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Strategies for Executing Leases Faster and Cheaper

Commentary by Anthony Casareale, Daily Business Review

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Anthony Casareale of Casareale & Partners.
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When a landlord and prospective or current tenant reach agreement on major business terms, typically in a nonbinding letter of intent, the leasing process begins. At that point, a landlord, its asset manager and broker want to finalize and sign leases as quickly as possible while minimizing legal costs. In order to achieve this objective, landlords, their asset managers, in-counsel and brokers should evaluate how they manage their leasing process and how it can be improved.

The leasing process begins, of course, with the lease. The form used by a landlord should be in plain English that is clear and concise. The use of terms such as "appurtenances" and "betterments" can and should be avoided.

A landlord should work with its counsel and broker representative to reduce length of the lease. Most leases can be shortened without impairing the rights and remedies of the landlord or the ability of the landlord to finance or sell the asset. Specific provisions should be re-examined.

Reconsider Positions

Any effort to streamline the leasing process has to include an evaluation of substantive lease provisions. Many provisions are simply inappropriate for inclusion in certain leases. For instance, in a lease of two full floors to a major tenant, it is difficult to see both the need for and the tenant's acceptance of a right of relocation by the landlord.

Some lease provisions are of no value or are repetitive. A prime example of such a provision is the following: "The captions and headings in this lease are inserted as a matter of convenience and for reference and in no way define, limit or describe the scope of the lease or the intention of any provision here."

Many lease provisions are often negotiated at length by the parties — especially larger, well-represented tenants — and end up a far cry from the landlord's initial position. If the landlord and its counsel crafted provisions that protected the landlord and dealt with reasonable tenant's concerns, these negotiations could be avoided. Here are some examples:

• Casualty: A lease will sometimes fail to address the tenant's right to terminate the lease in the event a casualty makes it impossible to occupy and use the premises for an extended period of time. A lease should address this issue by defining the parameters that give rise to such right of termination. A lease provision can describe the extent that the casualty impairs the use of the premises (more than 50 percent) and the time estimated to restore the premises (more than 12 months), and give the tenant a short period to send a notice terminating the lease.

• Recapture: Many first drafts of leases are sent out with extensive recapture rights in favor of the landlord. A recapture right does make sense for the landlord in many circumstances, but there are some situations where it does not. For instance, in a 10,000-square-foot lease of 10 years, does the landlord need the recapture right in the event the tenant proposes a sublease of 2,500 square feet for three years?

• Default notices and cure periods: Landlords should reevaluate their lease to provide for reasonable notice and cure periods to tenants. To do so simply reflects business reality. A landlord rarely, if ever, will terminate a lease or initiate eviction proceedings without notifying the tenant. At the same time, the lease should provide such cure rights to be taken away in the event the tenant repeatedly defaults, particularly, in the payment of rent. Some attention to these provisions should avoid lengthy negotiations with tenant's counsel.

Closing Schedule

With the distribution of the initial draft of lease by landlord's counsel, landlord should initiate a kickoff call that same day with all parties on the landlord and tenant side. On the call, the landlord and its representatives should maintain an upbeat tone, setting a closing date for the lease signing as well as a schedule of the intermediate steps, such as when comments to the lease should be sent by the tenant and its counsel. This call should focus on lead-time items needed for lease signing, which typically involve the architect, contractors and lenders.

Thereafter, a landlord should not allow or should minimize negotiation sessions involving only counsel. The transaction can benefit from one negotiating session between counsel where the landlord's counsel responds to the tenant's initial lease comments. The goal of this session is to resolve many lesser differences, set the list of open issues to be resolved and set out each parties' positions on those open issues. Open-lease issues should be tracked in writing. The landlord's counsel and broker should create a list of issues to be resolved following the first negotiation session, which can be circulated to all parties. This list is a useful reference and avoids the problem of issues slipping through the cracks.

After this one lawyers' negotiation session, all meetings or conference calls should involve decision-makers from both parties. There are no legal or business issues. Any issue that prevents a lease from being signed is a business issue.

In the end, a landlord, its attorney and broker should track and resolve open lease issues every day. This approach is simply the only way for a lease to get signed quickly and minimize costs.

Anthony Casareale is partner at Casareale & Partners, a Miami commercial real estate law firm focused on representing institutional and individual clients in real estate transactions.