

June 20, 2019

Reference Number 19-0045

Melissa Collins  
President  
Performance Plus Products, LLC  
**REDACTED**  
Aliso Viejo, CA 92656

Dear Ms. Collins:

This letter addresses your firm Performance Plus Products, LLC's (PPP) November 29, 2018 appeal of the California Unified Certification Program's (CUCP) October 9, 2018 decision to deny PPP's Disadvantaged Business Enterprise (DBE) Uniform Certification Application (UCA) under the rules of 49 CFR Part 26 (the Regulation).

CUCP based its ineligibility determination on multiple ownership and control grounds. After reviewing the record, we affirm CUCP's decision under section 26.71(e) and pursuant to section 26.89(f)(1).<sup>1</sup>

### *Background*

You are PPP's 51% owner, President, Chief Executive Officer, and a Manager. Your brother in law Tom Collins owns 49% and is Vice President, Chief Operating Officer, and a Manager.<sup>2</sup> He is not socially and economically disadvantaged (SED) under the Regulation. You and Mr. Collins are the firm's only employees. PPP manufactures a dual purpose grout for concrete slabs used in roadway repair. The firm sells the grout to contractors who install precast concrete

---

<sup>1</sup> Section 26.71(e) states: "Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm."

Section 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>2</sup> See Minutes of the Meeting of the Members of Performance Plus Products LLC (Nov. 30, 2017).

pavement on California Department of Transportation projects.<sup>3</sup> Mr. Collins previously owned a firm that manufactures recycled glass and concrete products.<sup>4</sup>

As Managers, you and Mr. Collins can unilaterally acquire property, invest funds, write checks, and otherwise financially and contractually obligate PPP.<sup>5</sup> Both you and Mr. Collins set policy for PPP's direction/scope of operations, bid on and estimate projects, make major purchasing decisions, perform marketing and sales activities, supervise field operations, perform office management tasks, and sign business checks.<sup>6</sup> You consult with Mr. Collins before making financial decisions and bidding on and estimating projects.<sup>7</sup> Mr. Collins designates profit spending and investment, obligates the firm by contract/credit, and purchases equipment – activities that you “never” perform.<sup>8</sup>

### *Discussion*

PPP bears the burden of proving that it meets the Regulation's certification requirements. *See* section 26.61(b). The standard is by a preponderance of the evidence, which means more likely than not. CUCP found that you do not control PPP within the meaning of section 26.71(e) because Mr. Collins “frequently” estimates and bids on projects and negotiates and executes contracts, “always” signs checks and approves equipment purchases, and has authorization to sign contracts.<sup>9</sup> In addition, he procured PPP's three largest contracts. Nonetheless, you argue that your involvement with PPP exceeds his because he has begun retiring.<sup>10</sup> You contend that you “have taken over the majority role in sustaining and growing [PPP].”<sup>11</sup>

Individuals who are not SED may be involved in a DBE as owners, managers, employees, stockholders, officers, or directors. However, those individuals must not possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm. *See* section 26.71(e). PPP's Operating Agreement shows that Mr. Collins possesses the power to control PPP, as he does not need your consent to act on behalf of the firm. Further, substantial evidence demonstrates that Mr. Collins is disproportionately responsible for the firm's

---

<sup>3</sup> *See* UCA at 5 and Site Visit Questionnaire (Aug. 22, 2018) at 2.

<sup>4</sup> *See* Site Visit Questionnaire at 2.

<sup>5</sup> *See* Operating Agreement for Performance Plus Products, LLC (Operating Agreement) (effective Sept. 10, 2014) at Art. III, Sec. 3.4.

<sup>6</sup> *See* UCA at 9.

<sup>7</sup> *See* Site Visit Questionnaire at 4-5.

<sup>8</sup> *See* UCA at 9.

<sup>9</sup> Denial Letter at 4.

<sup>10</sup> *See* Site Visit Questionnaire at 3 and 4.

<sup>11</sup> Appeal Letter at 1.

operations, as he procures contracts, designates profit spending and investment, obligates the firm by contract/credit, and purchases equipment – activities in which you never participate.<sup>12</sup>

We find that substantial evidence supports CUCP's determination that PPP is ineligible under section 26.71(e). Thus, we affirm.

*Conclusion*

We affirm CUCP's decision under section 26.89(f)(1). This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks  
Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: CUCP

---

<sup>12</sup> See UCA at 9.