

October 18, 2017

Reference Number: 17-0078

Ms. Cathy Crowley  
Chief Executive Officer  
Powell CWM, Inc.  
3200 S. State Rt. 291, Bldg. 1  
Independence, MO 64057

Re: DBE Certification Denial of Powell CWM, Inc.

Dear Ms. Crowley:

This letter responds to Powell CWM, Inc.'s (Powell) appeal<sup>1</sup> of the Missouri Department of Transportation's (MODOT) January 26, 2017, denial of Powell's Uniform Certified Application (UCA) for certification as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26 (the Regulation). After considering all the facts in the entire record pursuant to §26.89(e) of the Regulation, the U.S. Department of Transportation (the Department) affirms MODOT's decision, as required by §26.89(f)(1).<sup>2</sup>

## **FACTS:**

Powell provides architectural, engineering, and land surveying services.<sup>3</sup> Cathy Crowley, the firm's Chief Executive Officer (CEO) founded the firm in October 2016 following the merger of land surveying firm Crowley, Wade, Milstead, Inc. (CWM)<sup>4</sup> and Powell & Associates, a firm that specializes in engineering, architectural, and land surveying services.<sup>5</sup> Bethany Powell became Powell's President in October 2016. Ms. Crowley and Ms. Powell each have 35% ownership interest in the firm.<sup>6</sup> Ms. Powell is also Acting Managing Member of Powell &

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<sup>1</sup> See Appeal Letter (April 18, 2017).

<sup>2</sup> See §26.89(f)(1): "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

<sup>3</sup> See UCA at 1.

<sup>4</sup> Cathy Crowley's father, E. Lyn Crowley, co-founded CWM in September 1959. Katherine Crowley, Cathy Crowley's mother, inherited the firm upon Mr. Crowley's death. Cathy Crowley and her brother Mark Crowley appear to have inherited their respective 35% and 5% ownership interests from Katherine Crowley.

<sup>5</sup> See Special Meeting of Board of Directors (Sept. 27, 2016) and UCA at 7.

<sup>6</sup> Ms. Powell appears to have used joint marital assets to purchase her purported 35% ownership interest. MODOT cited ownership provision §26.69(b) as a denial ground, without explanation or reference to specific evidence in the record. MODOT simply made the general statement that "Cathy Crowley and Bethany Powell claim to be the majority disadvantaged owners." Denial Letter at 3. The ambiguity of MODOT's statement precludes the Department from determining whether MODOT found the firm ineligible on the basis of ownership. Section

Associates, having joined the firm in 2005.<sup>7,8</sup> Ms. Crowley's brother, Mark Crowley, joined Powell in October 2016 as Secretary and Director of Architecture.<sup>9</sup> He owns 5% of the firm<sup>10</sup> and is non-socially and economically disadvantaged (SED) under the Regulation. Ms. Powell's non-SED husband, Jeremy Powell, joined Powell in October 2016 as Vice President and Certified Federal Surveyor. He has 25% ownership in the firm.<sup>11</sup> Mr. Powell is President of Powell & Associates.<sup>12</sup>

Powell's additional employees include Aaron Barnhart, Arnold Woker, Joseph McLaughlin, and Timothy Atkins – all of whom are non-SED and none of whom have ownership interest in the firm. All are former employees of Powell & Associates and joined Powell at the time of its founding. Mr. Barnhart is Powell's Director of Engineering. Mr. Woker is a licensed architect, Mr. McLaughlin is a Professional Land Surveyor, and Mr. Atkins is a Professional Engineer.<sup>13</sup> As Powell's respective Director of Engineering and Project Architect, Mr. Barnhart and Mr. Woker bid and estimate projects; attend bid openings and lettings; and participate in sales/marketing activities.<sup>14</sup> As Project Surveyors, Mr. McLaughlin and Mr. Atkins bid and estimate projects and attend bid openings and lettings.<sup>15</sup> Mr. Crowley, Mr. Powell, Mr. Barnhart, Mr. Woker, Mr. McLaughlin, and Mr. Atkins supervise Powell's architectural and engineering design work.<sup>16</sup> Mr. Crowley, Mr. Powell, and Mr. Barnhart independently negotiate and execute contracts on behalf of the firm.<sup>17</sup> Ms. Crowley, Mr. Crowley, Ms. Powell, and Mr. Powell all

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26.89(f)(5) states: "The Department does not uphold your decision based on *grounds not specified in your decision*." (Emphasis added). Similarly, the Department is not rendering a decision on §26.69(f)(1), a provision cited by MODOT that refers to situations wherein expertise is relied upon as part of an SED owner's contribution. This argument is not raised by the firm.

<sup>7</sup> See UCA at 7. Prior to joining Powell & Associates in 2005, Ms. Powell worked at Red Cross Pharmacy from 2004-2005 and at Kilgore's Medical Pharmacy from 2001-2004. Résumés of Owners, Officers, Key Personnel. The document is a composite work history of C. Crowley, B. Powell, J. Powell, and M. Crowley.

<sup>8</sup> Powell & Associates provides land surveying services. Powell's UCA and On-Site Report state that Powell & Associates was to cease operation in December 2016. The record does not contain evidence whether Powell & Associates actually did so.

<sup>9</sup> See UCA at 8 and Résumés of Owners, Officers, Key Personnel.

<sup>10</sup> Mr. Crowley appears to have inherited his ownership interest from his mother, Ms. K. Crowley.

<sup>11</sup> See UCA and Résumés of Owners, Officers, Key Personnel.

<sup>12</sup> See UCA at 7.

<sup>13</sup> See UCA Supplemental Sheet.

<sup>14</sup> See UCA at 10.

<sup>15</sup> See *id.*

<sup>16</sup> See On-Site Report at 4.

<sup>17</sup> See *id.* The record shows that Mr. Barnhart provided the sole signature on at least two contracts, in the amounts of \$66,832 and \$60,009. See Contract Document Review.

have the power to sign checks on behalf of the firm, at any time and for any amount.<sup>18</sup> The checks only require one signature.<sup>19</sup>

MODOT denied Powell's UCA under ownership provision §26.69(b) of the Regulation (discussed in footnote 7 above) and control provisions §§26.71 (b), (g), (k), (m), (h), and (i).<sup>20</sup> On appeal, Powell contends that the firm meets the requirements of all of those control provisions, as well as those of §26.71(f). The Department affirms MODOT's denial based on §26.71(f) and (g). We decline to opine on MODOT's §26.71(h),(k),and (i) denial grounds in light of our disposition on §26.71(f) and (g), which includes a discussion that is sufficient to affirm MODOT's decision.

## **DISCUSSION:**

### Section 26.61(b) states:

The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and *control*.

(Emphasis added.)

### Section 26.71(f) states:

The socially and economically disadvantaged owners of the firm *may delegate various areas of the management, policymaking, or daily operations of the firm* to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the *power to hire and fire* any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can *reasonably conclude* that the socially and economically disadvantaged owners *actually exercise control* over the firm's operations, management, and policy.

(Emphasis added).

In its appeal letter, Powell contends that the firm satisfies the requirements of §26.71(f) because “Our licensed Department Directors report directly to us. We review and approve/disapprove all bids and RFQs prior to submitting.”<sup>21</sup> However, when previously asked which of the firm's participants negotiate and execute contracts, they responded, “Department heads – can execute their own contracts,” and that those same individuals, *i.e.*, Mr. Crowley, Mr. Powell, Mr. Barnhart, Mr. Atkins, and Mr. Woker, are responsible for the bidding process.– indicating that the department directors do not report (directly or indirectly) to Ms. Crowley or Ms. Powell, and

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<sup>18</sup> See UCA at 11.

<sup>19</sup> See Bank Resolution and Signatory Cards (Oct. 5, 2016).

<sup>20</sup> See Denial Letter at 3-4.

<sup>21</sup> Appeal Letter at 1.

that Ms. Crowley and Ms. Powell do not review and approve/disapprove all bids.<sup>22</sup> Powell did not these seemingly contradictory statements.

Powell's non-SED participants Mr. Crowley, Mr. Powell, Mr. Barnhart, Mr. Woker, Mr. McLaughlin, and Mr. Atkins manage all of Powell's architectural and engineering design work, without participation from Ms. Crowley or Ms. Powell. Indeed, Ms. Crowley and Ms. Powell stated that they "could not do" such work on their own.<sup>23</sup> The non-SED participants also supervise and manage Powell's field operations, with no apparent participation from the SED owners.<sup>24</sup> Ms. Crowley and Ms. Powell also stated that while they "assist" with the "financial aspect[s]" of contracts they do not participate in determining the scope of work;<sup>25</sup> rather, Mr. Crowley, Mr. Powell, and Mr. Barnhart do so. The non-SED participants also independently negotiate and execute contracts without authorization or participation from Ms. Crowley or Ms. Powell.<sup>26,27</sup> In addition, Ms. Crowley and Ms. Powell share their authority to sign checks with Mr. Crowley and Mr. Powell.<sup>28</sup> The checks only require one signature.<sup>29</sup> Ms. Crowley, Mr. Crowley, Ms. Powell, and Mr. Powell are all authorized to independently execute notes, mortgages, pledges, and "other agreements covering any of the stocks, bonds, accounts receivable, or other securities, assets or property" on behalf of Powell, at any time, and for any amount.<sup>30</sup>

The Regulation permits SED firm owners to delegate authority to the firm's non-SED participants. However, "the managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners *actually exercise* control over the firm's operations, management, and policy." (Emphasis added).

The substantial, and sometimes exclusive, authority that Powell's non-SED participants exercise in multiple areas of the firm's management, policy, and operations could not allow a recipient to

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<sup>22</sup> On-Site Report at 4.

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* The UCA states that Ms. Crowley "frequently" participates in field operations. UCA at 9. However, Ms. Crowley and Ms. Powell stated during the on-site visit that department heads and crew members are responsible for field operations. During the on-site visit, Ms. Crowley and Ms. Powell did not mention any participation from Ms. Crowley in the firm's field operations. *See* On-Site Report at 4.

<sup>25</sup> *See id.*

<sup>26</sup> *See* On-Site Report at 4. The record shows that Mr. Barnhart provided the sole signature on at least two contracts, in the amounts of **REDACTED**. *See* Contract Document Review.

<sup>27</sup> Ms. Crowley and Ms. Powell's inability to perform design work, minimal participation in contract execution, and lack of experience and expertise in any of the firm's primary activities suggest that Powell's non-SED participants disproportionately control the firm under §26.71(e). MODOT did not cite §26.71(e) in its denial letter.

<sup>28</sup> *See* UCA at 11.

<sup>29</sup> *See* Bank Resolution and Signatory Cards (Oct. 5, 2016).

<sup>30</sup> *Id.*

reasonably conclude that Ms. Crowley and Ms. Powell *actually control* the firm's management, policy, and operations – contrary to the requirements of §26.71(f).

Section 26.71(g) states:

*The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.*

(Emphasis added).

*Ms. Crowley*

Immediately prior to founding Powell, Ms. Crowley worked at CWM for 37 years.<sup>31</sup> At CWM she performed secretarial duties, office management, and bookkeeping.<sup>32</sup> As Powell's CEO, Ms. Crowley sets policy for the firm's direction and scope of operations; makes major purchasing decisions; supervises sales and marketing activities; hires and fires management staff; designates profit spending or investment; obligates the firm by contract; purchases equipment and signs business checks.<sup>33</sup> She also manages accounts receivable, employee benefits such as 401(k) plans, and payroll administration.<sup>34</sup> In addition, she makes and receives phone calls, sends and receives email, and sends and receives postal mail.<sup>35</sup> She does not supervise contract negotiations or execution, field operations, or architectural and engineering design work. Nor does she hold any of the professional licenses or certifications that Powell's non-SED owners or directors have earned.

MODOT determined that Ms. Crowley's duties at CWM do not indicate that she has the managerial and technical competence related to architecture, engineering, and land surveying activities that §26.71(g) requires. Powell did not provide any evidence to demonstrate otherwise. The sheer number of years that Ms. Crowley worked at CWM indicates she could have an overall understanding of architecture, engineering, and land surveying activities. MODOT further concluded that Ms. Crowley's administrative and secretarial responsibilities at CWM do not indicate that she can critically evaluate information that technical experts (or other participants in the business) provide and accordingly, make informed, independent decisions.

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<sup>31</sup> See Résumés of Owners, Officers, Key Personnel.

<sup>32</sup> See On-Site Report at 2.

<sup>33</sup> See UCA at 9.

<sup>34</sup> See Résumés of Owners, Officers, Key Personnel.

<sup>35</sup> See On-Site Report at 4.

Powell did not provide evidence to the contrary. Rather, Powell provided a host of evidence that the firm's non-SED participants, as discussed above, assume responsibility for evaluating information and making informed, independent decisions in such areas as engineering and architectural design work; contract negotiation and execution; and field operations. The record contains, at best, scant evidence that Powell's non-SED participants even consult with Ms. Crowley before making decisions.

Having considered Ms. Crowley's primarily administrative role at Powell, in conjunction with the primarily administrative role she performed at CWM, MODOT concluded that Ms. Crowley's expertise is limited to office management, administration, or bookkeeping functions unrelated to Powell's principal business activity of providing engineering, architectural, and land surveying services. Section 26.71(g) makes clear that such expertise is insufficient to demonstrate control.

*Ms. Powell*

Ms. Powell began her professional career in 2001 at Kilgore's Medical Pharmacy and Red Cross Pharmacy, neither of which are related to architecture, engineering, and land surveying activities.<sup>36</sup> In 2005 she began working at Powell & Associates, where her husband, Mr. Powell, "did it all" while she focused on administrative tasks.<sup>37</sup> Ms. Powell joined Powell in October 2016, while maintaining her employment at Powell & Associates.<sup>38</sup> As President of Powell, Ms. Powell organizes office operations and procedures; prepares payroll; pays bills; designs filing systems; reviews and approves supply requisitions; and assigns and monitors clerical functions.<sup>39</sup> She also purports to review sales reports and financials and compare them to Powell's short and long term plans; oversee business development and growth; and direct the firm's marketing plans.

Powell did not provide evidence of how Ms. Powell's administrative role at Powell & Associates has given her an overall understanding of Powell's primary business activities of providing architectural, engineering, and land surveying services. MODOT determined that Ms. Powell's experience at Powell & Associates does not demonstrate that she has the managerial and technical competence related to architecture, engineering, and land surveying activities that §26.71(g) requires.<sup>40</sup> MODOT further concluded that performing administrative tasks at Powell & Associates for 11 years does not demonstrate that Ms. Powell has the ability to critically evaluate information that technical experts (or other participants in Powell) provide and accordingly, make informed, independent decisions. Powell did not provide evidence

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<sup>36</sup> *See id.*

<sup>37</sup> *On-Site Report.*

<sup>38</sup> *See Résumés of Owners, Officers, Key Personnel.*

<sup>39</sup> *See id.*; *see also* On-Site Report at 4.

<sup>40</sup> As evidence of Ms. Powell's technical experience or expertise, Powell stated that Ms. Powell would receive her Certified Floodplain Managers (CFM) certification in May 2017, allowing her to supervise Powell's floodplain management and flood hazard projects and ultimately, lead to the firm's growth and success. *See id.* As of the date of Powell's appeal to the Department (April 18, 2017), Ms. Powell did not have this certification. The Department does not base its appeal decisions on future events. *See* 26.89(f)(6): "The Department's decision is based on the *status and circumstances of the firm as of the date of the decision being appealed.*" (Emphasis added).

demonstrating otherwise. Ms. Powell's current responsibilities at Powell, combined with administrative role at Powell & Associates, led MODOT to conclude that Ms. Powell's expertise is limited to office management, administration, or bookkeeping functions unrelated to Powell's principal business activities. Section 26.71(g) makes clear that such expertise, by itself, does not sufficiently demonstrate control.

The Department finds that substantial evidence in the record supports MODOT's conclusion that Powell does not meet the eligibility requirements of §26.71(g).

**CONCLUSION:**

Substantial evidence supports MODOT's determination that Powell did not prove eligibility under §§26.71(f) and (g), as §26.61(b) requires. MODOT's determination is consistent with applicable certification standards. We therefore affirm under §26.89(f)(1).

This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino  
Lead Equal Opportunity Specialist  
Disadvantaged Business Enterprise Division

cc: MODOT