

APPENDIX I: VA RULE OF TWO AND LEASE BUSINESS SIZE REVIEW REQUIREMENTS

Appendix I

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Part 1: Overview

The Purpose of this Appendix 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.

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 SBA's [Veteran Small Business Certification \(sba.gov\)](#) 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 in competitive lease procurements and as such, shall follow the procedures outlined herein.

For sole source lease acquisitions, refer to Part 5 of this Appendix: Procedures for non-competitive acquisitions of leasehold interests in real property (New/Replacing/Succeeding/Superseding).

Part 2: Market Research Requirement

The General Services Acquisition Manual (GSAM) 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, which is any methodical effort to gather information about the market, to gain insight or improve business decisions.

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 inform.

Consideration of VA Rule of Two in Market Research

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 SBA's [Veteran Small Business Certification \(sba.gov\)](https://www.sba.gov) 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 (see Attachment 1: Capabilities Statement Request), 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 SBA's [Veteran Small Business Certification \(sba.gov\)](https://www.sba.gov) database 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 SBA's [Veteran Small Business Certification \(sba.gov\)](https://www.sba.gov) database as of the date of market research for the lease contract file.

Part 3: 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.

Part 4: VA Rule of Two Set-aside Determination

- i. 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 because the VA Rule of Two could not be satisfied.

- ii. 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.

Part 5: 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, the LCO must follow procedures below prior to proceeding with the procurement:

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.
- 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 nonconcurrency, 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.

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.
- iii. In the event OSDBU does not concur with the LCO's determination and the LCO wishes to continue despite the nonconcurrency, 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.

Procedures for Non-Competitive Acquisitions of Leasehold Interests in Real Property (New/Replacing/Succeeding/Superseding):

- i. Completed VA 2268 signed by the LCO documenting the non-competitive situation and/or rationale why the VA Rule of Two could not be satisfied.
- ii. File the final VA 2268 with a copy of either the final approved Justification for Other than Full and Open Competition, or the Lack of Competition – Memo to File (SLAT Leases), in the eCMS lease contract file.
- iii. No further action is required.

Part: 6: References

- [Public Law 109-461](#), Veterans Benefits, Health Care, and Information Technology Act of 2006
- [Public Law 110-389](#), Veterans' Benefits Improvement Act of 2008
- [U.S. Supreme Court Decision 14-916 Kingdomware Technologies, Inc. v. United States](#)
- [U.S. Government Accountability Office Decision B-417971, Cross & Company, LLC](#)

Attachment 1 – Capabilities Statement Request

Attachment - VOSB or SDVOSB Status

The NAICS Code for this procurement is [531120 Lessors of Nonresidential Buildings (except Mini warehouses)], and the small business size standard is [\$41.5 million for owners; \$30 million for brokers]. Responses to this notice will assist [enter CONTRACTING ACTIVITY] in determining if the acquisition should be set-aside for competition and restricted to SDVOSB or VOSB concerns in accordance with 38 USC § 8127.

The magnitude of the anticipated construction/buildout for this project is [Choose one]:

- (a) Less than \$25,000;
- (b) Between \$25,000 and \$100,000;
- (c) Between \$100,000 and \$250,000;
- (d) Between \$250,000 and \$500,000;
- (e) Between \$500,000 and \$1,000,000;
- (f) Between \$1,000,000 and \$2,000,000;
- (g) Between \$2,000,000 and \$5,000,000;
- (h) Between \$5,000,000 and \$10,000,000;
- (i) Between \$10,000,000 and \$20,000,000;
- (j) Between \$20,000,000 and \$50,000,000;
- (k) Between \$50,000,000 and \$100,000,000;
- (l) More than \$100,000,000.

[Range should take into account the FMV of the project (to include lessor funded construction and buildout, including amounts to be reimbursed to the lessor via lump sum or amortized in the rent).

VA makes monthly rental payments in arrears upon facility acceptance and may elect to pay specified tenant improvement via single lump-sum payment or amortize costs over the firm term of the lease.

VA makes no progress payments during the design or construction/build-out phases of the project.

This is not a request for proposals, only a request for information for planning purposes, and does not constitute a solicitation. A solicitation may or may not be issued.

Project Requirements: [CONTRACTING ACTIVITY] seeks information from Potential Offerors who are capable of successfully performing a lease

contract, including design and construction of the facility described above, for a term of up to **XX years**, inclusive of all options, as well as all maintenance and operation requirements for the duration of the lease term, at a fair and reasonable price. More information on VA's requirements can be found on the [Technical Information Library](#).

SDVOSB and VOSB firms are invited to provide information to contribute to the market research for this project. SDVOSB and VOSB firms must be registered in [SBA's Veteran Small Business Certification \(sba.gov\)](#) database. All business concerns must have the technical skills and financial capabilities necessary to perform the stated requirements. All business concerns are requested to submit a Capabilities Statement if they are interested in participating in this project. A submission checklist and information sheet are provided below for firms to fill out and submit, which will serve as the firm's Capabilities Statement.

Capabilities Statement Will Include:

1. Company name, address, point of contact, phone number, Experian Business Identification Number, and e-mail address;
2. Evidence of SDVOSB or VOSB status through registration at [SBA's Veteran Small Business Certification \(sba.gov\)](#) database;
3. Evidence of ability to offer as a small business under NAICS Code **[531120]** and listing in the [System for Award Management \(SAM.gov\)](#), including a copy of the representations and certifications made in that system;
4. A summary describing at least three (3) projects of similar size and scope completed in the past five (5) years that demonstrate your company's experience designing, constructing, and managing Federal leased facilities or health care facilities relevant to the project described above (3-page limit), and
5. Evidence of capability to obtain financing for a project of this size.

If desired, the company may also submit a narrative describing its capability.

Although this notice focuses on SDVOSB and VOSB, we encourage all small businesses and other interested parties to respond for market research purposes.

**CAPABILITIES STATEMENT
SUBMISSION CHECKLIST AND INFORMATION SHEET**

[City, State, Project Type]

Company name:

Company address:

Experian Business Identification Number:

Point of contact:

Phone number:

Email address:

The following items are attached to this Capabilities Statement:

- Evidence of SDVOSB or VOSB status through registration at [SBA's Veteran Small Business Certification \(sba.gov\)](https://www.sba.gov) database;
- Evidence of ability to offer as a small business under NAICS Code **[531120]** and listing in the [System for Award Management \(SAM.gov\)](https://www.sam.gov), with representations and certifications;
- A summary describing at least three (3) projects of similar size and scope completed in the past five (5) years that demonstrate the company's experience in, and evidence of; designing, constructing, and managing Federal leased facilities or health care facilities relevant to (input project specific RSF). (3-page limit); and
- Evidence of capability to obtain financing for a project of this size. For example, financial commitment letters from verified lenders, or other financial information that attests to low risk in obtaining financing for a project of this size and scope.

If desired, the company may also submit a narrative describing its capability, not to exceed two (2) pages.

By: _____ (Signature)

(Print Name, Title)