

Real Estate Title Insurance & Construction Law

Renting to the State

Why landlords should look to the State of N.J. as a potential tenant

By Gordon J. Golum

Landlords with available rental space should consider marketing that space to the state of New Jersey, especially in this tight real estate market.

The broad leasing opportunities are illustrated by the Department of Treasury website. As of July 2012, the state had 291 leases in New Jersey comprising approximately 7.6 million square feet of office space, and 1.9 million square feet for other state uses ranging from 20 square feet for Department of Environmental Protection air monitoring stations, to close to 400,000 square feet for administrative offices. The state leases are for all departments of the state, including space for administrative offices (as noted), client-service space (e.g., unemployment offices and parole offices), state police barracks, court rooms and other uses.

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To obtain a lease, an interested landlord should monitor state advertisements and list its property in the database of properties for potential lease maintained by the Division of Property Management and Construction (DPMC) in the Department of Treasury. The database includes properties submitted in response to previous advertising as well as unsolicited listing of properties. Anyone interested in having property included in the database may do so by submitting to DPMC a "Property Profile Form" (PPF), available at www.state.nj.us/treasury/dpmc/forms.shtml.

State Agency Request for Leased Space

The process for leasing property to the state is explained at N.J.S.A. 52:18A-191.1, et seq., and N.J.A.C. 17:11-1.1, et seq. A state agency seeking space may submit a Space Planning Request (SPC) form to DPMC, which manages services related to the procurement, occupancy, maintenance and operation of space leased by the state, when an agency is interested in acquiring, increasing, decreasing or otherwise changing utilization of space. N.J.A.C. 17:11-4.1(a). DPMC reviews the requests under the criteria set forth in

N.J.A.C. 17:11-4.1(b). DPMC considers if agency needs can be satisfied through consolidation and restacking of state-owned or leased space. If not, DPMC shall pursue the most advantageous means of accommodating the request. N.J.A.C. 17:11-4.1 and 4.3(b). Thus arises the opportunity for the landlord to obtain a state lease.

Solicitation of Leases

The diligent landlord should monitor advertisements by DPMC, which advertises for solicitation of lease proposals via a PPF pursuant to N.J.A.C. 17:11-5.1, et seq. Typically, DPMC advertises for rental space on its website and places an advertisement in the "commercial real estate wanted" or similar section of the applicable regional newspaper.

In some circumstances, DPMC may elect not to advertise, such as when the space planning request from a state agency involves specialized, unique or mandated characteristics, or requirements where a competitive process would be unlikely to result in a more cost-effective proposed lease agreement. N.J.A.C. 17:11-2.4. Presumably, DPMC may look to its database as well as other sources to satisfy particular needs; thus the importance for a landlord seeking to lease its property to be listed in the database.

When the space needed is less than

20,000 square feet, DPMC may advertise exclusively on its website and not in newspapers, consider the PPFs in its files that were generated by the advertisement process and canvass the area for space. N.J.A.C. 17:11-5.1 (c).

Eligibility to Submit a Proposal

Proposals to the state may be made by an owner or an owner's designated representative, the holder of a purchase option, or an attorney or real estate broker with written authority to negotiate and act as an attorney-in-fact for an owner or holder of a purchase option. N.J.A.C. 17:11-5.3.

Lease Terms

While the parties will negotiate the usual lease issues (rent, term, etc.), the state will require certain provisions unique to a government lease. The landlord must weigh the benefit of leasing to a financially sound tenant with the unique requirements imposed upon the landlord leasing property to the state. Some of these requirements should be factored in to the calculation of the rental proposal as they may increase landlord's costs. For example, Executive Order # 86 (Corzine, Sept. 27, 2007), requires landlords to comply with the New Jersey Prevailing Wage Act, and to pay — and require its contractors to pay — not less than the prevailing wage rates to those performing building services.

Landlords must prove their moral and financial integrity to the satisfaction of the state. In the event of a change in ownership that results in the new owner or its principals being of known moral or financial disrepute, or being a party suspended or debarred from doing business with the state, the state may elect after a cure period to terminate a lease.

Furthermore, landlords must comply with affirmative action and antidiscrimination laws, with the Americans with Disabilities Act of 1990 and with pay-to-play laws.

A commission to a broker by the state has been disallowed pursuant to N.J.S.A. 52:34-15, where the broker had no past or continuing relationship with the owner but was retained because of the broker's influence with state officials. *Samuel J. Plumeri Realty Co. v. Capital Place Urban Renewal Assocs.*, 101 N.J. 13, 22 (1985); *Kugler v.*

Arnold Constable Corp., 138 N.J. Super. 551, (App. Div.), cert. den., 70 N.J. 578 (1976).

The liability of the state and its employees will be subject to the New Jersey Contractual Liability Act and the New Jersey Tort Claims Act.

Approval of a Lease

One disadvantage in seeking a lease with the state is that the process of approval takes time, during which the premises are removed from the market. Thus, potential lessors submitting space proposals to DPMC pursuant to N.J.A.C. 17:11-6.1 are required to hold the space available at the prices submitted until the state takes those properties under consideration for a minimum of 90 days after the submission date or as otherwise specified by DPMC. N.J.A.C. 17:11-6.1(b), 6.4.

DPMC reserves the right to reject proposals and to re-advertise if insufficient competition results from the initial advertisement, if the price is unfavorable to the state or for any other compelling reason. N.J.A.C. 17:11-6.8.

DPMC will enter into negotiations with potential lessors who submit the most cost-effective and responsive proposals. N.J.A.C. 17:11-6.10. Even after successful negotiations of terms with DPMC, steps must be taken for final approval of the lease. DPMC makes a recommendation for lease approval to the State Leasing and Space Utilization Committee by a Notice of Proposed Lease (NPL). N.J.A.C. 17:11-7.1(a). This committee consists of the state treasurer, the president of the New Jersey Senate and the speaker of the New Jersey Assembly or their designees. N.J.S.A. 52:18A-191.4. No proposed lease agreement shall be valid without the prior written approval of the committee. The recommendation to the committee is made with notice to other landlords who have submitted proposals. The committee will conduct a hearing and approve or disapprove the proposed lease agreement or request additional information.

Remedies for Disappointed Potential Lessors

For a disappointed landlord seeking to lease space to the state, an informal hearing procedure is provided by the director to address the potential lessor's issues. N.J.A.C. 17:11-8.1, et seq. In this case, the

final approval of the lease is delayed, and additional effort will be expended by the landlord who has submitted the proposal selected by the state. One method by which a disappointed lessor can address his concerns is through a "protest."

A "protest" may be made when a proposal is rejected for being nonresponsive or untimely submitted. The director will make a final decision in response to the protest, which may include an oral presentation at the discretion of the director.

Additionally, a "challenge" may be made to the decision of DPMC to recommend another party's proposal to the committee. N.J.A.C. 17:11-8.3. Potential lessors who proposed leases are to be given notice of the recommendation to the committee. N.J.A.C. 17:11-6.11. After a challenge, DPMC may decide not to recommend any proposal. *DGR Co. v. State Dept. of Treasury*, 361 N.J. Super. 467, 471-72 (App. Div. 2003). Subject to narrow exception, DPMC shall not proceed with a recommendation to the committee until a final written decision is made by the director. N.J.A.C. 17:11-8.3(c) and (d); *DGR & Co.*, 361 N.J. Super. at 472. As with a protest, the director has discretion to permit an oral presentation.

Conclusion

The opportunity to obtain a state lease awaits the landlord making the effort to market its space to the state, follow the requisite approval process and satisfy state standards. Interested landlords should monitor state advertisements for leases and offer space to the state on their own initiative. Given the variety of state needs, landlords should be able to find opportunities to lease space compatible with the use of their properties.

Leasing to the state may not be appealing or feasible for some landlords, who may consider the disadvantages to outweigh the benefits. A landlord may view disadvantages to include compliance with unique provisions mandated by state law, such as the New Jersey Prevailing Wage Act and what may be a lengthy and uncertain approval process, during which the premises cannot be marketed. On the other hand, the state offers another marketing opportunity in a poor economy, and the benefit of a tenant with solid financials who is not likely to default. ■