



COMMERCIAL TENANTS - LETTER OF INTENT/TERMS SHEET ISSUES CHECKLIST

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Particularly in today's market, there is never a time when a Landlord is more willing to negotiate lease terms than in the early stages of discussion of business terms. In many instances, commercial tenants waste this opportunity and leave many important issues for discussion later in the process and after they have invested more funds into the site and have committed themselves to the location. Failing to address as many issues as possible up front ultimately delays the process and increases cost to both Tenant and Landlord. Set forth below is a list of issues that should be considered by commercial tenants for discussion and inclusion in the terms sheet or letter of intent. Addressing these issues during the early stages of negotiation will ultimately save time and money when the parties reach the lease negotiation phase.

1. Premises.

- a. Specifically identify the location of the unit or space you are renting. If a specific location in the Building is important to you, let this be known early in the process.
- b. Square footage. When negotiating rent on a per square foot basis you must be aware of the method of measurement being employed by the Landlord (gross, rentable or useable). Measurements and rent can vary greatly depending on the calculation of the square footage. Unless you occupy the entire building the square footage of the premises and building, the measurement will also be used to determine your proportionate share of common area maintenance charges and taxes (if applicable). Reserve a right to measure the space after lease execution with appropriate adjustments if the original measurement is incorrect.
- c. Parking Rights. The number of spaces allocated to your unit should appear in the lease. Specify whether the spaces are reserved or non-exclusive. Insert text that would ensure that you are being treated as well as other tenants.
- d. Roof rights. Consider whether you intend to make use of the roof for an antenna/dish, equipment or other purposes. Landlords will often reserve the roof for their own use so.
- e. Require the Landlord to provide copies of any and all information or reports relating to the environmental condition of the property. The Landlord must agree that Tenant will not be responsible for pre-existing environmental conditions and that the Landlord will indemnify the Tenant from claims relating to pre-existing conditions. The Tenant should perform environmental due diligence early in the negotiation process so that time and money are not wasted should a major issue arise.

2. **Term.** While commitment to a lease terms of 10 of years or more may result in a lower rent, there may be disadvantages to being committed to one site for a long period of time (this is especially true for small tenants that may be required to guarantee their lease obligations). Tenant's should attempt to control the length of the term by keeping the initial commitment shorter and negotiating multiple renewal options. A five-year term with two five year renewal options poses much less risk than a fixed fifteen year term. If your term is longer, make sure the terms sheet or letter of intent provides for a tenant friendly assignment and sublet provision. If a lease guarantee is being required, a tenant may want to consider offering an increased security deposit, letter of credit or other means such as a "good guy" guarantee (where the guarantor's exposure is limited to lease obligations accruing only to the date the Tenant vacates the premises).

3. **Commencement Date:**
 - a. Zoning issues should be addressed as early in the negotiation process as possible. The need for use variance, change in use or occupancy or other similar governmental approvals may delay your ability to use and occupy the premises for your intended use. Tenants must avoid placing themselves into a situation where the payment of rent may commence prior to their ability to use and occupy the property. The Municipal Land Use Law and many local ordinances provide for certificate of zoning compliance, zoning permit or similar applications which will confirm whether your use is permitted as of right or whether certain approvals are necessary. The fee for such a filing is not substantial. Knowing what is required will allow you to properly negotiate the Commencement Date provision. Try to require the Landlord to obtain all zoning and other governmental approvals required to enable you to occupy the premises and conduct your intended use. If the Tenant is required to obtain approvals, the lease and the Commencement Date should be contingent upon those approvals being received.

 - b. Where work is to be performed pre-occupancy, a major concern of the Tenant should again be to avoid any possibility that rent will commence prior to the Tenant having the ability to occupy the premises for its intended use. If the Landlord is performing all work the commencement of rental payments should not begin until the work is completed and Tenant is provided with a certificate of occupancy and any and all governmental approvals necessary to allow the Tenant to occupy the premises for its intended use. There should also be a deadline by which the Landlord must deliver the premises. A Tenant cannot be expected to wait for the premises indefinitely and any delay in delivery by the Landlord could lead to Tenant becoming a holdover tenant in its current location and paying up to 200% rent during the holdover period. If the Landlord fails to meet the deadline date, Tenant should have remedies available to it such as a right of termination and/or a rent abatement equal to one day for each date of delay (which will defray the cost of holdover rent).

 - c. Early entry. In many instances the Landlord will perform only a portion of the work, with Tenant performing additional work after Landlord's work is completed. The period

where Tenant is performing work to prepare the premises for occupancy should be rent-free. As in many instances rent will commence after an agreed period of rent-free months whether the Tenant work is completed or not, a Tenant should investigate with

the Landlord the possibility of Tenant entering the premises to perform some of its work prior to completion of Landlord's work and delivery of the premises.

4. **Rent Increases.** Generally rent increases will either be fixed or will be based upon increases in the Consumer Price Index (CPI). Fixed rent increases provide a degree of comfort and assurance that a huge increase in rent will not occur, but at the same time may result in increases that do not reflect current market conditions. If a CPI Formula is used, make it clear that the CPI may result in a reduction of rent. Landlord's will generally attempt to insert text providing that "in no event shall rent be less than the previous year." If the Landlord insists on this text, request a ceiling on the maximum amount of rent increase in any year (e.g., "in no event shall any annual increase exceed 3%"). Before agreeing to a CPI increase provision, perform some basic research on increases in the CPI during recent years and be aware that large increases over a short period may result. With respect to renewal options, rent is often based upon either a CPI increase formula or fair rental value at the time of renewal. If fair rental value is proposed, make sure that the terms sheet or LOI indicates that there will be a dispute resolution process involving the use of appraisers.

5. **Additional Rent/Expenses.** The terms sheet or letter of credit should reflect what additional expense items are being passed through to the Tenant under the Lease. Generally, if a lease is triple net where all expenses pass through the amount of the base or fixed rent will be less than a lease for the same space where a lesser amount of expenses are being passed through. Tenants should consult their broker as to reasonableness of the proposed rent in light of the amount of costs and expenses being passed through to the Tenant(s)".

If the lease is not triple net, it will likely provide for the Tenant paying its proportionate share of certain defined expenses. In making your rental analysis, be aware of whether the operating expense or real estate taxes clause is an escalation clause where the tenant pays its pro rata share only for costs in excess of the amount incurred by the Landlord during a specified base year or whether the percentage share applies to the actual cost of all expenses. To the extent possible, exclude capital improvements from the expenses that may be passed through to the Tenant.

6. **Repairs.** The Tenant does not want to be responsible for structural or roof repairs or replacements to building systems or the parking area.

7. **Security Deposit.** Landlords will generally request a deposit of 1 to 3 months. If a large security deposit is required (in lieu of a guarantee for example) try to negotiate periodic reductions during the term. Commercial Tenants should be aware that the Landlord has no obligation to segregate the deposit and may commingle the deposit with other funds of the Landlord. For this reason (and also as a means of keeping the funds out of the Landlord's hands

in the event the Landlord files for bankruptcy at any time), the Tenant might also consider negotiating the right to post a letter of credit in the amount of the deposit. Again, periodic reductions may be built into the letter of credit.

8. **Options**. In addition to a renewal option, if the Tenant believes that there may be a need to expand and take additional space at the site, it should request a right of first offer requiring the Landlord to offer any space that becomes available to the Tenant prior to offering it third parties. Tenants that may have an interest in one day purchasing the site may also seek a purchase option, right of first refusal or other option.
9. **Construction**. If Landlord or Tenant is performing work prior to occupancy, (i) try to eliminate up front any “supervisory” or “administrative” fees payable to Landlord; (ii) clarify that the Tenant will not be required to remove any of the improvements at lease expiration; (iii) if there is a tenant allowance, clarify what costs may be applied against the allowance. Allowances often provide for an “up to” amount and you will want to be able to apply as many costs as possible, including engineering and architects fees, against the allowance. If the Landlord is performing the work, try to be as specific as reasonably possible concerning the work to be performed.
10. **Building Hours/Services**. Leases will often provide for overtime charges for HVAC and other services. The Building Hours (include Saturday hours if needed) holidays and the charges should be included, as well as a list of all services, including janitorial and trash removal, to be provided by the Landlord.
11. **Signage**. Space on monument signs, pylons, the building directory, and signage on the entrance to the premises, and who will pay for it, should be addressed. Again, the Landlord is generally more flexible on these types of issues early on the process.
12. **Subordination and Non-Disturbance Agreement**. Provide that as a condition to subordination of the Lease the Tenant will be provided with a non-disturbance agreement from the holders of every superior position (mortgagees, ground lessors, etc.).
13. **Brokers**. Clarify what brokers are involved and confirm that Landlord will be obligated to pay them pursuant to a separate written agreement.
14. **Letter is non-binding**. Make sure any writing provides that it is non-binding and subject to execution of a lease satisfactory to both parties.