



# Federal Leasing Year in Review

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*January 16, 2018*

**Holland & Knight**

# Agenda

- *Kingdomware* – One Year Later
- Foreign Ownership of Property with U.S. Tenants
- Miscellaneous Updates
- Questions

# Kingdomware Technologies, Inc. v. United States

## » Background

## » GAO decides . . . And decides . . . And decides

- “Although our Office is not bound by the court's decisions, its decision in *Kingdomware*, together with the VA's position on the meaning of this statute, effectively means that protesters who continue to pursue these arguments will be unable to obtain meaningful relief. Consequently, under these circumstances, we will no longer consider protests based only on the argument that the VA must consider setting aside procurements for SDVOSBs (or VOSBs) before conducting an unrestricted procurement under the FSS.  
*Kingdomware Techs.-Reconsideration*, B-407232.2 (Dec. 13, 2012).
- This is Rare. One instance in 2015, with 2500 protests filed and 600 decisions issued.

# *Kingdomware Technologies, Inc. v. United States*

- » The Court of Federal Claims Rules in Favor of VA
- » The Federal Circuit (on a 2-1 vote) Affirmed
- » The Supreme Court rejected the VA's position and reversed the lower courts, finding:
  - The Rule of Two is mandatory for the VA even where the Government meets its veteran contracting goals.
  - FSS orders are "contracts" within meaning of 38 USC §8127(d); the VA-specific Rule of Two applies to VA FSS orders

# Kingdomware: Why do I care?

## » You might not...

- VA Statute vs. Small Business Act & SBA Regulations
- Applicability of the FAR to GSAM

## » But then again...

Solicitation Number: VA101-15-R-0162

Notice Type: Sources Sought

Synopsis: The Department of Veterans Affairs (VA), Office of Construction and Facilities Management, Office of Real Property (ORP), Washington, DC, is conducting market research/seeking capable sources from bondable and experienced firms that are classified and registered in [www.vip.vetbiz.gov](http://www.vip.vetbiz.gov) as either **Service-Disabled Veteran-Owned Small Businesses (SDVOSB)** or **Veteran-Owned Small Businesses (VOSB)** that are interested in a forecasted lease project for a Community Base Outpatient Clinic located in San Diego, California, of 99,986 net usable square feet (nurf)

# Kingdomware: The Doomsday Scenario

- » Rule of Two
- » Small Business Set Aside - Limitations on Subcontracting (FAR 52.219-14 (Jan 2017):

By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for –

(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

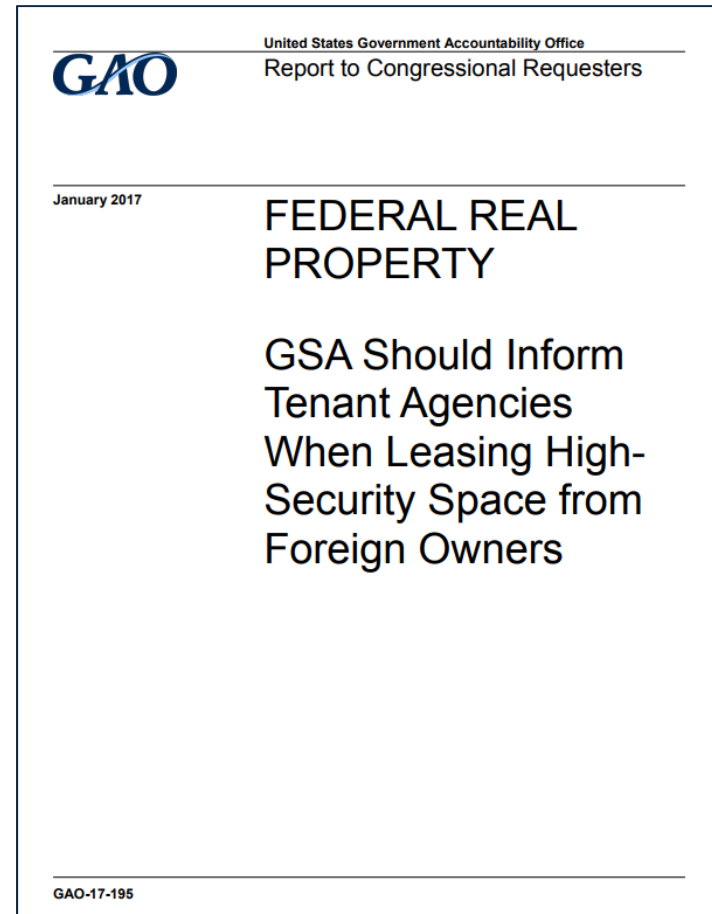
(2) Supplies (other than procurement from a nonmanufacturer of such supplies). The concern shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.

(3) General construction. The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

(4) Construction by special trade contractors. The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.

# Foreign Ownership – GAO Report

- » GAO was asked to examine GSA's lease of high-security space from foreign owners.
- » Report addressed:
  1. what is known about foreign ownership of high-security space leased by GSA;
  2. potential risks posed by such foreign ownership; and
  3. policies and procedures regarding GSA's leasing of space from foreign-owned entities.
- » Recommended that GSA determine whether the beneficial owner of high security leased space is a foreign entity and, if so, share that information with the tenant agencies for any needed security mitigation.



# Foreign Ownership – GSA Reponse

- » GSA Response two months later:
  - Determine beneficial ownership and, if it is a foreign-owned entity—
  - Inform tenant agency of foreign ownership
- » Applies to all leases regardless of security level
- » Requires the Contracting Officer to investigate through SAM / CAGE

**GSA** GSA Public Buildings Service

March 27, 2017

MEMORANDUM FOR: REGIONAL COMMISSIONERS, PBS  
REGIONAL LEASING DIRECTORS  
REGIONAL LEASE ACQUISITION OFFICERS

3/27/2017

X James C. Wisner  
James C. Wisner

Signed by: JAMES WISNER  
JAMES C. WISNER  
Assistant Commissioner for the Office of Leasing - PR

FROM:

SUBJECT: LEASING ALERT (LA-FY17-06) – Implementing GAO's Recommendation Regarding Foreign Ownership of High-Security Leased Space

1. **Purpose.** This Leasing Alert issues guidance requiring Leasing Specialists and Lease Contracting Officers (LCOs) to determine whether the beneficial ownership of leased space is identified as a foreign-owned entity and to notify the client agency in such instances, so that the agency can take any needed security mitigation measures.

2. **Background.** On January 30, 2017, the Government Accountability Office (GAO) issued Report Number GAO-17-195 entitled, "FEDERAL REAL PROPERTY - GSA Should Inform Tenant Agencies When Leasing High-Security Space from Foreign Owners." This report examined GSA's leasing of high-security space from foreign owners and identified risks posed by this ownership. Specifically, GAO reviewed the ownership of GSA leases in buildings that require a higher level of security (FSL III, IV, and V), and identified those buildings being leased by GSA that are foreign-owned. Based on its finding, GAO made the recommendation that GSA determine whether the beneficial owner of high-security leased space is a foreign entity and, if so, share that information with the tenant agency for any needed security mitigation measures. GSA agreed with GAO's recommendation; this Leasing Alert implements GAO's recommendation. At the request of congressional interests, application of this Leasing Alert expands beyond the report's recommendation by including lease acquisitions for space designated at all facility security levels, including FSL I and II.

U.S. General Services Administration  
1800 F Street, NW  
Washington, DC 20405-0002  
www.gsa.gov



# Foreign Ownership – Senate Letter

- » Rise of Foreign Investment in Real Estate (\$60 billion in 2017) and specifically Chinese Investment (\$33 Billion in 2017)
- » National Security Concerns:
  - Money Laundering
  - Proximity to Government Agencies
  - Conflicts of Interest
  - Murky Ownership
- » CFIUS Questions

## United States Senate

WASHINGTON, DC 20510

May 16, 2017

The Honorable Gene L. Dodaro  
Comptroller General of the United States  
United States Government Accountability Office  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Mr. Dodaro:

We are writing to request that the Government Accountability Office (GAO) review the approach taken by the Committee on Foreign Investment in the United States (CFIUS) to examine real estate transactions, and assess whether and how CFIUS addresses the full range of national security challenges such transactions may pose.

As you know, CFIUS<sup>1</sup> was designed to review transactions that could result in control of a U.S. business by a foreign person, in order to determine the effect of such transactions on the national security of the United States. While the United States has been a top destination for foreign investments across sectors, in the last year global real estate investors spent over \$60 billion on American commercial properties and comprised 13% of total transactions in the U.S. commercial real estate market (up from 10% just three years ago).<sup>2</sup> China is a leading purchaser of U.S. commercial real estate, topping the list of foreign investors in this sector for the second year in a row.<sup>3</sup>

Some of these investments have raised national security concerns, including due to the proximity of the property to other sensitive properties such as military bases or other government buildings, or because of unique security risks associated with individuals residing at or frequenting the property.<sup>4</sup> More generally, the real estate sector has recently been the subject of increased scrutiny by U.S. regulators concerned about the proliferation of transactions involving shell companies and the use of real estate purchases as a conduit for money laundering and other illicit activity. Additional national security considerations may be introduced by the fact that several senior Administration officials, including the President himself, retain ownership of significant

# Foreign Ownership – CFIUS

## » Nearly Limitless Jurisdiction

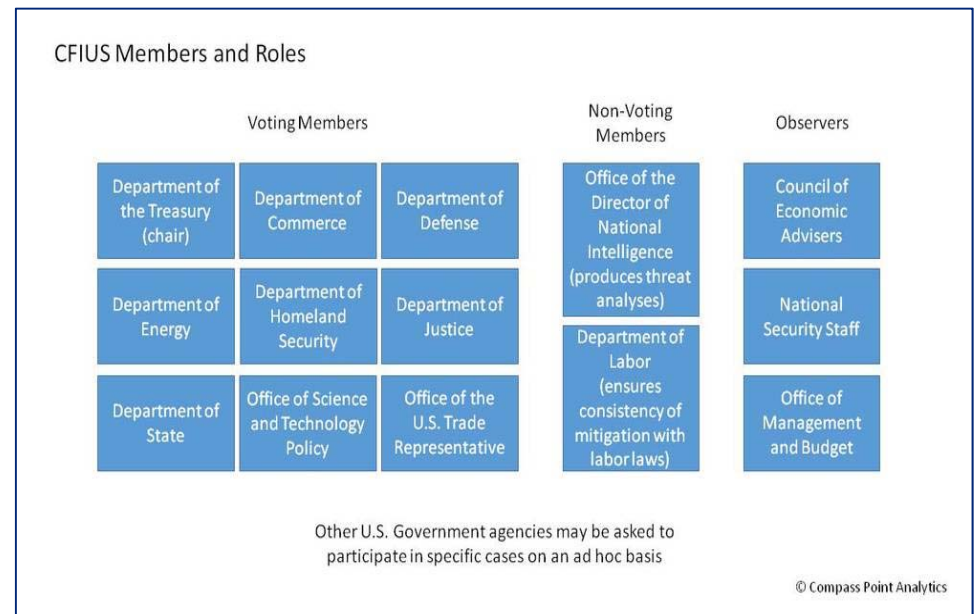
- Any transaction that could have an impact on national security
- “Covered transactions” include purchase of real property assets when paired with any business assets (such as a lease)

## » “Voluntary” filing seeking review

## » The Bad News

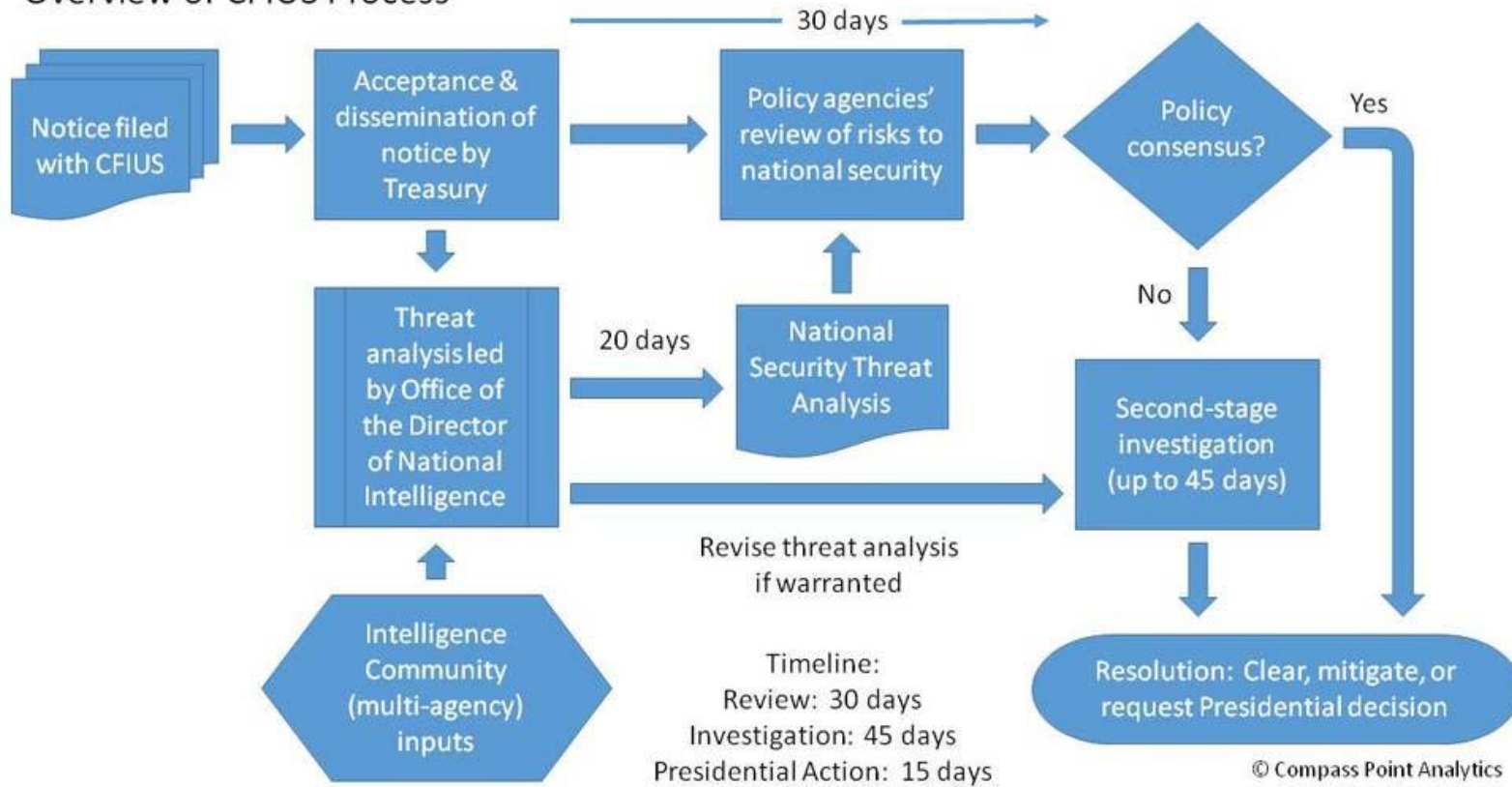
- Waldorf Astoria
- Dubai Port World
- Uranium One

Holland & Knight



# Foreign Ownership – CFIUS

Overview of CFIUS Process



# Foreign Ownership – CFIUS

## Takeaways:

- » CFIUS review is both a political and procedural process
- » Avoid if possible, but...
- » If you can't avoid it, you'll have the best outcomes if you engage early



# Miscellaneous Updates

- » Recent GAO Decisions
- » Novation Changes at GSA
- » Prospectus Backlog
- » New Leadership

## Contact Information / Follow on Questions

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