



[Kenneth W. Curtis](#)
Orange County
949-851-5493
kcurtis@allenmatkins.com



[Robert Shaia](#)
Orange County
949-851-5477
rshaia@allenmatkins.com

About Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP is a California law firm with more than 220 attorneys practicing out of seven offices in Orange County, Los Angeles, Century City, San Diego, Del Mar Heights, San Francisco and Walnut Creek. The firm's broad-based areas of focus include construction, real estate, land use, environmental, corporate, finance, business litigation, tax, bankruptcy and creditors' rights, labor and employment and intellectual property. [More...](#)

Related Practices

- [Construction](#)
- [Real Estate](#)
- [Litigation](#)

What Do You Mean I Was Nonresponsive?

September 30, 2010

Contractors who bid public jobs are likely familiar with the terms "responsive" and "responsible." Indeed, they signify prerequisites to the award of a public contract. A bid must be "responsive" to the agency's bid request and the agency must find the bidder to be "responsible."

The term "responsible bidder" is defined by the Public Contract Code as "a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract." But, whether a particular response in a bid bears on the bidder's responsibility or simply his responsiveness to the bid request is not always clear. The distinction is important because, according to the California case law, a bid rejected on the theory that the bidder is not *responsible* entitles the bidder to a hearing on the responsibility issue where certain minimal elements of due process must be afforded.

Public Agencies' Incentive To Abuse The "Nonresponsive vs. Nonresponsible Bidder" Dichotomy To Deny The Lowest Bidder's Right To A Hearing

Indeed, there is a temptation for public agencies to abuse the "nonresponsive vs. nonresponsible" dichotomy to justify their rejection of a bid on the theory that the bid is nonresponsive and, therefore, obviate their requirement to provide the bidder the necessary hearing. In many cases, providing a hearing will delay the awarding the contract and commencement of work. Thus, there is pressure on public agencies to avoid triggering a hearing.

Court Of Appeal Blasts The Irvine Unified School District For Apparent Favoritism In The Bid Process

In a recently published opinion, [Great West Contractors, Inc. v. Irvine Unified School District \(2010\) 187 Cal.App.4th 1425](#), the Court of Appeal blasted the Irvine School District for their apparent favoritism towards certain bidders on two separate elementary school remodel jobs, and for rejecting the lowest bids under the guise that those bids were not responsive.

In that case, the pertinent question in the bid package was: "Have you ever been licensed under a different name or license number?" The term "you"

This alert applies to contractors bidding on public works projects.

If Your Bid is Rejected as "Nonresponsive," Take a Hard Look at the Agency's Rationale -- You May Be Entitled to a Hearing.



Allen Matkins is recognized by *Chambers and Partners*

- #1 Real Estate Law Firm in California (2002 – 2010)
- Construction Group is ranked as one of the best in California (2009 and 2010)
- Labor & Employment Group is ranked as one of the best in California (2010)
- Environmental Group is ranked as one of the best in California (2010)

was broadly defined to include the contractor's "owners, officers, directors, shareholders, principals, RMOs or RMEs." Petitioner Great West, the lowest bidder on both jobs, simply answered the question "no."

The third lowest bidders on each job challenged Great West's bid on the ground that Great West had operated under other licenses and that Great West's president was listed as the RME under another license. Upon staff's recommendation, the District rejected Great West's bid as *nonresponsive*.

The Great West Court Lays The Framework For Distinguishing Between "Responsiveness" And "Responsibility"

The *Great West* opinion is quite lengthy and should be commended for its comprehensiveness. However, the crux of the *Great West* opinion is that it solidifies the analysis set forth in *D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757 for distinguishing the concepts of responsiveness and responsibility.

1. The Litmus Test

While the *Great West* court refused to articulate a hard and fast rule regarding the distinction between responsiveness and responsibility, it did provide somewhat of a litmus test based on the case law that has addressed this issue. Stated succinctly: If an external investigation is necessary to determine noncompliance, it is a *responsibility* issue; if noncompliance can be determined from the face of the bid, it is a *responsiveness* issue.

2. The Five Factor Test

The *Great West* court employed a five factor test to evaluate whether the District's rejection of Great West's bid was, in legal effect, for nonresponsibility rather than nonresponsiveness. Before listing the factors, the court clarified that literal *noncompliance* with a bid request makes a bid nonresponsive as a matter of law. Therefore, the court announced that the five factor test is used in situations where there is *literal compliance* with the bid request, but the agency still claims the bid is nonresponsive. Here are the five factors:

- a) The complexity of the problem and the ensuing need for subtle administrative judgment;
- b) The need for information received outside the bidding process;
- c) Whether the problem is the sort that is susceptible to categorical hard and fast lines, or whether it is better handled on a case-by-case basis;
- d) The potential for adverse impact on the professional or business reputation of the bidder; and
- e) The potential that innocent bidders are subject to arbitrary or erroneous disqualification from public works contracting.

Applying these factors, the *Great West* court opined that the District's rejection of Great West's bid was, in substance, for nonresponsibility rather than nonresponsiveness. As a result, Great West was entitled to a hearing.

If you have any questions about this article, the ramifications of the *Great West* decision or application of these factors, please contact Kenneth Curtis or Robert Shaia at (949) 553-1313.

Allen Matkins Offices

Century City (310) 788-2400	Los Angeles (213) 622-5555	San Francisco (415) 837-1515	Walnut Creek (925) 943-5551
Del Mar Heights (858) 481-5055	Orange County (949) 553-1313	San Diego (619) 233-1155	

© 2010 Allen Matkins Leck Gamble Mallory & Natsis LLP. All rights reserved. This email is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. This email was sent by: Allen Matkins Leck Gamble Mallory & Natsis LLP, 515 S. Figueroa Street, 7th Floor, Los Angeles, California 90071. To stop receiving this publication, click on the "unsubscribe" button.