

**Pitfalls in the USPS Lease & How to Avoid Them**

Steve Hurlbut  
Akerman LLP  
email: [steve.hurlbut@akerman.com](mailto:steve.hurlbut@akerman.com)  
202.393.6222

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## CONTRACTING AUTHORITY

- ▶ Only Authorized Contracting Officers Can Bind USPS
- ▶ Actual Authority
  - Letter of authority/warrant
  - (must be written - by regulation)
- ▶ NO Apparent Authority
- ▶ Type and Amount/Level (RE-1)

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## CONTRACTING AUTHORITY

(cont'd)

- ▶ Re-Delegation
- ▶ Ratification
  - Requires an affirmative action by someone with authority and knowledge
  - Silence alone is not sufficient
  - Preferably in writing
- ▶ Double Edged Sword
- ▶ Beware of multiple COs
- ▶ Not the same for lessors

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## WHAT LAW APPLIES?

- ▶ Federal
  - Large body of federal case law
  - Application of the best principles of modern decision-making to fill in voids
  - Can look to state law for guidance - not binding
  - Looks primarily to law of contracts
  - Newer leases say federal law
- ▶ State - will not normally control
- ▶ What Jurisdiction Are You In? (7th Cir.; 9th Cir.?)

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## WHAT LAW? (cont'd)

### CONTRACT DISPUTES ACT?

- ▶ What kind of lease do you have?
  - Pre-March 1979 CDA generally does not apply - US District Courts
  - Post March 1979 - PSBCA or Court of Fed. Claims
  - Dispute Resolution Forum can impact how lease is interpreted and the outcome!
- ▶ Certain issues fall outside of CDA
  - Purchase Options
  - Sales contract (unless involves a construction component)
  - What is the central issue?

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## UNDERSTANDING YOUR LEASE

- ▶ Start by reading it all!
- ▶ Don't assume that is all there is
- ▶ Implied Obligations - it's not necessarily in the lease
  - Good Faith and Fair Dealing
  - Duty not to Hinder or Delay Another Party
  - Duty to Vacate
- ▶ Laws and regulations can also affect interpretation of your lease (i.e. CDA dispute resolution)

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### MAINTENANCE/REPAIRS

- ▶ “Good Repair and Tenantable Condition”
- ▶ Preventive Maintenance not *Required*
- ▶ Necessary for other than purely cosmetic purposes
- ▶ To maintain the premises in a condition suitable for a business purpose
- ▶ Repair actual damage or prevent imminent damage to the building
- ▶ Obligations as specified in lease
  - Acts of God

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### MAINTENANCE (cont’d)

- ▶ Repair vs. Replacement
- ▶ Can facility/equipment be restored to required condition by repairing?
- ▶ USPS Installed Equipment/fixtures – who is responsible
- ▶ Damage – USPS responsibility/negligence
- ▶ Impending USPS purchase?

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### MAINTENANCE (cont’d)

- ▶ USPS right to repair and withhold
  - Different from most private leases
  - Reasonable notice
  - Emergencies
  - Scope/timing
  - Beware of IDIQ Contractors
  - Lexus vs. Kia
  - Impact on Purchase Option

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### MAINTENANCE/REPAIRS

- ▶ Maintenance Rider
  - USPS responsible for maintenance and repair/replacement unless they are Lessor’s express responsibility under Lease
  - Lessor also responsible for listed/express repairs including those due to casualty or act of God
- ▶ Example – Lessor not obligated to replace compressors for HVAC

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### TERMINATION FOR CAUSE (by USPS)

- Material breach – was the facility safe/capable of being restored to a reasonable condition
- Constructive eviction
  - “omissions by Lessor render the premises unfit for the purpose leased or”
  - “deprive USPS of beneficial enjoyment”
- Notice/Opportunity to cure
- Abatement of Rent vs. Damages – USPS’s choice
- Damages to move to new facility – trans., rent, etc.
- Mitigation

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### TERMINATION FOR CONVENIENCE (Cancellation)

- ▶ Must be in Lease – no implied right
- ▶ Notice required
- ▶ Authority
- ▶ Timing
- ▶ Remedies – Damages
- ▶ Obligation to vacate

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### LEASE RENEWAL

- ▶ Option – Acceptance of an offer
- ▶ Exercise must mirror lease – strictly construed
- ▶ Unconditional/unequivocal
- ▶ Timely Notice Required
  - Delivery rule
  - No mailbox rule
- ▶ Authority Issues
- ▶ No constructive exercise
- ▶ Have you specified where all notices are to be delivered?
- ▶ Delivery to lessor PO Boxes
- ▶ Waiver

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### PURCHASE OPTIONS

- ▶ Exercise/Notice Constitutes Acceptance
- ▶ Mirror Image Rule – Strict Compliance
- ▶ Unconditional/unequivocal
- ▶ Timely Notice Required
  - Delivery rule
  - No mailbox rule
- ▶ Proper Contracting Authority Required

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### PURCHASE OPTIONS (cont'd)

- ▶ If no proper exercise, lease continues to end of term
  - breach of obligation to vacate
- ▶ Holdover/Taking/market value
- ▶ What if USPS reneges?
  - Conversion to purchase agreement
  - Lease termination on purchase date

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### PURCHASE OPTIONS (cont'd)

- ▶ Lease Amendment Program Options to Purchase (circa 1980)
  - Market value
  - Delayed payout
  - ***In addition to*** other options
- ▶ Other considerations

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### HOLDOVERS

- ▶ Express Holdover Terms (rare)
- ▶ Implied obligation to vacate
- ▶ No automatic renewal terms \*
- ▶ Generally – eviction is not available
  - Depends on jurisdiction/forum
  - PSBCA/Court of Federal Claims – NO
  - U.S. District Court – MAYBE

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### HOLDOVERS (cont'd)

- ▶ Fair Market Rental
  - USPS appraisers typically exclude USPS facilities
  - Historically higher in many areas for these specific use buildings
  - Term – actual occupancy
  - Shorter term with unknown duration = higher rentals
  - Restoration time – where USPS breaches
  - Argue for marketing time
- ▶ Advise USPS in writing (before expiration)
  - Will demand market rent
  - USPS will be a *tenant at sufferance*

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### RESTORATION

- ▶ USPS can make alteration and install equipment/fixtures
- ▶ Can remove
- ▶ Lessor can require restoration at end of lease
- ▶ To "as good condition as that existing" at time of entry of lease
- ▶ Reasonable and ordinary wear and tear, damage by elements and "circumstances over which USPS has no control" are excepted

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### RESTORATION – USPS Breach

- ▶ Is the value/rental of property diminished?
- ▶ Repairs cannot exceed diminution of value
- ▶ Lost Rental – must show there were potential lessees
- ▶ Notice by lessor that restoration requested
  - Notice failure/delay not fatal
    - Prejudice to USPS
- ▶ Review Supplemental Agreements for alterations!

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### DISPUTES

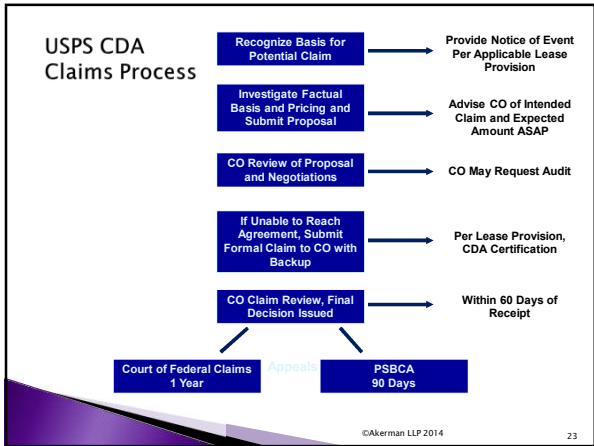
- ▶ Pre March 1979 Leases
  - Local Federal Courts
  - USPS's least favorable forum
  - Very independent
  - Can give injunctive relief/specific performance
  - Eviction/ejectment
  - Potentially state law applies (7<sup>th</sup> Circuit; others?)
- ▶ Real property vs. leasehold issues (purchase options – all leases)

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### DISPUTES (cont'd)

- ▶ Post 1979 Leases?
- ▶ Postal Service Board of Contract Appeals
- ▶ US Court of Federal Claims
- ▶ Beware of USPS attempts to require CDA
- ▶ Pre-emptive appeals may be necessary

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### Alternative Dispute Resolution

- ▶ Postal Service, as a matter of policy, encourages ADR as method of resolving contract disputes (39 CFR 601.109(b))
- ▶ Can be at any stage of claim process, but parties must agree
- ▶ Includes mediation, mini-trial, arbitration, facilitation, settlement conference w/settlement judge, etc.

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## NEUTRALS

- ▶ Postal Service has list of government contracts neutrals (PSBCA will appoint a mediation judge on request from parties)
- ▶ Generally, parties share cost of private neutrals
- ▶ Postal Service participates in Government Shared Neutrals Program
- ▶ Provides free neutrals for government mediations

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## Lease Administration: Best Practices

1. Never assume what the lease requires. Read it.
2. Don't always assume that the lease means what it says! Implied duties and rights exist, waivers occur, custom and usage can affect meaning.
3. Reply to all letters.

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## Contract Administration: Best Practices (cont.)

4. Put everything in writing that you may need to rely on; e-mail can be a writing.
5. Save all e-mail and correspondence. Toss all drafts (except lease or mod drafts).
6. Create, and keep current, indexed subject matter and chron files.
7. Don't guess at what you don't know. Don't say what you don't have to.

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## Lease Administration: Best Practices (cont.)

8. Know the applicable law: regulations and case law. There are tens of thousands of decisions on government contract/lease issues – your issue is probably not unique.
9. Don't ask for a "yes" when you are likely to get a "no." Instead, say what you intend to do and why, and what the consequences would be otherwise.

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## Lease Administration: Best Practices (cont.)

10. Sometimes it's better to probe than to respond.
11. Don't use threats, take extreme positions, or appear argumentative. Do the same thing in a reasonable looking way.

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## Questions

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