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Federal Leasing In A Turbulent Market

*By Gordon Griffin, Margot Mendelson Hammond, and Robert C. MacKichan, Jr**

Federal leases, whether with the General Services Administration (GSA)[1] or other Government agencies, offer landlords a revenue stream guaranteed by the full faith and credit of the U.S. Government, making them an attractive proposition. However, federal leases typically include a number of terms that distinguish them from both typical commercial leases and typical Government contracts.

Notably, the Federal Acquisition Regulation (FAR) does not apply to acquisitions of leasehold interests in real property.[2] This makes leases unique among Government contracts, in that many of the compliance obligations present in typical Government contracts are not mandatory in Government leases.

Nonetheless, for real estate lessors and property owners, federal real estate leasing may at times seem cumbersome and complex when compared to traditional commercial leasing. The Federal Government attaches a number of compliance obligations to its leases that have no analogous commercial terms, and the Federal Government is limited by statute in its ability to negotiate lease terms and provide certain deliverables that commercial leases treat as commonplace (such as estoppels and assignments).[3]

For these and other reasons discussed herein, turbulence in the commercial markets and distressed assets present unique challenges to landlords with federal tenants. Through this Briefing Paper, we provide a concise analysis of several of these unique challenges. Part I of this Paper discusses the lessors' rights when the Government seeks to terminate a lease early. Part II provides an analysis of the rights and

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obligations of buyers, sellers, and lenders in connection with real estate transactions involving federal tenants, with a focus on the impacts of distressed assets on those transactions.

Part I—When The Government Leaves Early

The commercial real estate market in the United States is undergoing a profound shift as building vacancy increases in most major markets and as trillions of dollars of financing are coming due in 2024 and 2025. At the same time, most Government agencies are reconsidering their long-term space needs[4] and shrinking their footprints as remote work and hybrid work have become the norm. Compounding the impacts of these reductions in space, roughly 50% of GSA leases are scheduled to expire within the next five years, and GSA is entering into more and more short-term extensions as tenant agencies continue to consider their real estate requirements.

This part of the Paper focuses on early terminations of Government leases and what to do in the event that the Government seeks to vacate a lease before the expiration of the lease term. This will be the first of two parts addressing special considerations of Government leasing in this rapidly transforming commercial real estate market. Part II will address distressed assets leased to the Federal Government and transfers of title to Government-leased properties.

Background—Know Your Rights If The Government Seeks To Terminate A Lease Early

The good news first: unlike traditional Government contracts, leases with GSA (and with most other federal agencies with leasing authority) do not provide the Government with the right to terminate the lease at the Government's discretion.[5] In fact, the only early Government termination right for GSA leases is for lessor default,[6] and it's uncommon for lessors to be unable to remedy a default once construction is complete and after commencement of the lease term.

If the Government does elect to vacate the premises early, its only contractual right to relief is through the "Vacant Premises" clause of the lease,[7] which allows the Government to reduce rent by a certain amount—usually about $1.50 to $2.00 per rentable square foot. This reduction is intended to offset the windfall that a lessor might receive in operating costs associated with the vacated space.

The bad news: the lack of a legal right to terminate the lease does not mean that the Government will not attempt to do so anyway. We have encountered a number of situations recently in which the Government either seeks to terminate for its convenience (seeking lessor consent to an early termination) or it makes a dubious claim of default or fraud in the inducement to walk away from its obligations. We have also seen the Government attempt to force a reduction in rent when it holds over in only a portion of the leased premises following the expiration of a lease. The increase in remote work and the downsizing

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of agency requirements appear to be driving the uptick in this trend.

When the Government abandons a leased property and ceases paying rent, the Government effectively forces the lessor to file a claim under the Contract Disputes Act[8] to protect its rights. But, as explained below, early engagement can potentially prevent the Government from terminating early, or it can lead to more favorable buyout terms or a better litigation position if the Government elects to terminate the lease.

What To Do When the Government Attempts To Leave Early

(1) *Engage Counsel*. Lessors should engage counsel with federal real estate expertise at the first indication that the Government may intend to seek an early termination of the lease. This will allow the lessor to make an informed decision with full knowledge of its legal rights and remedies. Additionally, the best defense against an early Government departure may be to communicate early and effectively to the Government that the lessor understands its rights and is prepared to litigate if necessary.

But if early engagement with the Government is unsuccessful, counsel should be able nonetheless to effectively document the lessor's refusal to agree to an early termination, as well as refute any Government claims of default or noncompliance that may be used as a pretextual basis to justify termination. And in any event, fully understanding the legal landscape will be necessary to effectively negotiate a settlement if the Government attempts to buy out the landlord for the value of the remaining term.[9]

(2) *Mitigate Your Damages*. If and when it becomes clear that the Government intends to breach its obligations and abandon a lease, the lessor must take reasonable steps to mitigate its damages. It is a basic tenet of Government contracts law that a party injured by a breach of contract has a duty to mitigate its damages.[10] In mitigating damages, the law requires only that the non-breaching party make "those efforts that are fair and reasonable under the circumstances."[11] Notably, "a party cannot recover damages for loss that he could have avoided by *reasonable efforts*."[12]

This begs the question: what are "fair and reasonable" mitigation actions? This will be a fact-specific analysis for lessors and their counsel to undertake, but the case law addressing the duty to mitigate in the context of lease procurement—while limited—provides some examples of reasonable mitigation efforts. Lessors should consider whether it would be appropriate to re-advertise or seek new tenants, and they should be prepared to justify their actions as reasonable mitigation steps. We note that the marketplace is sufficiently sophisticated to understand that if the tenant is the Federal Government, the lessor may be unable to offer a firm availability date for the space. Nonetheless, advertising the space may be a prudent approach to pursuing mitigation.

(3) *File a Claim*. The claim is the first step to enforcing your rights in the event of a Government breach and is a necessary preliminary action in order to bring a lawsuit against the Government. As a general rule, under the doctrine of sovereign immunity, the Government is immune from lawsuits unless it has expressly waived its immunity through a statute. The Contract Disputes Act[13] is just such a statute, and it provides a legal basis for suits against the Government.

However, this waiver of sovereign immunity is contingent upon the lessor filing a claim with the contracting officer and receipt of a contracting officer's final decision.[14] The U.S. Court of Appeals for the Federal Circuit defines a valid Contract Disputes Act "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract."[15]

Claims must be filed within six years of when they accrue,[16] and a claim accrues when all events that fix the alleged liability and permit assertion of the claim were known or should have been known.[17] Six years is a fairly generous window, but lessors would be well served to file a claim as soon as possible to ensure prompt resolution and to prevent any loss of relevant evidence over time.

Once a claim has been denied by the Government or

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the Government fails to respond within the allotted time, lessors can bring suit at either the Civilian Board of Contract Appeals within 90 days of the denial or deemed denial,[18] or at the U.S. Court of Federal Claims within one year of the denial or deemed denial.[19]

(4) *Establish Damages*. While the Court of Federal Claims has not yet opined on the calculation of damages from an improper early lease termination, the Civilian Board of Contract Appeals has held that in the event of such a breach by the Government a lessor is entitled to "expectancy" damages, which are defined as the profits (essentially rent minus the anticipated operating expenses) that a lessor would have realized but for the Government's breach, discounted for present value and the likelihood of the lessor to be able to mitigate its damages with a follow-on tenant.[20]

Part II—Special Considerations For The Purchase And Sale Of Distressed Assets Leased To The Government

In Part II of this Paper, we discuss distressed assets and the unique challenges posed by distressed assets in two contexts: (1) lease expirations and Government holdovers; and (2) assignment of lessors' rights in the event of a change of ownership or assignment of claims.

As explained in detail below, distressed assets present a number of pitfalls and opportunities for lessors (and their lenders) with Government tenants. The primary takeaway for all of the scenarios outlined below is that better outcomes will result from early, effective engagement and a sophisticated understanding of both the legal rules and the Government's standard practices and policies.

Holdovers And Short-Term Extensions

Since the easing of the pandemic and the beginning of the Government's return to office, there have been a number of acknowledgements from the White House, the Office of Management and Budget (OMB),[21] and GSA that agencies should pause and reflect upon their space needs moving forward. The practical result of these policies has been that agencies have for the past few years been revisiting and reconsidering their long-term space needs, and this has resulted in a slow down or, in some instances, a pause in procurements for new space.

The Government's decision to pause its long-term lease procurements could not have come at a more inopportune time for Government lessors. As noted in Part I of this Paper, commercial office vacancy rates in some markets are the highest they have been in decades, and many commercial real estate loans are coming due in 2024 and 2025. Against this backdrop of difficulties in the commercial real estate market, uncertainty with respect to Government tenants' intentions at lease expiration has lessors seeking to understand their rights and remedies. In particular, once a Government tenant goes into holdover, it becomes even more difficult to market or refinance a distressed asset. And it makes it nearly impossible to plan for a follow-on tenant or—as is common with distressed assets—a complete redevelopment.

What, then, are the landlord's remedies for Government tenants in holdover? First, we note that the Government cannot be evicted, even in the event that it stays past the expiration of the lease term. While there is an implied duty to vacate inherent in every lease,[22] a breach of this duty entitles the lessor only to monetary damages; eviction is unavailable as a remedy because it would constitute an order of specific performance of a contract obligation, and neither the Court of Federal Claims nor the boards of contract appeals have jurisdiction to entertain such a request under the Contract Disputes Act.[23]

However, landlords do have some small amount of leverage in negotiating the terms of extensions and stand-still agreements. First, in the event of a holdover, the lessor "is entitled to the *fair market value of the premises for the holdover period* less what GSA has paid appellant during the holdover period."[24] Similarly, "[t]he rent in the lease is evidence of rental value, but a landlord may establish a rental value greater than [current contract] rent."[25] So if the fair market value rent is significantly higher than the rent provided in the lease, then landlords have some leverage to negotiate favorable terms and conditions of any lease amendments that extend the term and keep the Government out of holdover.

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Next, there are internal policies and incentives in place at GSA to encourage contracting officers to avoid holdovers. Following the release of a 2015 Government Accountability Office (GAO) Report[26] on the prevalence of short-term extensions and holdovers in GSA leasing, GSA committed to implement a program of setting goals for reductions in holdovers, and as part of that program GSA maintains a "Key Performance Indicator" database that tracks holdovers and credits contracting officers that keep their leases out of holdover. This also provides the lessor with some amount of leverage to negotiate favorable extension terms.

So while short-term lease extensions and holdovers are becoming more and more common, there is an opportunity for lessors to take advantage of the—admittedly limited—leverage these situations provide to negotiate rental increases and other concessions.[27] The best practice in this scenario is to identify expiring leases early, to consider under what terms lease extensions might be acceptable, and to engage with Government tenants and the contracting officer long before lease expiration. Lessors seeking to re-let the premises to other tenants or to redevelop the property should ensure the Government is aware of these plans and that any lease extension memorializes the potential impact a holdover would have. This may provide some entitlement to consequential damages in the event of a subsequent holdover.

Lessors should also be aware that the Government's timeline for developing new lease requirements for succeeding leases begins three years out from lease expiration. This process involves a number of stakeholders—to include the tenant agency and its real estate and finance teams, as well as GSA—and typically includes a cost-benefit analysis to determine whether a succeeding lease would yield cost savings over a competitive procurement.[28] Early in this period, engagement with the Government can effectively shape the evaluation of succeeding leases versus competitive procurements.

Assigning Government Leases In Distressed Assets

Unlike traditional commercial leases, leases with the Federal Government cannot be assigned, either through sales contracts or through operation of law in the event of a foreclosure or a receivership. A group of statutes, collectively referred to as the Anti-Assignment Acts, have been enacted to ensure the Government doesn't run into a bait-and-switch scenario in which the Government contracts with one entity only to have it assign the contract to another. The statutes expressly prohibit any such assignment:

> The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party. A purported transfer in violation of this subsection annuls the contract or order so far as the Federal Government is concerned, except that all rights of action for breach of contract are reserved to the Federal Government.[29]

What this means as a practical matter is that unlike traditional commercial leases, the tenant—in this case, the Federal Government—has the authority to refuse to acknowledge a successor in interest to a landlord that no longer has title or control of the leased asset.

But while there is a blanket prohibition on the assignment of Government contracts and leases, the law and the lease language provides three mechanisms for ultimate recognition of a new owner—or at least payment of rent—whether that owner obtains title through sale, foreclosure, or some other operation of law: *novation, assignment of claims*, and *attornment*.

Each of these three pathways for assignment of interest in a Government lease has its benefits and drawbacks, and for each of these pathways to assignment the status of a distressed asset can impact the cost-benefit analysis. For example, the question of whether the owner of a distressed asset remains solvent or has wound down its operations may impact whether and how the new owner or receiver seeks to execute a novation agreement—which typically must be executed by both parties to the transfer—or seeks another route.

Below, we describe each of these pathways and their requirements.

(1) *Novation*. In light of the prohibition on unilateral assignment of Government contracts and leases

described above, the Government has implemented a process to allow for assignment once both parties to the asset transfer and the Government have all agreed on the terms of the transfer: novation.[30]

The purpose of the novation process is to protect the Government's interests. The FAR explicitly acknowledges this purpose at FAR 42.1204(a), which gives the Government the right to recognize a third party as the successor in interest to a Government contract when it is in the Government's interest to do so. Conversely, the Government may exercise its discretion not to approve transfer of a lease or contract. Specifically, FAR 42.1204(c) indicates that when it is not in the Government's interest to approve a transfer, the original party to the contract (which seeks to transfer the contract or lease) shall remain under contractual obligation to the Government and the contract or lease may be terminated should the original lessor or contract party not perform.

In practice, particularly in real estate, the Government only very rarely refuses to recognize a successor in interest following the purchase and sale of real property that is leased to a Government tenant once the prospective lessor has offered some evidence of the purchase and its ability to perform under the terms of the lease. But the process requires three parties to actively participate: the original lessor, the new lessor, and the Government.

For distressed assets, this process can become problematic. The original lessor may not be a willing participant in any assignment, and in some cases the original lessor may no longer exist. Alternatively, the property may be managed by a receiver or a special servicer with legal authority to maximize the value of the distressed asset.

These situations will require deviation from the standard novation practices laid out in FAR Subpart 42.12.[31] First, the standard novation language may need to be amended from three-party form into a two-party form. Additionally, many of the required document submittals outlined in the lease and the FAR (FAR 42.1204(e) and (f)) may not be available.[32] Finally, purchasers or lenders foreclosing on a borrower should consider whether they are willing or able to accept liability for all of the previous owner's acts and omissions, as the standard novation language requires

The best way to approach the novation in the event of a sale of a distressed asset is to address these concerns early in the process. Novations often take several months to complete, and if there are any deviations from the standard language or deliverables based upon the distressed nature of the asset, the novation process can take even longer. Additionally, we note that is a best practice to engage early in obtaining a System for Award Management (SAM.gov)[33] registration, as this can take several weeks (or longer) and is often the reason for delayed novation approvals; contracting officers cannot and will not recognize new lessors until they have completed this registration.

(2) *Assignment of Claims*. While assignment of Government contracts is prohibited, the same statute that prohibits such assignments—41 U.S.C.A. § 6305—expressly allows for the assignment of rents due under a federal contract or lease. Specifically, this statute allows for the assignment of all rents due to "a bank, trust company, Federal lending agency, or other financing institution."[34]

The FAR[35] clause that implements this statute—FAR 52.232-23, "Assignment of Claims"—provides as follows:

> The Contractor, under the Assignment of Claims Act, as amended, 31 U.S.C. § 3727, 41 U.S.C. § 6305 (hereafter referred to as "the Act"), may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence.[36]

This right is permissive, meaning the lessor has the right to assign its rents at its discretion, provided such assignment is a complete assignment and is to a "bank, trust company, or other financing institution." Notably, the Government does not have the right to refuse such a request, provided the assignee meets the criteria

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outlined in the clause. The statute provides that "an assignment under this subsection is a valid assignment for all purposes."[37]

GSA publishes a Public Buildings Service (PBS) Leasing Desk Guide[38] (LDG) that "contains authorities, policies, technical and procedural guides, and administrative limitations governing the acquisition by lease of real property," and that "appl[ies] to all PBS personnel engaged in the acquisition and administration of lease contracts."[39] The LDG also "applies to agencies leasing space under delegated authority from the General Services Administration (GSA)."[40] This guide provides as follows with respect to the mechanics of assigning claims under GSA leases:

> **Note that the lease should not designate a different payee, except under rare circumstances where the lessor has designated a different payee through an Assignment of Claims.** In such an instance, a Lease Amendment is necessary to process a change in payee. Such a change must be documented through a Lease Amendment, along with the executed Assignment of Clams (See Attachment 10).[41]

In its LDG, GSA also provides a proposed subordination, nondisturbance, and attornment (SNDA) agreement that addresses assignments of claims and rental payments, and this template confirms that the Government will not recognize the lender as the payee until and unless the lessor and the Government execute a lease amendment memorializing the assignment:

> In accordance with Paragraph ____ of the General Clauses of the Lease, Assignment of Claims, (48 C.F.R. 52.232-23) the Lessor may assign its rights to be paid to the Lender. Following such assignment, to be made in accordance with the Assignment of Claims Act, as amended, 31 USC 3727, and following the execution of a Supplemental Lease Agreement changing the named Payee in the Lease, the Lessee shall pay all rent and all additional rent to the Lender. Such assignment shall not be deemed to (a) cause the Lender to succeed to or to assume any obligations or responsibilities as the landlord under the Lease, all of which shall continue to be performed and discharged solely by the Landlord, or (b) relieve Landlord of any obligations under the Lease.[42]

Finally, we note that an assignment of claims does not allow the landlord and lender to avoid one of the more onerous obligations for Government landlords: the System for Award Management (SAM.gov) registration.[43] The FAR clause governing SAM registrations—FAR 52.204-13, "System for Award Management Maintenance," which is included in the General Clauses of GSA leases—provides that "Assignees [of claims] shall be separately registered in SAM."[44] Just as with more traditional novations, as a best practice lenders anticipating either an assignment of claims or attornment (or both) should begin their SAM registrations sooner than later, as these can take several weeks to complete.

For distressed assets there are a number of additional considerations that lessors and lenders should take into account. First, establishing the correct assignee may be difficult for assets in foreclosure, governed by receivership, or under a special servicer arrangement; understanding the relationship and the order of precedence of the various stakeholders is key. Second, a lessor that is in default or has ceased functioning as a viable business may not be a willing participant in an assignment, in which case lenders should consider their rights to attornment, laid out below.

(3) *Attornment*. For lenders seeking to foreclose or to obtain a deed in lieu of foreclosure, there is a third option for recognition as the landlord: attornment. However, while Government leases typically include a provision governing attornment (explained below), it's extremely rare to see the Government take advantage of this option and to treat lenders as the landlord without further action. Accordingly, lessors and lenders should not expect a simple attornment process and should instead plan on a traditional novation, albeit with some tailoring to address the unique circumstances surrounding the change in title.

First, we note that most Government leases[45] include a provision governing SNDA[46] that provides as follows:

> In the event of any sale of the premises or any portion thereof by foreclosure of the lien of any such mortgage, deed of trust or other security instrument, or the giving of a deed in lieu of foreclosure, the Government will be deemed to have attorned to any purchaser, purchasers, transferee or transferees of the premises or any portion

thereof and its or their successors and assigns, and any such purchasers and transferees will be deemed to have assumed all obligations of the Lessor under this lease, so as to establish direct privity of estate and contract between Government and such purchasers or transferees, with the same force, effect and relative priority in time and right as if the lease had initially been entered into between such purchasers or transferees and the Government; provided, further, that the Contracting Officer and such purchasers or transferees shall, with reasonable promptness following any such sale or deed delivery in lieu of foreclosure, execute all such revisions to this lease, or other writings, as shall be necessary to document the foregoing relationship.[47]

As a practical matter, the requirement that "transferees shall . . . execute all such revisions to this lease, or other writings, as shall be necessary to document the foregoing relationship" typically means that lenders seeking attornment or purchasers at a foreclosure sale will have to go through the novation process outlined above.

GSA's LDG confirms that the Government will likely seek to effectuate a novation as part of the attornment process. In Chapter 17, it provides a draft SNDA agreement that states as follows:

If the Lender forecloses the Loan or acquires title to the Real Property by deed in lieu of foreclosure, or in any other manner succeeds to the interest of the Lessor under the Lease, or if the Lender shall take possession of the Leased Premises, the Lessee shall attorn to the Lender as its Landlord under all of the terms, covenants, and conditions of the Lease for the balance of the term thereof remaining and any extensions thereof which may be effected in accordance with any option therefore as set forth in the Lease, with the same force and effect as if the Lender were the Lessor under the Lease. Such attornment shall be effective and self-operative immediately upon the Lender's succeeding to the interest of the Lessor, whereupon the Lessee shall recognize the Lender, or any person claiming by through or under the Lender (immediate or remote), as the lessor under the Lease without the execution of any further instruments on the part of any of the parties hereto. The Lease shall at all times continue in full force and effect, and the respective rights and obligations of the Lessee and the Lender upon such attornment shall be governed by the Lease. However, the Lessee agrees to execute, acknowledge, and or deliver to Lender any certificate or other instrument that Lender reasonably requests to confirm such attornment. Likewise, *the Lender agrees to execute a Novation Agreement in the form required by FAR Part 42.12.*[48]

For distressed assets, the process can become more complicated. Specifically, non-functioning or defaulting lessors may be unable or unwilling to participate in the novation process or to execute the novation agreement, which typically requires commitments from both the current owner and prospective owner. Effective outreach to GSA contracting officers and counsel is vital in these cases, because it involves deviating from regulatory requirements and lease provisions.

Conclusion

Government leases can be both lucrative and challenging. But guaranteed revenue streams for up to 20 years with a tenant that has never defaulted can occasionally blind new Government landlords to the pitfalls associated with Government leases. Lease expiration is not the time to learn that you cannot evict a Government tenant in holdover, particularly if a lessor has a follow-on leasing opportunity.

Accordingly, landlords should take the time to understand both the compliance obligations and the Government's limitations before entering Government leases.

Guidelines

These *Guidelines* are intended to assist you in understanding how to address some of the unique challenges faced by landlords with Federal Government tenants. They are not, however, a substitute for professional representation in any specific situation.

1. Familiarize yourself with the standard GSA lease forms and attachments prior to lease execution. Understanding your rights before an asset becomes distressed typically leads to better outcomes.

2. Should the Government seek to terminate a lease early, engage counsel promptly and seek to mitigate your damages. The Government has no right to terminate the lease early, but it may still attempt to do so and the lessor has an obligation to seek a replacement tenant or other mitigation of the impact.

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3. Understand your rights in the event of a holdover. As noted above, the Government cannot be evicted, so be ready to provide evidence of the market rate for both shell rent and operating expenses. And remember that your entitlement to tax adjustment payments continues into a holdover period.

4. Make every effort to coordinate efforts between lessors, lenders, and—if applicable—receivers or special servicers in the event of a default or foreclosure. The Government has, through the standard lease language, committed to recognizing assignments and executing commercially reasonable SNDA agreements and assignments of claims.

5. Ensure that purchase agreements and lending agreements include obligations for commercially reasonable cooperation with novations and attornments. Clear obligations in these agreements can help prevent difficulties in getting a new owner recognized as the lessor in the event of a foreclosure sale or a deed in lieu.

ENDNOTES:

[1]GSA possesses a unique statutory authority to enter into real estate leases with firm terms of up to 20 years. 40 U.S.C.A. § 585. This stands in contrast to all other agencies, whose contractual obligations are typically limited to the current fiscal year by the Antideficiency Act. 31 U.S.C.A. § 1341.

[2]48 C.F.R. § 570.101(d).

[3]See 40 U.S.C.A. § 585.

[4]OMB Memorandum M-22-14, "FY 2024 Agency-Wide Capital Planning To Support the Future of Work" (July 20, 2022), available at https://www.whitehouse.gov/wp-content/uploads/2022/07/M-22-14.pdf, "requires agencies to restart their annual planning process by developing and submitting their FY 2024–FY 2028 capital plans to OMB and the Federal Real Property Council," taking into account "broader workforce and workplace trends" and "lessons learned from agency operations during the COVID-19 pandemic."

[5]The FAR requires Government agencies to include a termination for convenience clause in all contracts for supplies and services. See FAR subpt. 49.5, "Contract Termination Clauses." These clauses provide the Government with the right to terminate the contract at any time "if the Contracting Officer determines that a termination is in the Government's interest." FAR 52.249-2(a). Courts have interpreted this clause to the give the Government broad latitude in terminating contracts. However, the FAR does not apply to Government leases. See 48 C.F.R. § 570.101(d) ("The FAR does not apply to leasehold acquisitions of real property."). Because the FAR provides the only applicable requirement for termination for convenience rights in Government contracts, the inapplicability of the FAR to Government leasing has historically meant that Government leases do not include any such termination rights for the Government.

[6]The standard GSA lease default clauses—48 C.F.R. § 552.270-18 and 48 C.F.R. § 552.270-22—provide the Government's default termination rights and obligations.

[7]See 48 C.F.R. § 552.270-16, "Adjustment for Vacant Premises."

[8]41 U.S.C.A. §§ 7101–7109.

[9]GSA's PBS Leasing Desk Guide, available at https://www.gsa.gov/real-estate/real-estate-services/leasing/leasing-policy, acknowledges that GSA can and will offer buyouts for lessors under certain circumstances when requirements have shifted and lowered. See GSA, PBS Leasing Desk Guide ch, 6, "Change in Square Footage—Expansion and Reduction," at 6.2-18.

[10]See Ind. Mich. Power Co. v. United States, 422 F.3d 1369, 1375 (Fed. Cir.), reh'g denied (2005).

[11]First Heights Bank, FSB v. United States, 422 F.3d 1311, 1316 (Fed. Cir. 2005) (quoting Home Sav. of Am., FSB v. United States, 399 F.3d 1341, 1353 (Fed. Cir. 2005)).

[12]Robinson v. United States, 305 F.3d 1330, 1333 (Fed. Cir. 2002) (emphasis in original) (quoting Restatement (Second) of Contracts § 350, cmt. b (1981)).

[13]41 U.S.C.A. § 7101–7109.

[14]41 U.S.C.A. § 7103(a)(1).

[15]Zafer Constr. Co. v. United States, 40 F.4th 1365, 1367 (Fed. Cir. 2022) (quoting FAR 52.233-1(c)).

[16]41 U.S.C.A. § 7103(a)(4)(A).

[17]A claim "accrues" when "all events, that fix the alleged liability . . . and permit assertion of the claim, were known or should have been known," and some injury has occurred. FAR 33.201.

[18]41 U.S.C.A. § 7104(a).

[19]41 U.S.C.A. § 7104(b).

[20]PJB Jackson-American, LLC v. Gen. Servs. Admin., CBCA 3628, 16-1 BCA ¶ 36,248 2016 WL 636067 (Feb. 11, 2016).

[21]OMB Memorandum M-22-14, "FY 2024

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Agency-Wide Capital Planning To Support the Future of Work" (July 20, 2022), available at https://www.whitehouse.gov/wp-content/uploads/2022/07/M-22-14.pdf.

[22]"The general rule is that 'an implied duty to vacate is an inherent part of every fixed term lease agreement unless the parties explicitly express an intention to the contrary.' " Allenfield Assocs. v. United States, 40 Fed. Cl. 471, 486 (1998) (quoting Prudential Ins. Co. of Am. v. United States, 801 F.2d. 1295, 1298–99 (Fed. Cir. 1986), cert. denied, 107 S. Ct. 1289 (1987)). For such a breach, the landlord's damages are calculated as the fair market rental value minus the rent actually paid. Cafritz Co. v. Gen. Servs. Admin., GSBCA No. 13525-REM, 98-2 BCA ¶ 29,936, 1998 WL 446301 (Aug. 3, 1998). In order to bring a suit against the Government to recover these damages, lessors must adhere to the requirements of the Contract Disputes Act, discussed in Part I.

[23]See Podlucky v. United States, No. 21-1377C, 2021 WL 2627130, at *2 (Fed. Cl. June 21, 2021) ("Plaintiff is, essentially, asking the court to order defendant to specifically perform its obligations under the contract. But a request for specific performance is equitable in nature, and falls outside this court's jurisdiction."), aff'd, No. 2021-2226, 2022 WL 1791065 (Fed. Cir. June 2, 2022); Harmonia Holdings Group, LLC v. United States, 157 Fed. Cl. 292, 301–02 (2021) ("[Plaintiff] cannot co-opt the Court's bid protest jurisdiction simply by reframing its claims as alleged violations of procurement law and requesting injunctive relief (which is not available under the [Contract Disputes Act])."); Tenaska Wash. Partners II, L.P. v. United States, 34 Fed. Cl. 434, 443–44 (1995) ("[S]pecific performance is not a remedy available against the United States, because sovereign immunity has not been waived for such relief."); Pellegrini v. United States, 103 Fed. Cl. 47, 55 (2012) ("Equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) (citation omitted)).

[24]Cafritz Co. v. Gen. Servs. Admin., GSBCA No. 13525-REM, 98-2 BCA ¶ 29,936, 1998 WL 446301 (Aug. 3, 1998) (citing Burdette A. Rupert v. Gen. Servs. Admin., GSBCA No. 10523, 93-1 BCA ¶ 25,243, 1992 WL 153641 (June 30, 1992)) (emphasis added). For many lessors, this remedy will not provide adequate redress, particularly in situations where the lessor seeks to either empty the building and redevelop the property or has a follow-on tenant waiting for the Government to vacate the premises. Damages stemming from the lost opportunity for follow-on leases or redevelopment are called "consequential" damages, and it is difficult to recover these damages under applicable Federal Circuit precedent.

[25]Burdette A. Rupert v. Gen. Servs. Admin., GSBCA No. 10,523, 93-1 BCA ¶ 25,243, 1992 WL 153641 (June 30, 1992).

[26]GAO, GAO-15-741 Federal Real Property: Performance Goals and Targets Need To Help Stem GSA's Reliance on Lease Extensions and Holdovers (Sept. 30, 2015), available at https://www.gao.gov/assets/680/673059.pdf.

[27]One concession lessors should consider is a one-time escalation of operating costs. Government leases typically escalate the operating costs portion of the rent using a Consumer Price Index (CPI) multiplier from the Department of Labor's Bureau of Labor Statistics. In our experience, this multiplier has not kept up with the pace of inflation of operating costs in the years following the pandemic. Specifically, energy costs in many markets have risen at a rate that exceeded the historical CPI multiplier, often dramatically. In light of this, the Government may agree to an escalation in these costs, which will benefit lessors due to the continuing annual escalation of these costs.

[28]See 48 C.F.R. § 570.402-6.

[29]41 U.S.C.A. § 6305(a).

[30]We have previously discussed the novation process in detail in partnership with LexisNexis. See Gordon Griffin & Robert C. MacKichan, Jr., "Commercial Real Estate Transactions With Federal Government Tenants," Lexis Practice Advisor (2018), https://www.hklaw.com/files/Uploads/Documents/Articles/CommercialRealEstateTransactions.pdf.

[31]The standard GSA lease form L100 incorporates this portion of the Federal Acquisition Regulation by reference.

[32]While the standard GSA Lease form L100 expressly incorporates FAR Part 42.1204 in the "Change of Ownership" section, in practice GSA has adopted a Novation Checklist with an abbreviated set of deliverables that is more tailored to real estate transactions.

[33]See FAR subpt. 4.11; 48 C.F.R. subpt. 504.11.

[34]41 U.S.C.A. § 6305(b)(1).

[35]The FAR does not generally apply to leasehold acquisition (see 48 C.F.R. § 570.101(d)), but Government leases will often expressly incorporate FAR clauses that implement applicable statutory mandates, such as this one.

[36]FAR 52.232-23(a).

[37]41 U.S.C.A. § 6305(b)(7).

[38]The GSA's PBS Leasing Desk Guide is available at https://www.gsa.gov/real-estate/real-estate-services/leasing/leasing-policy.

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[39]GSA, PBS Leasing Desk Guide ch. Introduction, "General Information, Lease Authorities, and Responsibilities," at 1.

[40]GSA, PBS Leasing Desk Guide ch. Introduction, "General Information, Lease Authorities, and Responsibilities," at 1.

[41]GSA, PBS Leasing Desk Guide ch. 17, "Lease Administration," at 17-26 (emphasis in original). The Leasing Desk Guide also notes that "Regional counsel must be consulted prior to processing an Assignment of Claims." Id.

[42]GSA, PBS Leasing Desk Guide ch. 17, "Lease Administration," attach. 4, "Subordination, Nondisturbance and Attornment Agreement," para. 4, at 17-51. This is not a lease or statutory requirement, but rather an internal GSA policy. As noted above, the statute expressly provides that "an assignment under this subsection is a valid assignment for all purposes" provided it meets the statutory requirements in 41 U.S.C.A. § 6305(b)(6)).

[43]See FAR subpt. 4.11; 48 C.F.R. subpt. 504.11.

[44]FAR 52.204-13(d)(2).

[45]The language cited herein governing SNDA comes from GSA Form 3517B—General Clauses. GSA serves as the procuring agency for most of the Federal Government's commercial office space leasing needs, as it possesses the statutory authority to enter into leases with terms of up to 20 years, while most other Government agencies may only enter leases subject to annual appropriations, which has the practical effect of forcing other agencies into one-year lease terms with multiple one-year renewal options. Compare 40 U.S.C.A. § 585(b) (providing that the Administrator of GSA may enter into leases of up to 20 years) with 31 U.S.C.A. § 1341 (limiting the obligation of funds to existing (annual) appropriations).

[46]The General Clause language governing SNDA also provides that "[i]t is the intention of the parties that this provision shall be self-operative and that no further instrument shall be required to effect the present or subsequent subordination of this lease." 48 C.F.R. § 552.270-23(a).However, the Government also commits to executing other "reasonable" instruments upon request by the lessor and lender:

> Government agrees, however, within twenty (20) business days next following the Contracting Officer's receipt of a written demand, to execute such instruments as Lessor may reasonably request to evidence further the subordination of this lease to any existing or future mortgage, deed of trust or other security interest pertaining to the premises, and to any water, sewer or access easement necessary or desirable to serve the premises or adjoining property owned in whole or in part by Lessor if such easement does not interfere with the full enjoyment of any right granted the Government under this lease.

48 C.F.R. § 552.270-23(a). In practice, the approval process can take significantly longer than 20 days, and it requires the approval of GSA regional counsel.

[47]48 C.F.R. § 552.270-23(c).

[48]GSA, PBS Leasing Desk Guide ch. 17, "Lease Administration," attach. 4, "Subordination, Nondisturbance and Attornment Agreement," para. 2, at 17-50 to 17-51 (emphasis added).

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