

Negotiate lease terms that meet business goals

Ever heard the phrase, "Everything is negotiable"? Every business owner should keep this phrase uppermost in mind when faced with signing a lease.

Lease rates are only negotiable within a narrow range. Market conditions and competition mostly determine where those numbers fall. Instead, tenants should focus on negotiating the terms and conditions within the lease, because oftentimes these line items directly affect a tenant's business operations and become more important than the lease rate itself.

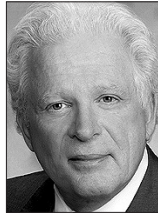
To be successful in negotiating a commercial lease contract, it's critical to understand what the landlord wants, why he wants it and what contract modifications are acceptable.

Once this is understood, tenants should negotiate their leases so that the terms and conditions protect their assets and limit their liabilities and obligations.

Here are some provisions to consider.

Changes in ownership. Some lease provisions restrict a tenant's ability to make ownership or management changes within the company during the term of the lease. Provisions may require that tenants secure landlord approval for transfers, sales, mergers or changes of control in company stock ownership. Landlords include these restrictions out of concern for the tenant's credit worthiness. Building owners want to have some control in their tenants' companies to protect their own credit positions. Though their concerns are founded, landlords who enforce these restrictions can make company decisions cumbersome for their tenants.

A compromise that normally is acceptable to both parties stipulates that sales, mergers and changes in control of up to 49 percent of company stock can be conducted without the landlord's approval. To make this compromise even more desirable to the landlord, the lease can require that the ten-



Norman Gelfand

ant must supply agreed-upon evidence that any change in ownership will not erode the landlord's original credit position. Such evidence can be presented in the form of an escrow corporate fund or a personal financial guarantee.

Tenant guarantees. Sometimes a landlord will request that a tenant personally guarantee the full amount of lease payments for the entire lease term. Landlords ask for this credit support to offset their risk that a tenant might vacate the lease early and spoil the landlord's profitability. However, such a comprehensive guarantee can jeopardize a tenant's ability to borrow funds for additional business working capital, personal investments, mortgages or capital expenditures.

To sidestep this situation, a tenant can negotiate to personally guarantee repayment of the landlord's costs — but not the landlord's profit — if the lease must be terminated early. The tenant's personal guarantee would include all of the landlord's out-of-pocket costs — for example, property improvements made for tenant, brokerage commissions and other fees paid to find the tenant, plus two months' rent. Furthermore, the tenant's guarantee would amortize downward over the term of the lease as the landlord's costs amortize.

Relocation clause. Many landlords insist upon a clause that gives them the right to relocate their tenants in the midst of a lease term — all at the landlord's expense, of course. However, this clause can be harmful to the tenant if not negotiated properly.

Moving costs entail much more than hiring help for the physical move. Tenants also incur costs from business interruption, lost productivity, printing fees and equipment installations. Additionally, a tenant's relocation may affect its image and its utility within the space.

Ideally, a relocation clause should be one of the first items taken out of a lease contract, but this isn't always possible. Many landlords are firm about retaining this option, particularly if their buildings have large floor areas designed for full-floor users. In these instances, landlords

prefer to retain relocation rights so they can shuffle tenants within the building to best suit utilize the space.

If a landlord insists on a relocation clause, tenants should negotiate a liquidated damage provision that the owner will pay the tenant an agreed-upon fixed lump sum for relocating, which eliminates the need of the tenant to itemize damages.

Contested claims. Tenants planning to make improvements on leased property should be aware of a typical lease provision that forces tenants to pay contested claims from contractors and vendors to avoid mechanics liens being placed on the property.

The provision states that the tenant must pay the contractor even if there is a disagreement on the quality, quantity or pricing of the improvements. Following payment, the tenant then can sue the contractor or vendor to recover the disputed amount.

Landlords typically are firm about this provision, as their mortgage holders don't want liens clouding up the property titles. To compromise with the landlord in this situation, tenants should ask for the right to provide the landlord with a payment bond from an approved bonding company. The bond guarantees payment of the claim and gives the tenant time to contest the contractor's claim without losing total control of the funds.

A business owner who is about to sign a lease should remember that when a dispute occurs between a landlord and a tenant, the lease contract has the final word. That's why it's so important that tenants negotiate favorable terms and conditions that will meet their long-term business goals and protect against potential perils and exposure.

Market conditions set the leasing price, but the terms and conditions are what guarantee a successful tenancy.

NORMAN GELFAND is president of Gelfand Group Commercial Real Estate in Austin. He can be reached at norman@gelfandgroup.com.