



# Construction Law Section Newsletter

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## New Law Expands P3 Access in New Jersey

by Aaron S. Brotman

After a long wait and a few false starts, public-private partnerships (P3s) are coming to New Jersey. This August, Governor Phil Murphy signed into law New Jersey's first comprehensive public-private partnership law (S-865/A-1299), entitled "An Act Concerning Public-Private Partnerships for Certain Building and Highway Infrastructure Projects, and Amending and Supplementing Various Parts of the Statutory Law." The act becomes effective Feb. 10, 2019. It authorizes any local government unit subject to the Local Public Contracts Law, school district, and any state government entity or any state/county college (collectively public entities) to enter into a P3 contract with a private entity. Under the act, the P3 contract is "to be referred to as a public-private partnership agreement, that permits the private entity to assume financial and administrative responsibility for a project of, or for the benefit of, the local government unit."

Like many other states, New Jersey is seeking ways to fund a wide scope of projects at all levels of government, from small recreational facilities to larger infrastructure. To overcome budgetary gaps, the Legislature has elected to allow public entities to 'partner' with private businesses to construct, operate, and/or maintain these projects. How such partnerships will function is broadly outlined in the act but will necessarily take greater shape as public/private projects are conceived, commenced, and completed.

### The Act Seeks to Promote Private Investment through Flexibility and Incentives

The act seeks to lure private investment for public projects by making the process, and hopefully the result, more business friendly. Unlike New Jersey's prior, half-measure iterations of P3, including the existing but limited right for state/county colleges to enter into P3s, the act does not limit the type of facility subject to the agreement. Infrastructure projects, office buildings, athletic facilities, and other structures built for some public benefit are all included. While the state and quasi-independent agencies have significant flexibility to consider factors beyond price to enter into the most advantageous contract under the act, municipalities will now have similar freedom, so long as it is a P3 rather than a standard procurement.

The act does not require that private entities wait for public entities to seek out private partners. A private entity can take the initiative and propose a project that a public entity may have overlooked. The Legislature is betting that the private sector will see projects and opportunities that the public sector may not. One cannot know, of course, how many projects go undeveloped because a private developer cannot consolidate the land, develop its funding, or manage its operation without a dedicated public sector partner, but the act contemplates—probably correctly based on the popularity of P3 projects around the world, the nation, and even quasi-P3 projects in New Jersey—that the private sector will see the public sector as a reliable partner and will proceed where the development may otherwise have stalled.

The act also gives public entities remarkable freedom when entering into P3 arrangements. For example, the standard for determining the method by which the private entity will recover its initial investment is whatever arrangement is “deemed to be in the best interests of the public and the [public entity]” so long as the private entity operates the facility in accordance with the public entity’s standards. Additionally, the act is designed to facilitate and promote P3s by easing restrictions and limitations on project financing and cost recovery. So long as the private entity provides financing in whole or in part, the agreement may provide for the public entity to lease back the site and make routine payments to the private entity so long as the project remains available for public use or allow the private entity to collect some or all of the revenue generated by the facility.

A P3 arrangement provides another distinct procedural advantage: The private partner that assumes financial and administrative responsibility for a project need not comply with the strict procurement and contracting requirements of the Local Public Contracts Law or other statutes that would otherwise apply to the public entity were it to undertake the project on its own. The potential benefit can be significant in accelerating the partnering process and in freeing up the private entity to more efficiently bring construction trades online and operating. The state is relaxing the more formalized process otherwise required in order to attract a larger pool of private partners—perhaps even those who might normally not consider working on public projects due to bureaucracy.

The act seeks to encourage private financing of projects that serve the public by allowing public entities, including the Economic Development Authority (EDA), to

be the landlord or tenant on a project and issue bonds without having to adhere to procurement protocols and contracting requirements that would otherwise apply to the public entity. Additionally, because the P3 project is an essential public function, the act seeks to alleviate or eliminate tax liability, plus the P3 project is exempt from mechanic’s lien liability.

Then there is the effort to incentivize not just private capital, but private ingenuity—and spark private entity interest. The act provides, at the public entity’s option, for remuneration to the unsuccessful bidders where the public entity sees the opportunity for innovative but costly proposal development. The act understands that the private entity will not take part, may not even submit a proposal, without some clear way to recover its sunk costs.

### **The Act Seeks to Retain Real Public Benefits and Oversight**

Lest the Legislature be accused of selling out the public trust to private interests, the act is not all pro-business. In exchange for tax benefits and eased restrictions, the act demands that benefits flow down to the labor force. All individuals employed in the construction, rehabilitation, or maintenance of a P3-related facility must be paid at least the prevailing wage. Also, all building construction projects must contain a project labor agreement designed to promote employment opportunities for local residents. Construction professionals and firms must also be approved to work on P3 projects by the Division of Property Management and Construction or the New Jersey Department of Transportation, as applicable. The general contractor, construction manager, or design-build team must post a performance bond and a payment bond for the project in exchange for lien immunity. Additionally, if stipends are paid to unsuccessful bidders on more unique, complex projects, the public entity will then own that work product. Finally, the P3 agreement must be reasonably able to be completed within five years of approval.

Strong, focused oversight by the public is a key component of the scheme contemplated by the act. The public entity does not have total freedom to enter into a P3 agreement, and significant EDA oversight and involvement is anticipated. All proposed projects must be approved by the EDA prior to procurement and should—though they are not required to—meet green and/or sustainable building standards and construction initiatives. The act sets out the required components of

the application to the EDA when seeking approval. The minimum requirements are: 1) a description of the P3 agreement; 2) a description of the lease, including any lease of a revenue-producing facility; 3) the estimated costs; and 4) a timetable for completion. Plus, of course, whatever else the EDA deems necessary. The EDA also has the authority to revoke approval should it feel the project has deviated too far from what was approved.

Because the P3 projects anticipated by the act tend to be larger, the act permits the public entity to dedicate an existing property interest—whether it be land, improvements, or tangible property—for use on the project. Eminent domain rights may not be delegated to the private partner, but nothing in the act precludes the public entity from using eminent domain to secure property in anticipation of a P3 or as part of it.

Though a private entity may propose an opportunity to the public sector, the potential windfall to the eagle-eyed private entity is not as great as it may seem. Before the public entity can partner with a private entity—even one that has reached out to it—it must turn around and seek proposals from other private entities to ensure a fair, open, and competitive bidding process. This represents a balancing of the public interests; reasonably, the state must further the interests of the public by ensuring that, at the very least, the public entity makes its selection of a project and private partner in a reasonable, responsible manner that represents the best value to the public. However, this is balanced against the interest of incentivizing private entities to come forward with viable, interesting, workable projects, as the first mover loses its edge on the competition with a more public process and the incentives tilt towards entities who sit and wait for others to do their research for them. The first mover will likely retain significant advantages, such as a more complete proposal and grasp of the project economics. Additionally, because the procurement process is much less rigid, P3s will effectively always be a negotiated procurement, even where there are multiple proposals and bidders for the same project. This leaves the public entity in position to determine what solution—and what partner—provides the best value long term, not just what is the least expensive at the time of proposal.

## What to Make of it All

With the scarcity of large, developable parcels in high-demand areas across the state, a greater P3 presence should facilitate development by combining private ingenuity and capital with the governmental capability to coherently combine land into a format and circumstance that can spark the next great round of development across the state. The act is, like much legislation, a balancing act between private incentive, public flexibility, and oversight in the public interest. Whether it will encourage new, significant development projects around the state remains to be seen.

This author expects there will be significant private sector activity to take advantage of the act. P3 projects work best where there is a clear, relatively confident revenue stream discernable to the private entity, whose motivation is financial. From the public entity's perspective, while overall cost to the public is, and should be, a factor in the decision-making process, the review of potential projects will be much more holistic.

Finally, something to keep in mind is that the act directs the EDA to promulgate rules to support the implementation of a P3 scheme in New Jersey. Until those rules are firmly in place, the availability of P3 projects remains uncertain. The act is fairly clear in its purpose and general outline, but regulations will make or break the process.

Ultimately, this author believes, the act represents a positive step for the state. Some uncertainty remains, particularly how involved the EDA may become and how much cajoling and convincing public entities may need to not just accept that a P3 may be the best solution for a particular problem, but that they will need to treat them differently than a regular, competitive bid procurement. The potential for true, meaningful partnerships is real, and private entities that can see the opportunities and persuade the public side to take advantage of it may be in a position to create tremendous value for themselves and New Jersey as a whole. ■

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# Bid Protests: Important Procedural Steps to Utilize to Preserve Rights and Avoid Potential Mootness

by Damian Santomauro

**B**id protests are a species of dispute that typically involve a challenge by an unsuccessful bidder to a public entity's decision to reject its bid<sup>1</sup> or to award (or issue a notice of intent to award) a contract to another bidder.<sup>2</sup> The law underlying the bid protest may differ depending upon whether the public entity is a local or state government entity or agency.<sup>3</sup> However, almost all bid protests have several things in common: 1) they move very fast (and almost always involve emergent applications); 2) they involve high stakes with a winner and loser and no realistic ability to settle,<sup>4</sup> and 3) they do not permit claims for money damages.<sup>5</sup> These characteristics implicate the processes by which bid protests are addressed at both the initial level and in any appeal, and highlight the importance of employing procedural mechanisms to preserve the bidder's rights as the protest proceeds. Specifically, as the New Jersey Supreme Court has cautioned,<sup>6</sup> prudent bidders should, at every step of the process, take steps to prevent the public entity from moving forward with the procurement to avoid a court finding that the protest has become moot.

## Failure to Stay Public Entity Action Can Moot the Protest

Under New Jersey law, the doctrine of mootness bars an action "when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy."<sup>7</sup> Indeed, "[i]t is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed."<sup>8</sup> As the court observed in *Anderson v. Sills*:

There are two basic reasons for this doctrine. First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system

that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed.<sup>9</sup>

In *Statewide Hi-Way Safety, Inc. v. Dept. of Transp.*,<sup>10</sup> the Appellate Division considered the application of these principles in the context of a bid protest regarding the New Jersey Department of Transportation's rejection of a contractor's bid on the grounds that its bid for the cost component of the subject highway project exceeded the maximum it could be in light of its bid rating classification, and the department's award of the contract to another contractor. The contractor filed an appeal of the department's determination with the Appellate Division, arguing its bid was improperly rejected and the contract awardee's bid should have been rejected. It also filed an emergent application to stay the department's award to the other contractor.

The Appellate Division denied the emergent application and the appeal was heard in the normal course. However, during the pendency of the appeal, the subject highway construction project had proceeded and, by the time of oral argument, was substantially completed.<sup>11</sup> Under such circumstances, the Appellate Division held that "we must dismiss the appeal as moot," stating:

It is, thus, too late to order rebidding or to award the contract to another bidder. Any order of this court to terminate the project at this juncture would be contrary to the public interest.<sup>12</sup>

As the Court further noted, it "would be contrary to the public interest to void the contract already awarded even for any remaining uncompleted portion of the road construction."<sup>13</sup>

Despite finding that appeal was moot, the Appellate Division addressed, on public interest grounds, the substantive issue of whether the contract awardee's bid should have been rejected because it was not totaled when submitted and, therefore, was not read by the department at the bid opening. Ultimately, the court held that this failure was a material deviation of the department's statutory procurement requirements that would have compelled rejection of the contract awardee's bid had the appeal not been mooted<sup>14</sup>—undoubtedly of small consolation to the appellant. Interestingly, the court's opinion appears to second guess its earlier decision to deny the appellant's emergent application for a stay, and, importantly, provides guidance for courts confronting such applications in cases involving bid protests.

Specifically, the court closed its opinion by stating:

We denied emergent relief to Statewide when a remedy was available, undoubtedly due to the deference we must give to the Commissioner's determination concerning its pre-bid qualification status and because we then thought the electronic bulletin board evidenced the absence of any possibility of fraud or corruption with respect to this award. We note, however, that we are cognizant of the need to grant stays, pending appeal, in cases like this which reflect a statutory deviation from the required bidding process. As the authority with jurisdiction to review final actions of a State administrative agency, we recognize our obligation to enter a stay to prevent some threatening, irreparable mischief which should be averted until opportunity is afforded for a full and deliberate investigation of the case.<sup>15</sup>

New Jersey courts have often followed this guidance and granted stays pending appeals in bid protest matters.<sup>16</sup>

Whereas the Appellate Division's decision in *Statewide Hi-Way Safety, Inc.* regarding stays in appeals of bid protest matters was directed at courts, the New Jersey Supreme Court's decision in *Barrick* directed its ruling at parties. The *Barrick v. State* decision involved the New Jersey Division of Property Management and Construction's award of a contract for the lease of office space to the lowest bidder even though it had not complied with the bid specification's requirement that the site location

be within one-quarter mile of public transportation. After an unsuccessful bidder's protest was denied by the division, that bidder filed an appeal with the Appellate Division without seeking a stay.<sup>17</sup> The Appellate Division reversed the division's determination, but, in the interim, the state had expended resources in the performance of the contract with the successful bidder.<sup>18</sup> Ultimately, the New Jersey Supreme Court reversed the Appellate Division's decision on the grounds that the division's decision "was not arbitrary and capricious and that it was error for the appellate panel to have substituted its judgment for that of the [Division's] Director."<sup>19</sup>

The Supreme Court's decision is noteworthy not for its ruling on the substance of the bid protest, but for its strong cautionary language regarding the need for appellants in a bid protest appeal to seek a stay pending appeal. Although the Court declined to issue a "bright-line rule in favor of mootness" when an unsuccessful bidder fails to seek a stay in an appeal of a bid protest, it expressed significant concern regarding bidders who fail to do so and emphasized that "an unsuccessful bidder, who does not promptly seek a stay of a lease bid award under Rule 2:9-8 when appealing an award determination, acts at his, her, or its peril."<sup>20</sup> The Court further noted:

For example, if the bidder does not seek a stay, by the time the unsuccessful bidder's appeal is heard the process of securing multi-Branch approvals and expenditure of funds on a building project—whether it involves a lease or other construction work—likely will have proceeded apace and the equities will be against the provision of relief on the merits. We caution against any expectation that a merits review will be readily available to such unsuccessful bidders who sit on their right to seek a stay and simply hope for a remedy down the road. The appellate process is equipped for stay applications in bidding disputes and that relief ought to be pursued as a matter of course.

Contractual matters in which the State and its public entities engage must proceed with alacrity. The bidding administrative process is premised on prompt identification, review, and correction of any contracting process errors. The State's business and the public interest in the State's contractual endeavors should not be unreasonably delayed while an unsuccessful bidder seeks

another level of review. Appellate review should be pursued with similar alacrity. Rule 2:9-8 provides an avenue to accommodate the interests of all parties in a swift and fair review of alleged improprieties in the bid award process.<sup>21</sup>

Certainly there are public procurements where the absence of a stay of the contract award will not moot the bid protest because of the subject matter of the contract at issue, the length of time of the contract, or the weighing of public interests favoring the protection of the integrity of the public bidding process over the potential impact in disrupting an existing contract. Relying on such grounds, the Appellate Division recently issued a pair of decisions reversing decisions by state entities even though no stay of the contract awards had been granted (although stays were sought in both cases).<sup>22</sup> Nevertheless, the New Jersey Supreme Court's decision in *Barrick* strongly militates in favor of seeking a stay whenever appealing a decision in a bid protest matter to mitigate the risk that the protest could become moot. Indeed, whether at the initial phase of a bid protest or during the appellate process, parties challenging the actions of a public entity should, at every available opportunity, endeavor to stay the subject procurement from proceeding further until the protest is fully and finally resolved.

### Practice Tips

The appropriate forum for bid protests will depend upon the specific public entity involved (*i.e.*, whether it is a local or state public entity). As the Supreme Court stated in *Infinity Broadcasting Corp. v. New Jersey Meadowlands Comm'n*:

The overarching rule in New Jersey has long been that every proceeding to review the action or inaction of a local administrative agency [is] by complaint in the Law Division and that every proceeding to review the action or inaction of a state administrative agency [is] by appeal to the Appellate Division.<sup>23</sup>

However, regardless of the forum for the protest, it is important that the unsuccessful bidder attempt to forestall the public entity from proceeding with the award of a contract to another bidder. As noted above, contract award, followed by contract performance, can undermine a bid protest because courts, depending upon the nature

of the procurement, are often reluctant to disrupt ongoing public contracts because of the potential costs and adverse impact on the public interests. Thus, bidders should initiate a protest as soon as a basis to challenge the public entity's decision is identified, and should seek to restrain or stay the public entity's action at every opportunity.

In matters involving local agencies, a bid protest is typically initiated by way of filing an action in lieu of prerogative writs<sup>24</sup> in the Law Division.<sup>25</sup> Such actions should be accompanied by an order to show cause application<sup>26</sup> seeking to temporarily restrain the local public entity from proceeding with the contract award during the pendency of the action.<sup>27</sup> The application for temporary restraints will be governed by the well-settled standards for interlocutory injunctive relief set forth in *Crowe v. De Gioia*.<sup>28</sup> However, application of the *Crowe* factors is less rigid in most bid protest cases because the unsuccessful bidder is simply seeking to preserve the *status quo*.<sup>29</sup>

Conversely, in matters involving state entities, a bid protest is made in the first instance to the state entity pursuant to procedures set forth in the bid solicitation or the public entity's regulations.<sup>30</sup> Even in instances where state entities have not enacted formal protest procedures, bidders have a right to protest the decision under due process principles.<sup>31</sup> Under the principles enunciated by the New Jersey Supreme Court in *Commercial Cleaning Corp. v. Sullivan*, the state entity should restrain proceeding with the contract unless and until it has made a final decision on the protest.<sup>32</sup> Certainly, when making a protest to the state entity it is prudent practice to request that any contract award be stayed pending the outcome of the protest.

If the initial phase of the bid protest results in an adverse decision by the Law Division (in the case of a protest of a public entity procurement)<sup>33</sup> or the state agency (in the case of a state procurement), an unsuccessful bidder may want to engage in the next phase of the protest—an appeal to the Appellate Division. In the case of the former, the appeal is of the trial court's decision pursuant to N.J. Ct. R. 2:2-3(a)(1), while the latter involves an appeal of final agency decision pursuant to N.J. Ct. R. 2:2-3(a)(2).

It is imperative that the protesting bidder who seeks appellate review seek a stay pending appeal. If the appeal is from an interlocutory order of the trial court, the bidder should seek a stay of the matter pending appeal with the trial court. Similarly, if the appeal is from a final decision of the state agency, the bidder must first request

that the state agency stay the final agency decision.<sup>34</sup> This is often done in the protest submission by requesting that the state agency stay the final decision if it is an adverse to the protester.

At the time the appeal is filed, the bidder should also seek an emergent stay from the Appellate Division. The procedure for seeking an emergent stay pending appeal involves filing an application for permission to file an emergent motion pursuant to N.J. Ct. R. 2:9-8.<sup>35</sup> In effect, this emergent application seeks a temporary stay while the Appellate Division considers a more formal motion for a stay pending appeal pursuant to N.J. Ct. R. 2:8-1, although the Appellate Division may collapse the two into one decision that grants or denies a stay pending appeal. The application is typically filed with the Appellate Division judge on emergent duty who can issue a temporary stay without notice until the Appellate Division acts upon the motion for a stay pending appeal.<sup>36</sup> If the application is denied, the bidder can seek review by the New Jersey Supreme Court. Any appeal to the New Jersey Supreme Court should, again, include an emergent application for a stay pending appeal pursuant to N.J. Ct. R. 2:9-8.<sup>37</sup>

Applications for stays pending appeal are governed by the *Crowe* factors and a party seeking such a stay “must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant’s claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were.”<sup>38</sup> The public interest may also be considered in cases of significant public importance.<sup>39</sup>

As is the case with other types of applications for injunctive relief, a more relaxed standard is applied in cases, such as bid protests, where the stay application seeks to preserve the *status quo*.<sup>40</sup> Moreover, as the Appellate Division noted in the *Statewide Hi-Way Safety, Inc.* decision, New Jersey courts should not hesitate to grant such emergent applications for a stay pending appeal to prevent mootness and ensure the integrity of the public procurement process is maintained. Thus, there is little reason not to make such applications when filing an appeal in a bid protest matter—particularly in light of the potential adverse consequences that can arise when a stay is not sought.

## Conclusion

Bid protests are high-stakes matters that often proceed swiftly because of the public interest involved in proceeding with the subject procurement. Public entities and winning bidders often want to move forward with the procurement despite the pendency of a protest, and an unsuccessful bidder who ignores this reality exposes itself to the risk that their protest may become moot before it is finally adjudicated on the merits. However, New Jersey’s Court Rules provide for certain procedural mechanisms that a bidder can utilize in an effort to preserve their protest. While a variety of factors (including, for example, cost, likelihood of success, value of the procurement, etc.) can impact the strategic decisions that an unsuccessful bidder may make, the following procedural actions should be considered:

- Complaints filed in the Law Division should be accompanied by an order to show cause application seeking temporary and permanent injunctive relief preventing the local public entity from proceeding with its decision;
- A protesting bidder should closely adhere to a state entity’s protest procedures to avoid the state entity invalidating the protest on technical grounds;
- A bid protest filed with a state entity should request that any contract award be stayed until the state entity issues a final agency decision resolving the protest in favor of the bidder (or pending appeal in the event the final agency decision is adverse to the bidder); and
- Any appeal of a trial court’s decision or a final agency decision regarding a bid protest should be accompanied by an emergent application for a stay pending appeal.

The foregoing steps do not guarantee success on the ultimate merits of the protests, and there is the potential for adverse rulings each step of the way. However, failure to employ these steps may result in the premature resolution of the bid protest or Pyrrhic victory in which an appellate court technically rules in the bidder’s favor on the merits of an issue even though the issue on appeal is moot. ■

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## Endnotes

1. See, e.g., *In re Jasper Seating Co., Inc.*, 406 N.J. Super. 213, 217 (App. Div. 2009) (“Plaintiff Jasper Seating Company (Jasper) appeals from the Final Agency Determination of the Division of Purchase and Property (Division) to reject Jasper’s bid as non-conforming for the State’s purchase awards under its publicly-bid contract for furniture. We affirm the Division’s determination.”).
2. See, e.g., *Suburban Disposal, Inc. v. Township of Fairfield*, 383 N.J. Super. 484, 487 (App. Div. 2006) (“This is an appeal by an unsuccessful bidder, Suburban Disposal, Inc., from a summary judgment upholding the award by defendant Township of Fairfield of a three-year trash collection contract to defendant Waste Management of New Jersey, Inc.”) *In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Management Services*, 436 N.J. Super. 350, 358 (App. Div. 2014) (“After DPP issued a notice of intent to award the contract to Northstar, the CWA filed its protest on April 17, 2013.”).
3. The underlying law governing a public procurement will depend on the nature of the public entity. Most procurements at the local level is governed by the Local Public Contracts Law, N.J.S.A. § 40A:11-1 *et seq.*, (in the case of municipalities or counties), or the Public School Contracts Law, N.J.S.A. § 18A:18A-1, *et seq.* (in the case of public schools). At the state level there are a variety of procurement statutes depending on the state entity involved. See N.J.S.A. § 52:34-6, *et seq.* (the Division of Purchase and Property in the Department of the Treasury), N.J.S.A. § 18A:64-52, *et seq.* (New Jersey state colleges); N.J.S.A. § 27.23-6.1 (Turnpike Authority).
4. Any settlement of a dispute with the public entity or as between bidders would adversely impact the public interest in a fair and competitive bidding process. See, e.g., *In re Coulson Aviation (USA) Inc.*, 2014 U.S. Comp. Gen. LEXIS 84, at \*37 (Comp. Gen. March 31, 2014) (“A settlement agreement promising award of a contract on a sole-source basis in exchange for abandoning ongoing litigation, such as a bid protest, is not a permissible basis for restricting competition and excluding potential offerors....Quite simply, the existence of a settlement agreement does not permit a contracting agency to act in ways not otherwise permitted by applicable statutes and regulations.”).
5. See *Delta Chemical Corp. v. Ocean County Utilities Authority*, 250 N.J. Super. 395 (App. Div. 1991) (“An unsuccessful bidder may attack the award of the contract but may not recover money damages, even if the challenge succeeds. To permit the low bidder to recover damages would simply twice penalize the public. Submission of the lowest bid in answer to an advertisement for bids by the State for public work cannot be the basis of a claim for damages based upon the failure or refusal to accept such bid.”); *Brockwell & Carrington Contrs., Inc. v. Dobco, Inc.*, 2013 N.J. Super. Unpub. LEXIS 3029, at \*14 (App. Div. Dec. 26, 2013) (The purpose of competitive bidding for local public contracts is...not the protection of the individual interests of the bidders but rather the advancement of the public interest in securing the most economical result by inviting competition in which all bidders are placed on an equal basis....Thus, as a salutary measure to protect the integrity of the public bidding process, courts have conferred standing on unsuccessful bidders to challenge contract awards. The point is not to make the challenger whole, but rather to vindicate the goal of competition, and its beneficial consequences to the taxpayers.”) (internal citations and quotation marks omitted).
6. See *Barrick v. State*, 218 N.J. 247 (2014).
7. *Redd v. Bowman*, 223 N.J. 87, 104 (2015) (citation and internal quotation marks omitted).
8. *Cinque v. New Jersey Department of Corrections*, 261 N.J. Super. 242, 243-44 (App. Div. 1993).
9. 143 N.J. Super. 432, 437 (Ch. Div. 1976).
10. 283 N.J. Super. 223 (App. Div. 1995).
11. See *id.* at 225.
12. *Id.* at 226.

13. *Id.* at 232. Other courts have similarly found appeals in bid protest matters were moot because the subject contract had proceeded—in some cases dismissing the appeal and in others issuing a ruling on the merits because of the public importance of the issues raised and their likelihood of repetition. *See, e.g., Gross v. Ocean Tp.*, 92 N.J. 539, 541 (1983) (“Although the question of whether the ‘negative charge public bidding device fashioned by Ocean Township is beyond the limits of municipal power is technically moot, inasmuch as the one-year period of the contract for which bids were sought has long since expired, the portentous nature of the problem creates the need for this Court to decide it.”); *Advance Elec. Co., Inc. v. Montgomery Tp. Bd. Of Educ.*, 351 N.J. Super. 160 (App. Div. 2002) (finding that the appeal was “technically moot” because the construction contract at issue had been completely finished, but nevertheless addressed electrical subcontractor’s claim regarding Public School Contracts Law); *In re Protest of Denial of Pre-Qualification Application of ABC Towing*, 2015 N.J. Super. Unpub. LEXIS 2715, at \*7-8 (App. Div. Nov. 25, 2015) (noting that the protestor would normally be entitled to relief, but it did not seek a stay of the Turnpike Authority’ decision when it filed its appeal, the towing contracts at issue had already been awarded to other qualified bidders, and the matter was, therefore moot); *P&A Constr., Inc. v. Township of N. Brunswick*, 2010 N.J. Super. Unpub. LEXIS 808, at \*6, 10 (App. Div. April 13, 2010) (dismissing contractor’s appeal because subject road improvement contract was nearly completed by the time the appeal was heard).
14. 283 N.J. Super. at 232.
15. *Id.* at 232-33.
16. *See, e.g., In re Bid Protest of Agate Constr. Co.*, 2017 N.J. Super. Unpub. LEXIS 759, at \*1 (App. Div. March 29, 2017) (“We stayed the award of a multi-million dollar contract to repair and reconstruct the stone seawall in Sea Bright and Monmouth Beach (the Project) made by the New Jersey Department of Environmental Protection (DEP), Division of Coastal Engineering (DCE), to J. Fletcher Creamer & Son, Inc. (JFC), pending appeal by an unsuccessful bidder, Agate Construction Co., Inc. (Agate). Given the public interest, we accelerated the appeal.”); *Brahma Constr. Corp. v. E. Brunswick Pub. Schs*, 2015 N.J. Super. Unpub. LEXIS 960, at \*6 (App. Div. March 24, 2015) (“Brahma filed a motion for leave to appeal the denial of preliminary injunctive relief. We granted Brahma’s motion, issued a stay pending appeal, and accelerated this appeal.”).
17. 218 N.J. at 251-52.
18. *See id.* at 252.
19. *Id.*
20. *Id.* at 263.
21. *Id.* at 263-64 (internal citation omitted).
22. *See In re Request for Proposals ##17DPP00144*, 454 N.J. Super. 527, 577 (App. Div. 2018) (reversing decision by the Division of Purchase and Property to award a \$6 billion contract for pharmacy management even though the Appellate Division had vacated its prior stay pending appeal order, stating: “Although the absence of a stay has presumably permitted the State to secure the first-year savings in the SHBP/SEHBP the procurement promised, no savings can justify the impairment to the integrity of the bidding process caused by an irregular proceeding. Accordingly, the Division must proceed to rebid the Contract as expeditiously as possible.”) (internal citation omitted); *In re Motor Vehicle Comm’n Surcharge Sys. Accounting & Billing Servs.*, 2018 N.J. Super. Unpub. LEXIS 285, at \*34 (App. Div. Feb. 8, 2018) (reversing decision by the Division of Purchase and Property to award contract for development and implementation of new billing and collection system and ordering rebidding of contract despite no stay, stating: “We were advised at the recent oral argument on the appeal that the implementation of the new billing and collection system is already substantially complete. Even if that is true, as MSB correctly pointed out in opposing a stay in the fall of 2017, there are over six more years of operation and revenue collection to occur under the contract. The appeal has not become moot in the interim.”).
23. 187 N.J. 212, 223 (2006) (citation and internal quotations marks omitted).
24. N.J. Ct. R. 4:69-1 to -7.

25. In the context of a decision by a local public entity, bidders can attempt to protest the local public entity's decision by way of a letter or some other attempt to be heard by the public entity. See *Bodies by Lembo, Inc. v. County of Middlesex*, 286 N.J. Super. 298, 302 (“On December 12, 1994, prior to any announcement of an award, Norcia sent a ‘letter of protest’ to Jack Garber requesting a hearing in the event that its alternate bid was not accepted. A purported hearing took place on December 14, 1994, between the County and Norcia. That hearing apparently caused Norcia to make numerous changes to its alternate bid which either corrected or bettered the non-conformities. Thereafter, on January 19, 1995, the Board awarded the contract (Contract) to Norcia.”). However, there is often no time to raise issues with the local public entity and, unlike the protests to State public entities, no formal protest procedure. As a result, unsuccessful bidders’ first action to challenge the decision of the local public entity is to file an action in the Law Division.
26. Such applications are explicitly authorized by N.J. Ct. R. 4:69-3 (“Upon or after the filing of the complaint, the plaintiff may, by order to show cause or motion supported by affidavit, and with briefs, apply for ad interim relief by way of stay, restraint or otherwise as the interest of justice requires, which relief may be granted by the court with or without terms. When necessary, temporary relief may be granted without notice in accordance with R. 4:52-1.”).
27. See, e.g., *Star of Sea Concrete Corp. v. Lucas Bros., Inc.*, 370 N.J. Super. 60, 66 (App. Div. 2004) (“The Freeholders subsequently adopted a resolution awarding the contract to Lucas Brothers, and the next day Star of the Sea filed an order to show cause, with temporary restraints, and a verified complaint in lieu of prerogative writs, attempting to have the Freeholder’s action reversed and Star of the Sea’s bid recognized as the lowest bid complying fully with the bid solicitation.”); *Palamar Constr., Inc. v. Pennsauken*, 196 N.J. Super. 241, 244 (App. Div. 1983) (“Palamar filed a complaint in lieu of prerogative writ on October 3 with the Superior Court, Law Division challenging the decision of the Township Committee. On that date, the Law Division judge issued an order to show cause and an interlocutory restraint enjoining the execution of the construction contract with Taylor and the initiation of any construction on the project pending final resolution.”).
28. 90 N.J. 126, 132-144 (1982) (injunctive relief requires a showing of irreparable harm, reasonable probability of ultimate success on the merits, a claim based on a settled right, and a balancing of relative hardships).
29. *Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority*, 433 N.J. Super. 445, 453-54 (App. Div. 2013) (“The power to impose restraints pending the disposition of a claim on its merits is flexible; it should be exercised whenever necessary to subserve the ends of justice, and justice is not served if the subject-matter of the litigation is destroyed or substantially impaired during the pendency of the suit. This less rigid approach, for example, permits injunctive relief preserving the status quo even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed.”) (internal quotation marks and citation omitted).
30. See, e.g., N.J.A.C. 17:12-3.1, *et seq.* (providing the Division of Purchase and Property’s procedures for protesting bid specifications, rejection of bids, and contract award or notice of intention to award a contract).
31. See *Hartz Mountain Industries, Inc. v. New Jersey Sports & Exposition Authority*, 369 N.J. Super. 175, 188 (App. Div. 2004) (“We appreciate...that there are no agency rules governing the conduct of a bid protest hearing, and undoubtedly NJSEA would be wise to adopt such rules. But,...the absence of rules does not vitiate the protest proceeding provided basic due process is accorded.”).
32. 47 N.J. 539, 552 (1966) (“Therefore the advertising for bids and the time specified therein for their receipt ought in fairness to be sufficiently in advance of the projected contract date to give a rejected bidder, upon timely request, a conference or informal hearing at which his protest can be presented.”). The Division of Purchase and Property’s regulations specifically prohibit a contract from being awarded until the division’s director issues a final decision on the merits of the protest unless the failure to award the contract will result in substantial cost to the state or there is a public exigency. See N.J.A.C. 17:12-3.3(c).

33. In a protest involving a local public entity procurement the initial adverse decision may not be a decision denying the protest on the merits. Indeed, the Law Division judge could deny the application for temporary restraints with the intention of addressing merits of the protest at a later date in the normal course. If that occurs, the protesting bidder should strongly consider pursuing an emergent interlocutory appeal seeking to reverse the denial of temporary restraints to protect the *status quo*.
34. N.J. Ct. R. 2:9-7.
35. The application is available on the Appellate Division's website along with guidelines for such applications, which were recently updated. See [https://www.njcourts.gov/forms/10498\\_appl\\_perm\\_file\\_emerg\\_motion\\_portal.pdf?cacheID=111WYv9](https://www.njcourts.gov/forms/10498_appl_perm_file_emerg_motion_portal.pdf?cacheID=111WYv9).
36. N.J. Ct. R. 2:9-8.
37. The New Jersey Supreme Court has published guidelines on the emergent application process, see [https://www.njcourts.gov/forms/11644\\_sc\\_emergent\\_appl\\_public\\_guide.pdf](https://www.njcourts.gov/forms/11644_sc_emergent_appl_public_guide.pdf), and an emergent matter intake form, see [https://www.njcourts.gov/forms/11641\\_sc\\_emergent\\_intake.pdf](https://www.njcourts.gov/forms/11641_sc_emergent_intake.pdf).
38. *Garden State Equality v. Dow*, 216 N.J. 314, 320 (2013) (citation and internal quotation marks omitted).
39. See *id.*
40. See *United Servs., Inc. v. City of Newark*, 2017 N.J. Super. Unpub. LEXIS 934, at \*10-11 (App. Div. April 17, 2017) (discussing standard, granting stay, and remanding to trial court to resolve bid protest complaint).