

WORK LETTERS OR WHAT LEASING LAWYERS NEED TO KNOW ABOUT DESIGN AND CONSTRUCTION AGREEMENTS

By

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I. WHAT IS A WORK LETTER

1. Purpose of Work Letters
 - (a) vs. “as-is
 - (b) Describes Landlord’s Work
 - (c) Triggers Commencement Date, i.e., substantial completion of Landlord’s Work
 - (d) Sometimes describes procedures for approving Tenant’s Work, particularly if Landlord will be performing Tenant’s Work
2. Types of Work Letters
 - (a) Simple narrative, i.e., detailed scope of work
 - (b) Plans and specifications – Complete set of construction drawings
 - (c) Plans and specifications – To be prepared
 - (d) For existing building
 - (e) For new construction/major renovation
3. Difference between a Work Letter and an Alterations provision

II. DESCRIPTION OF LANDLORD’S WORK

1. Scope of Work/Narrative – Issues, e.g., lack of specificity and detail
2. Plans and specifications to be prepared by Landlord
 - (a) Based on scope of work, preliminary drawings, etc.
 - (b) Mechanism for preparation, submission to Tenant, approval/rejection by Tenant, etc. – time periods, basis for approval/rejection, deemed approval, etc.
3. Complete set of plans and specifications as a Lease exhibit

4. Modification of plans and specifications after completed/approved
 - (a) By Landlord, e.g., requirements of law, field conditions, errors & omissions
 - (b) By Tenant, e.g., changes to accommodate Tenant's installations

III. SUBSTANTIAL COMPLETION

1. Definition – Exclude long lead items, items that shouldn't be completed until after completion of Tenant's Work, accelerate substantial completion date/commencement date for Tenant Delays for purposes of rent commencement (but not for satisfying Landlord's obligation to complete Landlord's Work), certification by Landlord's architect and/or by Tenant's architect, etc.
2. Notice of Substantial Completion – Timing (before or upon actual substantial completion), preliminary notice, conclusive and binding notice;
 - (a) Punch-List – Notice, Landlord's obligation to complete, time period for completion, coordination with performance of Tenant's Work, etc.
 - (b) Exceptions to Tenant's acceptance of substantial completion (or for an "as-is" provision - Latent defects, seasonal issues, Landlord's ongoing maintenance and repair obligations
3. Disputes – Time period for inspection and notice of dispute, resolution of disputes (e.g., expedited arbitration, one arbitrator from pre-approved list, prevailing party attorneys' fees)
4. Other Conditions for Substantial Completion/Trigger of Commencement Date - Premises to be in legal compliance (including ADA for Landlord's Work), Premises to be broom-clean, vacant, etc., Building systems in good working order, no violations that would delay Tenant's Work or use of Premises
 - (a) For New Construction - Removal of scaffolding, hoists, construction shanties, etc., Building/common areas in legal compliance, including ADA
 - (b) Rights of Re-measurement for new construction
5. Late Delivery – Preliminary Outside date; final Outside Date, damages and right of termination
 - (a) Tenant delays - notice requirement
 - (b) Force majeure - limitation on period
 - (c) Reimbursement of expenses
 - (d) Self-help right

- (e) Landlord right of termination

IV. PRE-COMMENCEMENT ACTIVITIES

1. Doesn't trigger Commencement Date
2. Interference with Landlord's Work - Priority for freight elevator, loading dock, hoists, etc., Tenant Delay]

V. OTHER LANDLORD'S WORK ISSUES/NEW CONSTRUCTION/WORK LETTER

1. Appoint construction representatives - to give notices, attend meetings, etc.
2. Require attendance at regular construction meetings
3. Benchmark/Milestone Dates - construction loan closing, building permits, demolition, excavation/foundations, Building skin, topping off, etc.
4. Separate sign-off for "substantial completion" of each item of Landlord's Work
5. Partial delivery of multi-floor premises

VI. TENANT'S WORK

1. Different procedure/time period for submission/approval of Tenant's plans
 - (a) No approval – cosmetic/decorative; below certain dollar amount (CPI adjustment); no requirement of governmental approval or plan submission
 - (b) No deemed approval for structural alterations
 - (c) Reasonable approval – non-structural; no (adverse) impact on Building systems; limited to interior
 - (d) Sole discretion – structural; impact on Building systems; outside the Premises
 - (i) Exceptions to sole discretion – minor core drilling; supplemental hvac, generators, rooftop equipment, internal staircases, etc.
 - (e) Pre-approval of plans/scope of work
2. Providing Building services
 - (a) After Commencement Date, subject to completion of Tenant Work - distribution of electrical work, plumbing, hvac ducts

- (b) Temporary services during Tenant's Work - electricity, a/c in summer for millwork, toilets, etc.
3. Tenant Improvement Allowance
- (a) Tenant performing Tenant's Work vs. Landlord performing Tenant's Work
 - (b) Soft-cost; ff&e
 - (c) No Tenant default/cure default
 - (d) Upfront payment vs. progress payments vs. payment upon substantial completion
 - (e) Tenant's money first vs. Landlord's money first vs. pari passu
 - (f) Timing of payments/conditions to payments - paid vs. unpaid invoices, lien waivers/in lieu of lien waivers, certificates of architects, inspections, etc.]
 - (g) Retainage/reduction of retainage
 - (h) Final payment/conditions
 - (i) Time period to use allowance
 - (j) Unused allowance
 - (k) Landlord's failure to fund - offset rights, limitation on amount of monthly deductions, right to dispute, interest
4. If performed by Landlord with Landlord's Work
- (a) Timetable for submission of plans and specifications and revisions (if applicable)
 - (b) Change orders
 - (c) Requirement to bid
5. If performed by Tenant
- (a) Union vs. non-union
 - (b) Noise/construction during business hours
 - (c) Use of freight elevator/loading dock

- (i) Staging of materials - sidewalk, interference with access and other tenants
 - (ii) Minimum required hours
 - (iii) Free after-hours use
 - (d) Approval of contractors - pre-approval, reasonable approval, deemed approval, reasons for disapproval, e.g., bankruptcy, problems in Building or other Landlord affiliate owned buildings, felony convictions
- 6. Additional security for Tenant's Work/Alterations - l/c, guaranty, threshold amount (subject to CPI adjustment), net worth test
- 7. Cooperation of Landlord
 - (a) Execute permit applications - including prior to plan submission and approval
 - (b) Access to Building plans
 - (c) Access to other portions of Building/other tenant space
 - (d) Use of Landlord's hoist/right to install Tenant hoist (new construction)
- 8. After completion of Tenant's Work/Alterations
 - (a) Close permits
 - (b) Sign-offs
 - (c) As-built plans
 - (d) No liens, violations, etc.

VII. MISCELLANEOUS ISSUES

- 1. Exceptions in SNDA for completing Landlord's Work, funding TI allowance, permitting offsets
- 2. Landlord security/guaranties
- 3. No sale of Building until construction is completed and fully operational