

“Understanding the Leasing Process”

By Peter Rosenthal / Steve Newhauser

It is not unusual that during the course of establishing a lease that landlords and tenants find themselves looking for guidance because an unpleasant surprise came up. Many such surprises are the result of a poorly understood or poorly constructed lease agreement and sometimes there are other contributing factors.

For example a tenant should notify a property owner if they are negotiating for more than one space. This can limit exposure of significant expenses by the property owner if the lease is not consummated, and in turn potentially favors the Tenant by creating some competition, especially in softer markets.

The process really begins by both parties understanding the Tenant's needs. However, landlords often use a Standard Lease Form, and it represents a landlord's wish list. A *Standard Lease Form* is potentially a problem for both Landlords and Tenants if either party doesn't really understand what the terms and conditions of the agreement will impose upon them. For this reason many times proposals to lease commercial property begin with a *Request For Proposal (RFP)* that represents the specific needs of a Tenant and, once presented, becomes the basis for documenting the negotiation and helps maintain a focus on relevant issues both resolved and not fully resolved between the parties. The *RFP*, once generally agreed upon, often becomes the foundation for a *Letter Of Intent*.

A *Letter Of Intent* outlines the basic terms under which parties would enter into a lease contract. These terms are then negotiated, credit-worthiness evaluated, and conditions satisfied before a lease draft is prepared. For this reason even though non-binding the basis of terms in an *RFP* are very important as it can be difficult to vary those terms later. It serves both the landlord's and the tenant's interests to spend time on the details of the *RFP* and/or letter of intent. Spending time can serve to minimize the misunderstandings that might otherwise come up during the course of negotiations and the associated cost of attorneys.

Essentially, a lease is much like a partnership agreement in that it sets out the parameters of a business relationship. Negotiating the terms of that business relationship doesn't have to be a complicated or confusing process. First, a favorable approach is to gain agreement on big issues to gain momentum and so that either side doesn't invest too much before finding out there are major points of difference. For example, the focus of lease negotiations is often limited to the issues of base rent and concessions.

Second, during the entire process both sides should pay close attention to documenting and knowing where each side stands on terms and issues raised.

A broker can help to ensure progress and to make sure each side has a good understanding of where the other side is, on terms and issues.

Third, Tenants should look at maintaining negotiating leverage by considering and possibly adding the following terms to an *RFP*:

- Options to extend or terminate
- Liability limitations
- Limiting liability from increasing operating expenses
- Clarifying liability for repairs, maintenance, and utilities
- Escalation and security deposit provisions
- Rights of first refusal
- Other items of significance

Lastly, both Landlords and Tenants should make sure neither the *RFP* nor *Letter Of Intent* be binding. Also, neither documents should state that parties are obligated to negotiate in good faith, but if no formal agreement is reached within a prescribed period of time, either party may terminate the negotiations. The potential for problems can result from many things, but by following a known process and recommendations, especially with the assistance of a Broker, both Landlords and Tenants can ensure a professional smooth leasing process.