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LEASING**Government Contractors Require Strategies for Leasing Space, Managing Security**

BY RICHARD J. HAMILTON

Government contractors are big users of leased space, both on their own behalf and on behalf of their customers under specific awards. As a tenant, a government contractor must be mindful to preserve exit strategies and manage the security needs of the contracting party. This article will discuss some of the more common lease provisions that require special attention during the initial negotiations of the lease so as to avoid unpleasant surprises down the road. While this article is by no means exhaustive when considering specific tenant needs with regard to any particular contract, it is intended to provide an overview of the types of issues that every government contractor should consider when entering into a lease.

A. Lease Term and Early Termination Options.

As part of the initial lease negotiations, the tenant will be inclined to match as closely as possible the term of the lease, including extensions thereof, with the length of the anticipated contract and probable contract

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extensions and renewals. While short lease terms are beneficial to the tenant, who will want to avoid paying rent for space that is not needed, short lease terms can reduce the tenant's leverage to negotiate other lease provisions in its favor. Short lease terms can also affect the rental rate, resulting in higher rents to compensate the landlord for the perceived additional risk inherent in the shorter term.

Either in connection with a longer initial term or in order to preserve flexibility and exit options, the tenant may negotiate a right of early termination to be exercised in the event the contract is terminated or otherwise not renewed. The landlord will want to curtail the tenant's ability to exercise its right of early termination by placing restrictions on the timing of the tenant's exercise and the conditions under which the tenant may exercise its right. From the tenant's standpoint, early termination rights must be carefully negotiated to address the tenant's actual needs and be a meaningful remedy in the event the contract is terminated or the tenant is not awarded follow-on work. For instance, the tenant should consider whether a restriction, favored by many landlords, that requires the tenant to exercise its right of termination within a particular time frame or by a date certain is ultimately consistent, from a timing standpoint, with the realities of contractor selection, bridge contracts, and the now inevitable bid protest.

B. Addressing Tenant's Security Needs.

With respect to the space itself, the tenant may have very specific security needs which could impose requirements on the landlord's access to the premises, the landlord's ability to perform its customary level of services in the ordinary course, and the tenant build-out process, with respect, especially, to sensitive compartmented information facilities (SCIFs) if classified or top secret work will be performed under the contract. At the outset, the tenant must be realistic about its actual security needs and negotiate all of its rights upfront, when its leverage is at its highest. Increased security requirements, if not well considered at the beginning of the landlord-tenant relationship, can impose increased

lease compliance costs on both the tenant and the landlord, including dramatically increased lease exit costs. The failure of the tenant to properly consider its security needs can also give rise to compromising legal situations during the term of the lease.

1. Landlord Services; Maintenance and Repair of the Building. Several boilerplate provisions contained in most leases grant the landlord unfettered access to the premises so that the landlord can provide customary tenant services and perform routine maintenance and repair of the building, building systems and common areas. These provisions provide for access for routine services such as daily janitorial services as well as less routine structural and building repair.

With respect to landlord services, the tenant should consider whether the nature of its work requires that all parties accessing the premises unattended, such as janitorial personnel or repair persons engaged by the landlord, be United States citizens or resident aliens (i.e., green card holders). In the case of tenant services, some governmental contractors have taken the position that the strict enforcement of International Traffic in Arms Regulations (ITAR) has necessitated extraordinary measures such as those described in this paragraph. (Similar concerns underpin the desire to restrict the presence of foreign-owned entities in other tenant spaces, as described below.) If the tenant has specific citizenship and status requirements in order to comply with the contract terms, or to avoid potential ITAR entanglements, the lease should provide a clear and easily-implemented mechanism so that tenant can verify that the landlord's service providers comply with the tenant's citizenship and status requirements. While some larger tenants can often manage this process through their own respective security offices, smaller tenants may need to rely on the landlord for a certain level of information verification. In some instances, most commonly with respect to janitorial service, citizenship requirements may necessitate that work be performed during business hours, which is not customary in a typical office situation, and under the supervision of tenant. If certain areas of the premises are secured, the tenant will want to consider whether the tenant needs to contract independently to have those areas cleaned, and whether the costs incurred by tenant for such service will act to offset the operating expense charges already payable by the tenant under the lease. Typically, operating expenses changes include a component allocable to janitorial service for the entire building, including those areas of the premises that the tenant, at its cost, has independently contracted to clean. In some cases, the landlord will seek to recapture directly from tenant the additional costs of services performed to accommodate tenant's security needs, such as daytime janitorial service. In all cases, the provisions regarding the landlord's obligation to provide tenant services, and costs associated therewith, should be negotiated upfront, accommodate each party's needs to the greatest extent possible, and be designed so that the landlord is able to recapture its actual additional costs incurred, but not more.

With respect to building maintenance and repair, the tenant must consider whether restrictions are required due to the tenant's secure installations constructed within the premises and those located outside of the premises. It is customary that the landlord be permitted

to maintain and repair the building, building systems, and common areas in the ordinary course of the landlord's business operations, so the tenant must carefully consider its actual security needs and negotiate in the first instance any necessary or advisable restrictions on the landlord's activities. Landlord's repair and maintenance obligations and tenant security requirements come into conflict most commonly with telecommunications installations and telecommunications closets not located within the premises, rooftop satellite dishes and antennae, and secure areas within the premises. For instance, the tenant may wish to be notified and have a representative present if the landlord needs to access a telecommunications closet not in the premises, but containing secure communications lines. Alternatively, if the landlord needs to perform routine maintenance of the roof that could affect the tenant's secure rooftop installation, the tenant should consider upfront whether the lease allows the tenant to properly screen and secure the installation or whether a tenant representative needs to be present during the landlord's work. Additionally, if the landlord needs to perform repairs within conduits that are located in secure areas of the premises, the tenant must address, at the time of lease negotiation and space planning, whether the landlord will be permitted to have access to that conduit once the tenant is operating from the premises, or whether either the conduit or the secure area should be located (or re-located) to a different area of the premises or the building. In some circumstances, the landlord's access to the premises is unavoidable, so the parties should consider during lease negotiations under what restrictions the landlord must operate when in the premises to performing its obligations.

2. Improvements to the Premises; Restoration and Surrender. Many government contracts require that the premises, or at least certain portions of the premises, contain improvements constructed to SCIF requirements or contain improvements that are not commonly found within a normal office environment, such as raised computer flooring, vaults, cipher locks, and additional perimeter security systems. Many lease forms require, prior to the expiration or early termination of the lease, that the tenant restore the premises to the condition in which the premises was delivered to the tenant. In some cases, this provision could require that the tenant remove all improvements within the premises and surrender the premises to landlord in near-shell condition. In other cases, this provision could require the tenant to remove all of its non-standard improvements and "restore" the premises to a standard office environment, in which case the tenant may be essentially providing, at its cost, landlord's build-out for the next user of the space. If the landlord and the tenant are not able to agree upfront as to what improvements the tenant will be required to restore upon lease expiration, the tenant may be faced with significant and unanticipated exit costs when, in reality, many SCIF-level improvements appear, to the typical office user, to be the same as standard office improvements. In any event, if the tenant has improved all or a portion of the premises in accordance with SCIF requirements and those areas of the premises are actually being used for the review of sensitive compartmented information, the tenant must use particular care to negotiate sufficient time to have the SCIF improvements decommissioned at the end of the lease term, as the tenant may become liable for hold-

over rent, and in some cases consequential damages, in the event that the tenant cannot properly vacate the premises at the end of the lease term due to a delayed decommissioning process. In connection with the tenant's surrender of the premises to the landlord, the tenant should also be cognizant of those improvements that the tenant may actually want to remove from the premises or the building, such as secure telecommunications cabling. In such a case, the tenant will want to negotiate for specific end-of-term access to the building and the common areas of the building to perform that work, while understanding that the tenant's access may be subject to certain time, place, and manner restrictions in order to avoid disrupting other occupants of the building and disturbing the common areas of the building during normal business hours.

C. Assignment and Subletting.

With regard to the tenant's occupancy of the premises, the tenant should pay particular attention to the assignment and subleasing provisions of the standard lease, which often prohibit the assignment of the lease or the subletting of the premises without the landlord's prior written consent. While most tenants are careful to negotiate rights of assignment within tenant's corporate family or to a related entity, many tenants overlook provisions of the assignment and subletting clause that would prohibit the desk-sharing and shared occupancy arrangements that are common within the world of government contracting. If the tenant's contract is entered into on behalf of a customer, or the tenant anticipates that third parties, such as auditors, will require designated space within the premises to perform contract-essential tasks, then these needs should be negotiated upfront to permit shared occupancy without a deemed transfer of the lease occurring. The failure of the tenant to provide for shared occupancy when it is a necessary part of the tenant's contract performance could result in additional costs down the road when the tenant must navigate a sometimes capricious assignment and sub-

letting process, which can impose unrealistic restrictions on the ability of the tenant's customers to perform their respective duties under the contract, and make it difficult or impossible in the future for the tenant to exercise negotiated renewal and expansion rights that require that the tenant occupy the entirety of the premises.

D. Security Concerns in Multi-Tenant Buildings.

Outside of the context of the lease itself, the tenant should also consider whether its security needs necessitate restrictions on foreign-owned entities occupying adjacent space, space on the same floor, or in other areas of the building. The tenant should be sensitive that issues can arise in sometimes subtle ways. For instance, if the tenant simply wishes to prohibit foreign-owned entities from occupying space on the same floor of the building on which the premises is located, the tenant must also take care at the outset of the lease to request that the landlord identify other tenants on other floors of the building that may have expansion rights onto the tenant's floor. Similarly, the tenant would want to restrict the landlord from granting expansion rights to existing or future foreign-owned tenants that could be exercised with respect to the same floor on which the premises is located.

With good legal counsel, attention to detail, and careful consideration of actual needs, government contractors can negotiate favorable lease provisions that lower lease entry and exit costs as well as reduce the possibility that unexpected problems will occur during the course of the lease term. While many government contractors do not consider real estate leasing transactions to be a core part of their business, poorly considered decisions made at the outset of a landlord-tenant relationship can seriously affect a government contractor's ability to perform under its contract in a timely and efficient manner.