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Government makes great tenant

The dream of most landlords in any real estate market is to find stable tenants; that aspiration becomes a necessity when the market is down. One potential tenant that is always dependable, seems immune to general economic trends, never runs out on a lease, and pays its obligations on a regular basis is government. Federal, state and local governments need lots of rented space. Landlords may wonder if such entities may provide advantages over typical commercial or nonprofit tenants. The short answer is that the government makes a great tenant.

At the federal level, the United States' General Services Administration is responsible for meeting the leasing needs of the government. According to the GSA, the U.S. government leases more than 7,300 properties in the United States. These leased properties contain half of the U.S. government work force and contain nearly 170 million square feet of space. Colorado is a key location for the federal government. In fact, only Washington, D.C., has more federal agencies located within it than Denver.

Leases with governmental entities are very different than typical commercial leases and can impose many additional risks on the landlord. This uniqueness often takes landlords out of their "comfort zone" and makes them reluctant to enter into leases with the government. Yet, there is really no reason to steer clear of this highly stable and dependable tenant so long as the landlord understands the key aspects of leasing to governmental tenants.

■ **Governmental leasing issues.** Unlike most lease situations, where the lease negotiations start with the landlord's form lease, in a lease with a governmental entity, the government's form will be the starting place. A lease with a Colorado state or municipal entity generally will look the most



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familiar to the landlord, but a GSA form lease is inevitably vastly different than any lease that the landlord has ever worked with.

Probably the most significant difference between a normal commercial lease and one with a government

lease is subject to the governmental budget process and appropriations. This makes the lease subject to the will of the political process – increasing the level of uncertainty for the landlord. A government cannot incur obligations that would subject future legislatures to future commitments for expenditures. What this means is that the legislature that enters into an agreement to expend funds under a contract, such as a lease, cannot commit the legislature in the future to the same obligations. This has the practical effect of making a lease cancellable by the government for lack of funding; however, the landlord does not have the same right to end the relationship. This uncertainty of the political process is an additional criteria the landlord must evaluate. Related to the leasing decision is the degree to which the landlord is willing to "advance" the costs of tenant required improvements. While a portion of tenant build-outs often is rolled into the computation of the rent, in the case of a governmental lease, there is some uncertainty as to whether the stated term of the lease will be the actual term of the lease for purposes of recouping the costs of the improvements.

A lease with a governmental entity is likely to have provisions



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referencing specific laws. Some of these provisions will require the landlord to make various certifications or otherwise alter how it conducts business. For example, here in Colorado, the parties signing the lease may need to make

a statement of compliance with the Colorado laws on bribery and abuse of public office. In the case of an individual landlord, rent payments may be subject to offsets for monies owed for child support or other governmental obligations. There are different, but somewhat similar, federal law requirements for leases to the U.S. government (but many more of them). The landlord will need to evaluate each of these requirements before signing a lease.

Another key difference between typical leases and most federal leases is that rent is paid in arrears instead of in advance. This is because of a common governmental procurement requirement that payments be made for goods and services that are actually received. This payment in arrears requirement is why security deposits are inapplicable to federal leases (state and local governments may give other reasons for the lack of a deposit).

Insurance requirements also are different. Most leases require the tenant to maintain liability insurance on the premises and property insurance on the tenant's personal property. Many governmental entities choose to self-insure for all or part of the usual insurance obligations imposed upon a tenant by a lease. They also may

place reliance on statutory provisions that limit the liability of government to others. For Colorado state government, the provisions of the Colorado Governmental Immunity Act and Colorado Risk Management Act impact the need for insurance. Similarly, most commercial leases require the tenant indemnify the landlord for various issues to protect the landlord from certain risks. It is very difficult, however, to get a governmental entity to provide such an indemnity clause in a lease.

Disputes may be resolved in a vastly different way than under a usual lease. In a typical lease situation, the landlord and tenant go to court or agree to arbitration if a dispute surfaces. Federal government leases generally require that disputes be handled initially through the appropriate federal contracting officer and then through the Disputes Act. Federal regulations and law also may apply rather than state law.

Other aspects that are different than the typical commercial lease include the elimination of: limitations on the landlord's liability, "as is" language regarding the rented premises, and specific descriptions of what constitutes a default by tenant and what remedies are available. The absence of these typical lease provisions serves to shift risk to the landlord from the governmental tenant.

■ **Conclusion.** Leases to government entities are very different than most commercial leases, but they are not to be feared. The landlord must make a business decision that evaluates the stability and dependability of the government tenant against the increased risks. Governmental leases are unique arrangements that require careful and professional analysis. Once the business decision is made to develop the government as a tenant, it is critical that the landlord seek out and obtain competent counsel.▲