

# Navigating the World of GSA Leasing Creating Opportunities, Managing Risk

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# Topics Covered

- The US Government as Customer
- Statutory and Regulatory Framework
- Before the Solicitation Process Starts
- Competitive Bidding and Source Selection
- Bidding and Award
- Protests
- Unique Lease Clauses
- Financing Issues
- Lease Extensions/Condemnation

# The US Government as Customer

- Tension between market economy and regulated industry
- Competing and often conflicting governmental interests
  - US General Services Administration (GSA) and tenant agency
- Contractor certifications
- Breach of contract may equal violation of law
- Substantial penalties for noncompliance
- Federal budget constraints
- Unique government rights and contract clauses

# The Statutory and Regulatory Framework

- The Overall Procurement System
  - Competition in Contracting Act (CICA)
  - GSA Statutory Leasing Authority
- “Integrity” of the System
  - Procurement Integrity Act
  - False Claims Act
- Federal Acquisition Regulation (FAR)
  - <http://www.arnet.gov/far>
- GSA FAR Supplement/Acquisition Manual (GSAM)
  - <http://www.arnet.gov/GSAM>

## Before the Solicitation Process Starts

- Tenant Agency Need
- GSA Prospectus Request
- OMB Scoring (OMB Circular No. A-11)
- Congressional Prospectus Approval

## Competitive Bidding (FAR Part 6)

- Role of the Contracting Officer
- Full and Open Competition, FAR Subpart 6.1
- Exceptions to Full and Open Competition, FAR Subpart 6.3
  - Only one responsible source, FAR 6.302-1
  - Unusual and compelling urgency, FAR 6.302-2
- Justification Requirements, FAR 6.303

# Solicitation Process and Source Selection

- Solicitations for Offers (SFO)
  - Go/no go factors
  - Award criteria
- Initial Proposals
- Competitive Range Determination, FAR 15.306(c)
- Negotiations with Offerors, FAR 15.306(d)
- Final Proposals, FAR 15.307
- Source Selection Decision, FAR 15.308
- Response Strategy
  - Modifications to SFO
  - Responses with alternates

## Bidding and Award

- Pre-Award Contacts with GSA
- Confidentiality of Information Submitted
- Contracting Officer Authority
- Appropriations Limitations/Anti-Deficiency Act (31 USC § 1341; *Williams v. District of Columbia*, June 22, 2006)
- Procurement Integrity
- Award Letter

# Protests

- Pre-award protests—challenges to the terms of the procurement
- Post-award protests—challenges to the decision
- Government Accountability Office (GAO)
  - Bid protests at GAO: a descriptive guide
    - <http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf>
  - Potentially limited relief
- Court of Federal Claims (CFC)
  - Rules of the CFC
    - <http://www.uscfc.uscourts.gov/rules.htm>
  - Potentially less limited relief

# Unique Lease Clauses

- Standard Forms
- No Indemnification (Anti-Deficiency Act Issue)
- Acceptance of Space and Rent Start
- Improvements Allowance
- Progress Payments/Payment Upon “Acceptance”
- Self-Help and Rent Offsets (Mutuality of Obligation)
- Applicability of Davis-Bacon and Miller Acts
- Subletting and Assignment/Substitution of Tenant Agency
- Labor Standards
- Casualty

## Unique Lease Clauses (cont'd)

- Changes Clause, FAR 52.243-1
  - Unilateral right to make almost any changes that are “within the scope of the contract”
  - Contractor must perform without agreement on price
  - Equitable adjustment to contract price/schedule; includes profit
- Suspension of Work, FAR 52.242-14
  - Unilateral right to “suspend, delay, or interrupt” the work
  - Adjustment to contract price/schedule; no profit
- Termination for Convenience (T4C), FAR 52-249-1
  - Unilateral right to terminate contract for any reason, or no reason
  - GSA approach to T4C

## Financing Issues

- Anti-Assignment Acts—Assignment of Claims and Notice of Assignment (41 USC § 15 and 31 USC § 3727)
- Lease Status Report
- Subordination, Nondisturbance, and Attornment Agreement
- GSA Legal Opinion
- Credit Lease Clauses (3517 vs. 3517x)

## Financing Issues (cont'd)

- Owner/Landlord Perspective
  - Debt vs. Equity
  - Leveraging Issues
  - Long/Short Term Hold Strategies
  - Max Debt Proceeds Results in Unfavorable Tax Position
  - Construction Completion Guarantees
  - Amortization vs. Term of Debt

## Financing Issues (cont'd)

- Lender Perspective
  - Bank Financing
  - Institutional Investor/Bond Financing
  - Credit Lease Structure
  - CTL Schedule D Treatment
    - Construction Guaranty
    - Reserves
    - Special Risk Insurance
    - Debt Service Coverage

## Lease Extensions/Condemnation

- What happens when an existing lease term ends and the agency is not in a position to vacate?
  - Delayed recompetition
  - Base realignment and closure (BRAC)
- Negotiated extension
- Condemnation of leasehold
  - Uniform Policy on Real Property Acquisition Practices, 42 USC § 4651
  - US Department of Justice condemnation guidelines
    - [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title5/env00000.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title5/env00000.htm)

## Questions?

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