ALL ABOUT EXPANSIONS, ROFO’S AND ROFR’S
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Generally

- Typically:
  - Negotiated in offer to lease
  - Subject to existing rights of other tenants
  - All rights personal to tenant
  - Tenant must be in possession and occupancy of premises
  - Tenant must not be in default under lease
  - Lease amending agreement required after rights exercised and agreement reached
- Often:
  - Terms of existing lease generally apply, except for rent and (depending on when rights arise), length of term and other special rights

Expansions

- Typically:
  - For a specific space or part of a specific space
  - Option has to be exercised by a specific date, after which it is no longer available
- Often:
  - Available prior to or early on in the term, particularly where there is a long lead time prior to the fixturing period (e.g. if it’s a new development) and the tenant has not fully completed its space planning process
  - Also used to anticipate future growth, so exercise may be timed to coincide with term extension rights e.g. after first five years when initial term is five years and tenant has one or more five year options to extend
- Rent:
  - If commencement of term for expansion premises close enough in proximity to initial term commencement, then landlord may agree that initial rents will be apply to expansion premises
  - Otherwise, parties can agree in advance on a fixed amount or to have rent based on market rates at the time – consideration will have to be given as to consequences of failing to agree i.e. is option void or is rent to be determined by arbitration or some other dispute resolution mechanism
- Main issue:
  - Unless tenant has a very clear plan for growth, the right to exercise the option seems never to arise at the right time e.g. if tenant anticipates needing expansion space in five years, need arises in year 3 or 7

ROFO’s (right of first offer)

- Typically:
  - More acceptable to landlords than a ROFR
  - Triggered only when ROFO premises become “available” – be clear as to how this is defined
  - Landlord required to notify tenant of availability and make an offer
  - Tenant given longer period of time to respond than for ROFR, because no third party (should be) waiting
- Often:
ROFO space is contiguous to existing space
- Tenant given right to take some or all of ROFO space, subject to certain qualifications e.g. remainder of space must be in a leasable configuration
- If tenant rejects landlord’s offer, gets another chance (the “Second Chance”) if:
  - Landlord wants to offer better financial terms to a third party within a specified period e.g. if landlord offers space to a third party at less than 90% of rent offered to tenant,
  - Landlord is unable to lease ROFO space within 6-9 months of first offering it to tenant

**Rent:**
- Basic rent offered at either at building face rate or market rates (consider use of “net effective rates”)

**Main issues:**
- No certainty that opportunity to expand using this right will arise
- Whether ROFO is a one-time right or a continuing right throughout term
- If landlord does not agree to give Second Chance, then less incentive for landlord to offer tenant reasonable terms in first instance

**ROFR’s (right of first refusal)**

**Typically:**
- Resisted by landlords, because creates an impediment on leasing to third parties
- Triggered when landlord receives an offer from a third party that it is willing to accept
- Tenant has right to match third party offer
- Tenant given short period of time to respond e.g. 2-5 days, because third party waiting

**Often:**
- ROFR space is contiguous to existing space
- Regardless of third party offer, tenant wants term of lease for ROFR space to expire concurrently with term of existing lease, but that may require adjustment to financial terms of third part offer

**Rent**
- Except as noted above, as in third party offer

**Main issues**
- No certainty that opportunity to expand using this right will arise
- Whether ROFR a one-time right or a continuing right throughout term
- Expiry date of term of lease in third party offer unlikely to match expiry of term (see above)
- Other potential difficulties if third party offer contains provisions personal to third party that don’t fit a lease to tenant e.g. lease takeover provisions

**First Right to Negotiate**

- From landlord’s perspective, the most benign of “expansion” rights
- Landlord simply obligated to notify tenant that there is space available to lease and invites tenant to make an offer
- Nothing more than an agreement to agree