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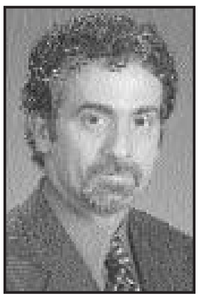
Law & Accounting

Office tenants' leverage: RFPs

An office tenant can benefit by using a request for proposal when leasing a significant amount of space in the marketplace. An RFP creates a bidding process among landlords for a tenant's business and allows a tenant to compare competing properties on an "apples-to-apples" basis. This process gives an office tenant leverage and additional information to obtain the best deal possible.

Lease transactions frequently are initiated by letters of intent going back and forth between a landlord and a tenant. A letter of intent generally "outlines" key business issues of a lease transaction but leaves many business and legal issues to be resolved by the landlord, the tenant and their respective lawyers during the negotiation of the specific lease language. Since most office lease forms are prepared by landlords, they are, not surprisingly, landlord biased. Accordingly, in most lease negotiations, tenants find themselves behind the proverbial "eight ball" on many material issues, and are left arguing for reasonable compromises on provisions contained in landlords' "standard" lease form.

An RFP, which is more detailed than a letter of intent, balances the playing field for tenants early in the negotiation process by providing proposed lease language for key business and legal issues to select landlords. Furthermore, an RFP asks a landlord to accept or provide specific comments to a tenant's proposed lease language when responding to the RFP. Since many economic issues exist in the devilish details of a landlord's "standard" lease form, proper vetting and resolution of hidden economic issues can provide tenants with significant economic "wins" when landlords are competing for the tenant to select their building as its new home.



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RFPs can be used to flesh out competing landlords' positions on key business issues as well as issues including, but not limited to, the following:

■ **Rent, concessions and lease term issues:** Base rental rate (including parking charges and rights); lease and rent commencement dates (including extension provisions and penalties, if any, for landlord delays or late delivery of the premises); free rent (including extensions if rent is abated during free rent periods and limitations on free rent recapture if tenant defaults); rent abatement if tenant is unable to occupy premises through no fault of its own; moving allowances; and specifics of the landlord's agreement to take over existing lease obligations.

■ **Operating expense and maintenance issues:** Creating limitations on the landlord's right to pass through operating expenses, including caps on increases, if any, and the types of expenses the landlord will agree to limit or exclude from operating expenses (e.g., the pass-through of capital improvements, landlord management fees, and marketing and leasing expenses; and, if applicable, the requirement to gross-up variable expenses in the base year and subsequent years); establishing tenant audit rights, offset rights and self-help remedies; and defining the landlord's specific maintenance/repair obligations, including janitorial specifications.

■ **Assignment and subletting issues:** Establishing the tenant's rights to assign or sublet the premises (without the landlord's right to terminate the lease upon the tenant's request to assign or sublet) and the right of the tenant to retain all or a portion of the profits from assigning or subletting, which can be a valuable right when the lease is executed in a depressed market; defining profits so that the tenant can deduct from income all rent paid to the landlord when the premises are not occupied and all expenses associated with the assignment and subletting.

■ **Work letter issues:** Tenant improvement allowances (including rights of the tenant, if any, to use excess funds for space planning and architect fees, attorney's fees, furniture, fixtures and equipment, and future rent obligations); limitations on the landlord's right to charge a supervision or construction management fee; defining base building work that the landlord will deliver at its expense, without charge against the tenant improvement allowance; competitive bidding requirements for work performed by the landlord; specific time periods and standards for the landlord's approval of tenant plans, etc.

■ **Eviction prevention:** From the landlord's secured lenders, require a subordination, nondisturbance and attornment agreement, which will protect tenant from eviction in the event the landlord loses its building through foreclosure.

To best implement an RFP approach to leasing, a tenant should first select a real estate broker knowledgeable in the desired market area to start the process of identifying its needs and a potential pool of properties that will satisfy those needs. Once this process has commenced, but before the tenant begins negotiations with any particular landlord, the tenant should select its legal counsel for the negotiations. Once counsel is selected, the tenant, its broker and attorney should meet to discuss the tenant's refined needs and to prepare an RFP for distribution to the identified group of qualifying landlords. This upfront investment is not necessarily duplicative, since most of this work would have to be performed later on during the actual lease negotiations.

Once prepared, the RFP is sent to a preselected pool of landlords. Depending upon the tenant's approach to the negotiations, landlords can be advised: 1) that the tenant will select one winning proposal and proceed to lease documentation; or 2) that the tenant will select the two best proposals for additional negotiations before selecting the winning landlord. Defining the process and timetables for landlords at the outset will make landlords more comfortable with the process of responding to a tenant's RFP.

While a letter of intent often is used to establish the business terms of a lease transaction, larger office tenants should consider using an RFP. As discussed above, an RFP helps level the playing field between a landlord and tenant, provides a tenant with economic advantages early in the negotiations, and enables a tenant to secure the best business/legal deal for its lease of new premises.▲