

## SECTION 4-3: LEASE ADMINISTRATION

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### 4-3-00 POLICY

A Federal lease provides specific rights to real property that has been assigned to the Federal Government. It is both a conveyance and contract to possess and use real property for a predetermined period of time. Lease administration ensures performance of the agreement that constitutes a lease and consists of: interpretation and enforcement of the lease; effecting renewal or extension of the lease; negotiation of changes to the lease; authorizing rent payments; termination of the lease; settlement of claims for restoration; and handling other related matters.

### RESTRICTIONS ON IMPROVEMENTS

The Government Accountability Office (GAO) has declared that generally, unless authorized by law, appropriated funds may not be used to make permanent improvements to property not owned by the federal government. However, this rule does not prohibit temporary improvements to a leased facility so long as the improvements remain the property of the government and the government reserves the right to remove them at the end of the lease. Therefore, appropriated funds may be used to fund a government-owned, removable improvement in leased space.

While appropriated funds may be used to fund temporary improvements, the B&F fund is not the proper funding source for this activity. It has been HHS' long-standing practice to use B&F appropriations to fund construction and permanent improvements of government-owned facilities and to use operating funds to finance temporary improvements in leased facilities. This policy is being continued. Therefore, unless specifically otherwise authorized by law, only operating funds may be used to fund temporary improvements in leased facilities. The General Law Division (GLD) of HHS's Office of the General Counsel believes this practice is legally justified and cannot be waived, unless there is specific language in the B&F appropriation which provides funding for such security purposes of leased facilities or (at the very least) clear legislative history providing that B&F funds may be used for temporary improvements to leased property.

If operating funds are not available for a given improvement (*e.g.*, OPDIV program funds), then the Lessor, as the owner of the facility, may be asked to pay for the improvements. The Lessor may either pay for the improvements outright, or they may pay for the improvements and increase the OPDIV's rent to cover the cost.

### 4-3-10 PROCEDURES

The lease is a legally binding document on the Government and the Lessor and it is the basis for lease administration. It is important for the files to be kept up to date. Should the lease not be clear on a matter that is in dispute, the lease file may contain related background of the agreements made during negotiations, which might clarify and resolve the issue amicably.

Only the Contracting Officer can authorize a change to a lease that is binding on the Government. If a change is necessary, it is desirable that the change be a bilateral agreement, documented in a supplemental

lease agreement, between the Government and the Lessor. A change to the lease is defined as a change in scope of services or a change in space and has financial consequences.

#### A. LEASE ADMINISTRATION

Ideally, once the Government occupies the space the only administrative action would be to pay the rent; however, it is rarely that simple. There will be times when it is necessary to make changes to the lease. There will also be times when disputes will arise between the Lessor and the Government.

1. Enforcement of the Lease: A Government lease has several mandatory clauses, such as Clause 15 (552.270-10 Failure in Performance Sep 1999), that provide the means for the Government to enforce the lease. On the other hand, there are provisions in the lease that the Government must comply with such as paying rent.
2. Facility Assessments: The Government will periodically conduct a facility assessment to determine Government needs, to identify facility deficiencies, and to prioritize their corrections. The facility assessment will identify the entity that is responsible for correcting the deficiencies. The facility assessment can be used to identify improvements made to leased property to meet the tenant's mission and programmatic needs.
3. Expanding the Square Footage after Award: Generally, leases do not provide provisions for the right to expand space. The possible need for new space is generally considered a new contract action and current regulations allow for noncompetitive expansion negotiations with the current Lessor in some situations. GSAR 570.403 addresses expansion of lease space. The Contracting Officer should determine if the need for additional space is within the scope of the lease. Generally, if the Government needs space very similar to that provided in the original lease and the amount of the space expansion is a reasonable percentage of the amount of space covered by the original lease, usually less than 10% of the space of the original lease, it is generally safe to assume the lease expansion falls within the general scope of the original lease and that space may be acquired from the lessor without a sole source justification under FAR 6.3. Federal real estate leases are usually for office, storage, and official parking space. Expansion of these categories is generally allowed under the GSAR. If the expansion is outside the general scope of the existing lease, FAR 6.3 requires written justification for other than full and open competition except when competitive procedures or simplified lease acquisition procedures are used.
4. Contract Modification or Supplemental Lease Agreement to Reflect the Expansion of Space: Identify how the escalation clause will be affected by expansion space. If the existing lease contains operating cost or tax adjustment clauses, then it is important that the contract modification describe how escalation formulas will be applied to the expansion space. In terms of operating cost adjustment clause, the first year base amount is usually described as an amount per square foot. Expansion space will increase the square footage so negotiation needs to address whether the CPI will be applied to the expanded square footage, or whether there will be some other approach. All other terms and conditions of the lease will remain in full force and effect.

If the expansion space is being accepted ("without alterations") for immediate occupancy, then an actual effective date for the expansion can be written into the supplemental lease agreement (SLA) without any other conditions. All other terms and conditions of the lease remain in full force and effect. However, if the expanded space is not suitable for occupancy, then the Government and the Lessor must negotiate provisions for an effective or actual date for when the Government can take possession of the expanded space. The SLA should describe that the expansion rent will not be due until the space is substantially completed and that the current rent for the original lease will continue in effect in the interim.

The original lease probably contained space preparation ratios for major items of the build out. If the expansion space rent is based on a specific layout plan rather than the original space preparation ratios, or some other ratios are needed, this should be specifically identified in the SLA. If the original lease contains cancellation rights or renewal options, then the negotiations must address whether these rights also apply to expansion space. This will affect the Lessor's pricing and future plans, so the understanding reached during negotiations should be included in the SLA for the expansion.

5. Reducing the Square Footage: A space reduction should not require any justification for other than full and open competition under GSAR 570 or FAR 6.3 because the Government is not acquiring new or additional contract obligation. If reduction involves significant changes to other aspects of the lease that would add to the overall scope of the contract, then such justification might be required. A good example of this would be a contract modification that allows partial reduction on square footage, but also adds months or years to the term of the remaining space. It should be pointed out that a reduction in space under contract puts the Government at a disadvantage. There is no incentive for the Lessor to agree to a reduction in space because the reduction represents a loss of income. Furthermore, if the Lessor agrees to the reduction there may be cost incurred to alter the released space so that it can be separated from the retained leased area, unamortized tenant improvement, restoration, etc. The tenant will be expected to provide lump sum payment, which might offset any savings from reduced rental. GSA leases will usually contain a cancellation clause in the Occupancy Agreement with 120 days advance written notice. The same lump sum payments will apply to GSA leases. However, GSA assumes the loss of future rents requirements.
6. Payee Changes: The payee must be specified in the lease. During the administration of the lease there may be several situations in which the payee may change while the ownership and the name of the owner would remain the same, or the original Lessor could have several reasons to name a new payee even if there is no change in ownership. The most frequent reasons for changing payee are to reflect a new address for the Lessor/payee or the appointment of a new property management company by the Lessor. A change in payee should only be considered valid if the most recent Lessor of record communicates it. The contract is with the Lessor designated on the lease (or a successor in intent which has to be approved by the Government). Only that Lessor should give directions about the recipient of rent payments. If the lease administrator receives a request from a new payee, a letter should immediately be sent to the current Lessor with copies to the current and alleged new payee. The letter should advise the Lessor that the Government would honor the change only if designated by the Lessor, and only if confirmed in writing. If there is any indication that a payee change is due to a change in ownership, then the guidelines under "Change to the Lessor Ownership" should be followed.
7. Change to Lessor Ownership: In accordance with the requirements of FAR 42.12 for direct leases, a novation agreement is required to include, but is not limited to, identifying the contracts to be transferred, the effective date of transfer, transferee acquirement of all assets of transferor, transferee assumption of all conveyance documents, etc.
8. GSA Policies for Ownership Changes: In accordance with the requirements of FAR 42.12, once the Government is advised of a change in lease ownership, the Government should send a letter to the current Lessor with a copy to the new owner, asking for the following information through a novation agreement:
  - A copy of the deed or other instrument of conveyance of ownership.
  - A Statement from the Seller. The statement from the seller should waive rights under the lease (the specific Government lease should be cited in the statement).

- A Statement from the Buyer. The statement from the buyer should agree to approve and adopt the lease (the specific Government lease should be cited in this statement), and further agrees to be bound by the terms of the contract.
- The taxpayer identification number (*i.e.*, W-9) for new ownership needs to be obtained for tax reporting purposes.
- The Lessor's banking information using an ACH form.

It is advisable that the General Counsel review and approve the package of information above before the lease administrator approves the new owner. When all the information has been received and approved, the lease administrator should draft a SLA that identifies the new owner's payee organization. The form of ownership must be obtained (*e.g.*, corporation, partnership, etc.). Without this information, the Government will not be able to determine who is legally authorized to make commitments for the new owner.

9. Suspending Rent: GSA policy is to suspend rent until an ownership change is satisfactorily documented with all the information outlined above. When everything is received and reviewed, then the suspended rents are released to the appropriate new owner/payee. This is because new lessors sometimes resist furnishing all the documents or because the former owner has no incentive to submit a statement that waives its right.
10. Estoppel Certificate – Statement of Lease: The statement of lease in the general clauses is intended to satisfy the desire of mortgagees and perspective purchasers for what are often called estoppel certificates or estoppel statements. A purchaser would buy a building subject to leases in effect, so it is considered important to verify the conditions of the leases that would be inherited if the purchase were complete. Lessors may want to sell or refinance their property while leases are in effect, and those buyers or mortgagees may want tenant verification, and a quick confirmation could be critical. Therefore, the Government agrees to provide within 30 days a confirmation of basic lease terms in effect.
11. Subordination, Nondisturbance and Attornment Documents: The Government agrees that the lease is subject and subordinate to all recorded mortgages, deeds of trust and other liens now and hereafter existing or imposed upon the premises, and to any renewal, modification or extension thereof.
12. Failure in Performance: The agreement to pay rent and the agreement to provide any service, utility, maintenance, or repair required under the lease are interdependent. If the Lessor fails to provide any service, utility, maintenance, repair, or replacement required under the lease the Government may, by contract or otherwise, perform the requirement and deduct the cost from the rent. If the Government elects to perform the work, the Lessor must allow the Government and its contractors access to the premises. The Government may deduct from the rent then or thereafter due an amount that reflects the reduced value of the contract requirement not performed.
13. Default by Lessor: As provided for in GSAR 552.270-22, default is the tenant's unilateral right to move out, stop paying rent, and possibly assess damages. The following constitutes a default by the lessor: 1) failure to maintain, repair, operate, or service the premises as specified in the lease, provided any such failure shall remain uncured for a period of 30 days following Lessor's receipt of notice from the Contracting Officer or an authorized representative; 2) repeated and unexcused failure by Lessor to comply with one or more requirements of the lease.
14. Damage by Fire or Casualty: If fire or other casualty destroys the entire premises, the lease will be immediately terminated. In case of partial destruction or damage, so as to render the premises untenable as determined by the Government, the Government may terminate the lease by

giving written notice to the Lessor within 15 calendar days of the fire or other casualty; if so terminated, no rent will accrue to the Lessor after such partial destruction or damage; and if not so terminated, the rent will be reduced proportionately by SLA. It should be pointed out that this provision in the lease does not relieve the Lessor from liability for damage to or destruction of Government property that is caused by the Lessor's willful or negligent acts or omissions.

15. Disputes and Claims: A contract dispute can only be between the parties that are privy to the contract. Clause 35 of the General Clauses includes specifics on the applicability of The Contract Disputes Act of 1978, as amended (41 USC 601-613), which applies regardless of the size of the area, lease term, or monetary value of the lease contract. GSAR 570.601 requires the Dispute clause (FAR 52.233-1) to be in all lease solicitations or contracts expected to exceed \$ 2,500.

## B. ALTERATIONS AND REPAIRS

If the proposed alterations are outside the general scope of the lease and the plan is to acquire them from the lessor without competition, the following justification and approval requirements apply:

- If the alteration project will exceed the simplified acquisition threshold, the justification and approval requirements in FAR 6.3 apply.
  - If the alteration project will exceed \$2,500, but not the simplified lease acquisition threshold, you may use simplified acquisition procedures and explain the absence of competition in the file.
  - If the alteration project will not exceed \$2,500, no justification and approval is required.
1. Requirements for Alterations: The Government's requirements are generally identified in general conditions, plans and specifications. These instruments are also known as contract documents. The contract documents instruct the contractors as to what is wanted. These documents should be prepared by licensed architects and engineers registered in the state where the work is to be performed.
    - a. General Conditions: The General Conditions of the contract set forth the terms of how the work is to be accomplished, such as: a written general scope of work; identification of the parties to the contract along with their rights and responsibilities; period of performance; requirements for submittals; progress payments; etc.
    - b. Specifications: There are generally three types of specifications, some times called technical specifications.
      - A proprietary specification. A proprietary specification is simply specifying a particular product, such as "Anderson Windows".
      - The second type of specification is a performance specification, which is encouraged for use in Federal contracts. Performance specifications specify the quality and performance of the product and should be limited to only the essential characteristics to avoid unnecessarily restricting competition.
      - Reference specifications are specifications that are industry standards such as those published by ASTM or the Underwriters Laboratory (UL).
    - c. Plans: The plans are the drawings that illustrate to the builder or contractor what is to be built or altered. The plans and specifications do not tell the contractor how to construct the alteration. Means and methods of construction are left up to the contractor.
    - d. Scope of Work: For alterations that do not require a design professional/licensed architect or engineer, a scope of work may be sufficient. If an alteration does not require a building

- permit, then it is safe to assume that professional design services are not required. The scope of work at a minimum should consist of the following: background for the need of the alteration; project description; codes and standards that apply to the project; scope of services and material needed to complete the project; Government furnished information; submittals if required; schedule; payment; interface and coordination; and options.
2. Design Contract: The need for the Lessor to have a contract with the architect/engineer firm to design the alteration work should not be overlooked. The Government must provide a program of requirements to the Lessor as a basis for design.
    - a. Design to Budget Clause: In public or private architect/engineer contracts, there is a clause that requires the architect/engineer to design the project so as not to exceed the established budget. Ensure that the budget and language requiring the architect/engineer to design to budget are included in the SLA.
    - b. Design Review of Alterations: The Government shall review the Lessor's or contractor's plans and specifications for compliance with the SOW or scope of work and the SLA for the alterations. The review intervals shall be established in the lease or through agreement between the Contracting Officer and the Lessor.
    - c. Local Building Codes and Ordinances: Clause 18 of GSA Form 3517 requires that the Lessor comply with all applicable codes and ordinances. This clause should be placed in any contract for alterations. Furthermore, all work must comply with the Americans with Disabilities Act (ADA).
  3. Contractual Relationships between the Parties in Alteration of Leased Property: It is important to understand the contractual relationship between the parties. The Government only has privity with the Lessor. The Government does not have privity with the architect/engineer, nor with the construction contractor. The Lessor's architect/engineer does not have privity to the construction contractor. Because of these contractual relationships, it is very important for the Government to express its requirements and produce a clear, correct, concise, and complete program of requirements. Requirements must be met through monitoring.
  4. Independent Government Estimate: When alterations, improvements, or construction are necessary, a written Government estimate is required. A government estimate will assist the Contracting Officer in negotiating a fair and reasonable price for the work. Without plans and specifications, it is difficult to do a government estimate. A budget estimate based on the broad order of magnitude (*e.g.*, a square foot estimate) may be sufficient in some cases. The tenant will provide the number of persons that will occupy the space. Normally lease space is area specific and it does not require a grossing factor to determine the actual size of lease space. A professional estimator should do estimates for the rehabilitation of building systems as well as any construction.
  5. Labor Standards: Since Federal funds will be used to finance the alterations, Federal labor laws for construction apply. The Secretary of Labor issued regulations to provide for the administration and enforcement of Federal labor standards in construction contracts. The Secretary's regulations cover the following wage determination procedures: duties of lessors on Government financed public buildings; labor standards for construction; labor standards for ratios of apprentices and trainees to journeymen; and wage determination review procedures (FAR 22.403-4). In addition, Congress passed the following statutory requirements concerning federally financed construction: Davis-Bacon Act, Copeland Act and Contract Work Safety Standards Act (FAR 22.403-3). Both public and private sector construction must comply with OSHA 29CFR 1910. The SFO states that the Government will be the sole or predominant tenant in order to apply Davis-Bacon rates; this information is generally found under section 1.18.

6. Government Acceptance: The Government shall conduct a final walkthrough with the Lessor to determine if the alterations are substantially complete. The Government and the Lessor will identify visible deficiencies in the built out space and establish a punch list for the Lessor to complete at a mutually agreed upon time between the Government and Lessor. Before the work is accepted, the Lessor must provide a copy of any certificate of inspection, occupancy, or approval by the jurisdiction having authority.
  - a. Beneficial Occupancy or Possession: Once the Government and the Lessor determine and agree that the alteration is substantially complete, the Government may take beneficial occupancy or possession.
  - b. Documentation of Acceptance: Acceptance by the Government establishes that the Lessor met the contract requirements. Acceptance may be documented on GSA Form 184 or 220, DD 250, or other appropriate form. The final status of defects and omissions at the time of final inspection must be documented.
7. Government Furnished Property: The alteration may include property furnished by the Government for installation by the Lessor. The Contracting Officer's Technical Representative (COTR) must assure that the property will be available at the time it is needed at the project. The Government should request a schedule from the Lessor giving the dates for delivery of the property to be installed. Upon receipt of the Lessor's construction schedule, the Contracting Officer should make the necessary arrangements to have the property delivered by the required date. Upon delivery, the Lessor and the COTR must jointly inspect the property for possible shortage or damage in transit. If any shortage or damage is found, the Lessor should follow instructions on the Government bill of lading for reporting to the carrier and should submit a detailed report to the Contracting Officer. The Contracting Officer may be required to take action against the supplier to correct the shortages or damages.

The contract documents should require the Lessor to: accept delivery of the property on the established dates; take steps to correct shortages or damage in transit; be responsible for proper storage and protection; provide any additional transportation required; uncrate, assemble, and install equipment; and dispose of waste/trash.

- a. Government Furnished Property: An agreement must be made stating what property the Government will supply and a definite time of delivery of the Government furnished property. As soon as the COTR has received notice from the Lessor of the required dates for delivery of the property, they must immediately notify the user group and confirm the delivery request in writing. Information concerning Government furnished property must be recorded in the official file, and any unusual durations must be brought to the attention of the Contracting Officer.
  - b. Delays: Government caused delays that impact on the lessor (e.g., untimely delivery of Government furnished property, changes in scope) may result in an increase in contract period of performance and could result in a time extension and an equitable adjustment in the contract amount. If delay is critical or is causing avoidable expense, consideration should be given to deleting the installation entirely and completing the work under a separate contract. In addition, consideration should be given to having the Lessor acquire the required property if it is feasible and reasonable; however, the Contracting Officer must document the decision in a determination and finding included in a SLA.
8. Ownership of Alterations and Improvements: General Clause 19, 552.270-12 – ALTERATIONS (SEP 1999) of GSA Form 3517B provides that the Government may make alterations, attach fixtures, and erect additions or signs in or on the premises. Furthermore, any fixtures, alteration, or structure placed on the premises by the Government remains the property of the Government.

The right to equipment or material must remain with the Government at the expiration of the lease. Depending on the clauses included in the lease agreement, the Government may be liable for damages to the premises when removing alterations, fixtures, structures, etc. and may be required to restore the premises to its original state in accordance with the existing conditions survey. If possible, a specific provision should be made in the SLA giving the Government the right to remove the equipment or material, or to abandon it in place, without restoration payment.

#### 4-3-20 GUIDANCE AND INFORMATION

##### A. RENT ADJUSTMENT CLAUSES

Lease provisions that adjust the rent during the term are classified as actions within the scope of the contract. Rent adjustment clauses in Government leases are not intended to guarantee or increase the Lessor's profit or return on investment during the lease, but they should protect the Lessor from major cost increases that cannot be accurately predicted.

Operating Cost Adjustments: Operating costs are the expenses incurred by the lessor as part of the operation and management of the premises. The operating cost may include interior and exterior cleaning; snow removal; maintenance of building systems; light bulb replacement; security systems and guard services for general building function; fuel; and water and sewage. The operating cost base amount should already be negotiated and identified in the awarded lease. The escalation will only be computed on the portion of rent that is identified as operating cost base; the entire gross rent will not be escalated.

1. Escalator Clauses: The operating cost clause in Section 3.6 of the standard SFO is virtually mandatory in all SFOs issued by GSA or under GSA delegation. This clause calculates future operating cost increases using the percentage change in the Consumer Price Index (CPI), multiplied by the first year base cost negotiated between the parties. This formula is used regardless of the actual expenses experienced by the lessor, whether they are higher or lower than the adjustment produced by the clause.
2. Real Estate Tax Adjustments (See Section 3.4 of the Standard SFO): Escalating clauses for real estate is a standard factor in commercial leases, just as operating cost escalators are now an accepted market practice. Adjustments to taxes are based on actual expense. The Lessor is eligible for tax escalation and the Government is eligible for a tax decrease only if there is actual evidence of increase/decrease. That evidence is the tax bill. The Government should be cautious not to mistakenly pay for the full amount of increase if the Government does not occupy the entire building. When the Government is a partial occupant, the amount of the increase for the total property should be reduced to the Government's percentage of occupancy. Adjustments are paid in a lump sum per annum. The tax clause is intended to reimburse the Lessor for tax expenses already incurred (not in the future).

##### B. RENEWALS OR EXTENSION OF THE LEASE

If the lease does not have negotiated (pre-established) renewal options, then there should be an appraisal of the leased property to determine the fair market rent. The rent should be negotiated and agreed to by both parties. Lease extensions should be administered in the same manner as lease renewals.

1. Negotiating Extensions of the Lease Ending Date: When an extension is necessary, one of the most effective techniques to maintain a cooperative relationship with a lessor is to begin discussion early. Most new leases require at least a year from market survey through actual occupancy. When there is only a year or less remaining on the existing lease term and

procurement for continued occupancy has not begun or is in its early stages, an extension at the current location will probably be necessary.

2. Noncompetitive Negotiation Justification: GSAR 570.405 states that the noncompetitive approval and justification requirements in FAR 6.3 must be followed when the value of a lease extension will exceed the simplified acquisition threshold. When noncompetitive justification is required, almost all lease extensions are covered by FAR 6.302-1, which allows contracting without full and open competition when there is only one responsible source to satisfy the need. GSAR 570.405 cites several examples of the most common lease extension situations: other space is identified but will not be ready in time; unexpected delays outside the Government's control will delay acquiring replacement space; and additional time is necessary to coordinate a consolidation of offices.
3. Improvements during the Extension of the Lease: Expiring lease locations often show signs of wear and tear after years of occupancy. Carpet, paint and wall coverings may need repair or replacement due to normal wear and tear. If the term of the extension will be a year or more, it may be too long to expect the Tenant to tolerate the existing condition. If the Government begins extension discussion well in advance of the termination date, there will be more time to discuss alternatives with both the Tenant and Lessor about possible improvement during the extension.
4. Administering Leases in Holdover Status: If continued occupancy is needed but negotiations have not produced a bilateral agreement by the date of expiration, the tenant is a holdover. Holdover tenancy generally applies to tenants that remain in possession after a lease that was for a period of a year or longer. Due to the unique nature of the Federal Government, a private sector landlord cannot evict a Federal tenant. The normal judicial remedies of state law are not applicable since Federal law controls the relationship. If a holdover cannot be resolved through negotiations, a Federal Court or a board of contract appeals might refer to general contract law principles to reach a decision, but that does not mean state law would directly apply.
5. Succeeding Leases: A succeeding lease is a follow on lease for continued occupancy of the same space, beginning the day after the former lease expires. A succeeding lease incorporates a new SFO with updated terms, conditions, and clauses. GSAR 570.402 contains special procedures for succeeding leases.
6. Exercising Renewal Options in Leases: Renewal options may be specified in Paragraph 5 of the SF 2 GSAR 570.401 contains general guidance for exercising a renewal option in a lease. The renewal option should contain cancellation rights during the option period. If renewal option periods are priced, then the analysis of prevailing rental rates discussed in the GSAR is required prior to the exercise of the option.
7. Vacating the Premises (Actions when Moving out of Expired or Terminated Leases): When the lease is about to expire, there are several steps that should be taken in the weeks preceding the move to minimize the Governments exposure. The following steps will help maintain a professional relationship with the Lessor:
  - a. A written inspection report that includes photographs of the conditions should be made before the Government vacates the premises.
  - b. The tenant must remove all Government and personal property prior to the termination date.
  - c. The Government is responsible to repair damages caused by its own negligence. The Government is not responsible to restore the premises to its original condition or to repair the effects of normal wear and tear.
  - d. Keys or security access cards for the premises should be returned to the Lessor.
  - e. Utility accounts that are paid separately by the Government should be terminated with the utility company.

- f. Telephone equipment is the responsibility of the Tenant and IT and they should arrange to transfer services to a new location.
8. Leasehold Condemnation: The Federal Government has the power of eminent domain regarding real property and it is usually applied in the condemnation of fee simple interest; however, Federal condemnation authority can also be used to condemn only the leasehold interest for a limited period of time in accordance with 40 U.S.C. 3113 - 3118. Whenever an OPDIV contemplates a lease holdover that could not be resolved through negotiations, as required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4651, it should promptly contact the Office of General Counsel to discuss the possibility of initiating lease condemnation procedures. Once HHS has determined that such condemnation procedures are necessary, OGC will contact the Department of Justice (DOJ) because DOJ would be responsible for filing any such condemnation action in Federal Court. This approach is used as the last resort to protect continued Government occupancy in an expired lease. When condemnation of a leasehold is being considered, among the documents the Government will need the following:
  - a. Title search to determine current ownership;
  - b. Appraisal to determined just compensation;
  - c. Detailed record of negotiation demonstrating that serious good faith efforts were made to avoid condemnation;
  - d. Declaration of Taking that is filed with the U.S. District Court stipulating the estimated period of time the leasehold will be needed; and
  - e. U.S Treasury check for the total amount of rent that the Government claims is just compensation for the period of the condemnation.

### C. TERMINATION OF THE LEASE

Lease terms can either be firm, where there are no rights to cancel, or termination rights can be negotiated into the basic lease terms. Very few leases have termination rights that allow cancellation of only part of the space. Most termination rights only allow cancellation of the entire premises.

Early Cancellation: Leases may not contain cancellation for convenience clauses except for GSA Occupancy Agreements with the tenant agency. Cancellation for convenience can be made part of a new solicitation. However, if the lease does not contain a cancellation clause, then for direct leases the Contracting Officer may negotiate terms and conditions for a lease cancellation. It is permissible to negotiate a lump sum payment (buy-out) to the Lessor in lieu of future rent if this is financially advantageous. The negotiation of a lease buy-out involves the calculations required to determine the net present value of future lease payments due the Lessor. Additionally, the buy-out negotiations could take into account current fair market rental for similar space, the cost of new tenant build-out, the potential loss of rent during vacancy, and the cost of leasing out space.

Excluding GSA leases, if buy-out negotiations are not successful, then the Government has no choice but to continue making rent payments, excluding some operating cost (*e.g.*, custodial, some utilities, or other items that will not incur cost for the lessor due to vacancy of the space). It should be made clear to the Lessor that no other tenant is allowed to use the space in the interim.

### D. LEASE CLOSEOUT AND SETTLEMENT

At the close of the lease term, the Contracting Officer must ensure that all the obligations under the lease have been met. When vacating lease premises, it is important to clear the property of all Government

property and furniture. Failure to do so may be construed as constructive occupancy and could be the subject of a claim for additional rent on the Lessor’s behalf. If removal of Government property causes damage to the premises, minor repairs should be made so that the premises are left in the same relative condition as when first occupied, less ordinary wear and tear. Where damage has occurred, an agreement for compensation should be arranged and an SLA should be made to document this agreement. All actions required to closeout the lease need not be completed at the end of the term. Final payment should be authorized when all SLAs, adjustments, and required documents have been completed, all restoration actions taken, and all property removed from the premises. Once the final payment has been made, the lease contract is closed.

Sample Lease Closeout Checklist

Item	Action	Yes	No
1	Terminal condition survey completed?		
2	Lessor acceptance and release signed?		
3	Keys turned over to Lessor with receipt in lease file? If keys are not returned, is the attempt to return documented?		
4	All Government property removed from premises? If Government property is not removed, is documentation for abandonment in place in both file and personal property file?		
5	Is restoration necessary? If restoration is required, have arrangements been completed?		
6	All service contractors notified?		
7	CIT notified?		
8	Utility companies notified?		
9	Final payment made?		
10	Lease file completed?		
11	Notification of OFMP that the lease is no longer active?		

4-3-30 REPORTING REQUIREMENTS

Space Budget Justification - OMB Circular A-11 requires agencies to complete Exhibit 54 “Space Budget Justification” electronic report for rent payments to GSA or to others (*i.e.*, other Federal agencies or commercial landlords) in excess of \$5 mil annually for space, structures, and facilities, land and building services. A separate report is required for each subordinate organization that makes rental payments above \$5 million annually, therefore OPDIVs that obligate more than \$5 million annually for rental payments are required to submit a space budget justification, in the format of A-11 exhibit 54, to OFMP.

This report provides a justification to OMB of the agency’s budget request for rent. GSA uses this information to refine estimates of rental costs.