

**United States Small Business Administration
Office of Hearings and Appeals**

IN THE MATTER OF:

Command Languages, Inc.

Appellant

RE: FEDSYS, Inc.

Solicitation No. SAQMMA08R0322

SBA No. VET-149

Decided: May 13, 2009

APPEARANCES

Richard L. Moorhouse and Sean M. Connolly, Greenberg Traurig, LLP, Washington, D.C., for Appellant.

Kevin R. Harber, U.S. Small Business Administration, Office of General Counsel, Washington, D.C., for the Agency.

DECISION

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134.

II. Issue

Did the Director for Government Contracting err when she found a service-disabled veteran controls a concern, as required by 13 C.F.R. § 125.10, when the service-disabled veteran resides 900 miles from the headquarters of the service-disabled veteran-owned concern? *See* 13 C.F.R. § 134.508.

III. Background

A. Solicitation

On November 21, 2008, the Office of Acquisition Management, U.S. Department of State (DOS) issued Request for Proposals No. SAQMMA08R0322 (RFP) as a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. The RFP

called for language-related services to be performed in Iraq in support of DOS's mission to include interpretation, translation, and transcription services, as well as management supervisory, and administrative functionality to support the provision of those services. On February 24, 2009, DOS issued a notice on FedBizOps advising that three awards were made under the RFP, including one to FEDSYS, Inc. (FEDSYS).

B. Protest

On February 27, 2009, Command Languages, Inc. (Appellant) protested the eligibility of FEDSYS. Appellant alleged FEDSYS's Chief Executive Officer (CEO), Matthew Mason, is not a service-disabled veteran and that he may not own FEDSYS. On March 9, 2009, SBA's Acting Assistant Director, Office of Contract Assistance, notified FEDSYS of the protest and requested documentation from FEDSYS to substantiate its alleged eligibility as a SDVO SBC. FEDSYS submitted documents in response to the protest electronically, on March 16 and 30, 2009, and by hand delivery, on March 20, 2009.

C. SBA Determination

On April 1, 2009, the SBA's Director, Office of Government Contracting (D/GC) determined FEDSYS meets SDVO SBC eligibility requirements. The D/GC noted FEDSYS submitted a copy of the Department of Veterans Affairs decision documenting Mr. Mason has a service-connected disability and satisfied the service-disabled veteran status requirement under 13 C.F.R. § 125.8. The D/GC found Mr. Mason owns fifty-one percent of all of FEDSYS's outstanding stock and that there are no stock options or impermissible conditions on stock ownership and, accordingly, FEDSYS satisfies ownership as required by 13 C.F.R. § 125.9. Finally, the D/GC determined FEDSYS meets the requirements of 13 C.F.R. § 125.10 because Mr. Mason possesses the managerial experience needed to run FEDSYS, holds the highest officer position, and controls the day-to-day management and administration of FEDSYS through regular travel to various FEDSYS office locations and worksites.

D. Appeal Petition

On April 15, 2009, Appellant filed an appeal of the D/GC's determination with the SBA Office of Hearings and Appeals (OHA). Appellant challenges Mr. Mason's control of FEDSYS under 13 C.F.R. § 125.10. Appellant asserts Mr. Mason: (1) lives too far away from FEDSYS's headquarters to control FEDSYS; and (2) must manage both the long-term decision making and day-to-day management and administration of the business operations of FEDSYS.

Appellant alleges the D/GC improperly determined Mr. Mason controls FEDSYS's day-to-day operations "based simply on what it deemed" meticulous travel itineraries, which the D/GC did not discuss further. Hence, Appellant alleges the D/GC's statement that Mr. Mason appeared to exercise day-to-day control of FEDSYS is without basis.

Appellant argues travel itineraries do not equal day-to-day management. Appellant notes that meticulous travel documents do not mean extensive travel and avers the D/GC makes no mention of how many times Mr. Mason traveled between his home in Virginia Beach and

FEDSYS's headquarters in Juno, Florida. Appellant alleges that other documents including payroll documents, telephone logs, or evidence explaining Mr. Mason's role in the decision making process would better serve to demonstrate the time and effort he spent managing FEDSYS's day-to-day operations.

Appellant also asserts the distance between Mr. Mason's home and FEDSYS's headquarters demonstrates his lack of day-to-day control. Appellant states there are 913 miles between Mr. Mason's home and FEDSYS's headquarters and thousands of miles between Mr. Mason's home and where the instant contract arising from the RFP is to be performed. Appellant alleges the D/GC glossed over these significant distances. Instead, the D/GC applied Mr. Mason's travel documents to determine Mr. Mason controls the day-to-day operations of FEDSYS without explaining what he does during his travels and what he does in Virginia to manage FEDSYS.

Appellant argues OHA precedent supports its position that distance is a key factor. Specifically, Appellant cites *Matter of DAV Prime/Vantex Service Joint Venture*, SBA No. VET-138 (2008); *Matter of NuGate Group*, SBA No. VET-132 (2008); *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007); and *Matter of First Capital Interiors, Inc.*, SBA No. VET-112 (2006). Appellant argues the control and care needed to manage overseas contracts of the type arising from the RFP cannot occur if FEDSYS is located in Florida and Mr. Mason is domiciled in Virginia.

Additionally, Appellant argues that the D/GC improperly failed to make any determination whether Mr. Mason was making long-term decisions for FEDSYS. Appellant avers there is no mention of Mr. Mason as the point of contact on the Central Contractor Registration (CCR) database. Appellant states FEDSYS's listed point of contact is Mr. Richard Ford, who works in Florida. Appellant argues this is probative since FEDSYS is responsible for updating and certifying its database entries.

Appellant's final argument is that the D/GC failed to consider conflicting evidence that Mr. Mason is neither in control of day-to-day management nor long-term decision making. Appellant reiterates FEDSYS does not list Mr. Mason as its primary or secondary point of contact on its CCR database entry and that this entry was current as of the date of its offer under the RFP. In addition, FEDSYS's VetBiz registry lists Mr. Ford as being the sole owner of FEDSYS. Taken together, Appellant alleges these facts provide credible evidence that FEDSYS is not controlled by Mr. Mason and thus the D/GC was in error.

E. SBA Response

SBA contends the Record supports the D/GC's Determination. SBA states the Record demonstrates Mr. Mason: (1) is a Service-Disabled Veteran; (2) owns 51% of FEDSYS; (3) serves as the Chairman and CEO of FEDSYS; (4) possesses both general management experience and experience in the subject matter of the contract; and (5) regularly travels to various locations to supervise the firm's personnel and oversee its business activities.

SBA notes Appellant's appeal cites *Matter of First Capital Interiors, Inc.*, SBA No. VET-112 (2006), and focuses on Mr. Mason's lack of physical proximity to FEDSYS's headquarters and contract worksites. However, SBA asserts Appellant's reliance on *First Capital Interiors, Inc.*, is misplaced. SBA argues, unlike the veteran in *First Capital Interiors, Inc.*, Mr. Mason has management experience, specialized experience in linguistics, translation, and intelligence operations, and regularly travels to FEDSYS's offices, worksites, and meeting locations. Additionally, SBA states *First Capital Interiors, Inc.*, was based on the unique nature of construction work. SBA also disputes that the D/GC based her determination on travel itineraries. SBA asserts that the determination was based upon meticulous documentation and not itineraries.

SBA defends the process it used to gain information from FEDSYS. SBA contends it was reasonable and based upon SBA's experience in gaining what is necessary to decide protests. Moreover, SBA contends it was diligent in investigating FEDSYS and required FEDSYS to provide additional documentation and clarification on points of concern.

SBA further argues that FEDSYS's CCR registration and VetBiz registrations are not relevant evidence in this appeal. Instead, SBA states they are merely evidence of sloppy record keeping.

Finally, SBA addresses the issue of long-term decision making and avers that the Record demonstrates Mr. Mason makes these decisions by his control over the board of directors.

IV. Analysis

A. Timeliness and Standard of Review

Appellant filed its appeal petition within 10 business days of receiving the D/GC's determination, and thus the appeal is timely. 13 C.F.R. § 134.503.

The standard of review for SDVO SBC appeals is whether the D/GC's determination was based on clear error of fact or law. 13 C.F.R. § 134.508. In determining whether there is a clear error of fact or law, OHA does not evaluate whether a concern met the eligibility requirements of 13 C.F.R. §§ 125.9 and 125.10 *de novo*. Rather, OHA reviews the record to determine whether the D/GC based her decision upon a clear error of fact or law. 13 C.F.R. § 134.508; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to size appeals and SDVO SBC appeals). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction the D/GC erred in making a key finding of law or fact.

B. Merits of the Appeal

OHA has not ruled on an appeal with facts similar to this, *i.e.*, OHA has not ruled on whether a service-disabled veteran needs to be located in close proximity to a concern's headquarters when the concern performs contracts many thousands of miles away from the headquarters. Thus, this is a case of first impression.

I also note that Appellant filed its appeal without the benefit of Mr. Mason's declaration and that Appellant's counsel only received access to documents available to the D/GC after counsel was admitted under a Protective Order. Accordingly, Appellant did not have the benefit of the evidence available to the D/GC and could not have known the extent of Mr. Mason's relevant experience and how he spent his time as CEO of FEDSYS while the D/GC did have this benefit and should have explained this in the determination. Hence, Appellant could not have known the travel itineraries merely support the contents of Mr. Mason's declaration. Otherwise, the travel itineraries, as Appellant correctly asserts, prove little.

It is also relevant that two primary decisions Appellant cites in support of its control argument, *Matter of First Capital Interiors, Inc.*, SBA No. VET-112 (2007), and *IITS Matter of IITS-Nabholtz, LLC*, SBA No. VET-114 (2007), involve construction contracts. Another decision Appellant cites, *Matter of NuGate Group*, SBA No. VET-132 (2008), involves janitorial services. Citing construction or janitorial cases is inapposite because that kind of work is irrelevant to this appeal. Construction and janitorial contracts performed by small concerns require personal attention for success to occur. Thus, the service-disabled veteran must be reasonably proximate to where the work is being performed to be able to manage day-to-day operations.

In the present appeal, Appellant is providing personnel to perform translation tasks overseas, thousands of miles from its corporate headquarters. Thus, geographic proximity is less of an issue in assessing day-to-day management. Instead, Mr. Mason reasoned the key to successfully performing the contract arising from the RFP is for FEDSYS to recruit the right kind of personnel to perform the challenging work required by the RFP. As the Record shows, this is precisely what Mr. Mason worked hard to accomplish.

The Record proves FEDSYS: (1) is 51% owned by Mr. Mason (and that no one but he can control FEDSYS's operations, either in the short-term or long-term); (2) provides specialized services to the United States in extremely challenging overseas locations; (3) performs several contracts in these challenging locations; and (4) has enjoyed substantial business growth since Mr. Mason became its CEO in early 2007. The Record contains a declaration that explains how Mr. Mason controls FEDSYS's daily and long-term business operations, including why he travels frequently, both inside and outside the United States, to manage FEDSYS. For example, Mr. Mason explains why and how he travels within the United States to recruit personnel and outside of the United States (for weeks at a time) to oversee contracts and meet with relevant government personnel. Based upon Mr. Mason's background as a decorated U.S. Navy special warfare operative, his explanation of his role is both logical and compelling.

Mr. Mason's declaration is illustrative of an executive immersed in the operation and direction of a concern. From his explanation and the timeline of FEDSYS's recent success, it is likely he is the driving force in the success of FEDSYS. The Record demonstrates his experience as a U.S. Navy special warfare operative and his experience in other positions prepared him to successfully manage FEDSYS.

Under the facts of this appeal, the locations of both FEDSYS's headquarters and

Mr. Mason's home are irrelevant. This is because FEDSYS performs its contracts in geographically diverse locations thousands of miles from its headquarters and Mr. Mason's home. Plainly, neither Mr. Mason, nor anyone else, can better control FEDSYS's contract operations from Florida than Virginia or vice versa. Accordingly, since the kind of work FEDSYS performs does not require close proximity to the headquarters or the home of the service-disabled veteran, *e.g.*, like a construction contract, the geographic location of the service-disabled veteran is irrelevant in this appeal.

To hold the location of FEDSYS's headquarters matters when it is performing work at various diverse overseas locations, would: (a) repudiate the ability/necessity of corporate executives to delegate authority under such conditions; (b) inhibit small business concerns from performing geographically diverse contracts; (c) ignore the efficacy of modern communications; and (d) prevent FEDSYS from growing. These would be undesirable results and would not advance the goals of the SDVO SBC program.

This decision does not mean geographic location cannot matter. Geographic location of the veteran can and does matter, as it did in *Matter of First Capital Interiors, Inc.*, SBA No. VET-112 (2007). In *First Capital Interiors, Inc.*, the service-disabled veteran lived and worked in California, thousands of miles away from First Capital's headquarters in Ohio. First Capital was awarded a construction contract in Ohio and OHA determined the veteran, who had no experience managing a construction concern, plainly did not have the ability to manage or control a company performing construction in Ohio while living and working in California. In that decision, I specifically noted construction routinely requires on-site interaction with customers and supervision of subcontractors and I acknowledged:

neither OHA nor SBA maintains a concern cannot manage a job that is 2000 miles away from its headquarters. Rather, I [held] it is not clearly erroneous for the Area Office to conclude that [the service-disabled veteran] cannot manage [First Capital Interior, Inc.'s] day-to-day business operations as required by 13 C.F.R. § 125.10(a), which would consist largely of construction contracts being performed in Ohio, via telephone or e-mail (especially at night), from three time zones away.

Matter of First Capital Interiors, Inc., SBA No. VET-112, at 8 (2007).

Here, Appellant correctly asserts that the D/GC's Determination should have made it clear that Mr. Mason also controls the long-term decision making of FEDSYS. However, the D/GC's omission is harmless, for the Record establishes Mr. Mason controls FEDSYS's long-term decision.

I have considered Appellant's other arguments concerning conflicting evidence, including the failure of Appellant to list Mr. Mason on the CCR as its point of contact. These points are irrelevant. First, as found by the D/GC, Mr. Mason owns 51% of FEDSYS and has the complete legal right to control FEDSYS's operations. Second, merely listing a person as a point of contact on the CCR does not indicate either control or a lack of control. Instead,

particularly under the facts of this appeal, it makes sense that FEDSYS would list Mr. Ford as the point of contact since Mr. Mason travels frequently in his efforts to lead and manage FEDSYS.

I hold that: (1) corporate location within the United States; and (2) the location of the service-disabled veteran within the United States are irrelevant to the issue of control when a concern performs the majority of its contracts overseas. Instead, the key, under 13 C.F.R. § 125.10, is whether the Record establishes the service-disabled veteran actually controls the SDVO concern. In the instant case the Record confirms Mr. Mason built FEDSYS to its current level of success and that he controls its operations through his hard work, nearly incessant travel, and use of modern electronic communications. Thus, the D/GC did not err in determining Mr. Mason controls FEDSYS.

V. Conclusion

The Record supports the D/GC's determination and so Appellant has failed to prove any clear error of fact or law in the D/GC's decision. Accordingly, the appeal is DENIED and the D/GC's determination is AFFIRMED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.515(a).

THOMAS B. PENDER
Administrative Judge