

MAKING LEASE WORK LETTERS WORK!

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1. INTRODUCTION

The function of the commercial lease is to set out the respective rights and responsibilities of the Landlord and Tenant relating to the leased property. As a part of a lease relationship, a tenant of commercial property will often need to have the lease address the manner in which the tenant will be allowed to make alterations to the real property.

The typical commercial lease will provide the tenant with rights to make alterations to the premises while reserving to the landlord certain rights to control the tenant's ability to carry out such alterations or modifications. The description of the contemplated modifications, the method for approval and carrying out the construction, and provisions for payment are usually contained in a document attached to the lease called a "**Work Letter**".

The work letter frequently contains critical terms, such as provisions that address the process for the description and approval of alterations and modifications to the Premises or the Building, important dates that may trigger the beginning of other duties of the parties under the terms of the lease (such as the commencement of the payment of rent), and terms and conditions for the landlord to provide a finish out allowance to be applied to the cost of the alterations to the premises required by the tenant.

In light of these important terms, the parties to a lease should carefully consider the take the time to review the work letter and negotiate the provisions, taking into consideration the responsibilities and relative sharing of risk by each of the parties in connection with carrying out the modifications to the premises.

The purpose of this paper is to outline the most significant provisions of a work letter and to discuss the issues that may arise in the process of reviewing and negotiating the terms of a work letter.

2. WORK LETTER PROVISIONS.

a. Overview. Work letters can be found in as many different forms and structures as there are forms of leases. The following delegations of responsibility between the landlord and the tenant are most common:

- i. Landlord creates the design deliverables for the work, with tenant input, and landlord carries out the work;
- ii. Tenant creates the design deliverables for the work, with landlord approval, and tenant carries out the work;

- iii. Tenant creates the design deliverables for the work with landlord approval, and landlord carries out the work.

There may also be circumstances where the work is to be split between the landlord and the tenant in phases. Phase one generally calls for the landlord to complete certain “base” or “core” building improvements, typically at Landlord’s cost and expense. Phase two will include those modifications the premises to meet the tenant’s particular requirements.

b. Key Elements. The typical work letter will address each of the following topics, in addition to any special circumstances relating to the carrying out of the alterations or modifications:

- i. *Parties*. The work letter is most often attached to the lease as an exhibit and, as such, the terms of the work letter are typically incorporated into the lease by reference. However, since the work letter sets out the guiding provisions for the design and construction of the tenant improvements, it may become detached from the lease at some point to be shared with architects, engineers, contractors and subcontractors. For this reason, consideration should be given to restating the parties to the lease and, possibly, setting out separate signature lines for the parties in the work letter.

- ii. *General Description of the location of the Work*. The work letter should include a general statement as to where the modifications are to be made and should also identify the work to be carried out (i) as within the leased premises, and (ii) within other portions of the project (ie. office building, shopping center). This description may also identify different categories of work to be carried, such as base or core building work, and tenant finish out that is dedicated to preparing the premises for occupancy by the tenant. These descriptions will necessarily be general in nature for the purpose of establishing the scope of each such phase of the finish out. The actual description of the work will be established by a procedure set out in the work letter for the development of space plans, preliminary plans and final plans and specifications or construction documents.

- iii. *Designation of Representatives*. The process of planning out construction within the leased premises will require a certain level of coordination and dialog between the landlord and tenant, as well as the architect and the contractor selected for the construction of the modifications. For this reason, the work letter should set out who the point person or persons will be for the landlord and tenant and provide their respective contact information. These provisions should include a process for changing or adding to these designated representatives from time to time and may establish a planned meeting schedule as well. The work letter might also include the appropriate contact information for the supervising architect and engineer, if they are known at that time, as well as a method for adding the contact information for other third parties involved in the construction process.

- iv. *Determination of Who Will Generate Deliverables*. One of the threshold issues to be determined between the parties is who will generate the deliverables called for under the terms of the work letter. The deliverables will typically include (i) initial programing for the use of the space and a related space plan, (ii) the architect’s contract, (iii) preliminary plans, (iv) final constructions drawings, plans and specifications, (v) bids from contractors, and (vi)

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