

## 1 **Administrative Law: Practice Pointers and Developments**

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## 2 **Notable Administrative Law Cases (2018)**

City of Des Moines v. IDOT, 911 N.W.2d 431 (Iowa 2018)

Ghost Player, LLC v. IDED, 906 N.W.2d 454 (Iowa 2018)

Nance v. IDOR, 908 N.W.2d 261 (Iowa 2018)

## 3 **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- The Court considered whether IDOT had the statutory authority to promulgate administrative rules regulating automated traffic enforcement (ATE) systems located along primary roads.
- The enforcement of IDOT's rules resulted in the party cities being ordered to relocate or remove several of their ATE cameras.

## 4 **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

### Background

- Until 2014 IDOT had no formal rules governing ATE systems, but instead relied on informal guidelines.
  - Cedar Rapids, Des Moines, and Muscatine each received IDOT's agreement that they would install ATEs under these informal guidelines.
- In 2013 IDOT began rule-making procedures for rules regarding the regulation and restriction of ATE placement and usage on primary roadways.
  - The rule-making was done in accordance with the Iowa Administrative Procedures Act.

## 5 **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- The rules proposed provided that ATE systems:
  - Shall only be considered after other engineering and enforcement solutions have been explored and implemented;
  - Should not be used as a long-term solution for speeding or red-light running; and
  - Should only be considered in extremely limited situations on interstate roads because they are the safest class of any roadway in the state and they typically carry a significant amount of non-familiar motorists.
- The proposed rules also required advance approval by IDOT and a detailed "justification report" for any ATE system.
- Thereafter, localities would be required to submit detailed annual evaluations to assist IDOT in reevaluating each ATE system and deciding whether to allow its continued use.

6  **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- After the rules became effective, the three cities submitted an evaluation to justify the continued presence of the cameras.
- IDOT considered the submissions from the cities and ordered each of the cities to disable or move some of their ATE equipment, either because the equipment:
  - Violated the 1,000-foot rule;
  - Was beyond an area of concern; or
  - Because there were a high number of citations;
  - Because crashes had increased at the particular location since the camera was installed; or
  - Because the location in question experienced a low crash rate.

7  **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- Each city appealed.
- IDOT's director upheld each decision.
- Each city filed a petition for judicial review under 17A, and the petitions were consolidated.
- The cities challenged:
  - The infringement of their home rule authority;
  - The lack of statutory authority for IDOT to promulgate the rules;
  - The process IDOT followed in promulgating the rules, especially because the original proposed rules did not contain the 1,000-foot rule; and
  - Whether IDOT's directives under the rules to remove or disable specific cameras were arbitrary and capricious.

8  **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- The district court upheld both the rules and IDOT's decisions made pursuant to those rules, finding that IDOT had sufficient authority to promulgate the rules, and the procedure followed had been correct.
- The cities appealed and the Supreme Court retained the appeal.
- The Supreme Court considered whether IDOT's actions were beyond the authority delegated to the agency by any provision of the law or in violation of any provision of the law.

9  **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- The Supreme Court does not defer to the agency's interpretation of its own statutory authority to issue a rule unless the legislature has clearly vested that interpretation in the agency.
- Here, as none of the relevant statutes expressly gave IDOT interpretative authority, the Court was not persuaded that the legislature clearly vested IDOT with interpretative authority to determine its own authority.
- The Court pointed out that IDOT relied in part on general provisions, which contained generic terms like "jurisdiction" and "deems necessary" that the Court reasons were widely used in other areas of law besides transportation and were not "specialized terms within the expertise of the agency," citing *Renda*.
- IDOT also relied on its authority to eliminate "obstructions" from highway rights-of-way as found

in Iowa Code chapter 318, but this was especially unavailing to the Court as the legislature had provided its own definition for obstructions that the Court found did not include ATEs.

10  **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- The Court found that IDOT did not have authority from the legislature to issue rules regulating ATE systems.
- This was because IDOT's specific statutory grants of authority are in other areas and do not support the rules.
- The Court found that the general authority over "regulation and improvement of transportation" was too broad to sustain the rules, particularly in light of the specific grants of authority in other areas.

11  **City of Des Moines v. Iowa Dep't of Transportation, 911 N.W.2d 431 (Iowa 2018)**

- An agency cannot by rule expand or limit authority granted by statute.
- When the legislature has given an agency general rule-making authority but has also granted specific authority in particular areas, the agency cannot then extend the specific grants beyond their scope.
- Because the Court found IDOT lacked authority to issue the ATE rules, it did not reach the cities' additional arguments regarding the rule-making procedures or that the rules and their application were illogical and irrational, etc.

12  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

Iowa Film Tax Credit case

- Ghost Player, LLC entered into an agreement with IDED to produce a documentary named Field of Dreams Ghost Players.
- Upon the completion of the documentary, Ghost Player was to submit for approval to IDED their qualified expenditures, after which time IDED would review those expenditures and issue tax credit certificates to the project's investors.
- The tax credit certificates were not to exceed 25% of the qualified expenditures for the project.

13  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

- Ghost Player claimed over 2M in qualified expenditures, and IDED allowed qualified expenditures of \$246,455.
- The auditor explained they would not allow what Ghost Player claimed to be in-kind contracts.
- The auditor also found that many of the expenditures claimed were not paid by Ghost Player, but were paid by an entity named DreamCatcher Productions, which paid the vendors and then charged Ghost Player for those payments at a mark-up that was sometimes substantial.
- Interestingly, DreamCatcher Productions was owned and operated by the same people who owned and operated Ghost Player. The auditor also disallowed other expenditures.

14  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

- Ghost Player filed a breach of contract action in district court, alleging that IDED had breached its contract by not issuing tax credits for all qualified expenditures.
  - The State filed a motion to dismiss, claiming that the final tax determination was an "other agency action" that required Ghost Player to seek judicial review under the Iowa APA and that Ghost Player had failed to exhaust its administrative remedies.
  - The district court agreed with IDED.
- Ghost Player then filed an action under 17A in DC seeking to appeal the February 22, 2012 final tax credit determination as an "other agency action" and sought additional discovery.
- The district court held a hearing on the discovery issue in January 2016, but the actions related to this filing were stayed pending other procedural processes.

15  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

- In December 2015 the AG's office, acting as a representative of IDED, investigated Ghost Player's supposed in-kind agreements.
- In light of this investigation, IDED sent a Notice of Default of Contract stating that it had reason to believe Ghost Player submitted false documents and made false statements in support of its film tax credit claim.
  - IDED demanded fully-executed copies of the in-kind agreements Ghost Player were claiming. IDED later sent a Second Notice of Default of Contract that averred that Ghost Player submitted inflated and untrue cost information in support of the film tax credit. IDED claimed the costs of production were inflated by \$932,000.
- Ghost Player averred that IDED made a final determination of the issue of tax credits on February 22, 2012 and lacked the power or jurisdiction to revisit the issue with a new investigation. Ghost Player also requested a hearing to present evidence regarding its response to the Notices of Default.

16  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

- The Director took Ghost Player's request for a hearing as a request for a contested case hearing.
- Ghost Player served a motion to dismiss the action before DIA arguing that it should be dismissed for lack of subject matter jurisdiction.
- Ghost Player asserted the February 2012 determination of tax credits was a "final agency action" and was entitled to res judicata effect. Ghost Player said IDED's action was seeking to collaterally attack its own final agency decision by transferring the matter to DIA.
- IDED took this as Ghost Player's refusal to participate in a contested case hearing on this issue, and issued a final agency decision based on the evidence in its possession. The Director (IDED) then revoked all tax credit certificates issued to Ghost Player and instructed IDR not to honor the tax credit certificates.
- Ghost Player filed a petition for judicial review of agency action in district court, seeking judicial review of IDED's actions in issuing the two notices of default. Ghost Player claimed that the notices of default were outside the authority of the agency because an agency may not unilaterally vacate or modify a final agency decision.

17  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

- IDED asserted it had the authority to issue notices of default and impose remedies for uncured

breaches under the Iowa Code, IDED rules, and the contract.

- The district court held that IDED's 2016 action revoking the tax credits was an invalid collateral attack on the agency's 2012 action and was barred under the doctrine of claim preclusion.
- IDED appealed the district court's decision, and the Supreme Court retained the appeal.
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18  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

- The Court found the pivotal issue to be whether IDED's decision to award tax credits to Ghost Player on February 12, 2012 was entitled to preclusive effect that prohibited IDED from attempting to revoke those tax credits in light of the discovery of fraud.
- The Court noted that many jurisdictions, including Iowa, have followed Section 83 of the Restatement (Second) of Judgments in considering whether administrative actions are entitled to preclusive effect.
  - Under Section 83 "an adjudicative determination by an administrative tribunal" is conclusive if the proceeding "entailed the essential elements of adjudication."
  - Section 83 provides that the "essential elements of adjudication" include adequate notice, the right of a party to present evidence and legal argument, and the right to rebut evidence and argument by opposing parties.

19  **Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)**

- The Court considered the statute that established the Film Program, the administrative rules promulgated under the statute, and the contract between IDED and Ghost Player.
  - The contract was found to be notably one-sided.
  - The Court noted that IDED's actions were imbued with informality, that IDED didn't attempt to answer Ghost Player's claims, and there was no requirement that IDED make any formal findings of law or fact in response to Ghost Player's claims.
  - The Court found that the lack of procedural rights and trial-type opportunities to present evidence and argument strongly weighed against applying res judicata on behalf of either Ghost Player or IDED.

20  **Nance v. Iowa Dep't of Revenue, 908 N.W.2d 261 (Iowa 2018)**

The Court considered whether a post-mortem Family Settlement Agreement (FSA) was binding on IDR when:

- There was a Transfer on Death (TOD) agreement that provided for the transfer of the funds in question at the death of the owner;
- The FSA was entered into after the TOD was challenged; and
- The challenged TOD was never found to be invalid.

21  **Nance v. Iowa Dep't of Revenue, 908 N.W.2d 261 (Iowa 2018)**

Background

- Beverly Gardiner Nance was the contingent beneficiary on a TOD of a brokerage account from her late father-in-law.
- The children that Gardiner Nance's late husband had with his first wife contested the TOD, claiming that their grandfather and grandmother were mentally incapacitated at the time they signed the TOD. The grandchildren sued Gardiner Nance. The parties settled their dispute in

mediation and entered into a FSA.

- The estate claimed that the brokerage account proceeds were passed by operation of the FSA to the grandchildren and were thus exempt from inheritance tax under Iowa Code section 450.9 as property passing from their grandfather's lineal descendants.
- The estate filed a refund claim with IDR. IDR denied the refund claim. The estate transferred any refund claim to Gardiner Nance and the estate was closed.

#### 22 **Nance v. Iowa Dep't of Revenue, 908 N.W.2d 261 (Iowa 2018)**

- The ALJ concluded that the FSA, executed after the transfer of the accounts to Gardiner Nance through the TOD, had no bearing on whether a taxable event occurred when the accounts passed to Gardiner Nance.
  - The ALJ also determined that Gardiner Nance had failed to prove by clear, convincing, and satisfactory evidence that her father-in-law lacked sufficient mental capacity to execute the beneficiary designation.
- Gardiner Nance appealed the ALJ's decision and filed a motion to allow additional testimony. The motion was granted and the doctor whose testimony was referenced at the ALJ hearing testified at the hearing before the Director.

#### 23 **Nance v. Iowa Dep't of Revenue, 908 N.W.2d 261 (Iowa 2018)**

- The Director found that Gardiner Nance failed to meet her burden of proof on the issue of whether her father-in-law lacked capacity to sign the designation.
- Gardiner Nance appealed to the district court, which found for IDR. She then appealed to the court of appeals, which found for her.
- IDR filed an application for further review, which the Supreme Court accepted.
- The Supreme Court concluded that a FSA cannot alter the inheritance tax consequences of TOD when the taxpayer unsuccessfully challenges the validity of the transfer.

#### 24 **Nance v. Iowa Dep't of Revenue, 908 N.W.2d 261 (Iowa 2018)**

- The Court noted that the principle that the property in a TOD account becomes the property of the designated beneficiary immediately upon death presumes a valid contract.
  - There was no determination that the TOD agreement was invalid.
  - Gardiner Nance, as the party challenging the validity of the contract based on a lack of capacity, bore the burden of proof.
  - The Court overturned the court of appeals, noting that the holding from the court of appeals would allow parties to evade inheritance tax without any adjudication defeating facially valid beneficiary designations.
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#### 25 **Contested Case Practice Pointers**

Be Flexible

- You may be asked to present first, even if the State does not bear the burden of proof.

- The rules of evidence are relaxed; virtually everything that is submitted will be admitted into the record.
- Parties will often be given leeway when presenting their cases.
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#### 26 **Contested Case Practice Pointers**

Be Aware

- Know the burden of proof and standard of review.
- Know prior decisions and orders of your agency, as even those not resulting in litigation may be available for review.
- Little is gained in over-presenting a case.

#### 27 **Contested Case Practice Pointers**

Be Helpful

- Some cases arise from misunderstandings and can be resolved during the hearing.
- Know the agency process at issue and ideally the policy behind it.
- Know how the background statutes interact with the applicable agency rules.

#### 28 **HF2343: Amendment to 17A.23**

AN ACT PROHIBITING STATE AGENCIES FROM IMPLEMENTING OR ENFORCING ANY STANDARD, REQUIREMENT, OR THRESHOLD WITHOUT CLEAR AUTHORIZATION

#### 29 **New section 17A.23(4)**

Provides that an agency shall not IMPLEMENT or ENFORCE any STANDARD, REQUIREMENT, or THRESHOLD (including any term or condition of a permit or license) UNLESS such standard, requirement, or threshold is CLEARLY REQUIRED or CLEARLY PERMITTED by state statute or rule, federal statute or regulation, court ruling, or executive order or directive.

#### 30 **Legislative history**

Enrolled version of HF 2343 (and the Wisconsin statute upon which the bill appears to be based) provide that an agency can implement/enforce a standard, requirement, or threshold only if it is EXPLICITLY required or EXPLICITLY permitted by state or federal statute or rule

Q: What is the impact of changing "explicitly" to "clearly" ?

#### 31 **17A.23 – Construction – delegation of authority**

HF 2343 adds a new section to 17A.23 – which already provides that agencies have "only that authority or discretion delegated to or conferred upon the agency by law" and that an agency "shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency."

Q: What does the new language of 17A.23(4) add to this existing standard?

#### 32 **17A.3 Adoption of Rules**

17A.3(1)(c) requires an agency to adopt rules "embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers."

Q: What does the new language of 17A.23(4) add to this existing requirement?

33  **17A.2 Definitions**

17A.2(11)(f) defines "rule" as each agency statement of general applicability that implements, interprets, or prescribes law or policy, but does NOT include portions of staff manuals, instructions, or other agency statements setting forth criteria or guidelines to be used by agency staff in certain situations

Q: What is the interplay between this definition and the new 17A.23(4) ?

34  **Open Records Update**

New Advisory Opinions from IPIB

- Application of Iowa Code 22.7 to email addresses of agency board members
- Personal email addresses regularly used for public business may lose their "personal" nature and become public records
- Application of 22.7 to email addresses and cell phone numbers received from persons outside of government
- Definition of "documented reasons and rationale" under 22.7(11)(a)(5)
- Plan on how to document at the time of discipline
- Don't forget to provide notice to the employee under Iowa Code 22.15

35  **Trends in Government Contracts**36  **Information Technology:  
Project Governance/Oversight  
&  
Project Management**37  **Overview/Goals**

OCIO "is created for the purpose of leading, directing, managing, coordinating, and providing accountability for the information technology resources of state government and for coordinating statewide broadband availability and access." Iowa Code § 8B.3(1).

Responsibility to: "Establish[] an enterprise strategic and project management function for oversight of all information technology-related projects and resources of participating agencies." *Id.* § 8B.21 (e).

Goals:

- Solutions that can be utilized by multiple agencies;
- Reduce duplication and waste by consolidating applications and systems where possible, or leveraging pre-existing solutions;
- Facilitate ready transfer/exchange of data across multiple State systems;
- Promote projects that facilitate identifiable governmental objectives;
- On budget, on time;
- Estimate project cost over entire system lifecycle to reduce frequency of budget issues;
- Facilitate compliance with IT security requirements and improve State's cyber-security posture.

38  **Project Governance/Oversight**

"Project Initiation" (Idea) - > At end of Project Initiation, prior to Project Planning, obtain "Approval to Plan" from CIO (Business Justification for Project);

"Project Planning" - > At end of Project Planning, prior to Project Execution, obtain "Approval to Proceed"

- Submit "Project Charter," identifying:
    - Project Manager;
    - Scope;
    - Estimated Budget;
    - Anticipated Timelines and key Milestones;
    - Signed by agency head.
  - Submit any proposed Contracts/Purchasing Instruments to be executed.
- "Project Execution" - > GO!

#### 39 **Project Governance/Oversight**

"Project Change" - > Prior to implementing a significant Change (divergence from originally anticipated Budget, Timelines, Milestones) must obtain "Change Approval" from CIO by submitting Change Request. Change is significant where:

- Budget varies upwards by over fifteen (15%);
- Timelines or Milestones vary by more than thirty (30) days beyond previously approved Timelines or Milestones.

"Project Status Reports" - > Must submit Status Reports to CIO:

- For a Project with a Budget under \$500,000, on a monthly basis;
- For a Project with a Budget equal to or over \$500,000, on a weekly basis.

"Project Completion"/"Project Closeout" - > Must submit Project Closeout Report once Project is Complete.

#### 40 **Project Management**

Project Manager, when required:

- Estimated project value of less than or equal to \$100,000, must assign a Project Manager. No specific prior or formal experience is required.
- Estimated Project value of over \$100,000 but less than \$500,000, must assign a Project Manager who can demonstrate either:
  - Past experience managing at least one Project of similar size, scale, and complexity; or
  - Formal Project management training.
- Estimated Project value of over \$500,000, must assign a Project Manager who can demonstrate both:
  - Past experience managing at least one Project of similar size, scale and complexity; and
  - Formal Project management training.

#### 41 **Project Management**

Roles, responsibilities, duties, and standards of practice:

- Working with relevant agency stakeholders to document estimated Scope, Budget, Timelines/Milestones;
- Providing required information to and obtaining required approvals from OCIO in accordance with Project Governance/Oversight policy/processes outlined in prior slides;
- Assisting in identifying necessary procurement processes and facilitating in completion of procurement/contracting processes, including facilitating drafting of RFPs and statements of work and other Purchasing Instruments;
- Documenting Project Execution, including whether Project is hitting Budget, Milestone, and Timeline projections;

Project Manager, who may serve:

- State Personnel hired directly by agency or utilized through the OCIO Project Management Division; or
- Contractors.

42  **Vendor Appeals**

43  **Since 2010**

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*NCS Pearson, Inc.*, 18DASV0003 (Iowa Dep't of Admin. Servs. Feb. 14, 2018) (Proposed Decision), *dismissed as moot* *NCS Pearson, Inc.*, 18DASV0003 (Iowa Dep't of Admin. Servs. March 30, 2018) (Final Decision and Order) (Department of Education (DOE) procurement for statewide educational assessment).

*RA Outdoors, LLC*, 18DASV0004 (Iowa Dep't of Admin. Servs. July 3, 2018) (Proposed Decision) (Department of Natural Resources (DNR) hunting, fishing, and recreational vehicle licensing and registration system).

*Keystone Peer Review Org., Inc.*, 18006477 (Iowa Dep't of Human Servs. Aug 7, 2018) (Proposed Decision) (DHS quality improvement services for Medicaid).

*Automated Health Sys., Inc.*, 18007429 (Iowa Dep't of Human Servs. Oct. 2, 2018) (Proposed Decision) (DHS provider services).

*Public Consulting Grp.*, 18DASV0007 (Iowa Dep't of Admin. Servs. Oct. 18, 2018) (Proposed Decision) (DOE computer system relating to statewide special education services).

*Conduent State Health Care, LLC*, 18008339 (Iowa Dep't of Human Servs. forthcoming) (DHS administrative member services).

*Conduent State Healthcare, LLC v. Iowa Dep't of Human Servs.*, LACL141274 (forthcoming) (other agency action challenging decision to withdraw Notice of Intent to Award) (DHS Medicaid Management Information System).

46

Documenting Scoring Process/Committee Notes:

- Not subject to open-meetings law, detailed minutes not required;
- No specific law, rule, or policy requiring notes taken during committee meetings;
- Numerical scores agreed on during consensus-scoring process are, themselves, documentation;
- ALJs will not create documentation requirement through reference to federal procurement law.

Incumbency:

- Considering past performance in context of relevant selection criteria acceptable, and materially different that conferring benefit merely due to status as an incumbent;
- Incumbency can cut both ways: positive or negative;
- Can create conflict-of-interest issues where members of the evaluation committee worked closely with incumbent Vendor, especially where committee member is the contract manager; although neither practice is currently prohibited by applicable law, rule, or policy;
- Make sure competitive selection documents contain a provision permitting consideration of extrinsic information and clearly stating that past performance may be taken into consideration.

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Scoring inconsistencies where proposals are substantially similar:

- ALJs reluctant to second guess scoring process at that level because:
  - Comparing and scoring proposals is role of the evaluation committee;
  - Burden of proof is on challenger to demonstrate illegality, and competitive selection documents generally permit consideration of information located in other sections or extrinsic information.

Cost Proposals:

- Cost proposals frequently ask Vendors to identify optional items that are not included in overall cost score;
- Can make it difficult to conduct apples-to-apples comparison where cost proposal is not clear on what is required versus what is optional;
- Clear, well-thought-out cost proposals and itemization can help facilitate apples-to-apples comparisons and avoid issues;
- Don't forget to use the clarification process;
- Make sure to have the evaluation committee review and ratify (if it agrees) to cost proposal scores before making final award or communicating recommendation to final decision maker.

48

Historically, ALJs applied modified IAPA standards (17A.19(10)).\*

Iowa Total Care (MCO appeal):

- ALJ listed the typical grounds for appeal in decision;\*\*
- DAS Director specifically struck those grounds when issuing Final Decision.\*\*\*

49

DAS [Procurement Policy and Procedures Manual](#) being introduced and cited more often as potential basis to set aside awards. [Eighty-eight \(88\) page document](#).

District Court in *Noridian* concluded "protocols" prohibiting current contract managers from sitting on evaluation committee utilized in connection with other, recently-issued RFP warranted setting aside award, even though "protocol" was not specifically part of RFP subject to challenge.\*

Recent decisions referring to/citing procurement manual.\*\*

Authority to promulgate procedures outside of rulemaking process?: "The [DAS] director shall adopt rules establishing competitive bidding procedures." \*\*\*

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