 and 2.2-4340.2 as follows:

§ 2.2-4340. Action on performance bond.

No action against the surety on a performance bond shall be brought unless within five years after completion of the work on the project to the satisfaction of the Department of Transportation, in cases where the public body is the Department of Transportation, or, in all other cases, within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty that gave rise to the action contract. For the purposes of this section, completion of the contract is the final payment 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.

§ 2.2-4340.1. Statute of limitations on construction contracts.

No action may be brought by a state public body on any construction contract, including construction contracts governed by Chapter 43.1 (§ 2.2-4378 et seq.), unless such action is brought within 15 years after completion of the contract. For the purposes of this section, completion of the contract is the final payment 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 15-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. In no case shall such action be brought more than five years after written notice by the state public body to the contractor of a defect or breach giving rise to the cause of action. The state public body shall not unreasonably delay written notice to the contractor.

§ 2.2-4340.2. Statute of limitations on architectural and engineering contracts.

No action may be brought by a state public body on any architectural or engineering services contract, including architectural or engineering services contracts governed by Chapter 43.1 (§ 2.2-4378 et seq.), unless such action is brought within 15 years after completion of the contract. For the purposes of this section, completion of the contract is the final payment to the contractor pursuant to the terms of the contract. However, if the architectural or engineering services are for a construction project for which a final certificate of occupancy or written final acceptance of the project is issued prior to final payment, the 15-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. In no case shall such action be brought more than five years after written notice by the state public body to the contractor of a defect or breach giving rise to the cause of action. The state public body shall not unreasonably delay written notice to the contractor.

§ 8.01-232. Effect of promises not to plead statute.

A. Whenever the failure to enforce a promise, written or unwritten, not to plead the statute of limitations would operate as a fraud on the promisee, the promisor shall be estopped to plead the statute. In all other cases, an unwritten promise not to plead the statute shall be void, and a written promise not to plead such statute shall be valid when (i) it is made to avoid or defer litigation pending settlement of any case, (ii) it is not made contemporaneously with any other contract, and (iii) it is made for an additional term not longer than the applicable limitations period. No provision of this subsection shall operate contrary to subsections B and C of this section.

B. No acknowledgment or promise by any personal representative of a decedent shall charge the estate of the decedent, revive a cause of action otherwise barred, or relieve the personal representative of his duty to defend under § 64.2-1415 in any case in which but for such acknowledgment or promise, the decedent's estate could have been protected under a statute of limitations.

C. No acknowledgment or promise by one of two or more joint contractors shall charge any of such

60 contractors in any case in which but for such acknowledgment another contractor would have been
61 protected under a statute of limitations.

62 *D. Subsections A and C shall not apply to, limit, or prohibit written promises to waive or not to*
63 *plead the statute of limitations that are made in, or contemporaneously with, subcontracts of any tier*
64 *that are related to contracts for construction, construction management, design-build, architecture, or*
65 *engineering under Chapter 43 (§ 2.2-4300 et seq.) or 43.1 (§ 2.2-4378 et seq.) of Title 2.2; under the*
66 *policies and procedures adopted by any county, city, or town or school board; under Title 23.1; or*
67 *under authorizing provisions, policies, or procedures for procurement of such contracts by any public*
68 *body exempted from the foregoing; however, such waiver or promise not to plead applies only to*
69 *demands, claims, or actions asserted under such contracts by a public body. As used in this subsection,*
70 *"subcontract" includes any contract or purchase order to supply labor, equipment, materials, or services*
71 *to an entity awarded a contract with a public body or to any lower-tier entity performing work provided*
72 *for in such a contract.*

73 **§ 23.1-1017. Covered institutions; operational authority; procurement.**

74 A. Subject to the express provisions of the management agreement, each covered institution may be
75 exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), except for §
76 §§ 2.2-4340, 2.2-4340.1, 2.2-4340.2, and 2.2-4342, which shall not be construed to require compliance
77 with the prequalification application procedures of subsection B of § 2.2-4317, provided, however, that
78 (i) any deviations from the Virginia Public Procurement Act in the management agreement shall be
79 uniform across all covered institutions and (ii) the governing board of the covered institution shall adopt,
80 and the covered institution shall comply with, policies for the procurement of goods and services,
81 including professional services, that shall (a) be based upon competitive principles, (b) in each instance
82 seek competition to the maximum practical degree, (c) implement a system of competitive negotiation
83 for professional services pursuant to §§ 2.2-4303.1 and 2.2-4302.2, (d) prohibit discrimination in the
84 solicitation and award of contracts based on the bidder's or offeror's race, religion, color, sex, national
85 origin, age, or disability or on any other basis prohibited by state or federal law, (e) incorporate the
86 prompt payment principles of §§ 2.2-4350 and 2.2-4354, (f) consider the impact on correctional
87 enterprises under § 53.1-47, and (g) provide that whenever solicitations are made seeking competitive
88 procurement of goods or services, it shall be a priority of the institution to provide for fair and
89 reasonable consideration of small, women-owned, and minority-owned businesses and to promote and
90 encourage a diversity of suppliers.

91 B. Such policies may (i) provide for consideration of the dollar amount of the intended procurement,
92 the term of the anticipated contract, and the likely extent of competition; (ii) implement a
93 prequalification procedure for contractors or products; and (iii) include provisions for cooperative
94 arrangements with other covered institutions, other public or private educational institutions, or other
95 public or private organizations or entities, including public-private partnerships, public bodies, charitable
96 organizations, health care provider alliances or purchasing organizations or entities, state agencies or
97 institutions of the Commonwealth or the other states, the District of Columbia, the territories, or the
98 United States, and any combination of such organizations and entities.

99 C. Nothing in this section shall preclude a covered institution from requesting and utilizing the
100 assistance of the Virginia Information Technologies Agency for information technology procurements
101 and covered institutions are encouraged to utilize such assistance.

102 D. Each covered institution shall post on the Department of General Services' central electronic
103 procurement website all Invitations to Bid, Requests for Proposal, sole source award notices, and
104 emergency award notices to ensure visibility and access to the Commonwealth's procurement
105 opportunities on one website.

106 E. As part of any procurement provisions of the management agreement, the governing board of a
107 covered institution shall identify the public, educational, and operational interests served by any
108 procurement rule that deviates from procurement rules in the Virginia Public Procurement Act
109 (§ 2.2-4300 et seq.).