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SENATE BILL NO. 1184

Offered January 9, 2013

Prefiled January 9, 2013

A *BILL to amend and reenact §§ 2.2-1102, 2.2-1111, 2.2-2012, 2.2-4304, 2.2-4309, 2.2-4311.2, 2.2-4317, as it is effective and as it shall become effective, and 2.2-4321 of the Code of Virginia, relating to the Virginia Information Technologies Agency; procurement of information technology and telecommunication goods and services by state agencies.*

Patron—Vogel

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-1102, 2.2-1111, 2.2-2012, 2.2-4304, 2.2-4309, 2.2-4311.2, 2.2-4317, as it is effective and as it shall become effective, and 2.2-4321 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-1102. Additional powers of Department.

A. The Department shall have the following additional powers, all of which, with the approval of the Director of the Department, may be exercised by a division of the Department with respect to matters assigned to that division:

1. Prescribe regulations necessary or incidental to the performance of duties or execution of powers conferred under this chapter; and

2. Establish fee schedules that may be collectible from users when general fund appropriations are not applicable to the services rendered.

B. All statewide contracts and agreements made and entered into by the Department for the purchase of computers, software, supplies, and related peripheral equipment and services shall provide for the inclusion of counties, cities, and towns in such contracts and agreements. For good cause shown, the Secretary of Administration may disapprove the inclusion from a specific contract or agreement.

C. The Department may operate or provide for the operation of hazardous waste management facilities.

§ 2.2-1111. Purchases to be made in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.) and regulations of Division; exempt purchases.

A. All purchases made by any department, division, officer or agency of the Commonwealth shall be made in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.) and such regulations as the Division may prescribe.

B. The regulations adopted by the Division shall:

1. Include a purchasing plan that shall be on file at the Division and shall be available to the public upon request;

2. Require that before any public body procures any computer system, equipment or software, it shall consider whether the proposed system, equipment or software is capable of producing products that facilitate the rights of the public to access official records under the Freedom of Information Act (§ 2.2-3700 et seq.) or other applicable law;

3. Require state public bodies to procure only shielded outdoor light fixtures and provide for waivers of this requirement when the Division determines that a bona fide operational, temporary, safety or specific aesthetic need is indicated or that such fixtures are not cost effective over the life cycle of the fixtures. For the purposes of this subdivision, "shielded outdoor light fixture" means an outdoor light fixture that is (i) fully shielded so that no light rays are emitted by the installed fixture above the horizontal plane or (ii) constructed so that no more than two percent of the total luminaire lumens in the zone of 90 to 180 degrees vertical angle is permitted, if the related output of the luminaire is greater than 3200 lumens. In adopting regulations under this subdivision, the Division shall consider national standards for outdoor lighting as adopted by the Illuminating Engineering Society of North America (IESNA).

For any project initiated on or after July 1, 2003, the Virginia Department of Transportation shall design all lighting systems in accordance with current IESNA standards and recommended practices. The lighting system shall utilize fixtures that minimize glare, light trespass, and skyglow, all as defined by the IESNA, while still providing a comfortable, visually effective, safe, and secure outdoor environment in a cost-effective manner over the life cycle of the lighting system;

4. 3. Establish the conditions under which a public body may use, as a basis for the procurement of goods and nonprofessional services, a particular vendor's contract-pricing that has been negotiated and

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59 accepted by the U.S. General Services Administration;

60 ~~5.~~ 4. Establish procurement preferences for products containing recycled oil (including reprocessed
61 and rerefined oil products) and recycled antifreeze no later than December 31, 2002;

62 ~~6.~~ 5. Establish conditions under which a public body shall demonstrate a good faith effort to ensure
63 that state contracts or subcontracts for goods or services that involve the manual packaging of bulk
64 supplies or the manual assemblage of goods where individual items weigh less than 50 pounds be
65 offered to employment services organizations as defined in § 2.2-4301 that offer transitional or supported
66 employment services serving individuals with disabilities; and

67 ~~7.~~ 6. Establish the conditions under which state public bodies may procure diesel fuel containing, at a
68 minimum, two percent, by volume, biodiesel fuel or green diesel fuel, as defined in § 59.1-284.25, for
69 use in on-road internal combustion engines. The conditions shall take into consideration the availability
70 of such fuel and the variability in cost of biodiesel fuel with respect to unblended diesel fuel.

71 C. The Division may make, alter, amend or repeal regulations relating to the purchase of materials,
72 supplies, equipment, nonprofessional services, and printing, and may specifically exempt purchases
73 below a stated amount or particular agencies or specified materials, equipment, nonprofessional services,
74 supplies and printing.

75 **§ 2.2-2012. Procurement of information technology and telecommunications goods and services;**
76 **computer equipment to be based on performance-based specifications.**

77 A. Information technology and telecommunications goods and services of every description shall be
78 procured by (i) VITA for its own benefit or on behalf of other state agencies and institutions or (ii) such
79 other agencies or institutions to the extent authorized by VITA. *Except as authorized by VITA or*
80 *pursuant to specific statutory authorization, every authority, department, division, institution, officer,*
81 *agency, and other unit of state government shall purchase through VITA all telecommunications goods*
82 *and services of every description, whenever the costs for such goods and services are wholly or partially*
83 *paid from the state treasury.* Such procurements shall be made in accordance with the Virginia Public
84 Procurement Act (§ 2.2-4300 et seq.), regulations that implement the electronic and information
85 technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended,
86 and any regulations as may be prescribed by VITA. In no case shall such procurements exceed the
87 requirements of the regulations that implement the electronic and information technology accessibility
88 standards of the Rehabilitation Act of 1973, as amended.

89 The CIO shall disapprove any procurement that does not conform to the Commonwealth strategic
90 plan for information technology developed and approved pursuant to § 2.2-2007 or to the individual
91 strategic plans of state agencies or public institutions of higher education. *Any contract for information*
92 *technology or telecommunications goods or services that is entered into by a state agency or institution*
93 *without written authorization from VITA, shall be void.*

94 B. All statewide contracts and agreements made and entered into by VITA for the purchase of
95 communications services, telecommunications facilities, and information technology goods and services
96 shall provide:

97 1. *Provide* for the inclusion of counties, cities, and towns in such contracts and agreements.
98 Notwithstanding the provisions of § 2.2-4301, VITA may enter into multiple vendor contracts for the
99 referenced services, facilities, and goods and services.

100 2. *Require that before any public body procures any computer system, equipment, or software, it*
101 *shall consider whether the proposed system, equipment, or software is capable of producing products*
102 *that facilitate the rights of the public to access official records under the Freedom of Information Act*
103 *(§ 2.2-3700 et seq.) or other applicable law.*

104 C. VITA may establish contracts for the purchase of personal computers and related devices by
105 licensed teachers employed in a full-time teaching capacity in Virginia public schools or in state
106 educational facilities for use outside the classroom. The computers and related devices shall not be
107 purchased with public funds, but shall be paid for and owned by teachers individually provided that no
108 more than one such computer and related device per year shall be so purchased.

109 D. If VITA, or any agency or institution authorized by VITA, elects to procure personal computers
110 and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which
111 public bodies, as defined in § 2.2-4301, may purchase such goods from any vendor following
112 competitive procurement but without the conduct of an individual procurement by or for the using
113 agency or institution, it shall establish performance-based specifications for the selection of equipment.
114 Establishment of such contracts shall emphasize performance criteria including price, quality, and
115 delivery without regard to "brand name." All vendors meeting the Commonwealth's performance
116 requirements shall be afforded the opportunity to compete for such contracts.

117 E. This section shall not be construed or applied so as to infringe upon, in any manner, the
118 responsibilities for accounting systems assigned to the Comptroller under § 2.2-803.

119 F. *The Comptroller shall not issue any warrant upon any voucher issued by any using agency*
120 *covering the purchase of any information technology goods or services or telecommunications goods or*

services when such purchases are made in violation of any provision of this section.

§ 2.2-4304. Cooperative procurement.

A. Any public body may participate in, sponsor, conduct, or administer a cooperative procurement agreement on behalf of or in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, or the U.S. General Services Administration, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods and services.

A public body may purchase from another public body's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies, except for:

1. Contracts for architectural or engineering services; or
2. Construction in excess of \$200,000 by a local public body from the contract of another local public body that is more than a straight line distance of 75 miles from the territorial limits of the local public body procuring the construction. The installation of artificial turf or other athletic surfaces shall not be subject to the limitations prescribed in this subdivision. Nothing in this subdivision shall be construed to prohibit sole source or emergency procurements awarded pursuant to subsections E and F of § 2.2-4303.

Any public body that enters into a cooperative procurement agreement with a county, city, or town whose governing body has adopted alternative policies and procedures pursuant to subdivisions A 9 and A 10 of § 2.2-4343 shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.

In instances where a cooperative procurement arrangement for information technology or telecommunications goods or services is required by any authority, department, agency, or institution of the Commonwealth, such procurements must be conducted by the Virginia Information Technologies Agency on behalf of the Commonwealth and such cooperatively procured contracts must be established by the Virginia Information Technologies Agency on behalf of the Commonwealth. In instances where any authority, department, agency, or institution of the Commonwealth desires to purchase information technology and telecommunications goods and services from another public body's contract and the procurement was conducted on behalf of other public bodies, such purchase shall be permitted if approved by the Chief Information Officer of the Commonwealth. ~~Any public body that enters into a cooperative procurement agreement with a county, city, or town whose governing body has adopted alternative policies and procedures pursuant to subdivisions A 9 and A 10 of § 2.2-4343 shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.~~

B. Subject to the provisions of §§ 2.2-1110, 2.2-1111, 2.2-1120 and 2.2-2012, any authority, department, agency, or institution of the Commonwealth may participate in, sponsor, conduct, or administer a cooperative procurement arrangement on behalf of or in conjunction with public bodies, private health or educational institutions or with public agencies or institutions of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of goods and services, other than professional services. A public body may purchase from any authority, department, agency or institution of the Commonwealth's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. In such instances, deviation from the procurement procedures set forth in this chapter and the administrative policies and procedures established to implement this chapter shall be permitted, if approved by the Director of the Division of Purchases and Supply.

Pursuant to § 2.2-2012, such approval is not required if the procurement arrangement is for telecommunications and information technology goods and services of every description. In instances where the procurement arrangement is for telecommunications and information technology goods and services, such arrangement shall be permitted if approved by the Chief Information Officer of the Commonwealth. However, such acquisitions shall be procured competitively.

Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

C. As authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

1. Any authority, department, agency, or institution of the Commonwealth may purchase goods and nonprofessional services, other than telecommunications and information technology, from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government, upon approval of the director of the Division of Purchases and Supply of the Department of General Services;

182 2. Any authority, department, agency, or institution of the Commonwealth may purchase
183 telecommunications and information technology goods and nonprofessional services from a U.S. General
184 Services Administration contract or a contract awarded by any other agency of the U.S. government,
185 upon approval of the Chief Information Officer of the Commonwealth; and

186 3. Any county, city, town, or school board may purchase goods and nonprofessional services from a
187 U.S. General Services Administration contract or a contract awarded by any other agency of the U.S.
188 government.

189 **§ 2.2-4309. Modification of the contract.**

190 A. A public contract may include provisions for modification of the contract during performance, but
191 no fixed-price contract may be increased by more than ~~twenty-five~~ 25 percent of the amount of the
192 contract or \$50,000, whichever is greater, without the advance written approval of the Governor or his
193 designee, in the case of state agencies, or the governing body, in the case of political subdivisions. *For*
194 *statewide public contracts for information technology and telecommunications goods and services, in the*
195 *case of state agencies contract modifications must be approved by the Chief Information Officer of the*
196 *Commonwealth.* In no event may the amount of any contract, without adequate consideration, be
197 increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an
198 error in its bid or offer.

199 B. Any public body may extend the term of an existing contract for services to allow completion of
200 any work undertaken but not completed during the original term of the contract.

201 C. Nothing in this section shall prevent any public body from placing greater restrictions on contract
202 modifications.

203 **§ 2.2-4311.2. Compliance with state law; foreign and domestic businesses authorized to transact**
204 **business in the Commonwealth.**

205 A. All public bodies shall include in every written contract a provision that a contractor organized as
206 a stock or nonstock corporation, limited liability company, business trust, or limited partnership or
207 registered as a registered limited liability partnership shall be authorized to transact business in the
208 Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as
209 otherwise required by law.

210 B. Pursuant to competitive sealed bidding or competitive negotiation, all public bodies shall include
211 in the solicitation a provision that requires a bidder or offeror organized or authorized to transact
212 business in the Commonwealth pursuant to Title 13.1 or Title 50 to include in its bid or proposal the
213 identification number issued to it by the State Corporation Commission. Any bidder or offeror that is
214 not required to be authorized to transact business in the Commonwealth as a foreign business entity
215 under Title 13.1 or Title 50 or as otherwise required by law shall include in its bid or proposal a
216 statement describing why the bidder or offeror is not required to be so authorized.

217 C. Any bidder or offeror described in subsection B that fails to provide the required information shall
218 not receive an award unless a waiver of this requirement and the administrative policies and procedures
219 established to implement this section is granted by the Director of the Department of General Services
220 or his designee or by the chief executive of a local governing body. *For procurements of information*
221 *technology and telecommunications goods and services by state agencies, such waivers may only be*
222 *granted by the Chief Information Officer of the Commonwealth.*

223 D. Any business entity described in subsection A that enters into a contract with a public body
224 pursuant to this chapter shall not allow its existence to lapse or its certificate of authority or registration
225 to transact business in the Commonwealth, if so required under Title 13.1 or Title 50, to be revoked or
226 cancelled at any time during the term of the contract.

227 E. A public body may void any contract with a business entity if the business entity fails to remain
228 in compliance with the provisions of this section.

229 **§ 2.2-4317. (Effective until December 1, 2013) Prequalification generally; prequalification for**
230 **construction.**

231 A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or
232 construction, and consideration of bids or proposals limited to prequalified contractors. Any
233 prequalification procedure shall be established in writing and sufficiently in advance of its
234 implementation to allow potential contractors a fair opportunity to complete the process.

235 B. Any prequalification of prospective contractors for construction by a public body shall be pursuant
236 to a prequalification process for construction projects adopted by the public body. The process shall be
237 consistent with the provisions of this section.

238 The application form used in such process shall set forth the criteria upon which the qualifications of
239 prospective contractors will be evaluated. The application form shall request of prospective contractors
240 only such information as is appropriate for an objective evaluation of all prospective contractors
241 pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to
242 request, by checking the appropriate box, that all information voluntarily submitted by the contractor
243 pursuant to this subsection shall be considered a trade secret or proprietary information subject to the

provisions of subsection D of § 2.2-4342.

In all instances in which the public body requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.

At least thirty days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the public body shall advise in writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by a public body denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

C. A public body may deny prequalification to any contractor only if the public body finds one of the following:

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;

4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the public body has not contracted with a contractor in any prior construction contracts, the public body may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii) Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and

7. The contractor failed to provide to the public body in a timely manner any information requested by the public body relevant to subdivisions 1 through 6 of this subsection.

D. If a public body has a prequalification ordinance that provides for minority participation in municipal construction contracts, that public body may also deny prequalification based on minority participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are in accordance with the Constitution and laws of the United States and the Commonwealth.

E. The provisions of subsections B, C, and D, *which only apply to construction*, shall not apply to prequalification for contracts let under § 33.1-12 or any contracts for information technology or telecommunications goods and services let under § 2.2-2012.

§ 2.2-4317. (Effective December 1, 2013) Prequalification generally; prequalification for construction.

A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.

B. Any prequalification of prospective contractors for construction by a public body shall be pursuant to a prequalification process for construction projects adopted by the public body. The process shall be consistent with the provisions of this section.

305 The application form used in such process shall set forth the criteria upon which the qualifications of
306 prospective contractors will be evaluated. The application form shall request of prospective contractors
307 only such information as is appropriate for an objective evaluation of all prospective contractors
308 pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to
309 request, by checking the appropriate box, that all information voluntarily submitted by the contractor
310 pursuant to this subsection shall be considered a trade secret or proprietary information subject to the
311 provisions of subsection D of § 2.2-4342.

312 In all instances in which the public body requires prequalification of potential contractors for
313 construction projects, advance notice shall be given of the deadline for the submission of
314 prequalification applications. The deadline for submission shall be sufficiently in advance of the date set
315 for the submission of bids for such construction so as to allow the procedures set forth in this subsection
316 to be accomplished.

317 At least 30 days prior to the date established for submission of bids or proposals under the
318 procurement of the contract for which the prequalification applies, the public body shall advise in
319 writing each contractor who submitted an application whether that contractor has been prequalified. In
320 the event that a contractor is denied prequalification, the written notification to the contractor shall state
321 the reasons for the denial of prequalification and the factual basis of such reasons.

322 A decision by a public body denying prequalification under the provisions of this subsection shall be
323 final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

324 C. A public body may deny prequalification to any contractor only if the public body finds one of
325 the following:

326 1. The contractor does not have sufficient financial ability to perform the contract that would result
327 from such procurement. If a bond is required to ensure performance of a contract, evidence that the
328 contractor can acquire a surety bond from a corporation included on the United States Treasury list of
329 acceptable surety corporations in the amount and type required by the public body shall be sufficient to
330 establish the financial ability of the contractor to perform the contract resulting from such procurement;

331 2. The contractor does not have appropriate experience to perform the construction project in
332 question;

333 3. The contractor or any officer, director or owner thereof has had judgments entered against him
334 within the past ten years for the breach of contracts for governmental or nongovernmental construction,
335 including, but not limited to, design-build or construction management;

336 4. The contractor has been in substantial noncompliance with the terms and conditions of prior
337 construction contracts with a public body without good cause. If the public body has not contracted with
338 a contractor in any prior construction contracts, the public body may deny prequalification if the
339 contractor has been in substantial noncompliance with the terms and conditions of comparable
340 construction contracts with another public body without good cause. A public body may not utilize this
341 provision to deny prequalification unless the facts underlying such substantial noncompliance were
342 documented in writing in the prior construction project file and such information relating thereto given
343 to the contractor at that time, with the opportunity to respond;

344 5. The contractor or any officer, director, owner, project manager, procurement manager or chief
345 financial official thereof has been convicted within the past ten years of a crime related to governmental
346 or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6
347 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii)
348 Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States
349 or another state;

350 6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an
351 established debarment procedure from bidding or contracting by any public body, agency of another
352 state or agency of the federal government; and

353 7. The contractor failed to provide to the public body in a timely manner any information requested
354 by the public body relevant to subdivisions 1 through 6 of this subsection.

355 D. If a public body has a prequalification ordinance that provides for minority participation in
356 municipal construction contracts, that public body may also deny prequalification based on minority
357 participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority
358 participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are
359 in accordance with the Constitution and laws of the United States and the Commonwealth.

360 E. A state public body shall deny prequalification to any contractor who fails to register and
361 participate in the E-Verify program as required by § 2.2-4308.2.

362 F. The provisions of subsections B, C, and D, *which only apply to construction*, shall not apply to
363 prequalification for contracts let under § 33.1-12 *or any contracts for information technology or*
364 *telecommunications goods and services let under § 2.2-2012.*

365 **§ 2.2-4321. Debarment.**

366 Prospective contractors may be debarred from contracting for particular types of supplies, services,

367 insurance or construction, for specified periods of time. *Prospective contractors for information*
368 *technology and telecommunications goods and services may be debarred from contracting with state*
369 *agencies and institutions for such goods or services for specific periods of time pursuant to procedures*
370 *established in writing by the Virginia Information Technologies Agency.* Any debarment procedure shall
371 be established in writing for state agencies and institutions by the agency designated by the Governor
372 and for political subdivisions by their governing bodies. Any debarment procedure may provide for
373 debarment on the basis of a contractor's unsatisfactory performance for a public body.