



Leases & Contracts

Leases & Contracts Overview

- ▶ Leases are Contracts
- ▶ Real Property
- ▶ Authority
- ▶ Leasing Process Summary
- ▶ Other Aspects

Leases are Contracts

- ▶ Contract definition:
 - An agreement creating obligations enforceable by law. The law provides remedies if a promise is breached or recognizes the performance of a promise as a duty. Contracts arise when a duty does or may come into existence, because of a promise made by one of the parties

Leases are Contracts (Cont.)

- ▶ Leases/Contracts are a promise for a promise
- ▶ Example: we promise to pay rent and the lessor promises to maintain the property under certain standards and promises to do things (such as maintain the building) for the rent
- ▶ Six essential elements:
 - Offer
 - Acceptance
 - Consideration
 - Competent Parties
 - Intent of the Parties
 - Object of the Parties

Leases are Contracts (Cont.)

- ▶ Most of the elements are self explanatory:
 - Consideration can be monetary or a like exchange of services
 - Leases are bilateral contracts; however, the Government via the Contracting Officer has some unilateral rights
 - Capacity of parties – you must have the legal capacity to enter into the contract; i.e., be sane, sober and of age
 - Intent – there must be a mutual assent or a "meeting of the minds"
 - Object – the contract must be for a legal purpose

Leases are Contracts (Cont.)

- ▶ A lease/contract can be written or oral but in the Federal Government all leases/contracts must be written
- ▶ Leases cannot be open ended, they must have established beginning and ending dates
- ▶ A lease is a binding agreement, enforceable by law
- ▶ We cannot deviate from the contract once it has been awarded unless it is mutually amended (modified).
- ▶ A lease once in place cannot be superseded, disregarded, outweighed, or overshadowed by a completely different contract
 - The terms of an active contract can't be violated by awarding a contract that says something contrary or different. That breaches the terms which were previously agreed to

Leases are Contracts (Cont.)

- ▶ When the lease is awarded, it is the binding agreement
- ▶ For instance, we can't have a lease in place that says we have to do all the alterations through the lessor and all maintenance is performed by the lessor and then award a separate or a completely different contract for alterations without going through the lessor
- ▶ Both parties are obligated to adhere to the terms of the lease

Real Property

- ▶ Real property lease definition:
 - A contractual agreement by which one party conveys an estate in property to another party, for a limited period, subject to various conditions, in exchange for something of value, but still retains ownership
 - A lease creates an estate in which we acquire an interest in real property held under a rental agreement...

Real Property (Cont.)

- ▶ Well known basic real estate principles
 - Location! Location! Location!
 - Regardless of the purpose of the lease, the owner of the building, or the authority used in awarding
 - The biggest determining value of real estate for both sales price and rental rates is the location
 - You could build the exact same building in two different locations and the value of that building, along with the cost of construction, and the rent it will generate, can vary substantially

Real Property (Cont.)

- ▶ Real estate location is really about the principles of supply and demand
- ▶ A high demand and a low supply equates to a higher value—the opposite is also true
- ▶ There are methods to determine value and compare different properties
- ▶ The best way to determine the current value of any property is through an appraisal, but appraisals for commercial properties are expensive

Real Property (Cont.)

- ▶ Landlord-tenant law governs the rental of commercial and residential property.
 - Composed primarily of state and common law
 - Federal law and policy also apply to what we do
- ▶ Difference between a fee simple ownership and a lease.
 - Fee simple owner has the absolute right to possess, use the land and dispose of the land as he/she wishes--sell it, give it away, trade it for other things, lease it to others, or pass it to others upon death
 - In a lease, the owner can sell or transfer the interest but the ownership interest is not absolute
 - Subject to the terms defined by the contract
 - For example, you can't sell the property if you have a leasehold interest

Real Property (Cont.)

- ▶ Leases contain covenants which can be implied or written
- ▶ Lease contracts also have conditions and clauses
- ▶ An example of a an implied covenant of a lease contract is the covenant of quiet enjoyment
 - It is implied in all lease contracts
 - Covenant of quiet enjoyment:
 - Landlord promises that during the term of the tenancy no one will disturb the tenant in the tenant's use and enjoyment of the premises
 - Quiet enjoyment includes the right to exclude others from the premises, the right to peace and quiet, the right to clean premises, and the right to basic services such as heat and hot water and, for high rise buildings, elevator service.

Real Property (Cont.)

- ▶ Each lease must describe the roles and responsibilities of the parties
- ▶ There are some mandatory clauses that must be included in Federal leases
- ▶ Since we have Federal employees and patrons in these leased facilities, we must protect their safety via the terms of the lease
- ▶ We cannot have employees and patrons in unsafe or hazardous environments
- ▶ The lease must contain a definition of the shell
- ▶ We must account for things such as mold, asbestos, etc.
- ▶ What happens if the building burns down?

Real Property (Cont.)

- ▶ We cannot act in the capacity of the building owner if we do not own the building.
- ▶ Appropriations law and OMB Policy also dictate that we cannot make capital investments in a building we do not own unless there are:
 - Special provisions in an appropriation
 - Adequate consideration from the owner
- ▶ The reasoning behind the federal government leasing space is so we do not have the cost, liability, and risk of ownership
 - When we pay rent, the owner of the building has the liability that comes with ownership

Leasing Authority

- ▶ IHS Authority to Lease – Public Law 94-437, Indian Health Care Improvement Act:

“(a) Notwithstanding any other provision of law, the Secretary is authorized, in carrying out the purposes of this chapter, to enter into leases with Indian tribes for periods not in excess of twenty years. Property leased by the Secretary from an Indian tribe may be reconstructed or renovated by the Secretary pursuant to an agreement with such Indian tribe

(b) The Secretary may enter into leases, contracts, and other legal agreements with Indian tribes or tribal organizations which hold –
 (1) title to;
 (2) a leasehold interest in; or
 (3) a beneficial interest in (where title is held by the United States in trust for the benefit of a tribe)”

Leasing Authority (Cont.)

- ▶ As noted, P.L. 94-437 gives the HHS Secretary the authority to enter into leases with tribes for a period up to 20 years
- ▶ The law also gives the Secretary the ability to re-delegate this authority which has been done as follows:
 - IHS Director
 - OEHE Director
 - ES Director
 - LCOs

Leasing Authority (Cont.)

- ▶ Up to 20 years includes all extensions and options so the total contract cannot exceed 20 years per the law
- ▶ The tribe's authority to enter the lease depends on the tribe but in most cases is approved by the counsel and signed by the Chief or the state Governor
 - A tribal resolution is not a contract between the Government and the Tribe, it's what authorizes the person for the tribe to sign the lease
- ▶ Recent legal opinion supports the premise that BIA involvement is not required when leasing trust land under P.L. 94-437
- ▶ Without the authority of P.L. 437, all leases would have to be done by GSA or via a GSA delegation

Leasing Authority (Cont.)

- ▶ P.L. 94-437 gives us the authority, the "Can"
- ▶ We all agree we "Can" lease with tribes
- ▶ "How" we do leases has to do with process
- ▶ The process is dictated by:
 - The requirements of the delegation whereby the IHS Director directed LCOs to comply with the laws, regulations, and policies described therein
 - Other acquisition related laws and regulations as applicable in addition to HHS policies

Leasing Process Summary

- ▶ Begin Acquisition Planning to determine the need
 - Include the LCO early in the process
 - The LCOs are willing to work with you throughout the process
- ▶ Conduct the market survey (Acquisition Planning continues)
- ▶ Translate the requirements into a Request for Lease Proposal
 - When approved by the Lease Priority System (LPS) Committee or the Department, the SF-81 is signed and issued to the LCO
- ▶ LCO issues the RLP

Leasing Process Summary (Cont.)

- ▶ LCO evaluates and negotiates the response to the RLP
- ▶ LCO closes negotiations and requests any final proposal revisions
- ▶ LCO finalizes the lease and completes the lease file
- ▶ Lease is awarded

The leasing process will be addressed in much more detail in the next presentation

The LCO is the only individual with the authority to negotiate with the lessor and award a lease!

Other Aspects of Leasing

- ▶ Leases usually involve:
 - Multi-year contracts
 - Several different types of acquisitions bundled together
 - Real property of course, but may also include goods, services, and construction. For example:
 - Goods where lessor supplies all the products used in the building
 - Services where the lease includes cleaning, landscaping, snow removal etc.
 - Construction for tenant improvements

Other Aspects of Leasing (Cont.)

- ▶ Due Diligence
 - Must acquire leases on the most favorable basis to the Federal Government, with due consideration to maintenance and operational efficiency, and
 - At charges consistent with prevailing market rates for comparable facilities in the community
 - LCOs must determine what is fair and reasonable
 - Market research is an essential part of making this determination

Other Aspects of Leasing (Cont.)

- ▶ Bona Fide Need Rule:
 - A "fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to, but continuing to exist in, the fiscal year for which the appropriation was made."
 - The LPS Committee was established to verify bona fide need because:
 - IHS was placed on a moratorium on awarding leases for 12 years
 - During that period, leases had to be approved by Congress
 - The LPS Committee's primary role therefore is to approve or disapprove the need for space

Other Aspects of Leasing (Cont.)

- ▶ All leases must be scored per OMB policy
 - There is no exemption to this policy in P.L. 94-437
- ▶ We cannot pay more than 90% of the Fair Market Value (FMV) of the property over the life of the lease
 - Paying more than 90% of the FMV is considered a Capital lease
 - A Capital lease can be awarded only if approved in advance. Furthermore, the entire cost of the lease must be set aside or paid during the initial year (which is rarely done)

Other Aspects of Leasing (Cont.)

- ▶ We've established leases are contracts. As such, leases must also comply with certain acquisition rules
 - Acquisition Planning
 - Competition in Contracting Act (CICA)
 - Properly documenting contract files
 - Etc.
- ▶ Like all acquisitions, Acquisition Planning is key
 - The old adage is true: "Failing to plan is a plan to fail"

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