

The commercial lease pitfalls and 327 questions to ask before you sign a lease

Today's soft commercial real estate market has a great many opportunities for savvy companies, yet with opportunities comes risk. Each year, 7-percent of the nation's commercial real estate leases expire.

Lurking inside almost every tenants lease are potential loop holes, traps, major ambiguities and dozens of issues that were never discussed. Among the legal rights and obligations, could be hidden costs, unreasonable risk and out right mistakes that could have that could have expensive consequences. Many times the language in some leases is unclear and important clauses omitted.

Even the most sophisticated of companies, architects, attorneys, experienced real estate professionals can over look the most basic items.

Since foreclosures have become a fact of life, the landlord today, may not be your landlord tomorrow. That's why the so called boiler plate issues, such as subordination, non-disturbance and attornment are important issues to tenants.

Landlords are in the business of leasing space. Prudent landlords calculate nearly every potential issue and angle far before any negotiations with the help from other asset managers, attorneys, financial analysts, property managers, real estate brokers, risk architects, space planners, engineers and contractors.

Tenants, on the other hand, often do not have the financial, professional or personnel resources commanded by the landlords. In spite of their expertise and success in their core of business, they are in foreign territory and out numbered when it comes to dealing with the maze of fine print and legalisms in a lease.

A lease is a very complex document that often contains hundreds of small agreements. Sometimes, changing one (1) or two (2) words can be the difference between a fair lease clause and trouble.

Here are 25 questions from the book, "327 Questions Asked Before You Sign A Lease". They can be used to find costly loop holes and uncover potential problems when negotiating a new lease. You can also use them to review your existing leases. A review can expose thousands of dollars in potential over charges for operating expenses, tax assessments, errors in calculating CPI adjustments, security deposit interest and lots more.

All the questions can be answered either yes or no. A no answer is a red flag, warning you to take steps to protect yourself. The idea of using a checklist may seem simplistic, yet, it is a very effective tool for making sure nothing is overlooked and prevent problems.

The questions are as follows:

1. Does the lease specifically state the square footage of the premises?
2. Is the total rentable square footage of the building specifically stated?
3. Is the tenant's pro rata share based total square footage in the building, instead of the square footage leased by the landlords?
4. Do the base year expenses reflect full occupancy or adjusted to full occupancy (for example, the base year real estate taxes are low because they are based on an unfinished building)?
5. Must the landlord provide a detailed list of expenses prepared by a certified public accountant (CPA) to support the increase?
6. Does the lease clearly give the tenant the right to audit the landlord's books and records?
7. Is any increase in operating expenses due to another tenant's "particular use" excluded from operating expenses?
8. If the tenant's use is limited to the use stated in the lease and no other use, does the lease provide for: "except concerning an assignment or subletting, in which event any change in use required by the transferee shall be subject to the prior written consent of the landlord, which consent shall not be unreasonably withheld or delayed?"

9. Is there a dollar limit on the tenant's obligation to make changes to the premises to comply with all municipal ordinances and state and federal statutes after the commencement date?
10. If the landlord becomes aware of my hazardous substances, hazardous materials or hazardous wastes in the building or the premises, is the landlord required to give the tenant prompt notice?
11. Are the janitorial services standards specified in an exhibit, such as emptying waste baskets nightly, washing the exterior windows once a quarter?
12. If the services are interrupted, does the lease decline the remedies available to the tenant; money damages, rent abatement or lease cancellation?
13. Is the landlord required to complete or correct the "punch list" items within 30 days or be in default?
14. If the landlord does not meet its responsibilities for repair and maintenance, can the tenant make the repairs upon 10 days notice (or without notice in an emergency), and deduct the costs of the repairs from the rent?
15. Does the lease say any repairs, alterations or other improvements required by any governmental authority that is required of the building in general, or similar buildings or uses in the area of the building, shall be done at the sole cost and expenses of the landlord?
16. If the landlord fails to notify the tenant of the assessment (or reassessment) in sufficient time to permit the tenant to contest the assessment, can the tenant exclude any increase resulting from the assessment from the taxes the tenant pays?
17. If the tenant is seeking to sublease only a portion of the premises, is the landlord precluded from recapturing the entire premises?
18. Is the landlord required to obtain non-disturbance agreements from current and any future lenders?
19. Is the landlord required to subordinate its contingent interest in the tenant's personal property and fixtures to the tenant's lenders?
20. Does the lease say any lease modifications requested by a lender cannot alter the basic business terms (rent, location, term)?
21. Can the tenant use an umbrella or blanket insurance policy that also covers other premises owned or leased by tenant?
22. Is the waiver of subrogation unlimited, instead of limited only to the amounts of insurance proceeds received?
23. Does the lease clearly define how disputes are decided?
24. Is everything the tenant negotiated, such as free rent, increased tenant improvement allowance, caps on operating expenses increases, stated in the lease and its exhibits?
25. If the lease is subject to mortgagee approval, is the lease automatically void, if the tenant does not receive written notice by a certain date that the lease has been approved?

Real estate often represents a firm's largest single financial commitment, and its largest annual expenses other than payroll. It can have a major impact on earnings for many years. Avoiding just one trap can save thousands or maybe millions of dollars each year. In today's economy, one cannot afford to be caught unprepared. The stakes are just too high.

Joseph W. Brady, CCIM, SIOR & President of Joseph W. Brady, Inc dba The Bradco Companies (DRE No. 01057618), in conjunction with Mr. Alan Whitson, RPA, co-published a book for the High Desert businesses concerned about their current or future leases. The book, "327 Questions to Ask Before You Sign A Lease" is available for \$79.95 through The Bradco Companies, a full-service commercial, industrial and land brokerage firm.

For additional information on how to order this book, contact The Bradco Companies at 760-951-5111 or visit our website at www.thebradcocompanies.com/327Questions .

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