

## *The Vexing Problem of Holdovers Under Government Leases*

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### **Introduction** [1]

One of the most vexing problems for a lessor of space to the federal government (the “Government”) arises when the Government tenant seeks to continue to occupy the space after the expiration of the lease term. Such a “holdover” tenancy is a source of recurring friction between the Government and lessors. For its part, the Government tenant typically wants to hold over for a short term—usually up to six months—to give the tenant agency the opportunity to move in an orderly fashion to new space or to consolidate its operations elsewhere. The Government tenant often wants the precise term of the holdover tenancy to be flexible—usually a month-to-month arrangement—and expects that the monthly rent will either be the same as or lower than the monthly rent at the end of the lease term.

For its part, the lessor facing a holdover situation typically wants certainty, to allow it to secure a new tenant or possibly even to sell the building. Indeed, the uncertainty created by a holdover Government tenancy is often a major headache for the lessor. Secondly, the lessor usually views a holdover tenancy as a source of financial loss—not gain—with the result that the lessor believes it is entitled to a substantial increase in rent for the holdover term, plus consequential damages.

This article will explore these issues, laying out first the basic legal rules which have developed and govern holdover tenancies by the Government. It will then turn to a discussion of the remedies available to lessors in the event of a Government holdover. Finally, the article will offer some practical tips to lessors to prepare for and in dealing with holdovers by a Government tenant.

### **A. The Government as Holdover Tenant**

As noted above, a “holdover tenant” is a tenant

that continues to occupy the property it has leased after the expiration of its lease term. If a Government agency finds that it intends to hold over, in some rare circumstances the agency may decide to condemn the property (an option unique to the Government and discussed briefly below) rather than suffer potential holdover damages for breach of its lease. However, holdovers are far more common than condemnations, and lessors need to be aware of the special position (and leverage) the Government enjoys as a holdover tenant.

Often, the most important factor influencing an agency's decision to condemn or hold over is its desire to avoid disruption to its operations. For example, the Government might wish to hold over when unforeseen delays occur in the process of procuring new space for the tenant agency, or when the tenant agency wants to move but the improvements needed for its new site cannot be accomplished by the expiration date of its previous lease. Bid protests, a lack of procurement planning, and agency inertia can all factor into the mix. Another factor triggering holdovers could be the unavailability of other properties of similar quality in the same area; this factor often comes into play when the tenant agency has special security or other unique tenancy requirements.

Under general landlord-tenant law in most states, a landlord can elect to treat a tenant who holds over at the end of a lease term as either a holdover tenant or as a trespasser[2] Under a holdover tenancy, the landlord who sues for breach of contract typically is entitled to the same rent and other terms to which it was entitled under the expired lease plus any special or consequential damages that were foreseeable at the time of contracting. Alternatively, a landlord can treat a holdover tenant as a trespasser under state tort law, which allows the recovery of the fair market rental value of the property plus all damages sustained so long as they are

*(Continued on page 5)*

1. This article relies in part on Chapter IX of *Leasing Real Property to the U.S. Government*, authored by A. Tomaszczuk, D. Hewitt, D. Miller, and B. Segal (Federal Publications, Inc., 1998).
2. See *Cafritz Company v. General Services Administration*, GSBCA No. 13525,97-1 BCA ¶ 28,680.

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

(Continued from page 4)

proximate. Thus, most landlords in a commercial setting generally have elected to treat the holdover tenant as a trespasser and seek the more generous tort remedies available under applicable state law.

However, tort remedies are not available against a holdover Government tenant[3]. Thus, whenever the Government remains in possession of leased property after the expiration of the lease, a lessor essentially has three legal options: (1) negotiate a resolution, (2) after following the procedures required by the Contract Disputes Act[4], bring an action for breach of the implied-in-fact covenant requiring the Government to vacate at the end of the term, or (3) bring an action under the Fifth Amendment of the U.S. Constitution for temporarily taking the lessor's property without just compensation. See Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295 (Fed. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) (“Prudential”); Reunion, Inc. v. United States, 90 Fed. Cl. 576 (2009) (“Reunion”). The third option can prove difficult, since “it is only when a contractual remedy is unavailable that the court will grant relief under the Takings Cause ....” Reunion, 90 Fed. Cl. at 581 (citing City Line Joint Venture v. United States, 503 F.3d 1319, 1323 (Fed. Cir. 2007)). Thus, as a practical matter, in most circumstances the lessor is left either to negotiate the best deal it can or sue the Government for holdover damages based on a breach of contract theory. The courts have recognized that this limitation on available remedies puts the Gov-

ernment tenant at an advantage and the lessors at a disadvantage, but have left any injustice for Congress and not the courts to remedy[5].

As noted above, contractual disputes arising under Government leases must be resolved in the first instance pursuant to the Contract Dispute Act[6]. The Contract Disputes Act and the accompanying Disputes clause in the Federal Acquisition Regulation (“FAR”), 48 C.F.R. § 52.233-1, generally required in all GSA leases over \$2500[7], sets forth detailed procedures that must be followed by the lessor in pursuing contract damages arising from the Government holdover. See, e.g., Modeer v. United States, 68 Fed. Cl. 131 (2005). This means, in the first instance, seeking redress from the Contracting Officer by the submission of a formal claim. If the amount in dispute exceeds \$100,000, the claim must be certified by the lessor. See FAR 52.233-1(c). If the Contracting Officer's decision is unfavorable, in whole or in part, the lessor has 90 days to appeal the final decision to the appropriate Board of Contract Appeals or, alternatively, one year to bring an action in the United States Court of Federal Claims (“Court of Federal Claims”). Notably, the procedural requirements of the Contract Disputes Act do not apply to a constitutional takings claim, which can be brought directly in the Court of Federal Claims without first presenting the claim to the Contracting Officer. But such a takings claim may be difficult to pursue, as noted above, where a contractual remedy is available. And any *contractual* claim for

(Continued on page 6)

3. There do not appear to be any reported cases of trespass arising from a holdover tenancy by the Government, presumably because the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., provides that the Government is not liable for claims based on the authorized performance of a “discretionary function,” which likely encompasses any decision to hold over. See Birbaum v. United States, 588 F.2d 319 (2d Cir. 1978) (holding that a discretionary function must be within the scope of authority of an agency or an official).
4. 41 U.S.C. § 601 et seq.
5. See Prudential, 801 F.2d at 1303 (concurrence by Judge Nichols discussing the inadequacy of damages in the context of Government contracts).
6. See Forman v. United States, 767 F.2d 875, 878-79 (Fed. Cir. 1985) (rejecting Government's position and holding that the Contract Disputes Act applies to leases, which do not fall within the Contract Disputes Act's exclusion for “real property in being”).
7. See 48 C.F.R. 570.601(a) (2009). The proposed rewrite of GSA's leasing regulations moves this provision and makes it subject to the micro-purchase threshold, which is currently \$2,500.

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

(Continued from page 5)

holdover damages must go to the Contracting Officer in the first instance.

### **1. No "Standard" Holdover Provision**

One might think that over the years the General Services Administration ("GSA"), as the agency responsible for the lion's share of Government leases, would have developed a "standard" holdover clause for its leases. Not so! Somewhat surprisingly, there is no standard holdover clause for Government leases. One provision that was used by GSA in the past read as follows: "If, after expiration of the lease, the Government shall retain possession of the premises, the lease shall continue in full force and effect on a month-to-month basis not to exceed 90 days. Rent shall be paid monthly in arrears on a prorated basis at the rate paid during the lease term." This provision granted the Government tenant an automatic right to continue occupancy for 90 days after expiration of the lease, without penalty, subject only to the obligation to pay rent for the "holdover" term. In regard to this "holdover" provision, however, GSA took the position it was not really a "holdover" clause. In particular, GSA stated, "It is important to note that when a lease has entered the 90-day period as described above, it is not actually a holdover lease and should not be reported as such to [the leasing division]. Occupancy is continuing under the holdover clause of the expiring lease." [8] According to GSA, the clause was never intended to be used to obtain additional time to complete negotiations for continued occupancy rights [9].

An anecdotal, admittedly non-scientific view of recent GSA leases suggests that GSA has completely

stopped using the 90-day "holdover" clause. Thus, there is currently no standard holdover clause in the GSA Acquisition Regulation that governs leasehold interests in real property, as codified at GSAR Part 570[10]. Nor does the sample solicitation for offers on the current GSA website contain any such holdover clause. In this connection, see [http://contacts.gsa.gov/webforms.nsf/0116A3F7C2E0044E4485256F4D00628BE3/\\$file/SFO\\_8-29-08.pdf](http://contacts.gsa.gov/webforms.nsf/0116A3F7C2E0044E4485256F4D00628BE3/$file/SFO_8-29-08.pdf). As a result, many GSA leases are now simply silent concerning the parties' rights and obligations in the event of a holdover.

When a lease provision *does* expressly address holdovers, that provision will in all likelihood govern the rights and obligations of the parties. And certainly there are still leases that contain some holdover-type language. Even in this circumstance, however, the meanings of such provisions are not always clear. For example, in *Corman v. United States* [11], the Claims Court (now the Court of Federal Claims) was called upon to interpret the old GSA holdover clause discussed above. The Government contended that, if it held over for only a portion of a month, it would only be obliged to pay for that percentage of the month in which it occupied the property, *i. e.*, the rent during the last month of occupancy should be prorated on a daily basis [12]. The lessor argued that, if the Government held over for any portion of the month, it was obligated to pay rent for the entire month, *i. e.*, the rent should be prorated on a monthly basis [13]. The court ruled that the original lease required the Government to pay an "annual rent," and that rent for a lesser period would be prorated on a monthly basis [14]. In ruling in favor of the lessor and against the Government,

(Continued on page 7)

8. GSA Leasing Division Circular PRL 84-17, November 26, 1984.

9. *Id.*

10. 48 C.F.R. part 570. On December 4, 2009, GSA published a Federal Register notice with proposed revisions to the GSAR. See 74 Fed. Reg. 63704 (Dec. 4, 2009). While those revisions have not yet been adopted, they also do not contain a "standard" holdover clause.

11. 26 Cl. Ct. 10 11 (1992).

12. *Id.* at 1014.

13. *Id.* at 1014.

14. *Id.* at 1015.

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

(Continued from page 6)

the court held that since the contract (lease) was written by the Government, any ambiguity should be construed against the Government under the doctrine of *contra proferentem*[15]. Finally, the court found that, since there was no controlling federal law, it could look to state law for guidance[16].

On this latter point, when the Government leases property, the lease normally is governed by federal law, and *not* by the law of the state where the lease is made or where the leased property is located[17]. Indeed, GSAR 552.720-8 explicitly states that GSA leases are governed by federal law. However, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") has stated that when "existing federal law is not determinative of the issue, and permits an area of choice between the merits of competing principles, the best in modern decision and discussion, including the general principles of contract and landlord-tenant law, should be taken into account"[18]. Thus, even though most leases now are governed by federal law, it seems likely that the federal courts will continue to rely upon state law in deciding holdover cases[19], where federal law has not resolved the underlying question.

### **2. The Government Has an Implied-in-Fact Duty to Vacate the Premises at the End of the Lease Term**

The general rule of landlord-tenant law, as applied between private parties, is that the expiration or termination of a lease agreement terminates all rights of the lessee in the premises, and it becomes the lessee's duty to surrender possession of the leasehold to the lessor in the absence of a provision to the contrary. In its seminal 1986 decision in *Prudential*[20], the Federal Circuit held that this rule applied to a fixed-term lease between a private party and the Government where there was no express covenant requiring the Government to vacate the premises upon expiration[21]. The court concluded that an implied duty to vacate is an inherent part of every fixed term lease agreement unless the parties explicitly express an intention to the contrary[22]. Additionally, the court looked to the nature of the landlord-tenant relationship and noted that a landlord who grants a temporary but exclusive right to use property for a predetermined period does so in anticipation that he will get it back at the end of the term [23]. The court further remarked that to hold otherwise would invalidate an express provision of the lease, namely, the date on which the lease expires[24].

Thus, federal law is clear: The Government has a duty to vacate the premises at the expiration of the

(Continued on page 8)

15. *Id.* at 1017.

16. *Id.* at 1016.

17. *See Prudential*, 801 F.2d at 1298.

18. *Id.*

19. Under general landlord-tenant law in effect in most states, when a landlord accepts rent from a tenant after the tenant holds over, a holdover tenancy is created. Under that law, the tenancy generally would be for one year if the original lease term involved was for a year or more, and the tenancy would be for the term if the lease term involved was for less than a year. This rule remains applicable today, subject to an important exception that arises when a landlord and tenant are negotiating for a new lease term. When such negotiations are underway, and the landlord accepts rent payments from the tenant, a month-to-month-tenancy is created. *See Cafritz Company v. General Services Administration*, GSBCA No. 13525, 97-1 BCA ¶ 28,680.

20. *See Prudential*, 801 F.2d at 1298 (citing 49 Am. Jur. 2d § 1013 Landlord and Tenant (1970), Restatement (Second) of Property § 14.6, Reporter's Note to Section 14.6, Note 2 (1977) (stating that, in making a lease, the tenant has contracted, in effect, to surrender the premises upon the termination of the lease and that by holding over the tenant has breached the lease).

21. *Id.* (citing *Georgia Kaolin Co. v. United States*, 249 F.2d 148, 149 (5<sup>th</sup> Cir. 1957)).

22. *Id.*

23. *Id.* at 1299.

24. *Id.*

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

*(Continued from page 7)*

lease term, even if the lease does not so explicitly state. If it fails to timely vacate the premises, the Government is subject to damages for breach of that implied-in-fact covenant.

Another key holdover issue that has clearly been resolved under federal law concerns whether a holdover tenancy obligates the Government to a new term of the existing lease. It does not. In order to obligate the Government for a holdover term, the Government must affirmatively bind itself for a new term[25]. The claim that a tenant should be bound for a new term is predicated on an implied-in-law contract theory. Yet the Government cannot be bound to implied-in-law contracts; it can be bound only to implied-in-fact contracts[26]. Thus, where the Government gives notice to a landlord that it will pay rent only for the actual period of its occupancy, such notice prevents it from being held to the lengthier term to which it otherwise would be bound under the common law of property in most states[27]. Nonetheless, the Government still is obliged to pay rent or damages for the period of its actual occupancy. The Government is presumed to consent to a contract to pay rent for its actual occupancy, such contract being implied by the fact that the Government continued to occupy the property. As noted in one recent Court of Federal Claims decision, "A governmental lessee who holds over after the expiration of the lease term and fails to vacate the property can be held liable to the lessor ... under a contractual theory for breach of the implied duty to vacate the premises at the expiration of the lease." Reunion, 90 Fed. Cl. at 581.

Thus, while the general rule in the commercial context is that a holdover tenancy creates a new lease term tied to the term of the original lease, that rule does not apply to a holdover tenancy by the Govern-

ment. In the holdover setting where the tenant is a Government agency, the mere fact of holdover does not create a new lease term. This causes substantial uncertainty—and potentially huge risk—for the lessor. The Government, for its part, can do much to alleviate that uncertainty by advising the lessor when the holdover tenancy will end and sticking to that date. When the Government is equivocal about its departure date, tensions between the Government and lessor often arise.

### **3. Recoverable Rental Value**

Apart from determining the Government's departure date, the other major point of contention in holdover situations is the amount of compensation a lessor is entitled to receive for the holdover term. The general rule, in the absence of a controlling lease provision to the contrary, allows a lessor to recover at a rate based on the previous rental rate, where the lessor elects to treat the party holding over as a tenant. In a decision going back more than sixty years ago, the Court of Claims (the predecessor to the Federal Circuit) held, "It is a well settled general principle of law that when a tenant holds over after the expiration of his lease with the express or implied consent of the landlord and without any new or different agreement as to rent, the terms of the old lease will apply." Garrity v. United States, 67 F. Supp. 821,822 (Ct. Cl. 1946). More modern authority suggests the lessor can recover at a rental rate based on the independently established reasonable rental value if that amount differs from the previous rental rate[28]. In addition, the landlord can, at least in theory, seek consequential and special damages that were foreseeable at the time of lease execution. Thus, as the law has developed, the rules governing the rental rate that apply in a Government holdover situation have become generally more favor-

*(Continued on page 9)*

25. See Goodyear Tire & Rubber Co. v. United States, 276 U.S. 297,292-93 (1928).

26. See Leiter v. United States, 271 U.S. 204 (1926).

27. See Goodyear Tire & Rubber Co., cited supra.

28. Restatement (Second) of Property § 14.5 (1977), cited in Jonnet Development Corp., GSBCA No. 6943, 86-3 BCA 119,311 at 97,656-57.

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

(Continued from page 8)

able to lessors.

The fair rental value for property under a holdover tenancy usually is higher than under the expired lease, and for good reason. First, the rent often reflects the greater uncertainty associated with a holdover tenant. Holdover tenancies are, by definition, shorter than tenancies under a term lease, and create greater economic uncertainty for a lessor when compared to a long-term lease. Identifying suitable new tenants, or competing for new procurements, can be especially problematic if the lessor cannot determine when the premises will become available. Second, the Government holdover tenant may reduce the marketability of a property to prospective buyers or prevent an owner from selling the property quickly. Third, although less likely in the Government context, a holdover tenancy has the potential to create increased damage and remodeling costs.

It also bears noting that the ability of lessors to seek fair market rental value for holdover periods *may* turn on whether the action is heard by the Boards of Contracts Appeals or the Court of Federal Claims. In Cafritz Company v. General Services Administration, GSBCA No. 13525, 97-1 BCA ¶ 28,680, the GSA Board of Contract Appeals (a predecessor to the Civilian Board of Contract Appeals) held that a claim for rent based on fair market value arising from a holdover is a tort claim, rather than a breach of contract and, consequently, that the Board did not have jurisdiction to hear it. In its analysis, the Board noted that the award of damages based on fair market value normally was associated with the tort of trespass, al-

though ultimately—after an appeal to and remand from the Federal Circuit—the Board did award fair market value damages to the landlord based on a breach of contract theory. Cafritz Company v. General Services Administration, GSBCA No. 13525-REM, 98-2 BCA ¶ 29,936[29].

For its part, the Court of Federal Claims has conclusively determined that it may award holdover damages based on the fair market rental value of the property. Reunion, 90 Fed. Cl. at 584. However, this damages formulation was based on a takings theory, not a contract theory. Nonetheless, this distinction between the precedent of the Court of Federal Claims and the Civilian Board of Contract Appeals may augur for filing holdover claims in the Court and not at the Board, if the lessor intends to seek holdover damages measured by the fair market rental value of the property. Also, as Reunion shows, the Court of Federal Claims may hear both breach and takings claims, which a party may plead in combination or in the alternative.

### **4. Special and Consequential Damages**

While special and consequential damages can be recovered for the breach of a contract (including a lease), such damages must have been foreseeable to the parties at the time of contracting[30]. This longstanding principle of contract law imposes a substantial burden on lessors since it undoubtedly is difficult, at the time of lease execution, to foresee what damages may arise as a result of a holdover in the distant future. Ultimately, however, foreseeability likely turns on the specific circumstances of a given case.

(Continued on page 10)

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29. See also Burdette A. Runert v. General Services Administration, GSBCA 10523,93-1 BCA 124,243 (holding that the amount paid to the landlord for the holdover tenancy should be greater than the rental rate established in the expired lease); Appeals of Isadore & Miriam Klein, GSBCA Nos. 6614,6767,84-2 BCA ¶ 17,273 (holding the Government liable for rent based on fair market value); Appeals of Isadore and Miriam Klein, GSBCA nos. 7551, 7845, 86-2 BCA 18,983; both affd., Isadore & Miriam Klein v. United States, 824 F.2d 978 (Fed. Cir. 1987) (unpublished).
30. In the context of holdovers by the Government, lessors have argued that they have incurred, *inter alia*, lost profits, greater economic uncertainty, increased remodeling and construction costs, increased interest costs, contract delay costs, increased brokerage fees, mortgage prepayment penalties, and longer lease-up periods.

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

(Continued from page 9)

The Klein series of cases illustrate this point[31]. At issue was the lease of an office building to the Government for use as a neighborhood Social Security office in Pittsburgh, Pennsylvania. When the lease expired, the Government held over and continued paying the rent it deemed appropriate. When the Government vacated the premises it turned off the heat, but did not turn off the water. The building's pipes subsequently froze and caused substantial water damage to the building. The landlord sued the Government for holdover rent and for the water damage it claimed was caused by the Government. In defense, the Government argued that it gave adequate notice to the landlord that it was vacating and that the landlord was responsible for any subsequent damage to the property after its departure. The GSBCA found that, in the holdover setting, the landlord had no way to anticipate when the Government would vacate the premises. Thus, the Board found that the Government had a duty to notify the landlord when it would vacate the premises and to give notice a reasonable amount of time beforehand. The Board further held that, in general, reasonable notice should be given at least one period before departure where a lease is divided up into discrete periods, *e.g.*, month-to-month. As to foreseeability, the Board found that "it was eminently foreseeable in Pittsburgh, Pennsylvania, that the pipes would freeze in very short order. It [was] also foreseeable that, having frozen, they would thereafter thaw, with resulting water damage to whatever was within reach [32].

The Prudential case, however, suggests that a more rigorous standard of foreseeability applies. That case involved a Government holdover of an office building

in Houston, Texas[33]. The lessor claimed that it lost a valuable private sector tenant because of the Government holdover, and that it had to subdivide its property as a result. The lessor argued that the Government was responsible for the lessor's loss of the private sector tenant, and other special and consequential damages that were foreseeable at the time the lease agreement was breached, *i. e.*, at the time of the Government holdover. After evaluating the general rules for special and consequential damages in contract law, which require foreseeability at the time of contracting, and the view expressed by the Restatement of Property, which requires foreseeability at the time of breach, the Prudential court decided to adopt the common law view that special damages must be foreseeable at the time of lease execution in order to be recoverable[34]. The Federal Circuit affirmed the trial court's determination that the special and consequential damages sought by Prudential were not foreseeable, and as a result Prudential did not recover *any* of the damages it sought in the case.

### **5. Transfers During the Holdover**

When a lessor transfers real estate held by the Government under a holdover clause, the transfer does not automatically include the lessor's preexisting claim for back rent. See Ginsberg v. Austin, 968 F.2d 1198 (Fed. Cir. 1992). In Ginsberg, the lessor sold two buildings (in which the GSA was a tenant) to another real estate investor, who was assigned (as purchaser) the existing GSA leases. The Government accepted the assignment of the leases, which were executed in conformity with the operative FAR novation provisions. See 48 C.F.R. § 42.1204. At the time of the assignment, the transferor was entitled to approximately

(Continued on page 11)

31. See Appeals of Isadore and Miriam Klein, GSBCA Nos. 6614,6767,84-2 BCA ¶ 17,273; Appeals of Isadore and Miriam Klein GSBCA nos. 7551, 7845, 86-2 BCA ¶ 18,983; both affd., Isadore & Miriam Klein v. United States, 824 F.2d 978 (Fed. Cir. 1987) (unpublished).

32. Id.

33. 801 F.2d at 1298.

34. Id. at 1300.

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

*(Continued from page 10)*

three months' rent for the Government's holdover tenancy. The transferor subsequently filed a claim against GSA for the back rent. At trial, GSA successfully argued that this entitlement had been transferred to the new owner. See Ginsberg v. General Services Admin., GSBCA No. 9911, 91-2 BCA ¶ 23,784. GSA further contended that the transferor had no standing to sue since it had assigned its interest in the lease and had no privity with GSA. The GSBCA agreed, and dismissed the transferor's claim for a lack of standing.

Upon appeal, the Federal Circuit was unable to find any federal law on the subject, so it turned to generally accepted principles of state contract and property law. The court found two federal cases holding that the assignment of a reversionary interest in a lease does not convey previously accrued rent. Furthermore, the court took judicial notice of the fact that a GSA handbook, entitled "Acquisition of Leasehold Interests in Real Property," instructed Contracting Officers to require purchasers of properties in which the GSA leases space to obtain letters from the transferor waiving all rights under the lease "except unpaid rent through a specified date[35]. For these reasons, the court held that, since the original lessor did not expressly transfer his claim for back rent, it retained the claim for back rent and had standing to pursue the merits of the claim.

As a result of the Ginsberg case, whenever a lease is transferred during a holdover tenancy, all parties—especially the transferee and the Government—would be well advised to specify which party is entitled to receive rental payments for the holdover tenancy. Absent an agreement which addresses these points, the transferor is likely entitled to the holdover rental payments.

### **B. A Few Words About The Condemnation Process**

Condemnation, also referred to as eminent domain, is the exercise of governmental power to acquire a real estate interest in private property. This power is subject to the Fifth Amendment to the Constitution's decree that private property shall not be taken for public use without just compensation. In general, if a Government agency has authority to condemn property, it can do so for a public purpose whenever it deems such action necessary or advantageous. Thus, in general, the Government can condemn any real or personal property when its interests so warrant, subject only to the requirement that it pay just compensation for the property. However, the executive branch of the Government may not exercise the power of eminent domain without congressional authorization[36]. And, in the holdover context, GSA—among other agencies—has received this authorization.

A detailed discussion of the rules and procedures governing condemnation actions is far beyond the scope of this short article. However, Lessors do need to be aware of the fact that the Government can—in most circumstances—condemn the property being leased, provided just compensation is paid. This unique power gives the Government substantial leverage in any holdover setting, since unlike a commercial tenant the Government tenant cannot be evicted or forced to vacate via an unlawful detainer action. On the flip side of the equation, as noted above, lessors facing an intransient holdover Government tenant can bring "matters to a head" by suing the Government under the same constitutional provision—the Fifth Amendment—for a temporary (or permanent) taking. Thus, condemnation and takings considerations can affect the holdover dynamic. In general, neither the Government's nor the lessor's interests are usually best

*(Continued on page 12)*

35. Ginsberg, 968 F.2d at 1201 (citing GSA Handbook, "Acquisition of Leasehold Interests in Real Property," Ch. 4, ¶ 4b (January 31, 1977); GSA Handbook, "Acquisition of Leasehold Interests in Real Property," Ch. 6, ¶ 4b (June 23, 1981)).

36. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).



## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

(Continued from page 11)

served by resorting to the courts via condemnation or takings litigation.

### **1. Condemnation Under the Takings Act**

If the Government determines it must pursue condemnation, GSA and other agencies generally prefer to condemn property under the authority of the Declaration of Takings Act, 40 U.S.C. § 258(a) (“Takings Act”). The Takings Act generally is referred to as the “quick take” statute because it allows property to be seized by the Government, with the title vesting immediately in the Government upon the filing of a Declaration of Taking and deposit of the estimated value of the property in the appropriate United States district court[37]. The Takings Act does not provide independent authority to condemn, but rather establishes procedures for the quick seizure of property when some independent authorization allows condemnation.

Upon application by the parties with interest in the property, the district court may order that the money deposited in the court for just compensation be paid immediately. If the compensation finally ordered by the court exceeds the amount deposited, the court will enter judgment against the United States for the amount of the deficiency[38]. The Takings Act further states that the district court shall have the power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the Government. The Takings Act also empowers the court to make orders in respect of liens, rents, taxes, insurance and other charges, if any, as it deems just and equitable[39].

### **2. GSA Condemnation Regulations**

GSA has promulgated regulations governing condemnation pursuant to 40 U.S.C. § 486(c). The regulations, part of GSA’s Federal Management Regulations, basically state that condemnation should be a last resort[40]. See 41 C.F.R. § 102-73.260. This policy is intended to promote fiscal economy—paying “just compensation” can become an expensive proposition for the taxpayers—and prevent opportunistic behavior on the part of the Government. These regulations further provide that the federal Government’s preferred policy is to acquire real property by negotiation, not litigation. *Id.* The regulations also require appraisals to be made of real property before the initiation of negotiations, and contemplate that owners should be allowed to accompany the appraiser during any inspection of the property. *Id.* § 102-73.265. Furthermore, GSA is required to estimate an amount that it believes is just compensation for a property, and offer that amount promptly. A summary statement must accompany any offer made to acquire real property. The summary statement identifies the location of the property and any interest therein, and describes how GSA has determined the fair market value of the property for the purposes of the offer. *Id.* § 102-73.275. The GSA is required to offer at least as much as the appraised fair market value of the interest it seeks to acquire. *Id.*

### **3. The Government Cannot Exercise Opportunistic Condemnation**

One question that arises from time to time in the

(Continued on page 13)

37. Note that a condemnation action by the Government must be brought in a U.S. District Court (usually in the district where the property is located), but that a temporary takings action brought by the lessor to recover holdover damages must proceed in the Court of Federal Claims (which has national jurisdiction but usually sits in Washington, D.C.).

38. 40 U.S.C. § 258(a).

39. *Id.*

40. Often, when it becomes obvious during negotiations for a lease extension that an agreement will not be reached prior to the expiration of the existing lease term, the Government will ask for a standstill agreement. This is a “hold harmless” agreement that signifies that a condemnation is not contemplated, and that the parties still are engaged in good faith negotiations. It also prevents the lessor from making any claims against the Government during the standstill period. Ultimately, however, if no agreement for a lease extension is reached, the lessor will not be deemed to have waived any of its rights by agreeing to the standstill agreement.

## *The Vexing Problem of Holdovers Under Government Leases (cont'd)*

*(Continued from page 12)*

condemnation context is whether the Government can opportunistically condemn property it already is leasing. For example, if the Government has executed a long-term lease with payments above current market rents, can it condemn the property and save money in so doing? Fortunately for lessors to the Government, the answer to this question is “no”—applicable law prohibits such an opportunistic condemnation. The power of condemnation may be exercised only as a last resort[41]. Where the Government already is holding property pursuant to a lease, there is no need to or authorization for it to condemn less than what it already has under the lease or holdover tenancy.

This issue was squarely addressed in Security Life & Accident Ins. Co. v. United States[42]. In that case, the Government leased an office building for use by the Veterans Administration for a five-year term and held over after the expiration of the lease. The lessor sent notice to the Government that it was electing to treat the Government as a holdover tenant and bind it for a five-year period or, alternatively, for a one-year period. Approximately one month after the lease expired, the Government filed a Declaration of Taking for the purpose of acquiring a right to use the property for a six-month period with the option to extend the use for further periods. The district court rejected the lessor’s argument that the Government was a holdover tenant, noted that the question of public necessity for a taking of property was not appropriate for judicial determination in the ordinary case, and concluded that the only issue to be resolved was that of just compensation. On appeal, the United States Court of Appeals for the Fifth Circuit reversed, finding that the presumption of holdover tenancy had not been rebutted

and that the Government was a holdover tenant for a period of one year. In so holding, the court stated, “This being so, [the Government] could not acquire by condemnation something less than it already had by the implied contract of holdover tenancy.”[43] This language suggests that the Government cannot acquire through condemnation a smaller interest than what it already has obtained through a valid lease. This rule does not per se deny the Government’s constitutional authority to effect a taking, but it prohibits the Government from improving its financial position under a lease or holdover tenancy via the condemnation process.

### **Conclusion**

Government holdovers pose a series of difficult legal and business issues for both the Government and its lessors. Lessors would be well advised to follow the following guidelines to put themselves in the best position to deal with a holdover situation:

1) Read the lease! What does it say regarding any holdover term/rights? In almost all circumstances, courts and boards will enforce the contract, or lease, according to its written terms. If the lease was drafted by the Government, and is ambiguous, that ambiguity will likely be construed against the Government.

2) Lessors should try to negotiate—up front and prior to lease execution—a “no holdover” covenant. If the Government refuses or affirmatively seeks holdover rights, the lessor should consider requesting a liquidated damages provision to address holdover damages[44].

3) The lessor should try to specify any special or consequential damages arising from a holdover in the lease at the time of lease execution, if at all possible.

*(Continued on page 14)*

41. 41 C.F.R § 102-73.260.

42. 357 F.2d 145 (5th Cir. 1966).

43. Id. at 150.

44. Notably, in the event of the lessor's delay in making space available to the Government tenant, GSA has adopted a Liquidated Damages (Aug. 2008) clause to protect the Government's interests. See [http://contacts.gsa.gov/webforms.nsf/0/16A3F7C2E0044E4485256F4D00628BE3/\\$file/SFO\\_8-29-08.pdf](http://contacts.gsa.gov/webforms.nsf/0/16A3F7C2E0044E4485256F4D00628BE3/$file/SFO_8-29-08.pdf), sample solicitation for offers, § 5.10.

## The Vexing Problem of Holdovers Under Government Leases (cont'd)

(Continued from page 13)

This will greatly enhance the likelihood such damages would be deemed foreseeable (and recoverable).

4) If the lease is silent on holdover rights (as is increasingly the case), the Government can holdover, probably indefinitely. The Government is liable to pay rent during any holdover term. No hard and fast rules govern the appropriate rent during the holdover term. The lessor may seek to recover the rental market value of the property plus any special or consequential damages that were foreseeable at the time of lease execution.

5) In the event the parties cannot negotiate reasonable holdover terms, the lessor's primary legal remedy is the recovery of breach of contract damages. A prerequisite to such an action is the submission of a claim to the Contracting Officer. If the claim is denied, the

denial can be appealed to the Court of Federal Claims or cognizant Board of Contract Appeals.

6) If there is a transfer during a holdover tenancy, the parties should specify in the novation agreement which party is entitled to the rent during the holdover tenancy.

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April 2010

**Meeting the challenge of doing more with less**

Officials and administrators at all levels of government are under greater pressure than ever to operate efficiently and make the best possible use of their limited resources. A Jones Lang LaSalle survey of federal, state, city, county and other public sector leaders conducted in January 2010 confirmed that government officials are looking harder than ever for ways to do more with less, even as they face increasing pressures to implement new mandates such as maximizing energy efficiency.

The survey was conducted by Jones Lang LaSalle's Public Institutions practice in order to gauge the impact of the recession on public sector budgets and programs, as well as to identify emerging challenges and opportunities. The breakdown of respondents included 39% from organizational bodies, 14% state, 13% federal, 11% county, 11% quasi-governmental and 12% from other entities. Their roles range from elected officials to administrative specialists such as Chief Operating Officers, heads of real estate and capital planning and economic development professionals.

"The results of this survey confirm our already deep reservoir of anecdotal experience in working with key decision makers at all levels of government," says Herman Bink, Chief Executive Officer, Public Institutions, Jones Lang LaSalle. "Times are tough, but our nation's public sector leaders are meeting the challenges. We have seen a long-term trend toward government agencies pursuing new strategies to enhance their effectiveness, many of which have been pioneered in the private sector and that trend is accelerating now that the pressure is on to do more with less."

**Among the survey's key findings:**

**Budgetary pressures**  
About 65% of respondents anticipate reduced budgets in the next fiscal year, and more than 17% expect their budgets to decline by more than 10%. These contractions are largely due to the economic recession, which has reduced income and sales taxes that fund many government activities.

Only 17% of respondents expect to see their budgets increase. Notably, this group of respondents consists entirely of officials at the federal level.



How do you expect your next fiscal budget to compare to the previous?

In fact, virtually every federal respondent reports stable or increased spending opportunities, while every state and county respondent anticipates a budget decline in the next year. This finding aligns with the widely reported need of financial crisis in states to address the significant challenges of declining tax bases and an inability to issue additional bonds. It also suggests that perhaps many federal agencies near the center of U.S. Government are in an optimal position for a responsive ear among decision makers in Congress or the Obama Administration.

For most public sector respondents, the coming year will signal a dual challenge of adjusting to reduced funding without sacrificing service levels to stakeholders. Since real estate costs are often the second highest expense for a public entity after personnel, real estate portfolios are one of the best opportunities to find savings opportunities that won't decrease agency functionality.

**Where to cut**  
Although the majority of stakeholders feel they will need to reduce program costs, agencies seem to be putting less focus on eliminating entire programs, reorganizing assets or cutting staff. Rather, they prefer to seek across the board opportunities to reduce program costs without sacrificing function.

The question, "How likely are you to reduce your leased and/or owned facility costs?" yielded a quartet of responses, with a roughly equal



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