

Date: September 30, 2021

From: Associate Executive Director, Office of Real Property (003C7)

Subj: Office of Construction and Facilities Management Real Property Policy Memorandum
2021-07: VA Rule of Two and Lease Business Size Review Requirements (VIEWS
5544333)

To: All VA Leasing Professionals

1. The Purpose of this Memorandum is to: (1) reaffirm the U.S. Supreme Court's decision in *Kingdomware Technologies* applies to real property lease procurements conducted by the U.S. Department of Veterans Affairs (VA) based on a legal determination that [38 U.S.C. § 8127](#) applies to all VA contracts; and (2) provides revised guidance and template documents for documentation and review of VA Rule of Two Set-Aside Determinations.

2. Background: On June 16, 2016, the U.S. Supreme Court ruled that, consistent with [Public Law 109-461](#) ([38 U.S.C. §§ 8127](#) and [8128](#)), VA shall award contracts based upon competition restricted to Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) when a Lease Contracting Officer (LCO) has a reasonable expectation, based on market research, that two or more firms listed as verified in Vendor Information Pages ([VIP](#)) database are likely to submit offers and an award can be made at a fair and reasonable price for the best value to the United States. This is known as the "VA Rule of Two". The VA Rule of Two is applicable when VA conducts the procurement per [38 U.S.C. § 8127](#)(d). For procurements conducted by other governmental entities on VA's behalf, [38 U.S.C. § 8127](#)(i) applies and limits the application of the rule to the acquisition of goods or services. Although there is no requirement to set aside lease contracts for small business concerns, VA LCOs are mandated to comply with the VA Rule of Two and as such, shall follow the procedures outlined herein.

3. Market Research Requirement for VA Rule of Two:

- a. The General Services Acquisition Manual (GSAM) [570.301](#) requires that a market survey be conducted to identify potential locations capable of meeting a space requirement for the Government. The term "market survey" refers to the process of gathering information and physically touring specific properties in the market, to determine whether suitable property is competitively available. Market surveys are often combined with general market research,

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which is any methodical effort to gather information about the market, to gain insight or improve business decisions.

- b. Market research also plays a central role in setting negotiation objectives by helping to identify ranges of fair and reasonable costs for the type of space desired. Commercial trade publications, real estate market reports from CoStar and LoopNet, current market information including rental quotes and cost estimates obtained on the market survey, communications with real estate brokers, and recent federal and/or private-sector lease contract rental rates are all relevant sources of information.
- c. In performing market research and developing the acquisition strategy, the LCO shall take into consideration the impact of VA Rule of Two and the best method of successfully implementing the requirement. The market research and assessment need to be completed and thoroughly documented in the lease contract file to memorialize compliance with the VA Rule of Two. LCOs are required to take the following actions:
 - i. Review the Vendor Information Pages ([VIP](#)) database to determine if two or more verified SDVOSB/VOSB firms are listed under the applicable NAICS code.
 - ii. Conduct and document appropriate market research to determine if the SDVOSBs/VOSBs identified are qualified and capable of performing the requirement(s) at a fair and reasonable price. This may include responses to sources sought notices, completed capabilities statements (Exhibit A), Requests for Information (RFIs), pre-proposal conferences, market surveys or other acquisition-specific approaches. The use of sources sought notices to identify SDVOSBs/VOSBs and sending emails to firms within the VIP is encouraged in conducting market research and should be used when appropriate to identify the capable businesses most likely to submit an offer.
 - iii. Document the results on the VA Form 2268 as well as on associated acquisition planning and market research documentation.
 - iv. Save a “print out” of the list of firms registered under the NAICS code in [VIP](#) as of the date of market research for the lease contract file.

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4. Reasonable Price Analysis for VA Rule of Two: If the LCO identifies two or more SDVOSBs and/or VOSBs as being capable as a result of market research, the LCO is encouraged to provide those interested parties with a copy of the draft Request for Lease Proposal (RLP) and to request preliminary shell pricing based on VA's general space needs for the project. The LCO should review the shell pricing received from the firms and compare it to the negotiation objectives developed from the market research, market survey, available appraisal information or other relevant data in the context of fair and reasonable pricing.

5. VA Rule of Two Set-aside Determination: If there are not two or more capable SDVOSB or VOSB firms, or if two or more capable firms were identified but did not yield fair and reasonable pricing, then the LCO is supported in a determination that the procurement should not be set aside for SDVOSB or VOSB firms. However, if the LCO determines there are two or more capable SDVOSB or VOSB firms who offer reasonable pricing, then the LCO shall set the procurement aside for those business concerns and Office of Small and Disadvantaged Business Utilization (OSDBU) review is not required. The determination as to set-aside must be documented on the VA 2268 with supporting documentation such as outreach efforts, market surveys/research, and assessment included in the lease contract file.

6. Next Steps if Procurement is Not Set Aside for SDVOSB or VOSB: If the LCO determines the procurement should not be set-aside for SDVOSB or VOSB interests, then the LCO may elect to pursue either a small-business set-aside or an unrestricted procurement (full and open competition). There is no requirement that the procurement be set aside for small businesses prior to soliciting unrestricted. However, OSDBU review is required for all lease procurements exceeding the Simplified Lease Acquisition Threshold (SLAT) that are not set aside for SDVOSB or VOSB business concerns. The determination as to set-aside must be documented on the VA 2268 in accordance with the following procedures.

- a. Procedures for acquisitions of leasehold interests in real property at or below SLAT:
 - i. Completed VA 2268 signed by the LCO and cognizant small business representative assigned to the procuring activity.

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- ii. In the event the small business representative does not concur with the LCO's determination and the LCO wishes to continue with the action despite the nonconcurrence, the Head of Contracting Activity (HCA) must concur and sign the VA 2268 in order for the procurement to continue.
- iii. OSDBU review is not required, however, if a review is conducted, the small business representative shall provide a report of any nonconcurrences to OSDBU.
- iv. File the final VA 2268 with copies of outreach efforts, market surveys and other related documentation in the eCMS lease contract file.

b. Procedures for acquisitions of leasehold interests in real property over SLAT:

- i. Completed VA 2268 signed by the LCO and cognizant small business representative assigned to the procuring activity.
- ii. Submit VA 2268 and required documentation for OSDBU review in accordance with sections 5a-5f of the FY 2016 Small Business Procurement Review Program Policy ([SBPRPP](#)) dated June 22, 2016 (Exhibit B).
- iii. In the event OSDBU does not concur with the LCO's determination and the LCO wishes to continue despite the nonconcurrence, the LCO must follow the procedures outlined in section 6.b. of the FY 2016 [SBPRPP](#). The HCA has the final review authority in such instances.
- iv. File the final VA 2268 with copies of outreach efforts, market surveys and other related documentation in the eCMS lease contract file.

7. Rescissions: "Real Property Policy Memorandum 2018-09 – *Kingdomware Technologies* U.S. Supreme Court Decision and Facility Leasing" is hereby rescinded.

8. References:

- a. [Public Law 109-461](#), Veterans Benefits, Health Care, and Information Technology Act of 2006
- b. [Public Law 110-389](#), Veterans' Benefits Improvement Act of 2008
- c. [VA Procurement Policy Memorandum \(2016-05\) \(Revised AUG 2019\)](#)

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- d. [U.S. Supreme Court Decision 14-916 Kingdomware Technologies, Inc. v. United States](#)
- e. [U.S. Government Accountability Office Decision B-417971, Cross & Company, LLC](#)

9. In the event policy or other guidance issued by any other VA organization pertaining to real property lease acquisitions conflicts with policy or guidance issued by Office of Real Property (ORP), ORP policy/guidance shall control.

10. If you have any questions, please contact Director, Real Property Policy and Programs, Brandi Stockstill, 202-329-6538, or Brandilyne.Stockstill@va.gov.

Scott MacRae
Acting

Attachments
Exhibit A – Capabilities Statement
Exhibit B – FY 2016 Small Business Procurement Review Program Policy