

# Corporate headquarters leasing: Key considerations for a post-pandemic workplace



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### ABSTRACT

*Among the many impacts of the COVID-19 pandemic on the corporate world, an unprecedented number of offices were left empty as, for months on end, thousands of employees worked from home. Today, as the number of vaccinated employees rises and mask mandates loosen, many employers are revisiting existing headquarters leases — or seeking out new ones — amid a heightened push for hybrid work policies and open and flex-office spaces. In the wake of this rapidly changing landscape, this paper examines the key legal and business considerations companies must keep in mind when leasing their corporate headquarters, including: what to consider in selecting premises; tips and details around the process of interviewing leasing brokers, designers, engineers, architects, construction professionals and project managers; and how best to assemble internal and external teams. As the world continues to wrestle with the long-standing impacts of the pandemic, the decisions companies make now about their headquarters will sketch a critical roadmap for the corporate world for years to come.*

*Keywords: headquarters, law, lease, leasing, office, corporate, real estate*

### INTRODUCTION

The phrase ‘a once-in-a-lifetime experience’ may conjure up images of dream vacations, exotic locales and great opportunities, but its application to the leasing of corporate headquarters would seem, at best, misplaced — unless, of course, the year is 2020 or 2021.

Typically, at the executive level, the handling of a headquarters commercial lease is often a first-time — and mercifully, one-time — experience for the tenant’s executives and staff, with the leasing term generally extending well beyond the careers of the executives who handled it — a welcome fact for those working on such lease. In the wake of the COVID-19 pandemic and its widespread impact on the corporate world, however, many employers began re-evaluating their existing headquarters leases amid mandated work-from-home orders, and even now, as remote and hybrid work policies continue to gain steam.

The challenge of a headquarters lease assignment, particularly in today’s environment, is compounded by the fact that the

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counterparty, the landlord, has substantial and current experience in the negotiation of major (and lesser) leases. What is more, the landlord has the competitive advantage of knowing their building inside and out — information upon which the landlord no doubt relies during lease structuring and negotiation. This paper will examine the process of procuring a headquarters lease amid these challenges and provide a suggested framework for assembling the internal and external expertise and data necessary to define, understand and overcome them.

To begin, a ‘headquarters lease’ is intended to include leases of office space of significant size or importance to the tenant in that the premises will house senior executives and administrative staff of the business units involved and be regarded as the ‘corporate hub’ for the tenant. Such premises tend to be leased for relatively long terms (typically anywhere from 10–20 years, not including customary extension options), require substantial investment in leasehold improvements, and involve personnel who require a high level of service. Importantly, the premises may represent a projection of the image of the business units, and thus, the lease may involve intangibles that counter-balance standard economic issues.

The toughest part is generally figuring out where to begin, and while there are myriad articles on substantive lease issues, that information is not very relevant at the commencement of a leasing process.

As such, it is important to keep two initial goals front of mind:

- To build an internal and external team; and
- To define essential transaction criteria.

The internal team must consist of those who can provide or develop, from within the organisation, the information needed to establish the transaction criteria, including not just financial experts, but also those

who are able to define and project the needs of the businesses which will occupy the premises. Therefore, assembling this team properly and understanding the premises criteria at the outset will help provide tenants with a sound basis on which to execute the project. It is, of course, easier to state the obvious than to achieve it.

To begin, the size of an internal team depends on the size of the company and lease space requirements; however, one key consideration is to ensure input from the IT/ audio-visual (AV), security and office or operations departments. Over the course of the last year, each of these departments has taken on an increasingly significant role in the workplace — given the recent emphasis on technology, cyber security protections and the rise of remote work. As such, drafting them into the initial stages of the process proves critical.

Locating outside experts — such as real estate brokers, real estate lawyers and architect/space designers — is also key, as a landlord may be an expert, but not impartial. Most executive officers will not intuitively think to start with a real estate lawyer (until they have read this paper, perhaps), but doing so can prove immensely helpful in ensuring a successful process. Begin with an interview to not only determine which candidate feels most qualified, but also to test relevant questions and issues to help refine and focus them.

Initial interviews with counsel should cover:

- The qualifications and experience of the law firm and the particular lawyers, including specialties such as construction, outsourcing and other relevant service contracts, finance and other areas not directly within a real estate practice, but perhaps relevant;
- Whether work extends beyond the principal documentation to preparing and negotiating related architectural,

consultant, project management and construction documentation, including contract documentation for the purchase and maintenance of sophisticated communications and software systems, governmental incentive programs, moving contracts, and the other agreements often ancillary to a corporate relocation;

- The proposed staffing of the project relative to the contemplated timetable for the transaction and the reasons for such staffing (eg is there an appropriate mix of seniority that seems relevant); and
- Fee estimates and budgets, including special fee arrangements (such as fixed fees), but keeping in mind that the costs 'saved' up-front may be modest compared to the costs that may be 'saved' over the term of the lease.

Beyond these basics, interviews should cover:

- Views on the market and special market opportunities, as qualified leasing counsel should be active in the market;

- Special deal or financing structures that may be relevant (eg leasehold condo structures, ground leases, etc.);
- An explanation of the basic process and recommendations as to other professionals (including, for the very pushy, other counsel) who might be interviewed to fill the various roles relevant to the process;
- Identification of typical gating issues — economic, substantive, timing — which should be programed into project plans; and
- Articles and other publications for clients which will provide relevant background.

Each of these questions, with required variations, can be asked of each professional group during the interview process, and will ultimately allow lessees to better understand the real needs and objectives for their organisation's new premises (see Figure 1).

Having retained the linchpin of the outside team, the next steps involve assembling the external professional advisory group and internal team — with the latter matching up

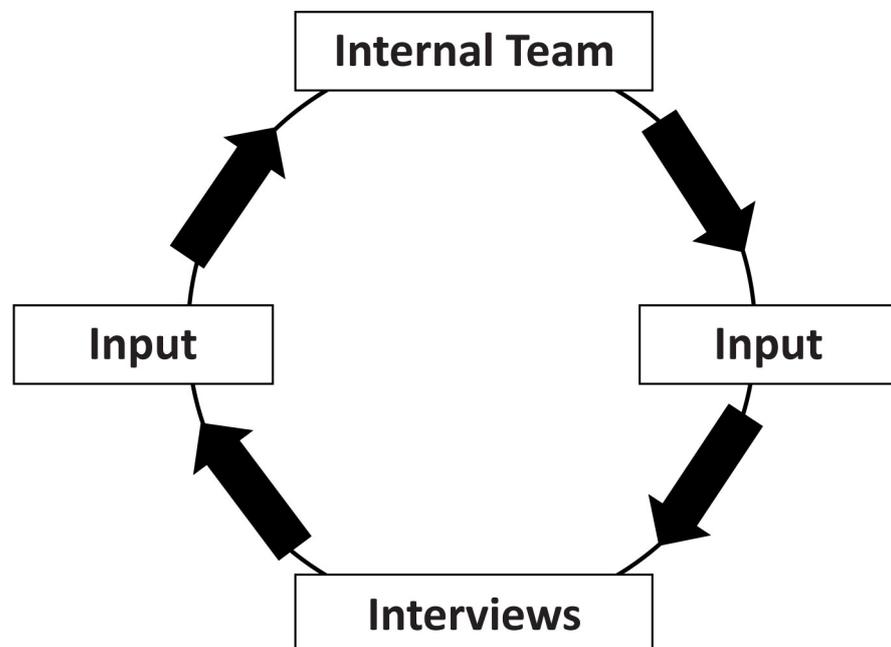


Figure 1: Internal team interview process

as counterparts to the former. The external professionals will include a leasing broker and an architect/designer (this role becomes increasingly important depending on the size and scope of the planned build-out), one or more engineers or specialised consultants as relevant to the planned installation and operations, and a construction consultant and/or general contractor (this role, too, becomes increasingly important depending on the size and scope of the planned build-out). For organisations with outsourced staff functions (eg mail, insurance, premises management, IT/AV, etc.), parts of the internal team may come from outside the organisation, and such persons may be able to fulfil both the internal and external roles, if needed.

Before reviewing the balance of the external roles, it is worth reflecting again on the essential nature of the lease transaction, which is to provide a relatively long-term accommodation to a dynamic environment. One need only reflect upon the fundamental changes in how business is done and space is occupied over, say, 15 years to see the challenge of providing for the next 15 years (or, in the case of a global pandemic, from one year, or day, to the next). In this context, the value of having a broad range of advice from those who have experience in the market should be evident. In addition, to be in a position to make sound choices, it is important to challenge the bases on which business units currently operate, on which they propose to operate in the future, and the space they currently occupy and propose to occupy in the future.

## LEASING BROKER

There are three primary tasks for the leasing broker: 1) the identification and presentation of space; 2) the negotiation of the basic business terms of the transaction; and 3) the coordination of the lease negotiation. While some professionals (or real estate companies) may provide a broader range of services, the

essential process of finding the appropriate space alternatives on reasonable (given the then market) terms is the critical function of the leasing broker.

As with counsel, an interview process with several qualified professionals is an important part of the selection process. The interviews should cover:

- The qualifications of the leasing broker's firm and of the particular broker, including: 1) experience in assignments of similar scope; 2) experience in the specific markets or sub-markets in which the lessee is interested; 3) timeliness of the experience; and 4) availability of ancillary support groups within the company in such areas as designing (determining and projecting space needs), technical engineering and building operational matters, project management, and insurance;
- The proposed approach to the assignment on a step-by-step basis through a timeline;
- The proposed staffing;
- The pricing of the brokerage services and such other services as may be relevant to the lessee's project (more on this point to follow).

This interview should also cover the more general issues noted above in respect to interviews of counsel: views on the market, special structures and alternatives to a commercial lease transaction (eg purchase, financing lease, ground lease, etc.), comments on the process, recommendations of other professionals, identification of gating issues, market reports and other written information.

These interviews are critical, particularly as many leasing brokers (and their companies) represent both landlords and tenants — even in the same transaction — and the commissions payable on a leasing transaction are generally paid by the landlord. Ultimately, however, the lessee must, of course, be comfortable with their leasing

broker, and should explore these matters during the interview.

Another factor in this regard is that leasing broker commissions are generally based upon a percentage of the rent payable. The more you pay, the higher the brokerage commission (and that commission is almost always payable by the landlord who receives the higher rent).

By now the leasing brokers will have pointed out:

- That counsel and other professionals (architects, engineers, etc.) represent landlords as well as tenants;
- That doing so gives a professional a better understanding of the dynamics of the transaction;
- That some professionals (engineers, for example) represent the building as well as the tenant;
- That the fees of others often vary with the size of the transaction.

Once a leasing broker is chosen, it is important to have a written agreement, even if a particular state or country's law does not require that a brokerage agreement be in writing. Among the items to be covered are the scope of the assignment, the duration of the assignment, the fee arrangements and the termination rights. Regarding fee arrangements, from the tenant's perspective, it will be important to make clear in any brokerage agreement that the broker will look to the landlord for the payment of its commissions and reimbursement of all its fees and expenses. Another important element of the brokerage agreement is to specify the key people to be involved on the broker side and build in provisions requiring that they remain active in rendering the services of the brokerage firm to the tenant.

Leasing brokerage engagements are almost inevitably on an 'exclusive' basis, which means that the broker will be entitled to compensation upon the signing of a lease whether or not the broker locates

the particular premises or negotiates the particular deal. Because of the potential for conflicting brokerage claims, as well as the general requirement of landlords that a tenant's broker provide authorisation to represent a tenant, non-exclusive arrangements are problematic.

This is not to say that arrangements with respect to special situations are not made. For example, a lessee may have renewal rights under their current lease. If that premises is a viable alternative, it may require special arrangements on the commission payable in respect of an exercise of renewal rights.

It is also customary for a leasing broker to seek protection as to premises shown to a client during the term of the leasing broker's engagement if, following expiration or termination of the engagement, the client leases any such premises. This provision (a 'run-off' clause or a 'tail period') generally requires that a specific list of such premises be provided promptly after an agreement expires or is terminated and limits the post-agreement protected period to a reasonable period of time.

What these examples illustrate is that whether or not lessees have first retained counsel in the process, they should have counsel advise them as to the brokerage agreement. Although this does not have to be the same counsel for the leasing transaction, it should be counsel experienced in handling brokerage agreements, because the selected broker and the broker's counsel certainly will be.

## OTHER PROFESSIONALS

As alluded to above, it can be helpful, if not essential, to have other professionals included as part of the initial team evaluating a lessee's space requirements. These professionals include:

- (1) *Designer*. As is becoming more common, a brokerage company or architectural

design company may provide this service, or it can be secured from an independent professional. Either way, the design process can be quite detailed and time-consuming as it can involve surveying the heads of each business unit or sub-unit as well as all support units. To complicate matters further, there are evolving and often conflicting concepts of space usage (hoteling/flex-space, open-space planning versus offices, etc.) as well as changing views on support functions (cafeterias, day care, health facilities, etc.) and health/safety protocols (eg designing safe workstations that meet physical and social distancing needs during a contagious pandemic). These conceptual differences are perhaps more stated now than ever as the office model has moved away from the cubicles and corner offices, which the baby boomer generation grew accustomed to, towards an emphasis on open floor plans, co-working spaces, outdoor spaces and amenities. That said, these trends may be affected by COVID-19, with the most obvious and immediate difference being that the open space plan preferred by the younger generations implies more employees per floor and less square footage per person in the premises. These differences are more than superficial — they go to the heart of the question of what, where, and how much space a business needs, both now and in the future. With the emergence of COVID-19 and the attendant transition to remote working, flexibility (and fungibility) of space usage has become vital, but this may merely be a short-term need, and in the context of a long-term headquarters lease the designer will also need to factor in the desired post-COVID-19 work environment. As businesses start returning to the office, it is important to formulate space usage plans that support social

distancing needs, or, in the very least, are easily adaptable to social distancing needs and any other relevant health protocols and guidelines. Evaluating these differences requires the nuance and attention to detail that a designer can provide. Indeed, a designer can help sort through details that are quite important to the proper functioning of a business, such as ensuring proper elevator capacity and efficiency, and adequate air ventilation and filtration systems to mitigate the likelihood of virus transmission.

Many of these matters must reflect an organisation's overall policies rather than simply current and projected business unit headcounts. A professional designer will assist in formulating and resolving these issues and ultimately in defining the space required. Included in this process should be at least preliminary conclusions as to layout requirements (classic examples being trading floors and other installations, which require raised flooring, special cabling, high power capacity, special cooling and ventilation and the like), stacking plans (which units should adjoin other units) and locational requirements (such as whether back-office functions should be located with front-office uses).

The end product of the designing should be not only a definition of the space requirements but also an indication of related technical requirements.

- (2) *Engineers*: Technical consultants should have sufficient input in defining a lessee's technical requirements for a premises. Obvious areas to explore include structural issues (eg floor loadings and inter-floor stairs), air circulation (eg special cooling for high-density and electronic data storage areas, ensuring adequate air ventilation and filtration systems to meet health and safety guidelines), electrical power, IT/AV and data transmission, security, environmental,

health/safety, special services (eg food and fitness), vertical transportation and traffic, and materials flows (how you move people and things).

- (3) *Architect*: In the initial phase, the architect will provide further input into the programming and technical requirements as well as translate these into general and special layout requirements, which may well have a significant impact on a tenant's search by eliminating some buildings or making others non-competitive on a cost basis. In addition, the architect will provide benchmarks against similar businesses (eg programming for adequate support space) and benchmarks for evaluating alternative premises (eg measurements on a per square feet per employee/desk/professional basis). This part of the process can be an early warning sign that a lessee needs to test their programming or otherwise re-evaluate the organisation's approach to space utilisation.
- (4) *Construction*: The construction professional will provide input as to timing, costs, process, and potential issues. This professional will also be able to analyse special construction requirements presented by particular buildings (eg access to loading docks or freight elevators) and by particular landlords. Some of this information may seem irrelevant this early in the process, but it is not unusual for one or more construction issues of economic or timing importance to be identifiable early on.
- (5) *Project manager/cost adviser*: A project management company will help oversee the planning, sequencing and execution of the project and ensure that costs remain within budget, which is important, since the amount of tenant improvement allowance will be tied to such budgeted amount. The lease might also contain deadlines by which the tenant's build-out must be substantially

completed. The project manager will help ensure that the project is planned and executed in a manner that is consistent with timing and budget estimates and expectations.

As with the brokerage agreement, it will be important to take care in reviewing and negotiating the engagement letters of the various professionals. Aside from the obvious economic points, tailoring the scope of the engagement to ensure the desired services are provided at the right time, and ensuring legal protection in the event of losses incurred as a result of the commissions or omissions of these third-party professionals, is critical.

Of course, one of the benefits of engaging all of the above-mentioned professionals early in the process is the synergies gained from having everyone work together on the project early on. Each professional comes with their own unique knowledge of the market and combining this collective experience together can help ensure a smooth, successful process in all respects. Overall, this process can be viewed as one where the staged input from each professional adds to the overall database and to the defining of your requirements (see Figure 2).

## PREMISES CRITERIA

With most headquarters' projects ending up in a series of compromises among the relevant criteria, it is important to understand the source and 'weight' of each criterion — and while there are seemingly endless criteria to be dealt with, some of the more significant are:

- (1) *Location*: Even if in a prescribed metropolitan area, one should consider, albeit in a narrower fashion, many of the same factors as with a broader search, including: 1) transport and traffic for employees, customers and suppliers;

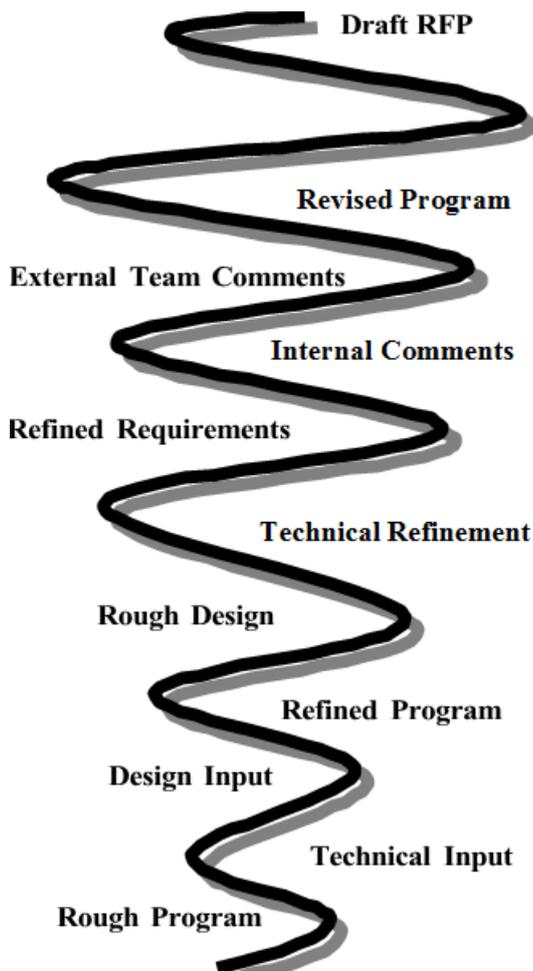


Figure 2: Professional staged input

2) labour pool (including educational, vocational and other community support to increase or enhance the labour pool); 3) safety, health, housing, schooling and other employee concerns; 4) proximity to customers, suppliers and others involved in the daily business; 5) governmental grant and benefit programmes (including financial and tax benefit programmes); 6) electric power and other utility packages; 7) area cost structures (including individual tax burdens); 8) industry concentrations or the lack or undesirability thereof; and 9) prestige/reputation of location (in the case of many metropolitan areas, such as

Manhattan, the current trend is towards 'live/work/play' environments).

(2) *Size and type of space*: Programming and design work should delineate current and projected space needs and configurations as well as any special requirements. As to size, the industry has at least two measurement standards: rentable and usable. The former is the basis upon which rent is calculated. In most communities in the USA, rentable area is computed in accordance with standards developed by US landlord trade association the Building Owners and Management Association (BOMA). In select areas (eg Manhattan) local custom supports alternative and even more landlord-favourable measurement approaches.

Usable, also called 'carpetable', area is the square footage of the floor that is occupiable. This measurement excludes core facilities and other building elements which may serve the floor but are not available for tenant use.

The difference between rentable and usable measurements is generally referred to as the 'loss factor'. In the BOMA measurement approach, there is a correlation between the public and equipment areas of a building and the loss factor, as the primary focus of the BOMA approach is to allocate such areas pro rata among the tenants. Thus, that loss factor reflects, in a general way, the space efficiency of a particular building. Efficiency is only one element to consider, however, as more extensive public amenities in a building (or at least within close proximity to the office) may be an important criterion in your search, and indeed, this criterion is becoming more and more important these days.

There is also the issue of how efficient a building's particular floor plate is. Some shapes are less appropriate than others for, say, perimeter office layouts or open floor plans. A design professional

can provide a preliminary layout for each building seriously considered and can also provide an overall loss factor (or efficiency rating) for each such building.

To compound the complexity of this issue, actual floor sizes will also affect efficiency in two major respects. First, the space requirements of functional business units may indicate that a certain size of floor is more adaptable. Second, as wholly occupied floors are inherently more efficient, floor sizes indicate the current and future ‘units’ in which space will be available. Thus, very large floors may require more space.

Beyond floor sizes, building sizes also affect efficiency. In larger central business district buildings, one is generally looking at vertical stacking of business units, whereas in suburban campus settings, one may have to consider horizontal stacking — that is, occupancy of multiple, smaller buildings or a single building with an extremely large floor plate.

These issues also need to be considered across the timeline of the lease term, which also raises the issue of length of term. The term issue is in part a function of the marketplace and in part a function of a tenant’s business plan. Most projections will show business growth and thus increased space needs. These needs are generally covered by the use of expansion options and/or expansion rights of first refusal or rights of first offer. As any such options or rights encumber the landlord’s flexibility, they are an important part of the negotiation of the overall lease package.

- (3) *Timing*: At any given time, the window within which a lease must be concluded will dictate the universe of choices. In tenant-favourable markets, this may not be a critical element, but in balanced or landlord-favourable markets, the challenge increases significantly. Thus, it

is important to understand the process and to develop a realistic schedule. It is likewise important to focus the planning process that this paper espouses on the general timing issue as well as on specific long lead time items and gating issues.

- (4) *Financial concerns*: There is a range of financial issues involved in a major lease project. The primary cost item, on a present value basis, will presumably be the rent (both the fixed rent and the additional rent payable in respect of real estate taxes, operating expenses, etc.). The fixed rent will largely be market-driven and should be within a range that the leasing brokers identify. This cost will also depend upon estimated space needs, operating costs and real estate tax attributes of the building, and overtime or special services requirements, such as a requirement for a prestigious address.

The next most significant cost item will likely be the cost of constructing leasehold improvements. Except in the tightest landlord markets, landlords provide tenants with a tenant improvement allowance and with some period of time without payment of rent within which the initial improvement construction is to be done. The improvement allowance and free rent period are generally market-driven and thus can be estimated (and negotiated). These are obviously linked to the rent as part of the economic package offered by a landlord, and while rent and allowance and free rent dollars are not fungible to a landlord, most will have some ability to trade among these economic components.

The third largest item is the moving expense, which may be materially greater for accounting purposes, as all employee severance and relocation costs may be chargeable as a project cost. This is also an area which must be carefully analysed as it may involve less than obvious issues.

For example, it may not be possible to disrupt trading floor operations by attempting to relocate and reuse existing equipment, with the result that a wholly new installation may be required. In any business — particularly service industries — continuity of service and seamlessness of operations are critical, especially today, so cutting corners on moving expenses is not advisable.

There will also be several other costs, including counsel and consulting fees, that arise. Even regular operating expenses, such as stationery, letterhead, forms, business cards, etc., can become significant budget items as they must be reprinted, or for computer-generated items, reprogrammed.

Further, as part of this overall analysis, it is important to understand not only the net present value (NPV) and cash flow attributes of the transaction, but also the generally accepted accounting principles (GAAP) accounting treatment. In 2016, the Financial Accounting Standard Board (FASB) issued new accounting standards for leases, which went into effect for public companies with fiscal years beginning after 15th December, 2018 and for private companies with fiscal years beginning after 15th December, 2019. The new standards require operating leases to be disclosed on a company's balance sheet. Previously, only finance leases — such as purchase options or leases for the assets' useful life — were required on balance sheets. Now, operating leases — such as a traditional leasehold interest like the one contemplated in this paper — must be added to a company's balance sheet. The current guidance is unclear on when the requirement to report the lease on the books of the company actually begins; however, an accountant or internal finance team can be consulted on these questions, in addition to legal counsel.

Early in the review process, it will also be important to ascertain whether each landlord has the financial resources to cover the costs to be borne by it. As a commercial lease is almost always nonrecourse to the landlord beyond its interest in the building, this may become an issue if there is no ascertainable source of funds. In some cases, the landlord will have specific credit arrangements available that can be structured to backstop the landlord's direct liability. In other cases, 'collateral' may consist of an offset against future rents.

Along these lines, it is important to be protected if a landlord defaults with its lender. A landlord and its lender will typically require a tenant to a headquarters lease to provide a subordination and attornment agreement to the lender at the time the lease is signed. From the tenant's perspective, it will be important to make sure that this agreement provides the tenant with adequate non-disturbance rights in the event that the lender takes possession of the building, and it will also be important to ensure that the tenant has the right to offset any outstanding tenant improvement allowance dollars against rent. This is a critically important protection to negotiate for in subordination and non-disturbance agreements because tenant allowance dollars for headquarters leases can amount to substantial sums.

- (5) *Physical criteria:* A significant part of the planning process involves developing the requirements for the new premises. These will cover a wide range of building and third-party services, most of which will have to be covered in specific lease provisions. Some of the more important of these are:

- (a) *IT/AV and data transmission, including specialised lines and satellite:* A headquarters requires access for service providers as well as rights to

locate and service equipment. With an increasing number of tenants seeking to upgrade these services, however, landlords have looked to charge for the building facilities (riser space, equipment space, roof space) required to provide them. Buildings may also vary widely in their capacity to handle these upgrades for the cost thereof;

- (b) *Electrical power*: Tenants that use excessive electric power may be able to negotiate favourable rates from their electric service companies (ESCOs) — the now and future retailers of electric power. On the other hand, landlords (directly or through industry purchasing cooperatives or through their real estate service companies) may be able to purchase electric power equally economically. Control over the purchase of electric power from ESCOs, both financially and physically, is a developing issue in commercial leasing. Installing supplemental systems can raise technical and cost issues that are best addressed early on in the process. There may also be a need to tap into back-up generators available at the building, or for a tenant to install their own back-up generator (something which, again, has become increasingly common and more and more important for those tenants who need to protect electronic data);
- (c) *Heating, ventilation and air conditioning (HVAC)*: Many businesses have significant requirements for special heating, ventilation and air conditioning requirements, some of which may be provided by independent, tenant-supplied systems such as supplemental HVAC and some of which may require the support of existing building systems.

The need for supplemental systems is becoming more important now as the trend is moving towards fewer individual offices and more open floor plans, which means more people occupying each floor, thereby necessitating additional cooling needs. Tenant cooling needs have been further magnified by the increased use of computers, electronics and data storage systems at offices, as well. Further, to combat COVID-19 (and presumably future health pandemics), the US Centers for Disease Control and Prevention recommend that businesses use HVAC systems that increase the percentage of outdoor air and improve filtration. While it may be more efficient for a tenant to provide its own special systems for very high use areas (conference facilities, trading floors and the like), the running costs may be moderated by using building-supplied chilled or condenser water, which typically comes at a negotiated cost. Depending on the tenant's hours of operation, it will also be important to understand and assess the overtime HVAC costs at a given building, as this has become an increasingly significant tenant expense, particularly for tenants who use their offices regularly on nights and weekends;

- (d) *Health/safety*: The needs and concerns here range from special systems to support specialised uses (conference centres may require special fire exits; cooking facilities may require special venting; fitness centres may come with their own health and safety requirements), to COVID-19 related protocols, to the level of compliance with the Americans with Disabilities Act, to issues related to asbestos, 'sick' building

syndrome, and other employee concerns. There is likely to be a score of such matters in a major lease transaction, each of which will involve cost and control issues;

- (e) *Special uses*: Some business units may have specialised requirements for presentation, training, laboratory and similar facilities, and may call for broader requirements for employee food service, on-premises health care, exercise facilities and the like. Again, these types of special uses raise physical issues as well as cost issues;
- (f) *Security*: Security requirements may range from control of lobby access to a dedicated security desk, to having secure vault areas for the storage of items of high value (geological reports, source codes, securities, etc.). In metropolitan areas, buildings will typically have their own security protocol and systems and require that any tenant security needs tie into these systems;
- (g) *Delivery/access*: If business units have significant deliveries (to and from) or a significant level of visitors, securing special rights to use building loading docks and freight and passenger elevators, it may be required to have a special reception area in the lobby or a separate entrance to the building.

## REQUEST FOR PROPOSAL

Although there are several means of conducting a space search, a common format is the request for proposal (RFP). This is where the hard work and team building recommended in this paper come together. Essentially, the RFP allows a prospective tenant to invite the selected landlords to address the full range of requirements, costs and issues generated by the space

and business unit criteria. Although the market differs from area to area, the RFP approach is directed to resolving many, if not most, of the core issues at the preliminary stage (before a draft lease is produced) of negotiations.

Perhaps just as important, the RFP process allows (or rather, requires) this information to be presented in a manner which collates input from all team members. While not all of this information is presented in the RFP, the framework of the projections is formatted so that the landlord's responses will address those factors where information is needed.

In some markets, substantial detail as to important lease provisions is included; in other markets, the RFP will be a broker's letter highlighting the basic deal terms. Willing landlords will typically respond to the RFP with a term sheet, which will be negotiated by both sides until it is substantially final, at which point both parties transition to negotiating a draft lease. Either way, the salient takeaway is that a tenant has the most leverage at the beginning of the process. Once a term sheet is signed and lease negotiations begin in earnest, a landlord's leverage increases — knowing the tenant needs the space and has, for all intents and purposes, committed to it. During the RFP and term sheet negotiation stage, however, when landlords are still courting the tenant, the tenant should address all key commercial and operational points. Although non-binding, it is very difficult to retrade points or contravene a letter of intent in any way and experienced lawyers will not allow the other party to do it without a 'new circumstances' justification, no matter how unreasonable it might seem. The importance of the RFP and letter of intent from a tenant's perspective underlines how critical it is for a tenant to involve its third-party professionals, particularly its outside counsel, during this stage of the process.

As the joys of the business and lease

negotiations await, prospective tenants should take comfort in the fact that they are now better prepared to appreciate and consider the points at issue and to weigh the various compromises that will be required.

#### **AUTHORS' NOTE**

This paper is intended solely to alert readers to issues of general interest and should not be construed as legal advice. For such advice about particular facts and legal issues, the reader should consult legal counsel.

This paper is based on a prior article

written by Lee A. Kuntz, a former partner in the Shearman & Sterling Real Estate Group, who passed away in 2019. Lee was integral to the growth of the Shearman Real Estate Group and to the many successes it has had over the years. His technical excellence and commitment to client service remain the pillars upon which the group operates. Lee had a long and distinguished career at Shearman & Sterling, where he practised for 41 years, including 34 years as a partner. During his tenure, he held several leadership positions at the company, including as Managing Partner.