

## New Jersey Appellate Decision Reminds Bid Protestors to Take Caution When Determining Where to File an Action



**Brian Glicos**  
bglicos@pecklaw.com



**Nicholas J. Zaita**  
nzaita@pecklaw.com

On February 21, 2023, the New Jersey Appellate Division held that University Hospital is not a “state administrative agency” and, therefore, the Appellate Division does not have original jurisdiction to determine the merits of an action commenced by an unsuccessful bidder to challenge the award of a contract. [In re Protest of Contract for Retail Pharmacy Design, Constr., Start-up & Operation, Request for Proposal No. UH-P20-006, A-1667-20, 2023 WL 2125002 \(N.J. Super. Ct. App. Div. Feb. 21, 2023\).](#)

Pursuant to Rule 2:2-3(a)(2) of New Jersey’s Rules of Court, final decisions or actions of any state administrative agency or officer may be appealed directly to the Appellate Division as of right. Accordingly, where an unsuccessful bidder chooses to challenge the award of a contract issued by, for example, the New Jersey Department of Transportation, the unsuccessful bidder must file its action directly with the Appellate Division. On the other hand, where an unsuccessful bidder wishes to challenge a contract award made by a local municipality (among a slew of other public entities), the Superior Court Law Division maintains original jurisdiction over the dispute.

In a matter of first impression, the Appellate Division was presented with the “novel question” of whether or not University Hospital – which, in 2012, was established “as a body corporate and politic [that] shall be treated and accounted for as a separate non-profit legal entity from Rutgers, The State University” – is considered to be a state administrative agency whose final decisions are directly appealable to the Appellate Division under R. 2:2-3(a)(2). The Appellate Division ruled that University Hospital is not a state administrative agency whose final decisions are appealable to the Appellate Division.

### Background

On October 25, 2019, University Hospital issued an RFP to design, construct, start up, and operate a retail pharmacy at the hospital. After awarding the contract to Shields Pharmacy of University, LLC (“Shields”), one of the unsuccessful bidders, Sumukha, LLC (“Sumukha”), challenged the award. The hospital appointed a hearing officer to review and determine the merits of Sumukha’s protest.

Approximately four months after the contract award to Shields, the hearing officer issued a “final decision” and determined that Sumukha failed to provide any “legal or equitable” basis for vacating the award to Shields. In so concluding, the hearing officer reasoned that University Hospital is not bound, limited or governed by statutes and regulations governing the procurement and award of public contracts for the State of New Jersey and local government entities.

Sumukha then filed a notice of appeal with the Appellate Division arguing, among other things, that the hearing officer erred in finding that University Hospital was not a state administrative agency. In response, among other substantive arguments, University Hospital argued that the Appellate Division did not have jurisdiction to hear Sumukha’s appeal because University Hospital is not a state administrative agency.

### Analysis

While the Court Rules do not define the term “state administrative agency,” the Court examined the history of judicial review of state administrative agency determinations, the New Jersey Administrative Procedure Act and the language of University Hospital’s enabling statute to determine that University Hospital is not a state administrative agency.

First, a state administrative agency is one that is “in” an executive branch of the State government. As an example, the Court pointed to the New Jersey Sports and Exhibition Authority, which is part of the Department of State. While the Legislature established University Hospital as an instrumentality of the State whose functions are public and essential for the health and welfare of the people of New Jersey, it did not place University Hospital in any state executive branch department. To underscore the point, the Court mentioned how in 2012 the Legislature separated University Hospital from UMDNJ (part of the Department of State) and, through the same Act, Rowan University was allocated to the Department of State. Thus, the Court reasoned that had the Legislature intended to allocate University Hospital to a department of the executive branch (which would render it a “state administrative agency”), it would have expressly done so. Moreover, the Act did not expressly state that University Hospital’s final decisions would be subject to appellate review.

In its analysis, the Court acknowledged that the Request for Proposals (RFP) for the contract at issue contained language that referred to University Hospital as a “state agency” and that the RFP is a “public sector bid.” The Court also noted that the RFP referenced the availability of appellate review for certain claims made by the contractor who is awarded the contract.

However, the presence of this language in the RFP which could – and apparently did – lead an aggrieved bidder to believe that University Hospital’s decision to award a contract was subject to immediate appellate review under R. 2:2-3(a)(2), was not dispositive. Pursuant to the New Jersey Constitution, only the Legislature can create a state administrative agency; University Hospital does not have the authority to declare itself a state administrative agency.

Accordingly, the Appellate Division ruled that R. 2:2-3(a)(2) did not apply to University Hospital’s decision to award the contract to Shields and thus Sumukha’s appeal was dismissed. However, the dismissal was without prejudice to Sumukha’s right to file an action in the Law Division to challenge the award.

### **Lesson Learned**

While the Court’s dismissal “without prejudice” preserved Sumukha’s right to re-file in the appropriate lower court, this case serves as a stark reminder to counsel and clients alike to take caution in determining the correct court to file an action seeking to vacate a contract award. Typically, a bid protestor is faced with a simple determination as to where to commence an action. But as this case underscores, one cannot solely rely on the language of the RFP to make that determination and may have to dig deeper into the legislative history of that particular public entity. It is certainly foreseeable that this issue could arise more frequently in the future as new project delivery methods are utilized by New Jersey public entities and potentially new “agencies” or authorities are created to issue those contracts.

It is also important to note that the Appellate Division’s ruling came nearly two and a half years after University Hospital’s decision to award the contract at issue to Shields. The written opinion does not detail the status of the project, but since the Court had denied Sumukha’s request to stay the award, by the time Sumukha files the action with the lower court to challenge the award the challenge may be moot depending on how much progress University Hospital and the low bidder have made on the project.

*The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.*

*As always, we are pleased to share insights and updates related to legal issues of interest with clients and friends of the Firm. Our records reflect that the recipient of this message is not a European Union “Data Subject” as defined by the General Data Protection Regulation (GDPR), enacted on May 25, 2018. If you are or consider yourself to be a Data Subject under the EU’s GDPR, kindly email Megan Seybuck at [mseybuck@pecklaw.com](mailto:mseybuck@pecklaw.com) right away. The GDPR requires that all European Union Data Subjects provide explicit consent in order to continue to receive our communications.*