

By Certified Mail and By Email
Chris.Celsi@countyofnapa.org

Mr. Chris Celsi
Executive Director
Napa-Vallejo Waste Management Authority
1195 Third Street, Room B-10
Napa, CA 94559

Re: Construction & Demolition Facility Napa-Vallejo Waste Management Authority
Project No. 17810

Response of Midstate Construction Corporation to June 10, 2025, Protest of BHM
Construction, LLC

Dear Mr. Celsi:

Pursuant to the Instructions to Bidders, this is a written response to a June 10, 2025, letter from BHM Construction, LLC ("BHM"), which purports to protest our company's bid.

Midstate Construction Corporation ("Midstate") submitted the lowest responsive bid from a responsible contractor. BHM lacks standing because its own bid includes irregularities. BHM's arguments are baseless. The protest should be overruled.

1. BHM Lacks Standing To Protest Because It Admits That Its Own Bid Is Nonresponsive

At page 3 of its June 10, 2025, letter, BHM concedes that it "did not list all interested persons on Proposal Form P-13" as the bidding documents require. BHM therefore lacks standing to file a protest.

A disappointed bidder has standing to file protest only if it has the legal right to be awarded the contract. *SJJC Aviation Services, LLC v. City of San Jose*, 12 Cal. App. 5th 1043, 1057 (2017); *Monterey Mech. Co. v. Sacramento Reg'l County Sanitation Dist.*, 44 Cal. App. 4th 1391, 1414 n.12 (1996). When its own bid is nonresponsive, a contractor lacks the direct financial interest that is a prerequisite to prosecuting a protest. *See id.*; Civ. Proc. Code § 1086.

BHM argues that the irregularities in its bid can be waived because "the variance cannot have affected the amount of the bid or given the bidder an advantage or benefit not allowed other bidders." Exactly the same principle applies to the items raised by BHM in its protest, however, such as BHM's argument with regard to attaching copies of addenda. Whether addenda are attached cannot affect the amount of the bid or provide any other advantage where, as here, the bidder has expressly acknowledged all addenda and is legally obligated to enter into a contract that incorporates the addenda.

It would be improper for the Authority to give BHM preferential treatment by waiving irregularities in BHM's bid while at the same time refusing to do so for others. Applying different

standards to different contractors is inherently arbitrary and capricious and would introduce an unjust element of subjectivity into the bidding process. *See City of Inglewood-LA County Civic Center v. Superior Court*, 7 Cal. 3d 861, 867 (1972); *see also Verdugo Hills Hosp., Inc. v. Dep't of Health*, 88 Cal. App. 3d 957, 964 (1979).

2. Midstate Complied With All Subcontractor Listing Requirements

Midstate fully complied with the Subletting and Subcontracting Fair Practices Act and the Authority's bidding requirements for listing of subcontractors.

According to BHM itself, all bidders received a proposal from Capitol Valley Electric, LLC ("Capitol Valley") for the electrical and solar scope of work a few minutes before 2:00 p.m. on June 3, 2025, the deadline for contractors to submit their bid proposals.

Relying upon Capitol Valley Electric's proposal, Midstate included Capitol Valley in its subcontractor list for the electrical and solar scope of work. In its subcontractor list, Midstate provided complete and accurate information for Capitol Valley Electric, including the name, portion of work to be performed, contractor's license number, DIR registration number, dollar value of work to be performed, and the city and state where Capitol Valley is located. Screenshot of the subcontractor listing information for Capitol Valley is provided below:

Capitol Valley Electric	Electrical	1085507	1000855022	2,650,000	Sacramento CA
Capitol Valley Electric	ROOFING, ETC.) Energy Electrical Power Generation System	1085507	1000855022	495,000	Sacramento CA

Midstate therefore fully complied with the Subletting and Subcontracting Fair Practices Act and the Authority's bidding requirements for listing of subcontractors *See* Pub. Contract Code § 4104; Standard Specification 2-1.10; Proposal Form P-14.

Contrary to BHM's assertions, Midstate did not learn that Capitol Valley wanted to modify its bid proposal until after the Authority's 2:00 p.m. deadline for submission of bids.

Capitol Valley sent its revised proposal at 2:02 p.m. By then it was too late for Midstate to change its bid proposal or modify its subcontractor list. *Greer v. Hitchcock*, 271 Cal. App. 2d 334 (1969); Pub. Contract Code § 4104. Please see the screenshot below and a copy of the June 3, 2025, email from Capitol Valley Electric.

Carly Rodriguez	
From:	Jon Werner <jwerner@capitolvalleyelectric.com>
Sent:	Tuesday, June 3, 2025 2:02 PM
To:	bidroom
Cc:	Richard Harryman; Gary Gladson
Subject:	R1 Proposal Napa Vallejo Waste Management
Attachments:	Napa Vallejo Waste Management Proposal Letter- 6.3.25.pdf
Categories:	Green category
EXTERNAL EMAIL DO NOT ENTER USERNAME/PASSWORD	
Please find our R1 Proposal – PV scope of work is now excluded.	

The fact that Capitol Valley emailed a revised proposal after the 2:00 p.m. bid opening deadline is not a basis for a disappointed bidder to protest the lowest responsive bid.

First, in *Diede Construction, Inc. v. Monterey Mechanical Co.*, 125 Cal. App. 4th 380 (2004), the Court of Appeal ruled that a general contractor is under no obligation to withdraw its bid when a subcontractor, after the bid deadline, alleges that it made a mistake in its bid.

Second, Public Contract Code Section 4107(a)(1) specifically allows a contractor to substitute subcontractors who will not sign a contract based on the subcontractor's bid proposal and the project plans and specifications. If Capitol Valley refuses to sign a subcontract based on the proposal that Midstate received and relied upon, Midstate will be entitled to obtain approval for a substitution of subcontractors and can recover the additional cost to hire another subcontractor. Pub. Contract Code § 4107(a)(1); *Diede Construction, Inc.*, *supra*, 125 Cal. App. 4th at 390; *Saliba-Kringlen Corp. v. Allen Engineering Co.*, 15 Cal. App. 3d 95, 100 (1971); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409 (1958).

Third, BHM's protest is based on the unfounded assumption that Capitol Valley will not sign a subcontract for the solar scope of work. A protest cannot be based on speculation. *Bay Cities Paving & Grading, Inc. v. San Leandro*, 223 Cal.App.4th 1181, 1196 (2014). As the protesting party, BHM bears the burden of proof. *Id.*, 223 Cal. App. 4th at 1198. (2014).

Thus, a bid protest cannot be based upon assumptions or conjecture about matters that will arise during the performance of a contract. *See, e.g., Mike Moore's 24-Hour Towing v. San Diego*, 45 Cal. App. 4th 1294, 1309 (1996) (rejecting protest based upon whether insurance would meet requirements that applied during performance); *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.*, 146 Cal. App. 4th 757 (2007).

Capitol Valley may well decide to enter into a subcontract for all of the electrical scope of work for which it is listed instead of incurring liability for refusing to honor its proposal. Midstate

and Capitol Valley also could reach an amicable resolution regarding issues relating to Capitol Valley's alleged mistake. BHM has failed to produce any actual evidence to support its protest, only speculation and conjecture about future events.

Fourth, even when a subcontractor is legally unable to perform the work for which it has been listed, a general contractor's bid is not subject to a protest. *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.*, 146 Cal. App. 4th 757 (2007). In *D.H. Williams*, the Court of Appeal emphasized that the general contractor could replace a listed subcontractor if the subcontractor were could not perform the work for which it had been listed. Thus, the fact that Capitol Valley at some time in the future may refuse to perform the work for which it was listed cannot be a basis for protest.

3. BHM Cannot File A Protest Based On Its Own Failure To Have Submitted The Lowest Bid

Midstate has carefully reviewed its estimate and is satisfied that its bid price will cover all costs, overhead, and a reasonable profit on the project, including the cost to furnish and install a 1,124 kilowatt photovoltaic system if that is what the Authority determines the plans and specifications require.

BHM argues that it is somehow unfair that another contractor submitted a lower bid price than BHM did. BHM's argument is absurd.

Submitting a bid that is lower than a competitor's is legal and proper:

The policy of the common law has always been in favor of free competition, which proverbially is the life of trade ... Thus, in the absence of prohibition by statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices.

A-Mark Coin Co. v. General Mills, Inc., 148 Cal. App. 3d 312, 323 (1983).

The lowest overall bid on a project cannot be rejected simply because a competitor believes that a bidder's price is too low. A contractor that submits a winning bid is legally obligated to complete its work on a construction project

Whether he bids one cent, one dollar or five dollars [for an item] So long as there is no semblance of chicanery in relation to the potential quantity requirement of the ... item, no competing bidder is harmed and the public is benefited. Every contractor may apply his own business judgment in the preparation of a public bid, and his willingness to perform one of the items for a nominal amount is but his judgmental decision in an effort to underbid his competitors.

Riverland Constr. Co. v. Lombardo Contracting Co., 154 N.J. Super. 42, 47 (App. Div. 1977).

This is particularly true given that Midstate provided a bid bond guaranteeing that Midstate will sign a contract for the prices in its proposal.

4. Midstate's Expressly Acknowledged All Addenda In Its Bid Proposal And Is Legally Obligated To Enter Into A Contract That Incorporates The Addenda

In its bid proposal, at page P-15, Midstate acknowledged all of the addenda for the project:

ADDENDUM ACKNOWLEDGEMENT	
Bidder acknowledges receipt of the following addendums which are attached to the proposal:	
Addendum No. <u>1</u>	Date <u>November 4, 2024</u>
Addendum No. <u>2</u>	Date <u>November 5, 2024</u>
Addendum No. <u>3</u>	Date <u>November 13, 2024</u>
Addendum No. <u>4</u>	Date <u>November 22, 2024</u>
Addendum No. <u>5</u>	Date <u>December 11, 2024</u>
Addendum No. <u>6</u>	Date <u>December 20, 2024</u>
Addendum No. <u>7</u>	Date <u>April 8, 2025</u>
Addendum No. <u>8</u>	Date <u>May 2, 2025</u>
Addendum No. <u>9</u>	Date <u>May 29, 2025</u>

BHM is therefore mistaken in relying upon *DeSilva Gates Construction, LP v. Department of Transportation*, 242 Cal. App. 4th 1409, 414 (2015). Unlike the contractor in *DeSilva Gates Construction*, Midstate expressly acknowledged in its signed bid proposal that it had received all of the project addenda.

As the Court of Appeal noted in its opinion in *DeSilva Gates*, the contractor in that case had “failed to acknowledge Addendum #1 dated September 7, 2012, ... on the signature page ... of its bid proposal. [CalTrans] considers the addendum to be a material amendment to the contract and is unable to identify in [the contractor’s]s bid submittal that it considered and agreed to be bound to the terms of said addendum.”

In addition, under Special Provision SP-21, “Any addenda or notices issued during the time of bidding and forming a part of the documents provided to the Bidder for the preparation of his bid, shall be covered in the bid and shall be made a part of the contract.” In its proposal form Midstate committed that it “will contract with Napa-Vallejo Waste Management Authority in the form of the copy of the contract annexed hereto.” The contract form at Article I incorporates the

special provisions. By submitting its bid proposal, Midstate bound itself to the terms of all of the project addenda, which would be incorporated as part of the contract that Midstate will sign.

Midstate and its surety in the bid bond submitted to the Authority provided a written guarantee that Midstate would enter “into a written contract in the prescribed form.” (Bid Bond Form, p. P-15). The prescribed form incorporated the special provisions, including Special Provision SP-21, which in turn expressly states that any “Any addenda or notices issued during the time of bidding” are “part of the contract.”

The fact that Midstate did not attach copies of addenda did not render its bid proposal nonresponsive. The decision in *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, 223 Cal. App. 4th 1181 (2014) is controlling precedent. In *Bay Cities*, Gallagher & Burk submitted a bid package that was missing the first page of the bid bond form, but which included the second page of the bond. The Court of Appeal ruled that the awarding agency, the City of San Leandro, properly rejected a protest of Gallagher and Burk’s bid.

The Court noted that the bid form was part of the bidding manual for the project. Thus, the fact that the first page of the bond was missing from the contractor’s proposal was an inconsequential variance that did not provide any competitive advantage, such as the ability to withdraw a bid for mistake.

Here, as in *Bay Cities*, the addenda were part of the bid documents provided to all bidders. There is no dispute as to what the addenda require. In its bid proposal, Midstate expressly acknowledged receipt of all addenda and committed itself to entering into a contract that incorporated all of the addenda for the project. Midstate provided bid security that it would forfeit if it did not enter into a contract incorporating the addenda. Not attaching copies of the addenda therefore did not affect the enforceability of Midstate’s bid or provide it with any kind of advantage.

Not every bid variance is “sufficiently significant to render the bid nonresponsive.” *DeSilva Gates Construction, LP v. Department of Transportation*, 242 Cal. App. 4th 1409, 1420 (2010). It is “well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential.” *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, 223 Cal. App. 4th 1181, 1188 (2014); *Ghilotti Construction Co. v. City of Richmond*, 45 Cal. App. 4th 897 (1996).

Not attaching duplicate copies of the addenda is at most an inconsequential variance that does not affect the responsiveness of Midstate’s bid.

Conclusion

Midstate respectfully requests that the Authority overrule BHM’s protest. In *Ghilotti Construction Co. v. City of Richmond*, 45 Cal. App. 4th 897 (1996), the Court ruled that it would

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June 12, 2025

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amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of a low bidder after the fact, and cancel the low bid on minor technicalities, with the hope of securing acceptance of his, higher bid. Such a construction would be adverse to the best interests of the public and contrary to public policy.

The Court's ruling in *Ghilotti* is directly applicable here. BHM is asking for preferential treatment by having irregularities in its own bid waived, while demanding strict enforcement of bidding requirements against others. BHM lacks standing.

BHM's protest is based on false assumptions and is legally baseless. Midstate's bid is responsive and fully enforceable under longstanding precedent and applicable law. Equally important, Midstate's bid will save the Authority and its ratepayers more than \$1,600,000, and Midstate is committed to providing a 1,124-kw photovoltaic system to the Authority if that is what the plans and specifications require.

Thank you for your careful review and consideration of the applicable facts and the law. Please feel free to call or email us if you have any questions.

Very truly yours,



Patrick Draeger, Vice President

MIDSTATE CONSTRUCTION CORPORATION

Enclosures (Capitol Valley Electric Email)

cc: Jeff Mazet, BHM Construction (jmazet@bhmconstruction.com)

Carly Rodriguez

From: Jon Werner <jwerner@capitolvalleyelectric.com>
Sent: Tuesday, June 3, 2025 2:02 PM
To: bidroom
Cc: Richard Harryman; Gary Gladson
Subject: R1 Proposal Napa Vallejo Waste Management
Attachments: Napa Vallejo Waste Management Proposal Letter- 6.3.25.pdf

Categories: Green category

EXTERNAL EMAIL **DO NOT ENTER USERNAME/PASSWORD**

Please find our R1 Proposal – PV scope of work is now excluded.

Thank you,

Jon Werner
Senior Estimator

O (916) 504-4419
C (916) 336-8458
8550 Thys Ct.
Sacramento, CA 95828



Capitol Valley Electric, LLC
Proactive Solutions
Capitolvalleyelectric.com

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