

Implications of the Recent GSA Directive on Delegated Leasing Authority

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You may have recently read an article or heard from people within the real estate industry that the U.S. General Service Administration (GSA) recently issued a revised directive pertaining to the delegation of its leasing authority. GSA did indeed issue such a directive, and you may well ask “how does it impact me?” Depending on your current relationship with the Federal Government or your marketing plans for the future, it may very well change the way you do business with the Government. Here's how.

Background: GSA was created in 1949 pursuant to the Federal Property and Administrative Services Act (Act) and, among other responsibilities, was granted primary authority to satisfy the space requirements for the Federal Government. The Act conferred upon GSA the power to serve as the central property management agency for the Federal Government, including the ability to exercise real estate leasing authority to acquire long-term leasehold interests in real property. While the Act empowers GSA to be the Federal Government's central property management agency, the Act also allows GSA to delegate this authority to other federal agencies in its discretion.

Since the creation of GSA, and until 1996, most delegations of GSA's leasing authority[1] were made on a case by case basis in one of three categories: (1) general purpose leasing, (2) categorical leasing, or (3) special purpose leasing. General purpose leasing authority allowed an agency to acquire general purpose space under a lease with a term of

up to twenty years. Categorical delegations of leasing authority were issued to specific agencies to allow the agency to acquire certain types of space particular to that specific agency under a lease with a term of up to twenty years. For example, this might include leases for such specialty space as military recruiting facilities, depots, or laundromats. Lastly, delegation of special purpose authority has been issued to twelve agencies to address specific, mission-related requirements such as cotton classing laboratories for the Department of Agriculture.

In 1996, GSA issued a new directive announcing its “Can't Beat GSA Leasing” or as it has also been referred to, the “Provider of Choice” (POC) program. Essentially, the POC program encouraged federal agencies to use GSA as its provider for the acquisition of leased space, but GSA also issued a blanket delegation of general purpose leasing authority for other federal agencies to conduct their own lease procurements. To exercise such authority, agencies were obligated to comply with certain applicable laws and regulations relating to awarding leases and were required to provide to GSA certain lease award information. However, this authority could not be used for leases in excess of prospectus limitations.[2]

The Can't Beat GSA Leasing program was reaffirmed in 2005 when GSA issued a directive reemphasizing its delegation of authority and providing revised guidelines for the usage of this authority by other federal agencies. After concerns were raised in 2006 relat-

ing to the sufficiency of GSA's oversight of the delegated leasing authority, the Government Accountability Office and GSA Office of Inspector General (OIG) issued separate reports in 2007 documenting the status of the program and calling for reforms. Responding to these two reports, GSA issued, in November 2007, FMR Bulletin 2008-B1, Delegations of Lease Acquisition Authority – Notification, Usage, and Reporting Requirements for General Purpose, Categorical, and Special Purpose Space Delegations (Directive), substantially amending the delegated authority pursuant to the Can't Beat GSA Leasing program.

The Directive became effective November 19, 2007 and, in summary, provides the following general conditions to the use of all leasing authority delegations from GSA[3]:

(a) Agencies must secure prior written confirmation from GSA that suitable Government controlled, owned, or vacant leased space cannot be provided to meet their space requirements.

(b) The average net annual rent (gross annual rent excluding services and utilities) must be below the Lease Prospectus threshold.

(c) The authority may only be exercised by a warranted realty contracting officer fully meeting the experience and training requirements of the Contracting Officer Warrant Program.

(d) Agencies must comply with all laws, Executive orders, regulations, and Office of Management and Budget (OMB) Circulars governing

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[1] Delegation of leasing authority should be distinguished from GSA's delegation of (1) administrative contracting officer authority, (2) lease management authority, (3) operations and maintenance authority, (4) repair and alteration authority, and (5) utility services authority.

[2] A Lease Prospectus justifying proposed construction, lease, or alteration projects must be submitted to the appropriate House and Senate authorizing committees of Congress if the cost exceeds a statutorily established threshold. The amount is annually escalated and for FY2008 is \$2.59 million.

[3] Includes General Purpose, Categorical, and Special Purpose Space Delegations.

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warranted GSA realty contracting officers.

(e) Federal agencies must acquire and use the space in accordance with all applicable laws, Executive Orders, regulations, and OMB Circulars that apply to Federal space acquisition activities.

(f) Agencies must maintain the capacity to support all delegated leasing activities, including the use of a warranted realty contracting officer, legal review and oversight, construction and inspection management, cost estimation, lease management and administration, and program oversight. Additionally, rent for acquired space must be at prevailing market rates for comparable facilities in the community.

(g) All lease files must be available for audit by GSA OIG personnel or other GSA personnel or authorized agents.

(h) Agencies must provide GSA no less than eighteen months' advance notice of lease expiration if there is a continuing need for the space and the agency wishes to use the delegation of authority again to satisfy the requirement.

(i) The General Purpose delegation applies only to leases for less than 20,000 rentable square feet of space and may not be used to enter into a Supplemental Lease Agreement to expand the amount of space currently under lease if such an expansion will cause the agency to lease a total of more than 19,999 rentable square feet of General Purpose space at the leased premises.

Although the conditions and reporting requirements have been strengthened, the primary deviation from the 1996 and 2005 Directives is limiting the space that an agency may lease to less than 20,000 rentable square feet. This is a significant limitation and likely will

result in a greater workload for GSA and its contract brokers and may prompt agencies to seek specific delegations of general purpose leasing authority. However, because GSA acted in response to the reports of GAO and GSA OIG, generally citing GSA's failure to properly oversee adherence of agencies to the terms of the delegations, this author believes GSA will be reluctant to issue specific delegations of general purpose leasing authority to agencies unless there is a comprehensive showing that the agency requesting the authority is prepared to meet all of the requirements of the delegation.

Notwithstanding the foregoing, it should be mentioned that several agencies have independent statutory authority to enter into leases and to conduct their own lease procurements to satisfy their own space requirements. However, lessors must be aware that agencies using their own leasing authority may subject lessors to limitations and pitfalls not found in GSA leases. GSA has statutory authority to enter into long-term leases and has the authority to enter into leases that are not subject to annual appropriations of monies. For that reason, a GSA lease does not typically include a Termination for Convenience clause, but agencies with independent leasing authority may not be able to delete the Termination for Convenience clause and, in the absence of no-year monies, must make the lease subject to annual appropriations.

So what will be the result of the issuance of this Directive? In all likelihood, GSA will likely handle more of the lease procurements for general purpose space requiring Lessors to exercise greater care when entering into leases directly with agencies other than GSA. In those instances, Lessors should be sure that the agency has proper real estate leasing authority to enter into a binding lease for space and that Con-

gress has appropriated sufficient monies to cover the expected lease costs. Don't hesitate to ask the contracting officer or procurement official for a reference to the authority of the agency to enter into a long term lease. If the agency is offering a long term lease without conditioning the lease on annual appropriations, you need to be sure that the agency has multiple year money to fund the lease. Without such funding, the lease may not be enforceable should Congress fail to appropriate sufficient rent monies for the lease. Also, a lease is considered a government contract, creating certain obligations of the lessor as a federal "contractor," and the absence of language in the lease explicitly creating such obligations will not allow the lessor to avoid complying with any such obligations.

So, henceforth, if you are working with an agency other than GSA, just be sure you've done your homework.

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